No. 20-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellees

vs.

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-Appellants

On Appeal from the United States District Court
for the Northern District of California, No. 20-cv-5799
The Hon. Lucy H. Koh, District Judge

BRIEF OF THE STATES OF LOUISIANA AND MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' EMERGENCY MOTION TO STAY

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INTRODUCTION AND INTERESTS OF AMICI

After five weeks of litigation and intrusive discovery, the district court preliminarily enjoined Secretary of Commerce Wilbur Ross ("the Secretary"), the Department of Commerce, the Census Bureau Director, and the Census Bureau from following a revised plan for the census that was announced on August 3 (the "August Re-Plan"). The progress of the census has been disrupted, and the Secretary has been prevented from adapting to the circumstances of the COVID-19 pandemic while maintaining compliance with clear statutory deadlines.

The effect of the district court's orders has been to boost enumeration in certain jurisdictions at the expense of jurisdictions—like Amici—with lagging enumeration. And the downstream effect of the district court's order that the Secretary ignore his statutory deadline is to imperil Amici States' ability to comply with their own redistricting and reapportionment obligations. Indeed, 24 states have state statutory or constitutional deadlines tied to the census that are imperiled. Yet the district court refused to consider those harms.[1]

[1] As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

ARGUMENT

I. The District Court's Injunction Is Inconsistent with the Constitution's Textual Commitment of the Census to Congress.

The Constitution gives Congress extremely broad discretion in conducting the decennial census "in such Manner as [it] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. Congress delegated part of that discretion to the Secretary, directing him to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). But Congress cabined the Secretary's discretion by requiring him to report to the President the "tabulation of total population by States . . . within 9 months after the census date," which is elsewhere defined as April 1 of the census year. 13 U.S.C. § 141(b). So, by statute, the Secretary must provide the final census report to the President by December 31, 2020, with other statutory deadlines following in due course. That simple outline highlights the district court's erroneous path.

First, and most remarkably, a single federal district court decreed not that it can *overlook* the violation of a statutory deadline, but that it can affirmatively *compel* an Executive officer to violate Congress's unequivocal command based on vague impacts to census accuracy. Of

course, the census has never been perfectly accurate. *See, e.g.*, *Department of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 322 (1999). And accuracy is but one of the competing values the Secretary must juggle.

"[T]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Congress made precisely such a choice by setting a statutory deadline, then consciously choosing not to extend that deadline in response to COVID-19-related delays. *See, e.g.*, H.R. 6800 § 70201. And because the text of the Constitution expressly commits management of the census to Congress and provides no manageable standards for resolving disputes over how "accurate" a census must be, management of the census is a classic political question. *See Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004); *see also Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Plaintiffs' challenge should fail on this ground alone.

Second, the district court's preliminary injunction purported to

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show deference to the Census Bureau itself in enjoining the August Re-Plan, on the grounds that "the decision to accelerate the census schedule was not made by the Census Bureau." TAB E at 14. But it is the Secretary — not the Census Bureau — who has statutory authority to manage the census. 13 U.S.C. § 141(a). The Secretary is under no obligation, statutory or otherwise, to defer to the Census Bureau's staff, particularly when doing so would violate his statutory duties.

Third, Plaintiffs have launched no direct attack on 13 U.S.C. § 141 itself, which establishes the deadline for delivering census results to the President. This omission makes sense in light of the broad discretion the Constitution gives to Congress to regulate the census. But it does mean that, even if Plaintiffs could establish some defect in the August Re-Plan, the Census Bureau would still need to comply with the December 31, 2020 deadline. Statutory deadlines are not discretionary and must be followed. *See, e.g.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). Plaintiffs have not disputed that if census data collection is extended beyond September 30, "the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data

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prior to April 1, 2021." TAB A ¶ 100. Plaintiffs also have not put forward an alternative timeline that would satisfy their non-statutory demands and comply with the statutory deadline. The undisputed evidence is that no such timeline exists. Plaintiffs therefore have not established that their alleged injuries are redressable in the federal courts.

Fourth, it is also not clear that Plaintiffs' alleged harms can be traced to the August Re-Plan. What Plaintiffs urge is for the courts to legislate a plan that *departs* from the statutory deadlines set by Congress, rather than bringing a typical APA challenge that aims to force an agency to *obey* a statutory mandate. This makes it clear that any harm they face is the result of the deadlines imposed by Congress, not the specifics of the August Re-Plan put forward by Defendants. To the extent Plaintiffs are harmed by something the agency did, it was the unchallenged delays in response to the COVID-19 pandemic. The district court erred in – effectively – forcing the Secretary to proceed with an April COVID-19 Plan that was expressly made contingent on relief that Congress subsequently declined to provide.

Finally, Plaintiffs' Enumeration Clause arguments fare no better.

The Enumeration Clause requires an actual count of the U.S. population, rather than an estimation, but it does not set forth any particular standards for accuracy. Census data "are inherently less than absolutely accurate." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). A Census plan cannot be struck down simply because it will fall short of perfect accuracy. Plaintiffs fail to establish any binding metric of accuracy that the August Re-Plan fails to meet. The Secretary's decisions on how to conduct the census "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). While accuracy is certainly a goal of the census, so is timeliness, and the August Re-Plan reflects a reasonable balance of these two goals that will indeed further the constitutional purpose of the census.

II. AMICI STATES WILL SUFFER IRREPARABLE HARM THAT THE DISTRICT COURT AFFIRMATIVELY REFUSED TO CONSIDER.

Last minute interference in complex processes tends to itself cause harm. For that reason, the Supreme Court has repeatedly made clear that last-minute judicial disruption of government operations is improper, especially on a Preliminary Injunction or Temporary

Restraining Order record, even when fundamental rights are affected. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The COVID-19 pandemic has not changed that rule. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

Here, the status quo would have been an orderly wind-down of census operations in jurisdictions with acceptable enumeration, with Census Bureau resources re-directed to jurisdictions — like Louisiana and Mississippi — that have lagging enumeration rates, followed by cessation of data collection on September 30 so as to facilitate post-processing of the collected data by the statutory deadline. Tab A ¶¶ 66-67, 95-97. That status quo was upended by the district court's TRO. *See id.* ¶¶ 93-97. The day after the district court extended its TRO, Louisiana filed a Notice of Intent to Intervene ("Notice") explaining that the relief demanded by the Plaintiffs (and granted by the TRO) largely served to deplete Census Bureau resources that could otherwise be expended finalizing the census in Louisiana, and that continued judicial micromanagement and delay was harming Louisiana. TAB B. When the Defendants pointed to the harms set forth in Louisiana's Notice at a

hearing later that day, the district court blithely remarked that Louisiana had not filed a motion to intervene.[2]

Louisiana, joined by Mississippi, moved to intervene on September 23, and further moved for expedited consideration of their intervention. TABS C, D. Tracking Louisiana's Notice, Louisiana and Mississippi explained that they were being irreparably harmed by the TRO and the court-ordered delay in shifting Census Bureau resources to their jurisdictions. The effect of the TRO was to run up the census tally in Plaintiffs' jurisdictions at the expense of lagging jurisdictions like Louisiana and Mississippi, which raised Equal Protection concerns. *Id.* at 10 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000)). Louisiana and Mississippi noted that even if this Court ultimately reversed the district court on the merits, the harm they were suffering would be irreparable if Census Bureau resources were expended elsewhere (contrary to the Census Bureau's own plan and wishes) in the meantime. *Id.* On the other hand, Louisiana and Mississippi also pointed to the disruption of

[2] Louisiana recognized that it would require several days to prepare a proposed answer to Plaintiffs' 370 paragraph Amended Complaint, as required by Federal Rule of Civil Procedure 24. It attempted to protect its interests in the interim by filing the Notice and seeking to participate in the district court proceedings.

redistricting and reapportionment in 24 states that have constitutional or statutory deadlines if Plaintiffs succeeded in delaying the census tabulation, including a morass of litigation. *Id.* at 9-10; *see also id.* at ECF 204-7 and 204-8 (listing states and statutes).

The district court's preliminary injunction order contained no discussion of any of these harms to Louisiana and Mississippi, which now proceed as Amici in support of Defendants' Emergency Motion to Stay. The district court briefly discussed possible harm to the Census Bureau itself if it failed to meet a statutory deadline. TAB E at 75. But it did not discuss the diversion of Census Bureau resources away from Amici States while the August Re-Plan is blocked. There was no apparent analysis of the impact on non-parties, including the vast financial impact of special legislative sessions and litigation resulting from delayed census reporting and corresponding delays in reapportionment and redistricting. The district court's only comment on Amici States was an acknowledgement that bad weather, especially hurricanes, could disrupt census efforts along the Gulf Coast. *See* TAB E at 51–52. The failure to discuss harms to Amici States was particularly striking given that Louisiana filed its Notice of Intent to

Intervene one week before the Preliminary Injunction Order was issued (less than 24 hours after learning of this litigation), and also filed a full answer and motion to Intervene before the Preliminary Injunction Order issued, in each case detailing the serious harms to which Amici States were being subjected.

This Court should not leave those harms unaccounted for. In ruling on the Defendants' Emergency Motion, this Court must consider, *inter alia*, where injury from the district court's preliminary injunction will fall and "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, this Court should consider the harms to Amici States — not only to the Plaintiffs — in determining whether the district court's injunction against the August Re-Plan should be stayed. Those considerations weigh heavily in favor of a stay.

CONCLUSION

Although the COVID-19 pandemic is unprecedented, controversy over census matters is not. *See Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992) ("As one season follows another, the decennial census has again generated a number of ... controversies"). Americans have argued over the best methods for conducting a Census for decades. Rather than

allowing the judgment of a single court to upend the plan of the Secretary, this Court should issue a stay such that no census-related action will be disrupted until a final judgment has been reached that such action was unlawful. Amici States are confident that the result in this case will vindicate, rather than condemn, the Defendants' decisions.

Respectfully submitted,

/s/ Elizabeth B. Murrill

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,053 words.

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Dated: September 28, 2020.

/s/ Elizabeth B. Murrill

TAB A

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

WILBUR L. ROSS, JR., *et al.*,

Defendants.

Case No. 5:20-cv-05799-LHK

DECLARATION OF ALBERT E. FONTENOT, JR.

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I, Albert E. Fontenot, Jr., make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Executive Summary

1. I am the Associate Director for Decennial Census Programs at the U.S. Census Bureau, and I submit this declaration to:

- Explain the magnitude, complexity, and planning involved in the 2020 decennial census, including the tightly integrated nature of census operations and processing;
- Detail the changes made to the original design in light of the COVID-19 pandemic; and
- Discuss the impacts of extending field operations past their current end date of September 30, 2020.

II. Qualifications

2. I am the Associate Director for Decennial Census Programs, in which capacity I serve as adviser to the Director and Deputy Director of the Census Bureau on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial census programs; provide executive and professional leadership to the divisions and central offices of the Decennial Census Programs Directorate; and participate with other executives in the formulation and implementation of broad policies that govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.

3. I began my career with the Census Bureau after retiring from a successful 40-year career as a senior executive in the private sector with midsize manufacturing companies where I was responsible for providing visionary leadership, developing innovative corporate growth and development strategies. I served as Vice President of Marketing, Vice President of Research and Development, and, for the last 14 years, as President and Chief Executive Officer.

4. In addition to a successful corporate career I served as Adjunct Professor in the MBA program in the Keller Graduate School of Management from 2005–2013 where I taught Leadership and Organizational Development, Marketing Management, Corporate Finance, Statistics, and Marketing. I earned a BA in management and MBA in management and finance

from DePaul University and Doctor of Ministry in pastoral ministry from Bethel Theological Seminary

5. I served as a as a commissioned officer in U. S. Army and was decorated in combat in Vietnam. After leaving active service, I remained in the US Army reserve attaining the rank of Major.

6. After retirement from private sector corporate management, I began my career with the Census Bureau in 2009 as a Field Operations Supervisor in Southern California for the 2010 Census. I quickly rose through the ranks and managed the Non-response follow-up operations for the 2010 Census as Area Manager responsible for census activities in Los Angeles County, the State of Hawaii, San Bernardino County and Riverside County California. After 2010, I served in positions of increasing responsibility as Survey Supervisor, Senior Supervisory Survey Statistician, Assistant Regional Director for the Los Angeles Region, and Regional Director for the Chicago Region. I moved from the field to the Census Bureau headquarters to assume the position as Chief of the Field Division and subsequently Assistant Director of Field Operations, Assistant Director for Decennial Census Operations, then Associate Director for the Decennial Census.

7. From 2012–2016, I represented the Field Directorate on the team that developed and wrote the Operations plan for the 2020 Decennial Census.

8. I have in-depth firsthand knowledge about the planning, management, and execution of Census Bureau field operations and effective mission-oriented leadership. I serve as the Chairman of the Census Crisis Management Team; I served as a member of the 2020 Census Design Executive Guidance Group; I am a member of the Census Data Quality Executive Guidance Group; and I chair the 2020 Census Operations Planning Group. Additionally, I represent the Decennial Census Program in our engagement with two of the three committees that advise the Census Bureau: the Census Scientific Advisory Committee and the National Advisory Committee.

III. A Complex Design and Budget for the 2020 Census

9. The Census Bureau goes to extraordinary lengths to count everyone living in the country once, only once, and in the right place, including those in hard-to-count populations. This is the core mandate of the Census Bureau, and has been the most significant factor informing every decision made in designing, planning, testing, and executing the decennial Census.

10. The Census Bureau's mandate in conducting the decennial census is to count everyone living in the United States, including the 50 states, the District of Columbia, and the territories of Puerto Rico, American Samoa, Commonwealth of the Northern Mariana Islands, Guam, and U.S. Virgin Islands. To that end, we expend significant funds, efforts, and resources in capturing an accurate enumeration of the population, including those who are hard to count. In particular, the 2020 Census operational design considers population groups that have historically been hard to count, as well as population groups that may emerge as hard to count.

11. The planning, research, design, development, and execution of a decennial census is a massive undertaking. The 2020 decennial census consists of 35 operations utilizing 52 separate systems. Monitoring the status and progress of the 2020 Census—the operations and systems—is managed in large part using a master schedule, which has over 27,000 separate lines of census activities. Thousands of staff at Census Bureau headquarters and across the country support the development and execution of the 2020 census operational design, systems, and procedures. In addition, the 2020 Census requires the hiring and management of hundreds of thousands of field staff across the country to manage operations and collect data in support of the decennial census.

12. The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations. Almost every major operation in the 2020 Census contains components designed to reach hard-to-count populations. This includes: census outreach, census content and forms design, finding addresses for enumeration, field infrastructure, multiple modes for self-response, Non-Response Follow-Up (NRFU) operations that enumerate households that did not self-respond to the census, and other operations designed specifically for the enumeration of population groups that have been historically hard to count. The best explanation of the many integrated operations designed to reach these populations is set forth in Appendix B to Version 4.0

of the 2020 Census Operation Plan, available at https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/operational-plan.html. Examples include:

- Verifying address lists using address data provided by community organizations, satellite technology, and in-person address listers checking addresses in communities nationwide;
- In-person enumeration using paper questionnaires in areas such as Remote Alaska;
- Hand-delivering 2020 Census materials to areas impacted by natural disasters, such as those impacted by Hurricane Michael in Florida;
- Conducting a special operation to count persons in "Group Quarters." Group Quarters include places such as college or university student housing, nursing homes, and corrections facilities;
- Working with local partners to identify locations, like shelters and soup kitchens, to best count people experiencing homelessness; and
- Creating culturally relevant advertisements targeting hard-to-count communities.

13. The Census Bureau obtained approval under the Paperwork Reduction Act from the Office of Management and Budget for the data collections involved in the 2020 Census. The Operational Plan is a project management document and, as in prior censuses, we did not obtain clearance for it. We presented information about our plans as we developed them in quarterly public Project Management Reviews, and we obtained input on our plans from both our Census Scientific Advisory Committee and National Advisory Committee. We consulted with other agencies throughout the decade about data security, postal delivery, acquisition of records, and the like, though we did not ask other agencies to review or approve our project management plans.

14. We allocate vast resources to ensure as complete and accurate a count as possible. Research and testing, in addition to the Census Bureau's collective knowledge and experiences, has resulted in an effective approach to reach all population groups.

15. The complexity and inter-related nature of census operations is echoed in the budget for the 2020 Census. The overall budget estimate for the 2020 Census—covering fiscal

years 2012 to 2023—is $15.6 billion. This represents enough funding to successfully complete the 2020 Census in virtually all possible scenarios, including the current challenging circumstances. In fact, the Government Accountability Office (GAO) recently reviewed this budget estimate[1] and determined, as of January 2020, that the estimate substantially or fully met GAO's standards and best practices for a reliable cost estimate in terms of credibility, accuracy, completeness, and documentation quality. It is rare for civilian agencies to be so designated, and we are proud that the Census Bureau has achieved this status.

16. As of this writing, the Census Bureau has been appropriated in aggregate just under $14 billion to use for the 2020 Census, covering fiscal years 2012 through 2020. This is $4.4 billion greater in appropriated dollars than the $9.6 billion actually expended from fiscal years 2002 to 2010 for the 2010 Census.

17. Combined, prior to the COVID-19 pandemic operational adjustments, there remain just over $2 billion in contingency funds that have been appropriated, but which we have not needed to use. With only minimal exceptions, Congress appropriated these funds to allow us to flexibly and quickly respond to any and all risks to the 2020 Census that might be realized and have an impact on the operations.

18. That is exactly what the Census Bureau has done in these challenging times. We have always planned to exhaust any resources necessary to fulfill the Census Bureau's mission in counting everyone living in the United States once, only once, and in the right place. In all scenarios, the focus of our resources includes the hard-to-count. We have designed and implemented the 2020 Census to enumerate the most willing and able to respond in our most efficient and cost effective manner, thereby freeing the majority of our resources to reach hard-to-count communities using a bevy of in-person techniques specifically tailored to reach them.

IV. Census Step 1: Locating Every Household in the United States

19. The first operational step in conducting the 2020 Census was to create a Master Address File (MAF) that represents the universe of addresses and locations to be counted in the

[1] This is known as the 2020 Census Life Cycle Cost Estimate (LCCE) Version 2.0. An executive summary of that estimate is publicly available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/life-cycle-cost-estimate_v2.pdf.

2020 Census. This operation constitutes a significant part of the 2020 Census, and our plans to enumerate every resident once, only once, and in the right place.

20. A national repository of geographic data—including addresses, address point locations, streets, boundaries, and imagery—is stored within the Census Bureau's Master Address File/Topologically Integrated Geographic Encoding and Referencing (MAF/TIGER) System. The MAF/TIGER System provides the foundation for the Census Bureau's data collection, tabulation, and dissemination activities. It is used to generate the universe of addresses that will be included in a decennial census. Those addresses are then invited to respond, typically through an invitation in the mail. The MAF/TIGER System is used to control responses as they are returned to the Census Bureau and to generate a list of nonresponding addresses that will be visited in person. Finally, the MAF/TIGER System is used to ensure that each person is tabulated to the correct geographic location as the final 2020 Census population and housing counts are prepared.

21. For all of these reasons, the Census Bureau implemented a continuous process for address list development in preparation for the 2020 Census. There are two primary components to address list development—in-office development and in-field development. In-office development involves the regular, on-going acquisition and processing of address information from authoritative sources, such as the U.S. Postal Service (responsible for delivering mail to addresses on a daily basis), and tribal, state, and local governments (responsible for assignment of addresses to housing units), while in-field address list development involves individuals traversing a specified geographic area and validating or updating the address list based on their observations and, if possible, interaction with residents of the housing units visited.

22. Between 2013 and 2019, the Census Bureau accepted nearly 107 million address records from government partners. Over 99.5 percent of those records matched to addresses already contained in the MAF, many of which were obtained from the U.S. Postal Services' Delivery Sequence File (DSF). The remaining 0.5 percent of address records from partner governments represented new addresses and were used to update the MAF. In addition, partners submitted over 75 million address points that were either new or enhanced existing address point

locations in TIGER. Over 257,000 miles of roads were added to TIGER using data submitted by partners.

23. For the third decade, as mandated by the Census Address List Improvement Act of 1994, the Census Bureau implemented the Local Update of Census Addresses (LUCA) Program to provide tribal, state, and local governments an opportunity to review and update the Census Bureau's address list for their respective jurisdictions. In 2018, participants from over 8,300 entities provided 22 million addresses, of which 17.8 million (81 percent) matched to addresses already in the MAF. The Census Bureau added 3.4 million new addresses to the MAF, nationwide, as a result of LUCA.

24. Between September 2015 and June 2017, the Census Bureau conducted a 100 percent in-office review of every census block in the nation (11,155,486 blocks), using two different vintages of imagery (one from 2009, which was contemporary with the timing of address list development and Address Canvassing for the 2010 Census, and one concurrent with the day on which in-office review occurred) and housing unit counts from the MAF. The 2009-vintage imagery was acquired from a variety of sources, including the National Agricultural Imagery Program as well as publicly available imagery from state and local governments. Current imagery was acquired through the National Geospatial Intelligence Agency's Enhanced View Program, through which federal agencies can access imagery of sufficiently high quality and resolution to detect individual housing units and other structures, driveways, roads, and other features on the landscape.

25. During the in-office review, clerical staff had access to publicly available street-level images through Google Street View and Bing StreetSide, which provided the ability to see the fronts of structures, as if standing on the sidewalk. The technicians categorized blocks as passive, active, or on-hold. Passive blocks represented stability, meaning the technician verified the currency and accuracy of housing data in the office. Active blocks represented evidence of change and/or coverage issues in the MAF. On-hold blocks represented a lack of clear imagery. In these latter two instances, In-Field Address Canvassing was required. At the end of the initial

review in June 2017, 71 percent of blocks were classified as passive, suggesting a need for in-field review of only 29 percent of blocks.

26. However, since the 2020 Census was still several years away when In-Office Address Canvassing completed its initial review of the nation, the Census Bureau continued the in-office review to ensure the MAF was keeping up with changes on the ground. The Census Bureau used information from the U.S. Postal Services' DSF and partner governments to identify areas experiencing recent change and triggered these areas for re-review. Between July 2017 and March 2019, the additional review resulted in the categorization of nearly 87.9 percent of the 11.1 million census blocks as passive, indicating a need for in-field review of only 12.1 percent of census blocks.

27. In-Field Address Canvassing occurred between August 2019 and October 2019. Of the 50,038,437 addresses in the universe, fieldwork validated 44,129,419 addresses (88.2 percent). The remainder were removed from the universe as deletes, duplicates, or non-residential addresses. There were 2,685,190 new addresses identified during fieldwork, of which 1,553,275 matched addresses already in the MAF as a result of contemporaneous in-office update processes. In other words, even the hardest to count areas that required fieldwork to verify the addresses, resulted in only a small percentage of additions to the existing MAF.

28. The design for address list development in the decade leading up to the 2020 Census was the most comprehensive in history. Extensive partnerships with tribal, federal, state, and local governments provided multiple opportunities to validate and update the MAF using the most authoritative sources available. This process of continual assessment and update using partner-provided data created a strong foundation on which to implement the use of satellite imagery to validate existing addresses or detect change during In-Office Address Canvassing. This suite of in-office methods allowed the Census Bureau to focus In-Field Address Canvassing resources in the hardest to validate census blocks.

29. The MAF/TIGER System created the foundation for the 2020 Census. The Census Bureau believes that the Census Bureau's MAF/TIGER System is the most complete and accurate in history.

V. Census Step 2: Encouraging Self-response Throughout the 2020 Census

30. In order to encourage everyone in the United States to self-respond, the Census Bureau designed, tested, and implemented and Integrated Communications Program, the IPC. The two major components of this program are the ICC, the Integrated Communications Contract, and the IPP, the Integrated Partnership Program.

A. Advertising and Media

31. The ICC is the major contract that supports all components of the communications campaign for the 2020 Census. For the 2020 Census, the push to educate people and motivate response to the 2020 Census represented the largest advertising campaign in U.S. government history.

32. The budget for the 2020 Integrated Communications Contract is currently funded at a higher level than in the 2010 Census, adjusted for both inflation and population growth. The cost of the 2010 Census Integrated Communications Contract, in 2020 constant dollars, would be $456 million, while the Census Bureau currently plans to spend approximately $695 million on the 2020 Census Integrated Communications Contract. The $695 million spent on the communications program will mean an 18% increase in per-person spending over the 2010 amount.

33. To run the ICC in connection with the Census Bureau, a contract was awarded to VMLY&R, a major legacy-advertising firm with over 80 years of experience. Known as Team Y&R, or TYR, by the Census Bureau, the contracting team includes 13 subcontractors. TYR includes firms with expertise in reaching and working with the major audiences that will receive advertising through the media outlets directed toward their population groups, including the Black/African American, Hispanic/Latino, Asian, American Indian and Alaska Native, and Native Hawaiian and Other Pacific Islander populations. By relying on firms with these individual skill sets, the Census Bureau was able to better tailor the media and messaging toward individual groups and gauge the response before going live with the advertising. It also allowed for more creative risk-taking, and less of a one-size-fits-all approach.

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34. Every part of the 2020 Census communications program was grounded in research. Based on the commitment to being a data driven campaign, beginning in 2018, we extensively researched how people perceived the census and what would motivate them to complete it. Models were developed to predict areas and audiences of low response across the country. These models were then translated into "low response scores" that help the Census Bureau anticipate respondent behavior so that messaging, media, and other communications activities could be deployed to maximize impact.

35. As a result of that research, we mounted a media campaign with stories in news media across the country in print, social, and digital media. The campaign was tested in over 120 focus groups across the country, and driven by efforts to reach historically undercounted audiences. More than 1,000 advertisements, in English and 43 other languages, were developed to communicate the importance of responding to the 2020 Census. This compares to roughly 400 separate creative pieces created in 2010. A sample of these creative pieces can be seen on the Census Bureau's YouTube channel website.

36. On March 29, 2019, the Census Bureau launched 2020census.gov—a key information hub about the census, how to complete it, and how it will affect communities across the country. Three days later, on April 1, 2019, we held a press conference to unveil the campaign platform: "Shape Your Future. START HERE." On January 14, 2020, we unveiled highlights of the public education and outreach campaign. That same day, we began airing ads to reach 99 percent of the nation's 140 million households, including historically undercounted audiences and those that are considered hard to reach.

37. The massive multimedia campaign sought to engage stakeholders and partners, support recruitment efforts and the Statistics in Schools program, and communicate the importance of the census through paid advertising, public relations, social media content, and the new web site. This was the first census where we made a significant investment in digital advertising, and spending time and resources targeting online sites including Facebook, Instagram, paid search engines, display ads, and programmatic advertising.

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38. The push to have a greater digital presence allowed the Census Bureau to reach a mobile audience, tailor messages, micro-target, and shift campaign ads and messages as needed. Online media, particularly search engines and social networking sites, made up a significant portion of digital connections. Nearly every person living in the United States was reached an average of 40 times throughout the campaign, from television, radio, newspaper and online ads, as well as outdoor locations such as billboards and bus stops.

39. The Census Bureau adapted its outreach strategies in response to delayed census operations due to COVID-19, increasing advertising and outreach to specific areas of the country with lower response rates. We quickly adjusted our messaging, pivoting from our original campaign to encourage people to respond online from the safety of their own homes. The use of micro-targeting allowed the Census Bureau to tailor its messaging, including directing appropriate messages to hard-to-reach communities and those who distrust government, both of which have been traditionally undercounted. This targeting continues through NRFU as we encourage the public to cooperate with enumerators. This targeting has allowed us to make each dollar spent on the advertising campaign more effective than in any previous census.

B. Partnerships with Community Organizations

40. The second major element of the Integrated Communications Program is partnerships. There are two prongs to the Partnership Program, the National Partnership Program that works from Census Bureau headquarters mobilizing national organizations, and the Community Partnership and Engagement Program, that works through the regions at the local level to reach organizations that directly touch their communities. The National Partnership Program and Community Partnership and Engagement Program are more integrated than ever before, and numbers involved for both programs significantly exceed the totals reached in prior censuses.

41. Census partners include national organizations like the National Urban League, the Mexican American Legal Defense Fund, the National Association of Latino Elected Officials (NALEO), the National Association for the Advancement of Colored People (NAACP), and the U.S. Chambers of Commerce. Major corporations also become census partners. At the local level,

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partners can be churches, synagogues and mosques, legal aid clinics, grocery stores, universities, colleges, and schools.

42. Partners are the trusted voices in their communities; they have a profound impact on those who listen when they say the census is important and safe. We depend on our partners to seal the deal with communities that may be fearful or distrustful of the government. Even with all the Census Bureau's innovation and improvements to the self-response system, we have learned—and confirmed through research—that when communities and leaders recognize the importance of participating in the census, this message is better conveyed to households within those communities. The best, most trusted information comes from a person of trust.

VI. Census Step 3: Self-Response

43. The design of the 2020 Census depends on self-response from the American public. In an effort to ensure the most efficient process to enumerate households, the Census Bureau assigns every block in the United States to one specific type of enumeration area (TEA). The TEA reflects the methodology used to enumerate the households within the block. There are two TEAs where self-response is the primary enumeration methodology: TEA 1 (Self-Response) and TEA 6 (Update Leave).

44. TEA 1 uses a stratified self-response contact strategy to inform and invite the public to respond to the census, and to remind nonresponding housing units to respond. Invitations, reminders, and questionnaires will be delivered on a flow basis unless a household responds. These mailings are divided into two panels, Internet First and Internet Choice. Internet First emphasizes online response as the primary self-response option. Mailings to the Internet First panel begin with an invitation letter that alerts the housing unit to the beginning of the 2020 Census and provides the Census ID,[2] the URL for the online questionnaire, and information for responding by phone.

45. Internet Choice is targeted to areas of the nation that we believe are least likely to respond online. Historical response rates from other Census Bureau surveys, internet access and

[2] A Census ID is a unique identifier assigned to each address in a decennial census; the Census ID is used to track whether an address has self-responded or to track the address through nonresponse data collection and, ultimately through response processing and data tabulation.

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penetration, and demographics are used to determine those areas least likely to respond online. Mailings to the Internet Choice panel begin with an invitation letter that alerts the housing unit to the beginning of the 2020 Census and provides the Census ID and the URL for the online questionnaire, information for responding by phone, and also a paper questionnaire. Housing units in Internet Choice areas have the *choice* to respond on paper beginning with the initial contact. All nonresponding housing units, regardless of panel, receive a paper questionnaire after the initial mailing and two separate reminder mailings.

46. Update Leave (TEA 6) is conducted in areas where the majority of the housing units do not have mail delivery to the physical location of the housing unit, or the mail delivery information for the housing unit cannot be verified. The purpose of Update Leave is to update the address list and feature data, and to leave a 2020 Census Internet Choice package at every housing unit. The major difference from TEA 1 is that a Census Bureau employee, rather than a postal carrier, delivers the 2020 Census invitation to respond, along with a paper questionnaire. Housing units also have the option to respond online or by phone.

47. Self-response began in March 2020 and will continue until the end of data collection. The total self-response period for the 2020 Census will be longer than the 2010 self-response period.

VII. Census Step 4: Nonresponse Followup (NRFU)

48. NRFU is the field operation designed to complete enumeration of nonresponding housing unit addresses. The primary purpose of NRFU is to conduct in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire.

49. After giving everyone an opportunity to self-respond to the census, census field staff (known as enumerators), attempt to contact nonresponding addresses to determine whether each address is vacant, occupied, or does not exist, and when occupied, to collect census response data. Multiple contact attempts to nonresponding addresses may be needed to determine the housing unit status and to collect decennial census response data.

50. The 2020 Census NRFU operation is similar to the 2010 Census NRFU operation, but improved. In both the 2010 Census and the 2020 Census, cases in the NRFU workload are

subject to six contact attempts. In both the 2010 and 2020 NRFU, the first contact attempt is primarily an in-person attempt. In the 2010 Census, these six contact attempts could be conducted as three in-person attempts and three attempts by telephone. By comparison, each contact attempt in the 2020 Census NRFU will be either a telephone or an in-person contact attempt (however the vast majority of attempts will be in-person).

51. In both the 2010 Census and 2020 Census NRFU, if upon the first contact attempt an enumerator determines an address is occupied and the enumerator is able to obtain a response for the housing unit, then the housing unit has been counted, and no follow-up is needed.

52. If upon the first contact attempt, the enumerator is not able to obtain a response, the enumerator is trained to assess whether the location is vacant or unoccupied. Enumerators will use clues such as empty buildings with no visible furnishings, or vacant lots, to identify an address as vacant or non-existent.

53. In both the 2010 and 2020 Census, a single determination of a vacant or nonexistent status was not sufficient to remove that address from the NRFU workload; a second confirmation is needed. If a knowledgeable person can confirm the enumerator's assessment, the address will be considered vacant or non-existent and no additional contact attempts are needed. A knowledgeable person is someone who knows about the address as it existed on census day or about the persons living at an address on census day. A knowledgeable person could be someone such as a neighbor, a realtor, a rental agent, or a building manager. This knowledgeable person is known as a proxy respondent.

54. If a knowledgeable person cannot be found to confirm the status of vacant or non-existent, use of administrative records may provide confirmation of the enumerator's assessment. The Census Bureau does not rely on a single administrative records source to determine an address is vacant or non-existent. Rather, multiple sources are necessary to provide the confidence and corroboration before administrative records are considered for use. When used in combination with an enumerator's assessment of vacant or non-existent, corroborated administrative records provide the second confirmation that a nonresponding address is vacant or non-existent.

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55. If, upon the first in-person contact attempt, the enumerator believes the address is occupied, but no knowledgeable person is available to complete the enumeration, the Census Bureau will use consistent and high-quality administrative records from trusted sources as the response for the household and no further contact will be attempted. We consider administrative records to be of high quality if they are corroborated with multiple sources. Examples of high-quality administrative records include Internal Revenue Service Individual Tax Returns, Internal Revenue Service Information Returns, Center for Medicare and Medicaid Statistics Enrollment Database, Social Security Number Identification File, and 2010 Census data.

56. Regardless of whether administrative records are used as a confirmation of vacancy or non-existent status or for the purposes of enumerating an occupied housing unit, the Census Bureau will, as a final backstop, send a final mailing encouraging occupants, should there be any, to self-respond to the 2020 Census.

57. The vast majority of nonresponding addresses in the NRFU workload will require the full battery of in-person contact attempts to determine the status of the nonresponding address (vacant, occupied, does not exist) and to collect 2020 Census response data. The full battery of in-person contact attempts also includes the ability to collect information about persons living in a nonresponding housing unit from a proxy respondent. Nonresponding units become eligible for a proxy response after a pre-determined number of unsuccessful attempts to find residents of a nonresponding address.

58. The operational design for NRFU evolved over the course of the decade. Use of administrative records, field management structures, systems, procedures, data collection tools and techniques were proven in tests occurring in 2013, 2014, 2015, 2016, and 2018.

VIII. Census Step 5: Quality Control

59. The Census Bureau is committed to a quality NRFU operation and has in place several programs to monitor and promote quality, such as the NRFU Reinterview Program, the Decennial Field Quality Monitoring Operation, and the Coverage Improvement Operation.

60. The NRFU Reinterview Program involves contacting a small number of households to conduct another interview—to help us ensure that enumerators are conducting their jobs

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correctly and are not falsifying responses. We have streamlined this operation, using information collected from the mobile devices used by enumerators. The data from these mobile devices tell us where the enumerators were physically located while they were conducting the interviews, how long they spent on each question in the interview, time of day of the interview, and other detail data about the interview process. Having this information—which is new for the 2020 Census—provides management with information on how the census takers are doing their jobs, and allows us to select reinterview cases in a targeted fashion.

61. A second quality check program, new for the 2020 Census, is the Decennial Field Quality Monitoring operation. This operation monitors overall adherence to field procedures in order to identify unusual patterns. We used this near real-time data analysis successfully during the Address Canvassing operation in 2019, and it is currently active in the NRFU operation. The goal of the program is to identify and investigate potential quality issues. In this program we examine data from individual field representatives and larger scale data, scanning for the possibility of both individual and systemic data quality problems. The program monitors outlier metrics, and produces reports that we analyze on a daily basis. Management staff use these reports to investigate suspicious activities and follow up as needed.

62. Another quality check operation, the Coverage Improvement Operation, seeks to resolve erroneous enumerations (people who were counted in the wrong place or counted more than once) and omissions (people who were missed) from all housing unit data. Coverage Improvement will attempt to resolve potential coverages issues identified in responses from the Internet Self-Response, Census Questionnaire Assistance, and NRFU operations, as well as from the paper questionnaires.

63. The Census Bureau believes that these quality programs (Reinterview, Decennial Field Quality Monitoring, and Coverage Improvement), taken together, provide a robust quality check for our data collection operations. We believe that our quality program remains an effective deterrent to poor performance, and an appropriate method to identify enumerators who fail to follow procedures. None of these programs, to date, reveals a pattern of substandard data collection.

64. The Census Bureau has also formed a Data Quality Executive Guidance Group that brings together the Census Bureau's experts in the fields of census operations, statistical methodology, acquisition and utilization of administrative records, and in the social, economic and housing subject areas. The group's mission is to provide direction and approvals about quality assessments of changes to the operational plans and of the 2020 Census data during and post data collection. We plan to release Demographic Analysis estimates of the population in December, prior to the release of the apportionment counts, as previously planned.

65. Finally, as noted by the Director in his August 3, 2020 statement, the Census Bureau intends to meet a similar level of household responses as in prior censuses, meaning that we will resolve 99% of the cases in each state. In short, the Census Bureau has robust programs in place to monitor data quality and has no indication that its NRFU operation is collecting "substandard" data.

IX. Census Step 6: Post-data Collection Processing

66. The next major step in the census, after the completion of data collection operations, is post processing. Post processing refers to the Census Bureau's procedures to summarize the individual and household data that we collect into usable, high quality tabulated data products. Our post processing procedures and systems are meticulously designed, tested and proven to achieve standardized, thoroughly vetted, high quality data products that we can stand behind.

67. Post data collection processing is a particularly complex operation, and the steps of the operation must generally be performed consecutively. It is not possible, e.g., to establish the final collection geography for the nation prior to processing housing units and group quarters that are added or corrected during NRFU. Similarly, it is not possible to unduplicate responses prior to processing all non-ID responses. In this sense, the post data collection activities are like building a house – one cannot apply dry wall before erecting the walls, any more than one could lay floor tile before the floor is constructed. There is an order of steps that must be maintained.

68. As part of developing the Replan Schedule, we looked at the possibility of starting the post data collection processing activities on a flow basis and reaffirmed that there is no opportunity to begin the post data collection processing until data collection operations close

everywhere. For example, we cannot begin processing in one region of the country while another region is still collecting data. This is true because the first post processing step is geographic processing, which cannot begin until the entire universe is determined. Geographic processing is key because we must tabulate census results at the block level and then build to higher levels of geography such as block groups, tracts, counties, and states.

69. The information below provides additional detail about the post data collection activities under the Replan Schedule.

A. Incorporate address updates from the field data collection operations into MAF/TIGER

Original Dates: February 10 – August 10, 2020

Replan Dates: February 6– September 24, 2020

During the data collection operations, the census field staff can update address and physical location information and add addresses. These updates are incorporated into our address and geo-spatial MAF/TIGER databases. Once updated, each address must be associated to the correct state, county, tract, block group and block. Since it is critical to associate each address to the correct geography, we verify that the address and geo-spatial updates are incorporated correctly.

B. Produce the Final Collection Geography MAF/TIGER Benchmark

Original Dates: August 14 – September 1, 2020

Replan Dates: September 5 – 25, 2020

In preparation for the producing the final collection geography data files needed for producing the apportionment counts and redistricting data products, we create a benchmark of MAF/TIGER, which is a snapshot of the databases.

C. Produce the Final Collection Address Data Products from MAF/TIGER

Original Dates: September 2 – 14, 2020

Replan Dates: September 26 – Oct 14, 2020

Once the benchmark has been created, the final collection geographic data files are produced and verified.

D. Produce and review the Decennial Response File 1 (DRF1)

Original Dates: September 15 – October 14, 2020

Replan Dates: October 14– November 8, 2020

The verified final collection geography data are integrated with the response data. Integration of these data is also verified to ensure accuracy. The next set of activities involves the standardization of the collected information.

- First we determine the final classification of each address as either a housing units or a group quarters facility. Addresses can change from a housing unit to group quarters and vice versa. Initial status is set at the start of the data collection operations as either a housing unit or group quarters. During the enumeration operations, we collect information that informs us on the classification. For a small number of addresses the classification may change, for example a housing unit may have been turned into a small group home. Based on the information collected we determine the status of every address as either a housing unit of group quarters.
- Next, we identify each unique person on the housing unit returns.
- As part of NRFU operation, we conduct a reinterview of a sample of cases to ensure quality. We incorporate the results of the reinterview.
- As part of the Internet self-response option and telephone operation, respondents can provide their data without their Census Identification Number (ID). These cases are assigned an ID which associates them to the final collection geography.
- Some group quarters will provide the information electronically. These files can contain duplicate records, so we need to remove the duplicates.
- We also determine the population count for all group quarters.

- We collect data in many ways, for example on-line, over the phone, on a paper questionnaire, electronic administrative files, and in person using an electronic questionnaire. As a result, we need to standardize the responses across the modes of collection.
- Finally, for the operations that collect data on a paper questionnaire, some housing units have more people than can fit on one paper questionnaire. The census field staff will use multiple paper questionnaires to enumerate the house. These continuation forms are electronically linked to form one electronic form.

E. Produce and review the Decennial Response File 2 (DRF2)

Original Dates: October 14 – November 4, 2020

Replan Dates: November 9 – 30, 2020

Once the previous step has been verified, we incorporate the results from the Self-Response Quality Assurance operation. As part of the group quarters operations, we enumerate domestic violence shelters. Their locations and data are high sensitive and are handled with special procedures both in the field and in processing. Their data are incorporated at this point in the process. Finally, for a small number of addresses we receive multiple returns, for example where one person in a house completes the form on-line, and other completes the paper questionnaire. For these cases, we select a form that will be used as the enumeration of record.

F. Produce and review the Census Unedited File (CUF)

Original Dates: November 4 – 30, 2020

Replan Dates: December 1 – 14, 2020

Once the previous step has been verified, we incorporate administrative records data as the response data for housing units were we do not have an enumeration and have high quality administrative records data. Next we determine the status

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for every housing unit as occupied, vacant or non-existent. Non-existent units are removed from future processing. For every occupied housing unit, the population count is determined. For each person with write-in responses to the race and Hispanic origin questions, we merge in the information from automated and clerical coding operations. The coding operations assign a numerical value to the write-in responses. At this point in the post-data collection activities, for every housing unit and group quarter their location (state, county, tract, block group and block) is assigned, their status (occupied, vacant or non-existent) is determined, and in occupied addresses the number of persons is known. In addition, at the person level the demographic information (relationship, age, date of birth, sex, race and Hispanic origin along with write-in code values) and at the housing unit level housing information (tenure) is determined. For the majority of these items, the respondent provided the information. However, for a small number of people and addresses the information may be missing or inconsistent with other provided information, for example the Person 1's spouse is five years old. The result of these processes is a file that contains records for every housing unit and group quarters along with person records for the people associated with the addresses. Note that some of the demographic information and response to the tenure question may be missing.

G. Produce, review and release the Apportionment Counts

Original Dates: December 1 – 28, 2020

Replan Dates: Dec 15- 31, 2020

Once the CUF has been verified, the process goes down two paths. The first path is to determine the apportionment counts. Since every housing unit and group quarters has a population count and linked to a state, we can tabulation the state level population counts. In addition, we merge in the count of the Federally Affiliated Overseas population and the results of the Enumeration of Transitory Locations for each state. To ensure accuracy in the apportionment numbers, the

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state counts including the overseas population and apportionment numbers are verified by multiple independent ways. The results of the independent verifications are compared and reconciled, if necessary.

X. Census Step 0: Research and Testing of the 2020 Census Design

70. The operational design of the 2020 Census, discussed above, has been subjected to repeated and rigorous testing. Given the immense effort required to conduct the census, the importance of the results, and the decade of work by thousands of people that goes into planning and conducting the decennial census, the Census Bureau expends a significant amount of effort to evaluate its planning and design to ensure that its operations will be effective in coming as close as possible to a complete count of everyone living in the United States. Design and testing of the 2020 Census was an iterative process: after each test, we revised our plans and assumptions as necessary.

71. Below are eight significant tests conducted prior to the 2020 Census. Seven of the tests listed below directly contributed to the support of the NRFU operational design or the infrastructure needed to support it. The eighth test pertained to In-Field Address Canvassing.

A. **2013 Census Test.** The 2013 Census Test explored methods for using administrative records and third-party data to reduce the NRFU workload. Key objectives of the 2013 Census Test included:

i. Evaluate the use of administrative records and third-party data to identify vacant housing units and remove them from the NRFU workload;

ii. Evaluate the use of administrative records and third-party data to enumerate nonresponding occupied housing units to reduce the NRFU workload;

iii. Test an adaptive design approach for cases not enumerated with administrative records and third-party data; and

iv. Test methods for reducing the number of enumeration contact attempts as compared with the 2010 Census.

B. **2014 Census Test.** The 2014 Census Test built upon the results from the 2013 Census Test specific to administrative records and third-party data usage to reduce the NRFU workload. Key objectives of the 2014 Census Test included:

i. Testing various self-response modes, including the Internet, telephone, and paper, and response without a preassigned census identifier;

ii. Testing the use of mobile devices for NRFU enumeration in the field;

iii. Continuing to evaluate the use of administrative records and third-party data to remove cases (vacant and nonresponding occupied housing units) from the NRFU workload;

iv. Testing the effectiveness of applying adaptive design methodologies in managing the way field enumerators are assigned their work; and

v. Examining reactions to the alternate contacts, response options, administrative record use, and privacy or confidentiality concerns (including how the Census Bureau might address these concerns through micro- or macro-messaging) through focus groups.

C. 2014 Human-in-the-Loop Simulation Experiment (SIMEX). Key findings included:

i. Determination that the field management structure could be streamlined and the supervisor-to-enumerator ratios increased;

ii. Messaging and alerts within the operational control system provided real-time and consistent communication; and

iii. Smartphones were usable by all people—even those with little technology experience were able to adjust and adapt.

D. **2015 Optimizing Self-Response Test.** The objectives of this test included:

i. Determining use of digital and target advertising, promotion, and outreach to engage and motivate respondents;

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ii. Offering an opportunity to respond without a Census ID (Non-ID Processing) and determine operational feasibility and potential workloads around real-time Non-ID Processing; and

iii. Determining self-response and Internet response rates.

E. **2015 Census Test.** The 2015 Census Test explored reengineering of the roles, responsibilities, and infrastructure for conducting field data collection. IT also tested the feasibility of fully utilizing the advantages of planned automation and available real-time data to transform the efficiency and effectiveness of data collection operations. The test continued to explore the use of administrative records and third-party data to reduce the NRFU workload. Key objectives included:

i. Continue testing of fully utilized field operations management system that leverages planned automation and available real-time data, as well as data households have already provided to the government, to transform the efficiency and effectiveness of data collection operations;

ii. Begin examining how regional offices can remotely manage local office operations in an automated environment, the extent to which enumerator and manager interactions can occur without daily face-to-face meetings, and revised field staffing ratios;

iii. Reduce NRFU workload and increase productivity with the use of administrative records and third-party data, field reengineering, and adaptive design; and

iv. Explore reactions to the NRFU contact methods, administrative records and third-party data use, and privacy or confidentiality concerns.

F. **2016 Census Test.** The 2016 Census Test tested different supervisor-to-enumerator staffing ratios and incremental improvements and updates to the

field data collection software that guided an enumerator through interviews. The 2016 Census Test also allowed the continued evaluation of the use of administrative records to reduce the NRFU workload. Key NRFU objectives included:

i. Refining the reengineered field operations;

ii. Refining the field management staffing structure;

iii. Testing enhancements to the Operational Control System and field data collection application; and

iv. Testing scalability of Internet and Non-ID Processing during self-response using enterprise solutions.

Objectives related to self-response included:

i. Testing provision of language support to Limited English Proficient populations through partnerships and bilingual questionnaires;

ii. Testing the ability to reach demographically diverse populations;

iii. Testing deployment of non-English data collection instruments and contact strategies; and

iv. Refining Real-Time Non-ID processing methods, including respondent validation.

G. **2018 End-to-End Census Test.** The 2018 End-to-End Census Test focused on the system and operational integration needed to support the NRFU operation. Nearly all 2020 system solutions supporting the NRFU operation were deployed. The test also allowed continued evaluation of the NRFU contact strategy. The objectives of this test included:

i. Testing and validating 2020 Census operations, procedures, systems, and field infrastructure together to ensure proper integration and conformance with functional and nonfunctional requirements.

H. Address Canvassing Test (conducted in the fall of 2016). The Address Canvassing Test examined the effectiveness of the In-Office Address

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Canvassing through the results of the In-Field Address Canvassing. The objectives of the test included:

i. Implementing all In-Office Address Canvassing processes;

ii. Evaluating the effectiveness of online training for field staff;

iii. Measuring the effectiveness of In-Office Address Canvassing through In-Field Address Canvassing; and

iv. Integrating multiple information technology applications to create one seamless operational data collection, control, and management system.

XI. Current Status of 2020 Census Operations

72. As of September 2, 2020, over 96 million households, 65 percent of all households in the Nation, have self-responded to the 2020 Census. Combining the households that self-responded with those that field staff have enumerated under NRFU reveals that as of September 1, 2020 the Census Bureau has enumerated 84 percent of the nation's housing units.

73. The Census Bureau is now roughly 3 ½ weeks into the 7 ½ week schedule for conducting the NRFU operation. Under the Replan Schedule, NRFU is scheduled to last 7 ½ weeks, not 6 weeks as some of Plaintiffs' declarations state. As of September 1, 2020, we have completed roughly 60% of the NRFU workload. We were helped in achieving this result by the fact that we got a "head start" on data collection by beginning NRFU at select offices in July at a "soft launch." When we began NRFU in all areas on August 9 we had already enumerated over 3 million households. Additionally, over 80% of the households in 40 states have been enumerated

74. While the number of enumerators hired and deployed has not been at the level anticipated, current progress indicates that we will nonetheless be able to complete NRFU before September 30. We currently have over 235,000 enumerators actively deployed, and we are conducting continuous replacement training sessions to increase that number.

75. The productivity rate for our enumerators thus far is substantially above the planned rate. Our plans assumed a productivity rate of 1.55 cases/hour, and 19 hours/week average hours

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worked, whereas as of September 1, 2020 we have experienced a productivity rate of approximately 2.32 cases/hour, and 20.1 hours/week averaged work hours.

76. In sum, at our current rate we anticipate being able to conclude NRFU data collection no later than September 30, 2020.

XII. Replanning the Census – Multiple Times

77. The Census Bureau's planning for the 2020 Census was, in my professional opinion, excellent. Our plan was comprehensive and thoroughly tested. In March 2020, however, it became clear that COVID-19 was a serious health issue, and we were forced to change our plans around the time we began our self-response operation.

78. On March 18, 2020 the Census Bureau initially announced a two-week suspension of field operations to protect the health and safety of our employees and the American public because of the COVID-19 Pandemic. Self-response continued during this period through Internet, telephone and paper questionnaires. On March 28, 2020 the Census Bureau announced an additional two week suspension, until April 15, 2020.

79. At that time the career professional staff at the Census Bureau undertook the project of replanning each of the field operations based on our best predictions of when we could safely begin sending staff into the field to interact with the public. On April 13, 2020 staff finalized the plan to adjust field operations, and I presented the plan to the Secretary of Commerce and Department of Commerce management. The plan involved delaying our key high personal contact operations by 90 days. Update Leave, which had started on March 15 and been stopped because of COVID-19 on March 17, would resume pursuant to a new schedule beginning on June 13 and concluding on July 9. In-person Group Quarters operations which had been scheduled from April 2 – June 5 would be rescheduled from July 1 – September 3, and our largest field operation, NRFU, which was scheduled from May 13- July 31, would be moved to August 11- October 31. We rescheduled self-response to conclude with the end of Field Operations so instead of ending on July 31 as indicated in the original plan, it was extended to October 31. This schedule required Congress to provide legislative relief from the statutory deadlines of December 31, 2020, for the submission of the Apportionment counts to the President, and March 31, 2021, for the delivery of

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redistricting data to the states. A request statutory relief from Congress was made for 120 days to enable us to complete the field operations and post enumeration processing.

80. On April 13, 2020, the Secretary of Commerce and the Director jointly announced the new Census Schedule and stated that they would seek statutory relief from Congress of 120 additional calendar days. This new schedule set a completion date for field data collection and self-response of October 31, 2020. For clarity, I will refer to this as "the COVID Schedule." The COVID Schedule assumed Congressional action and called for the delivery of apportionment counts to the President by April 30, 2021 (120 days after the statutory deadline) and redistricting data files to the states no later than July 31, 2021.

81. Once it became apparent that Congress was not likely to grant the requested statutory relief, in late July the career professional staff of the Census Bureau began to replan the Census operations to enable Census to deliver the apportionment counts by the Statutory deadline of December 31, 2020. On July 29, the Deputy Director informed us that the Secretary had directed us, in light of the absence of an extension to the statutory deadline, to present a plan at our next weekly meeting on Monday, August 3, 2020 to accelerate the remaining operations in order to meet the statutory apportionment deadline. I gathered all the senior career Census Bureau managers responsible for the 2020 Census at 8:00 a.m. on Thursday, July 30 and instructed them to begin to formalize a plan to meet the statutory deadline. At that time I consulted with the Associate Director of Communications and we directed that the COVID Schedule be removed from our website while we replanned. We divided into various teams to brainstorm how we might assemble the elements of this plan, and held a series of meetings from Thursday to Sunday. We developed a proposed replan that I presented to the Secretary on Monday August 3.

82. In developing the proposed replan we considered a variety of options and evaluated risk for each suggested time-saving measure. We evaluated the risks and quality implications of each suggested time-saving measure and selected those that we believed presented the best combination of changes to allow us to meet the statutory deadline without compromising quality to an undue degree. The challenge was to shorten the field data collection operation by 30 days, and to conclude the post processing operation in only 3 months, as opposed to 5 months in prior

schedules. We began with a review of the status of all field outreach operations, and assessed the impacts of possible revisions on the Census Bureau's ability to complete those operations within the compressed timeline. The six million housing units in the Update Leave Operation (which provides Census invitations to housing units that do not receive regular US mail) had been completed in early July, and we had received over two million self-responses and the remaining housing units would be moved into the NRFU operation to be visited by enumerators for personal interviewing. The Group Quarters enumeration operation which had begun on July 1st was on track to be completed on schedule by September 3, 2020 and would not be negatively affected by compressing the balance of the Field Schedule. The enumeration of persons staying in transitory locations (Campgrounds, RV parks, marinas and hotels without a home elsewhere) was scheduled to be conducted from September 3 – September 28. That operation could be conducted as planned within the replan schedule timeline.

83. The COVID-19 pandemic had precluded the Census Bureau from sending staff to conduct our Service Based Enumeration (SBE) operation. SBE is conducted at emergency and transitional shelters, soup kitchens and regularly scheduled food vans and targeted non-sheltered outdoor locations (TNSOL), and is designed to insure that people experiencing homelessness are counted); it was originally scheduled to be conducted March 30-April 2. We had conducted an extensive consultation in May and early June with a panel of 67 national service providers, federal and state agencies to determine the best time frame to conduct this operation to best replicate the weather, migratory behaviors and other factors affecting this population. The overwhelming consensus of the stakeholders, and the input from Census experts, was that the best time to conduct this operation would be mid-late September. Based on that stakeholder consultation we selected September 22-24 to conduct the SBE and TNSOL operations with appointments made with service providers in early September. A review of this operation indicated that we could conducted it in the replan as currently scheduled without disruption.

84. We also reviewed NRFU, our largest and most critical operation. The Census Bureau had conducted soft launches of all our major operations (during a soft launch a small portion of the operation starts early to insure that all the planned and tested systems work as

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designed under real field conditions with real respondents and actual newly hired temporary employees). The NRFU Soft Launch was planned with six offices that could be safely started based on COVID risk profiles (developed using CDC, HHS, State and Local health guidance), availability of staff, and provisioning of Personal Protective Equipment. The original plan was to begin the operation in one office from each of our six regions starting on July 16th (Cycle 1a) and to follow on July 23rd (Cycle 1b - one week later) with six additional offices picked from coastal areas that would be prone to Hurricane risk. As the plan developed we were unable to take offices from all of the areas in the original plan because of high COVID risk and state and local stay at home orders, however we were able to select 6 offices for each cycle and these offices commenced NRFU field operations without incident on the planned dates. In early to mid July, as the pandemic controls began to be lifted, and our concerns grew over lack of action on a waiver of the December 31, 2020 apportionment statutory deadline, we decided to expand NRFU operations to all offices that could meet the safety, health, and staffing requirements – to start those offices in advance of the initial planned start date of August 11, 2020. We deployed NRFU operations in 35 additional offices on July 30, 2020 and 39 additional offices on August 6, 2020. We then made the decision to pull forward all remaining offices from August 11 to August 9. All ACOs had begun NRFU operations by August 9 and we had enumerated over 7.4 million housing units before the Replan Schedule's official start date of August 11.

85. Concurrent with the early start of NRFU operations, we observed higher levels of overall staff productivity resulting from the efficiency of the Optimizer (a software program that both schedules work for our enumerators and then routes them in the most effective routing). The increased productivity that we observed during the soft launch period was a factor in our ability to design the replanned field operations to end by September 30, 2020. The bonus plan to increase hours also contributed to our ability to create a replan to meet this deadline. We presented the Replan Schedule to the Secretary on August 3, he accepted it, and the Director announced it that same afternoon. For clarity, I will refer to this schedule as "the Replan Schedule."

86. The Replan Schedule intends to improve the speed of the NRFU operations without sacrificing completeness. Under the Replan Schedule, the Census Bureau has responded to the

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shortened calendar period for NRFU operations by taking steps to increase the ability of its employees in the field to work as efficiently as possible. This involves increased hours of work per enumerator, spread across the total workforce, to get the same work hours as would have been done under the original time frame. We incentivize this behavior by providing monetary bonuses to enumerators in who maximize hours worked, and retention bonuses to those who continue on staff for multiple successive weeks. Successful completion of NRFU is dependent on hours worked, not days worked.

87. We have aimed to improve the effectiveness of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, and keeping phone and tablet computer devices for enumeration in use for the maximum time possible, thereby decreasing the inefficiency created by training new enumerators.

88. The Census Bureau was able to adopt the Replan Schedule because the design of the 2020 Census allows a more efficient and accurate data collection operation in a shorter timeframe than was possible in the 2010 Census. Improvements that make this possible include use of our route and case optimization software, use of handheld devices, and streamlined processing. Additionally, it is worth noting that largely because of the schedule delays, the self-response period for the 2020 Census will be longer than the self-response period for the 2010 Census.

89. The Replan Schedule also necessitated some changes to the content and timing of our post processing operation. These changes include:

- We shortened address processing from 33 to 20 days. This required eliminating 13 days of processing activities that will be deferred until the creation of the redistricting data products.
- We cancelled the internal independent review of the final list of addresses that will be used to tabulate 2020 Census data (what we call "the MAF Extract").
- We eliminated redundant quality control steps, and the multiple file deliveries that supported those steps, in order to enable a state-by-state flow of deliveries for processing.

(Previous procedures delivered data to the next step only when the entire country had been reviewed by multiple teams).

- We optimized employee assignments to ensure maximum staff resource usage during this shortened production period – i.e., implemented a seven-day/week production schedule.
- We compressed the time allotted for subject matter expert review and software error remediation, cutting 21 days from the schedule.

90. These changes increase the risk the Census Bureau will not identify errors during post processing in time to fix them.

91. Nevertheless, the Census Bureau is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule. The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations.

92. The Census Bureau has kept the Office of Management and Budget informed about schedule developments for both the COVID Schedule and the Replan Schedule, and has filed nonsubstantive changes that have been published in the Federal Register. OMB was not required to approve the changes to the operational plan, nor did it. As with the 2018 Operational Plan, we did we not ask other agencies to review or approve either the COVID Schedule or Replan Schedule.

XIII. Impacts of Granting a Preliminary Injunction

93. If the Court grants an injunction, the Census Bureau will need to replan the remaining census operations again. We cannot speculate at this point exactly how we will replan the remainder of the census, as the specific actions we take will depend on when the Court rules and the specifics of the ordered actions.

94. The timing of any Court order changing the schedule is particularly important, as stated in our filing on Wednesday, September 2, 2020, where we explained that the Census Bureau has already taken steps to conclude field operations. As I will explain further, the fact that we are concluding field operations in ACOs that have completed their workload is a normal part of the NRFU operation, and is not specific to the Replan Schedule.

95. The Census Bureau manages its nonresponse follow up operation (NRFU) out of "Census Field Supervisor areas" or "CFS areas" within each of the nation's 248 ACOs. As of September 3, 2020, roughly 11% of CFS areas nationwide are eligible for what we call "the closeout phase," over 1,220 are actually in the closeout phase, and roughly 50 have actually reached conclusion. The closeout phase refers to the process of focusing our best enumerators to resolve the remaining cases in that area. CFS areas are eligible for closeout procedures when they cross the 85% completion mark. All CFS areas become eligible for closeout procedures on September 11. This does not mean that all CFS areas will be moved to closeout procedures on that date, only that regional directors can make this decision. Prior to that date no CFS area can be moved into closeout procedures until it reaches 85% completion. **The Census Bureau is continuing to work across the nation to obtain responses from all housing units, and has not begun closeout procedures for any CFS area with under 85% completion.**

96. It is a normal and planned part of the NRFU operation for an ACO to move into the closeout phase and complete operations. We used closeout procedures in NRFU in the 2010 Census and always planned to do the same for the 2020 Census. If we have not wound down in some areas, it is because we are still counting. Some ACOs have greater initial workload, and some started earlier than others –therefore, moving to completion varies by ACO and is a reflection of workload and local conditions and results in the allocation of enumerator resources from areas that are complete to areas that require more work.

97. We are currently finished with over 64% of the NRFU field work and over 85% of the total enumeration of all housing units in the nation and those numbers increase daily. More than 13 states have over 90% of their housing unit enumeration completed, and in 18 additional states we have completed over 85% of the housing units in those states. As we complete areas, staff are offered an opportunity to assist by enumerating in other areas that are not yet complete. Some staff elect that option, others choose not to go outside of their home area, and as their area is completed, they are released. As we complete more field work, the number of staff that are still active declines, and our ability to ramp up is severely hampered.

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98. Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

99. Were the Court to enjoin us, we would evaluate all of the changes we made for the Replan Schedule and determine which to reverse or modify. For example, we notified participants of the cancellation of the Count Review 2 operation, originally scheduled for September 15. If our schedule were extended, we would evaluate whether to re-schedule this operation. We would go through each and every aspect of remaining operations and determine how best to use the remaining time to maximize the accuracy and completeness of the census results.

100. Finally, we wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021. The post processing deadlines for the Replan Schedule are tight, and extending the data collection deadline would, of necessity, cause the Census Bureau to fail to be able to process the response data in time to meet its statutory obligations. We have already compressed the post processing schedule from 5 months to only 3 months. We previously planned and tested our post processing systems assuming that we would follow a traditional, sequential processing sequence, and the 3-month schedule necessary for the Replan Schedule has already increased risk. We simply cannot shorten post processing beyond the already shortened 3-month period.

101. As I have tried to make clear in this Declaration, the decennial census is a massive, complex, and interrelated endeavor. Particularly troubling is the prospect of continual, conflicting, and evolving court orders from this this and other courts, including appellate courts. While Census Bureau staff have demonstrated considerable resilience and flexibility during this difficult year,

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some certainty as to the amount of time available to conclude data collection and post processing will increase the likelihood of a successful outcome.

XIV. Commitment to Transparency and High Quality Enumeration

102. In my role as Associate Director, I remain committed to transparency about 2020 Census operations. The Census Bureau has been posting detailed information on its website about both self-response and NRFU completion progress:

https://2020census.gov/en/response-rates/self-response.html

https://2020census.gov/en/response-rates/nrfu-completion.html

https://2020census.gov/en/response-rates/nrfu.html

103. The 2020 Census is the first to post NRFU workload information, which is now available at the state and ACO level and may be seen at https://2020census.gov/en/response-rates/nrfu-completion.html. I have briefed staff for House and Senate leadership every Friday since April (except for August 7), and I have provided a transcribed briefing to Congress. We produce a massive amount of documents and other information to the Office of the Inspector General and the General Accounting Office every week, and these organizations interview Census Bureau staff on almost a daily basis.

104. In my role as the Associate Director, I remain committed to conducting a high-quality field data collection operation as explained above, and the ultimate goal of a complete and accurate census.

I have read the foregoing and it is all true and correct.

DATED this ___ day of September, 2020

Albert E Fontenot

Digitally signed by Albert E Fontenot
Date: 2020.09.05 00:14:42 -04'00'

Albert E. Fontenot, Jr.

Associate Director for Decennial Census Programs

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United States Bureau of the Census

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE Plaintiffs, v. WILBUR L. ROSS, Defendants.	No. 5:20-cv-05799-LHK **NOTICE OF INTENT TO INTERVENE AND REQUEST TO PARTICIPATE IN STATUS CONFERENCE** Hr'g Date: Sept. 18, 2020 Hr'g Time: 10:00 a.m. Judge: Hon. Lucy H. Koh Action Filed: Aug. 18, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the State of Louisiana ("Louisiana") has received notice of and intends to promptly file a motion to intervene in the above-captioned action pursuant to Federal Rule of Civil Procedure 24. In the interim, until a ruling on that motion, and particularly in light of the nature of the action, Louisiana requests permission to participate in the Status Conference set for September 18, 2020, and any subsequent hearings or conferences. In support thereof, Louisiana states as follows:

1. This action was filed one month ago, on August 18, 2020.

2. Louisiana is a sovereign State that has significant protectable interests in connection with the census, including the size of Louisiana's Congressional delegation and Louisiana's proportionate allocation of limited federal resources, *see* Compl. ¶¶ 300-318. Not surprisingly, federal Courts have repeatedly permitted States to intervene in disputes over the census. *See, e.g., Utah v. Evans*, 536 U.S. 452, 459 (2002).

3. According to the Census Bureau, Louisiana's self-response rate as of September 16, 2020, is only 59.2% (placing Louisiana 46th of the 50 States) and Louisiana's overall enumeration rate is only 86.9% (tied for 48th place). The Census Bureau estimates that Louisiana's population is 32.8% African American, with 19.0% of Louisiana's population living in poverty and 35% of its population living in hard-to-count neighborhoods.[1] Plaintiffs allege those populations are underrepresented in administrative records, such that using administrative data to fill in missing information for non-responsive households will produce a less accurate census. *See* Compl. ¶ 106. Further, Plaintiffs argue that jurisdictions — like Louisiana — with high numbers of hard-to-count citizens suffer disproportionately when compared to areas with low numbers of these same groups. Reply (ECF 130) at ECF p.11.

4. On September 5, 2020, the Court granted Plaintiffs' motion for a TRO until a September 17, 2020, hearing on Plaintiffs' motion for a PI. Order (ECF 84). That TRO enjoined the federal defendants from implementing their current plan for the census. *Id.* at 6-7.

[1] https://www.census.gov/quickfacts/LA

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5. The status quo would have been an orderly wind-down of census operations in many jurisdictions, with Census Bureau resources re-directed to jurisdictions — like Louisiana — that have lagging enumeration rates, followed by cessation of data collection so as to facilitate post-processing of the collected data. Fontenot Decl. (ECF 81-1) ¶¶ 66-67, 95-97. That status quo has been upended. *See id.* at ¶¶ 93-97. Time has marched toward the Census Bureau's statutory deadlines, and Census Bureau resources have been expended in jurisdictions that have acceptable enumeration rates rather than redirected to Louisiana.

6. Last-minute interference with large government undertakings creates disruption and harm. Not surprisingly, the Supreme Court has repeatedly rejected last-minute judicial disruption, especially on a PI or TRO record, even when fundamental rights are affected. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The COVID-19 pandemic has not changed that rule. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). And the census is a vastly larger and more complex operation than the elections where the rule is most commonly applied. *See* Fontenot Decl. (ECF 81-1) ¶ 66-67, 101. Indeed, Louisiana respectfully submits that the relief demanded by the Plaintiffs (and to an extent granted by the TRO) will largely serve to deplete Census Bureau resources that could otherwise be expended finalizing the census in Louisiana, and that continued micromanagement and delay harm Louisiana.

7. Plaintiffs demanding court-enforced allocation of Census Bureau resources and changes to complex census-taking logistics plainly do not represent Louisiana's interests. Neither do the federal Defendants, whose powers may be affected by the outcome of this litigation, but who — unlike Louisiana — suffer no risk of losing representation or federal resource allocations.

8. Louisiana could partially protect its interests by filing a separate action to compel compliance with the statutory deadline for completing the census and the existing enumeration plan. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring) (reviewing multiple district court litigations and noting that "[u]niversal injunctions have little basis in traditional equitable practice"). But such relief would inherently be partial given the effect of the TRO on other localities, which necessarily depletes Census Bureau resources. Additionally, the delay

inherent in pursuing a separate action would adversely affect Louisiana's interests while census resources continue to be reallocated or depleted.

9. A September 30, 2020, census Re-plan deadline is approaching. If data collection is extended beyond September 30, "the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021." (ECF 81-1) at ¶ 100. Nevertheless, on September 17, this Court continued the PI hearing to September 22, 2020, and extended its TRO until "until the Court issues its decision on the preliminary injunction motion or through September 24, 2020, whichever is sooner." Order (ECF 142) at 3. In doing so, the Court noted "the complexity of the issues and the fact that 1,800 documents may be produced three days before the hearing," at least some of which may require resolution of privilege disputes. *Id.* at 2-3, 14-15.

10. In view of the above, the disposition of this action is highly likely to impede Louisiana's ability to protect its interests. And in view of this Court's September 17 Order, the likelihood of that impediment is becoming increasingly certain. Accordingly, upon learning of this Court's September 17 Order, Louisiana promptly retained local counsel and appeared. *Cf. United States v. Alcan Aluminum, Inc.,* 25 F.3d 1174, 1182-83 (3d Cir. 1994). Recognizing the fast pace of this litigation, Louisiana provides this abbreviated Notice of Intent to Intervene. Louisiana respectfully requests permission to participate in today's Status Conference and any subsequent conferences or hearings.

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Dated: September 18, 2020

Respectfully submitted,

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TAB C
EXCERPTS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE *et al*

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

NOTICE OF MOTION AND MOTION TO INTERVENE BY STATES OF LOUISIANA AND MISSISSIPPI

Hr'g Date: TBD
Hr'g Time: TBD
Judge: Hon. Lucy H. Koh
Location: San Jose Courthouse, Courtroom 8

Action Filed: Aug. 18, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Local Rule 7-1(b), the States of Louisiana and Mississippi (collectively, "State Intervenors") respectfully move to intervene as Defendants in the above-captioned litigation without oral argument and on an expedited basis. Alternatively, the State Intervenors notice that on October 29, 2020, at 1:30 p.m., before the Hon. Lucy H. Koh, 280 South 1st Street, San Jose, or such other time as the Court may order, the State Intervenors will and do hereby move for the same relief.

This motion is brought pursuant to Federal Rule of Civil Procedure 24. As more fully set forth in the accompanying memorandum, the grounds for the motion are: (a) the motion is timely; (b) the State Intervenors have significant protectable interests; (c) this action has already impeded the State Intervenors' ability to protect those interests, and the disposition of this action could further impede the State Intervenors' ability to protect those interests; (d) the current parties do not adequately represent the interests of the State Intervenors; and (e) a separate lawsuit to protect the State Intervenors' interests would plainly involves common questions of law and fact with this action, and their direct opposition to Plaintiffs' claims satisfies the "common question" requirement for permissive intervention. Federal Courts have repeatedly permitted States to intervene in disputes over the census, *see, e.g.*, *Utah v. Evans*, 536 U.S. 452, 459 (2002), and this Court should do so here.

This motion is based on this motion and the supporting memorandum below; the accompanying Declaration of Joseph S. St. John; and any further papers filed in support of this motion, the argument of counsel, and all pleadings and records on file in this matter.

PLEASE TAKE FURTHER NOTICE that counsel for Louisiana contacted counsel for the parties via email on September 22, 2020. Defendants responded: "Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction." Plaintiffs responded but did not provide a position. *See* Exh. 16.

PLEASE TAKE FURTHER NOTICE that State Intervenors urge that this motion not delay the Court's issuance or denial of a preliminary injunction.

PLEASE TAKE FURTHER NOTICE that State Intervenors' proposed answer is attached.

BC-DOC-0000027554

MEMORANDUM IN SUPPORT

BACKGROUND

THE DECENNIAL CENSUS

The Constitution requires the federal government to conduct a census every ten years:

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

U.S. Const. art. I, § 2.

Consistent with its express constitutional authority to regulate the "manner" of the census, Congress requires that the Secretary of Commerce, with the aid of the Census Bureau, "***shall***, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April." 13 U.S.C. § 141(a) (emphasis added). The resulting "tabulation of total population by States . . . ***shall*** be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* at § 141(b) (emphasis added). The President must then transmit to Congress the tabulation of total population and the number of representatives to which each State is entitled:

> On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, 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, no State to receive less than one Member.

2 U.S.C. § 2a (emphasis added). Additional apportionment and redistricting-related tabulations "***shall*** . . . be completed, reported, and transmitted to each respective State within one year after the decennial census date." 13 U.S.C. § 141(c) (emphasis added). In short, Congress has imposed a series of clear, mandatory deadlines, starting December 31, 2020, for the Secretary and the President to provide census tabulations to Congress and the States.

THE 2020 CENSUS

On or about December 31, 2018, the Census Bureau released Version 4.0 of its Operation Plan. Exh. 1. The plan contemplated ceasing census data collection at the end of July 2020, *id.* at 108, 129, followed by post-processing. But the plan also contemplated "late operational design changes," *i.e.*, "design changes [that] are required following the completion of key planning and development milestones." *Id.* at 175. The announced mitigation strategies for such late design changes included "[p]repar[ing] for rapid response to address potential changes and make decisions based on the results of the change-control process." *Id.* at 176. The plan further contemplated impacts from exogenous limitations on staffing and operations, and included mitigation strategies for those limitations, too. *Id.* at 141, 176.

Consistent with its Operation Plan, the Census Bureau began data collection in 2020. But on March 13, the President declared a national emergency based on the outbreak of COVID-19 and the resulting strain on the Nation's healthcare system. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, 85 Fed. Reg. 15337 (Mar. 18, 2020). On March 15, the Census Bureau announced it was "adjusting some operations" to protect "the health and safety of our staff and the public" while fulfilling its "statutory requirement to deliver the 2020 Census counts to the President on schedule." Exh. 2. The Census Bureau noted the "planned completion date for data collection for the 2020 Census is July 31, 2020," but "***that date can and will be adjusted if necessary as the situation evolves*** . . . ." *Id.* (emphasis added).

A few days later, the Census Bureau announced that "2020 Census field operations [would] be suspended" due to the ongoing COVID-19 pandemic. Exh. 3. The Census Bureau explained it was doing so "to protect the health and safety of the American public, Census Bureau employees, and everyone going through the hiring process for temporary census taker positions." *Id.* Then, on April 13, the Census Bureau announced:

> [T]he Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.
>
> Under this plan, the Census Bureau would extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021.

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Exh. 5. Such a delay would cause significant downstream disruption to States vis-à-vis redistricting and upcoming elections, would likely trigger costly special legislative sessions, and would yield a morass of litigation. *See* Exhs. 6, 7, 14, 15, 16. Not surprisingly, although legislation was introduced, *see, e.g.*, H.R. 6800 § 70201, Congress has thus-far declined to provide relief from the statutory deadlines it had previously established.[1] Accordingly, on August 3, the Census Bureau announced a further update to its plan that includes "enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by [the] statutory deadline of December 31, 2020 . . . ." Exh. 8. To satisfy they statutory deadline, the Census Bureau announced that it would end field data collection by September 30, 2020. *Id.*

PLAINTIFFS SEEK TO PAD THE CENSUS COUNT IN CERTAIN JURISDICTIONS

On August 18, 2020, Plaintiffs — represented by a platoon of attorneys — filed suit seeking to vacate the Census Bureau's August 3 plan, reinstate the April plan, and enjoin various federal Defendants from implementing the August 3 plan. Compl. (ECF 1). Plaintiffs' theories are that the August 3 plan violates the Enumeration Clause, Section 2 of the Fourteenth Amendment, and the Administrative Procedure Act. *Id.* ¶¶ 330-354. Plaintiffs proceed under the remarkable theory that a federal district court can command federal officers to violate clear statutory law on a subject that the Constitution expressly assigns to Congressional regulation. *Id.* ¶ 13. In terms of the Administrative Procedure Act, Plaintiffs urge that a federal district court can set aside an agency action that it finds arbitrary and capricious and mandate an agency action that is clearly contrary to law.

On September 5, the Court granted Plaintiffs' motion for a temporary restraining order until a September 17 hearing on Plaintiffs' motion for a preliminary injunction. Order (ECF 84) ("TRO"). The TRO enjoined the federal Defendants from implementing their current plan for the census. *Id.* at 6-7. The status quo would have been an orderly wind-down of census operations in jurisdictions with adequate enumeration rates, with Census Bureau resources re-directed to jurisdictions — like Louisiana and Mississippi — that have lagging enumeration rates, followed by cessation of data

[1] The Census Bureau also sought $1 billion in additional funding. To the extent the cost census operations exceed the authorized appropriation, the responsible officers or employee of the United States Government may be subject to criminal sanctions. 31 U.S.C. §§ 1341, 1350.

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collection so as to facilitate post-processing of the collected data. Fontenot Decl. (ECF 81-1) ¶¶ 66-67, 95-97.

That status quo has now been upended. *See id.* at ¶¶ 93-97. The Census Bureau made clear that if data collection is extended beyond September 30, "the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021." *Id.* ¶ 100. Yet the TRO included no analysis of the impact on non-parties, including the vast financial impact of special legislative sessions and litigation resulting from delayed census reporting and corresponding delays in reapportionment and redistricting. More pointedly, time has marched toward the Secretary's statutory deadlines, and Census Bureau resources have been expended in jurisdictions that have acceptable enumeration rates rather than redirected to Louisiana and Mississippi. The effective result – even if the Court vacates the TRO or the Court is reversed on appeal – is the picking of jurisdictional winners by inflating the enumeration in certain jurisdictions while suppressing the enumeration in others by preventing the planned shift in Census Bureau resources.

On September 17, the Court extended the TRO "until the Court issues its decision on the preliminary injunction motion or through September 24, 2020, whichever is sooner." Order (ECF 142) ("TRO Extension"). Once again, the Court included no analysis of the impact on non-parties. *See id.* Louisiana learned of this suit and the TRO Extension that afternoon, retained local counsel, and appeared the same day. *See* Notice of Appearance (ECF 144). Recognizing the fast pace of this litigation, Louisiana filed a Notice of Intent to Intervene the next morning. Notice (ECF 146).[2] That Notice detailed certain of the harms to Louisiana resulting from the Court's order; generally set forth grounds for intervention; and directed the Court to analogous cases in which the Supreme Court made clear that district courts should not disrupt complex government operations with last-minute injunctions, even when fundamental rights are at stake. *Id.* Given the rapid pace of this litigation,

[2] Rule 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24; *see also* Fed. R. Civ. P. 24(a) (listing pleadings). It was impracticable for Louisiana to prepare an answer to Plaintiffs' 370 paragraph Amended Complaint prior to the September 18 status conference. Louisiana therefore filed an abbreviated Notice of Intent to Intervene and asked to participate in order to protect its interests.

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Louisiana also requested permission to participate in a Status Conference and any subsequent conferences or hearings until it could formally move to intervene. *Id.*

At a status conference later that day, the Court implicitly denied Louisiana's request to participate. *See* St. John Decl. ¶¶ 10-11. When the federal Defendants attempted to raise the harms apparent from Louisiana's Notice, the Court stated that Louisiana had neither a motion to intervene nor an amicus brief pending. This motion to intervene follows.

LEGAL STANDARDS

With respect to intervention as of right, "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). "An applicant seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). "[T]he requirements are broadly interpreted in favor of intervention." *Id.*

With respect to permissive intervention, "[o]n timely motion, the court may permit anyone to intervene who. . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Additionally, "the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order administered by the officer or agency." *Id.* at 24(b)(2). Thus, "permissive intervention requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011).

INTERESTS AND GROUNDS FOR INTERVENTION

I. The Court should grant intervention as of right.

A. The motion is timely.

Plaintiffs filed their complaint last month. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding a motion was timely when filed three months after plaintiff's complaint). The proposed intervention poses no prejudice to the parties, and the State Intervenors have acted promptly after learning of this litigation and the orders imperiling their interests. This motion is therefore timely. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (listing considerations for timeliness and finding district court abused its discretion in denying intervention in fifteen year old litigation where litigant's actions and court order implicated changed circumstances); *see also United States v. Alcan Aluminum, Inc.,* 25 F.3d 1174, 1182-83 (3d Cir. 1994) (finding intervention in four year old litigation timely where intervention was sought 43 days after intervenor became aware its interests were imperiled).

B. The State Intervenors have significant protectable interests.

The State Intervenors have clear and substantial protectable interests at stake in this action. The "property" that is the subject of this action — particularly given Plaintiffs' request for nationwide relief — includes the size of the State Intervenors' Congressional delegations, their proportionate allocation of limited federal resources, and the Equal Protection rights of their citizens. *See* Am. Compl. ¶¶ 304-333. In particular, Plaintiffs seek to boost the census enumeration of their own jurisdictions at the expense of jurisdictions – like Louisiana and Mississippi – with lagging enumeration. *Cf. Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (abrogated on other grounds) ("By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.").

C. The disposition of this action could impede the State Intervenors' ability to protect their interests.

The risk this action poses to the State Intervenors' interests is readily apparent. According to the Census Bureau, Mississippi's self-response rate as of September 19 is only 59.6%, and Louisiana's is only 59.3% (placing Mississippi and Louisiana 44th and 46th of the 50 States, respectively). Exh. 10. Likewise, Mississippi's overall enumeration rate is only 89.6%, and Louisiana's overall enumeration rate is only 89.1% (placing them 46th and 48th of the 50 states, respectively). *Id.*

That lagging enumeration is compounded by the Intervenor States' demographics. Census Bureau estimates that Mississippi's population is 37.8% African American, with 19.6% of Mississippi's population living in poverty.[3] Louisiana's population is similar: 32.8% African American, with 19.0% of Louisiana's population living in poverty.[4] And 26% of Mississippi's population and 25.5% of Louisiana's population did not self-report in the 2010 Census, representing hard to count populations. Exhs. 12, 13. Plaintiffs allege those populations are underrepresented in administrative records, such that using administrative data to fill in missing information for non-responsive households will produce a less accurate census. *See* Compl. ¶ 106. Further, Plaintiffs argue that jurisdictions — like Mississippi and Louisiana — with high numbers of hard-to-count citizens suffer disproportionately when compared to areas with low numbers of these same groups. Reply (ECF 130) at ECF p.11. Under Plaintiffs' theory, diversion of Census Bureau resources to increase the count in jurisdictions with adequate enumeration directly imperils the interests of the Intervenor States and their residents, who are lagging in enumeration.

As explained in Louisiana's Notice, last-minute interference with large government undertakings itself creates serious disruption and harm. Not surprisingly, the Supreme Court has repeatedly rejected such last-minute judicial disruption, especially on a PI or TRO record, even when fundamental rights are affected. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). The COVID-19 pandemic has not changed that rule. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). And the census is a vastly larger and more

[3] https://www.census.gov/quickfacts/fact/table/MS/BZA210218
[4] https://www.census.gov/quickfacts/LA

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complex operation than the elections where the rule is most commonly applied. *See* Fontenot Decl. (ECF 81-1) ¶ 66-67, 101. Indeed, the Intervenor States respectfully submit that the relief demanded by the Plaintiffs (and to an extent granted by the TRO) will largely serve to deplete Census Bureau resources that could otherwise be expended finalizing the census in the Intervenor States, *see id.* ¶ 96, and that continued micromanagement and delay irreparably harm those States. Indeed, this Court's TRO itself implicates serious Equal Protection concerns vis-à-vis the Intervenor States' citizens. *See Bush v. Gore*, 531 U.S. 98, 105 (2000). And even if this Court is reversed on appeal, those harms will have occurred and be irremediable. On the other hand, if Plaintiffs succeed, any significant delay in enumeration will necessarily have major impacts on states like Louisiana that have state constitutional or statutory deadlines for redistricting. Exhs. 6, 7, 11, 14-17; *see also, e.g.*, La. Const. art. I sec. 6. Indeed, massive amounts of litigation — including by Plaintiffs — is likely to follow any such delay.

D. The parties do not adequately represent the interests of the State Intervenors.

1. Neither Plaintiffs nor the federal Government represent the interests of the State Intervenors.

Unlike Plaintiffs, the State Intervenors believe the December 31, 2020, statutory deadline is clear, mandatory, and constitutional; and that the April COVID Plan was contrary to law to the extent it would necessarily require violation of that deadline. To that end, the State Intervenors believe the August Re-Plan is adequately supported and was effectively required once it became clear that Congress was unlikely to grant relief from the December 31 deadline. Plaintiffs attacking the August Re-Plan clearly do not represent the State Intervenors' interests.

The federal Defendants do not represent the State Intervenors' interests, either. Although the federal Defendants have urged the Court to reject the Am. Complaint, they have made only passing reference to the vast and irreparable harm the TRO and any PI are likely to cause the States vis-à-vis suppressed enumeration and impacts to State deadlines. The federal Defendants also cannot respond to the Plaintiffs' arguments in the same manner the State Intervenors can: as sovereign States in our federal form of government. *See Sagebrush Rebellion*, 713 F.2d at 528 (stating that courts assessing the adequacy of representation consider whether the intervenor offers a necessary element to the proceedings that would be neglected).

"In assessing the adequacy of representation, the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). "[T]he burden of showing inadequacy is 'minimal,' and the applicant[s] need only show that representation of its interests by existing parties 'may be' inadequate." *Id.* (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). The Intervenor States and their distinct sovereign interests easily satisfy that standard.

2. This Court's findings regarding the conduct of the federal Defendants compellingly reinforce that they are inadequate to represent the interests of the State Intervenors.

This Court's findings vis-à-vis the federal Defendants make clear that their representation is inadequate in-fact. This Court faulted the federal Defendants for the lack of progress in this case, and – implicitly – the corresponding harm to the State Intervenors from the resulting delay. Indeed, this Court found that the federal "Defendants' repeated denial of the existence of an administrative record and failure to make any attempt to collect the administrative record . . . have necessitated delay of the preliminary injunction hearing and extension of the TRO." TRO Extension at 13-14. The Court concluded:

> based on Defendants' violation of the Court's Order to Produce the Administrative Record as discussed above, an extension of the TRO is necessary for Defendants to produce the OIG production and a privilege log; for the parties to litigate objections to at least four different grounds of privilege; for United States Magistrate Judges to resolve the parties' privilege disputes; for the parties to file supplemental briefs on the motion for preliminary injunction addressing the OIG production; and for the Court to hold a hearing on the motion for preliminary injunction and to issue a reasoned decision.

TRO Extension at 17. The Court made a similar finding at yesterday's preliminary injunction hearing, concluding that any delay in the preliminary injunction hearing was caused by the federal Defendants' non-compliance with the Court's orders. Where the State Intervenors are suffering irreparable harm as a result of delay and the Court has attributed that delay to the federal Defendants' non-compliance with Court orders, those same federal Defendants clearly cannot be said to adequately represent the State Intervenors' interests.

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II. Alternatively, the Court should permit permissive intervention pursuant to Rule 24(b).

Even if this Court does not grant intervention as of right, the Court should permit the State Intervenors to intervene permissively pursuant Rule 24(b). Because the Court's jurisdiction is based on federal questions raised by Plaintiffs and the applicants for intervention do not assert additional claims, the requirement for an independent ground for jurisdiction does not apply. *Freedom from Religion Found.*, 644 F.3d at 844. This application is timely for the reasons argued above.

Louisiana and Mississippi could partially protect their interests by filing a separate action to compel compliance with the statutory deadline for completing the census and the existing enumeration plan. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring) (reviewing multiple district court litigations and noting that "[u]niversal injunctions have little basis in traditional equitable practice"). But such relief would inherently be partial given the effect of the TRO on other localities, which necessarily depletes Census Bureau resources. Additionally, the delay inherent in pursuing a separate action would adversely affect Louisiana's and Mississippi's interests while census resources continue to be misallocated or depleted. Such an action would, however, clearly involve common questions of law and fact with this one.

Moreover, with respect to remedies, the lagging enumeration in the State Intervenors' jurisdictions and the harms articulated by State Intervenors will provide a "helpful, alternative viewpoint" to those offered by Plaintiffs that have pursued litigation causing those very harms, thereby "contribut[ing] to full development of the underlying factual issues and to the just and equitable adjudication of the legal questions presented." *Pickup v. Brown*, 2012 WL 6024387, at *4 (E.D. Cal. Dec. 4, 2012).

CONCLUSION

Federal Courts have repeatedly permitted States to intervene in disputes over the census. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 459 (2002). For the foregoing reasons, the State Intervenors request the Court do so here and grant their motion to intervene as a matter of right under Rule 24(a) or, alternatively for permissive intervention under Rule 24(b).

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Dated: September 23, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE *et al*, Plaintiffs, v. WILBUR L. ROSS *et al*, Defendants.	No. 5:20-cv-05799-LHK **DECLARATION OF JOSEPH S. ST. JOHN ISO LOUISIANA AND MISSISSIPPI'S MOTION TO INTERVENE** Judge: Hon. Lucy H. Koh Action Filed: Aug. 18, 2020

DECLARATION OF JOSEPH S. ST. JOHN

I, Joseph Scott St. John, am employed by the Louisiana Department of Justice; I serve as counsel to the State of Louisiana in connection with the above-captioned matter. I make this declaration in support of Louisiana and Mississippi's Motion to Intervene. I am competent to testify as to the matters set forth herein.

1. Attached hereto as Exhibit 1 is a true and accurate copy of excerpts from 2020 Census Operational Plan Version 4.0 as downloaded from the Census Bureau's website.[1]

2. Attached hereto as Exhibit 2 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.[2]

3. Attached hereto as Exhibit 3 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

4. Attached hereto as Exhibit 4 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

5. Attached hereto as Exhibit 5 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

6. Attached hereto as Exhibit 6 is a true and accurate copy of a document as downloaded from the National Conference of State Legislatures's website.[3]

7. Attached hereto as Exhibit 7 is a true and accurate copy of a document as downloaded from the National Conference of State Legislatures.[4]

8. Attached hereto as Exhibit 8 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

9. Attached hereto as Exhibit 9 is a true and accurate copy of a press release as downloaded from the Census Bureau's website.

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[1] https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf
[2] https://www.census.gov/newsroom/press-releases.html
[3] https://www.ncsl.org/research/redistricting/state-redistricting-deadlines637224581.aspx
[4] https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx

10. On September 18, 2020, I attempted to appear via Zoom at a status conference in this case. The Courtroom Deputy did not admit me into the proceeding with counsel for the parties. When the Courtroom Deputy asked any counsel who had been missed to click the "raise hand" button on Zoom, I did so, but I was still not admitted. I therefore watched the proceeding as a member of the public.

11. Had I been physically present in a courtroom or been permitted to participate in the Zoom hearing, I would have made my presence known and sought to be heard for the purpose of protecting the State of Louisiana's interests, including by oral motion to intervene.

12. I am informed and believe that Louisiana's local counsel also attempted to participate in the September 18, 2020, status conference via Zoom.

13. On September 22, 2020, I watched the preliminary injunction hearing in this proceeding as a member of the public.

14. Attached hereto as Exhibit 10 is a true and accurate copy of a document downloaded from the Census Bureau's website.

15. Attached hereto as Exhibit 11 is a true and accurate copy of a document downloaded from the National Conference of State Legislatures' website.

16. Attached hereto as Exhibit 12 is a true and accurate copy of a document downloaded from the National Conference of State Legislatures' website.

17. Attached hereto as Exhibit 13 is a true and accurate copy of a document downloaded from the National Conference of State Legislatures' website.

18. Attached hereto as Exhibit 14 is a true and accurate copy of a media report.[5]

19. Attached hereto as Exhibit 15 is a true and accurate printout from the website of the Louisiana legislature.

20. Attached hereto as Exhibit 16 is a true and accurate printout of correspondence between counsel.

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[5] https://www.nola.com/news/politics/article_b18b9f36-212b-5cd5-82db-9685c9123a26.html

21. Attached hereto as Exhibit 17 is a true and accurate printout of a document obtained from the website of the Louisiana legislature.

22. Further declarant sayeth naught.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA AND THE STATE OF LOUISIANA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed in New Orleans, Louisiana this 23rd day of September 2020.

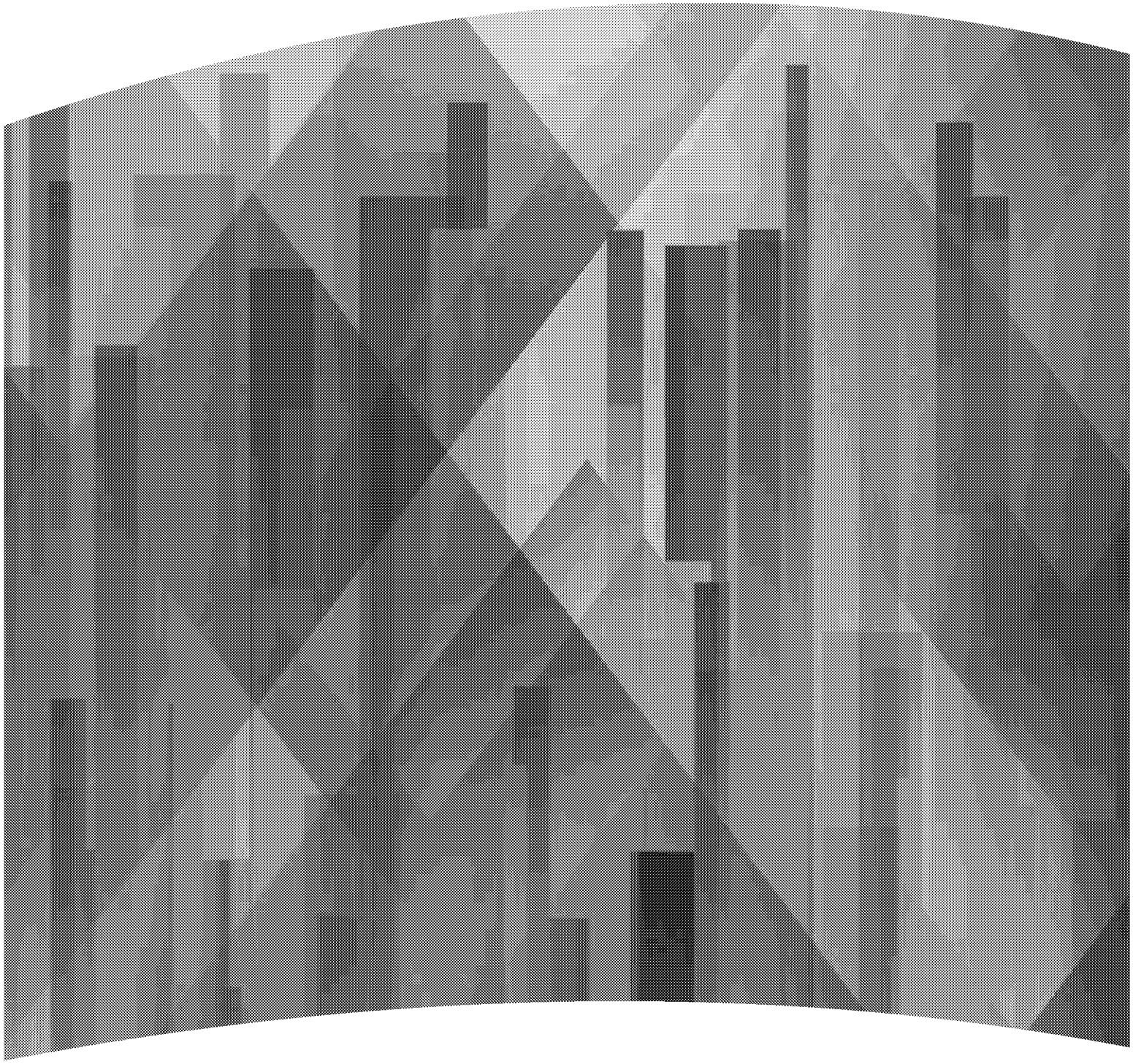
/s/ Joseph S. St. John

E IBIT 1

2020 Census Operational Plan

A New Design for the 21st Century

Issued December 2018
Version 4.0



United States® Census

U.S. Department of Commerce
Economics and Statistics Administration
U.S. CENSUS BUREAU

United States® Census 2020

Other Self-Response:

- ✓ Text messaging will not be used as a data collection mode.
- ✓ HUs from whom an Internet questionnaire is not received will be mailed a paper questionnaire.
- ✓ ISR will not be part of the Group Quarters (GQ) Operation enumeration. While GQ enumeration cannot prevent GQ residents from responding via the Internet, this method of data collection is not part of 2020 GQ enumeration plans.
- ✓ The 2020 Census printing and mailing workload as part of the OSR strategy is identified in the Life Cycle Cost Estimate.
- ✓ The response rate projections for all self-response modes are in the Life Cycle Cost Estimate that was released in December 2017 and will be updated for release in early 2019.

Design Issues to Be Resolved

There are no remaining design issues to be resolved for this operation.

Cost and Quality

Investment in ISR is projected to influence (reduce ↓ or increase ↑) the 2020 Census overall costs in the following ways:

- ↓ Reduced amount of self-response through paper questionnaire.
- ↓ Increased self-response, which will decrease the NRFU workload, thereby reducing field costs.

In addition:

- ↑ ISR is expected to increase the workload for CQA.

Impacts of this operation on overall 2020 Census quality include the following:

- ↑ Increase in overall self-response rates.
- ↑ Real-time edits to respondent data.
- ↑ More complete self-response for large households.
- ↑ Potential increase in self-response from traditionally hard-to-count populations.

Risks

Major concerns for the ISR Operation are covered by the 2020 Census risks listed in Chapter 6.

Milestones

Date	Activity
March 2016	Begin the 2016 Census Test.
June 2017	Release the ISR Detailed Operational Plan.
March 2017	Begin the 2017 Census Test.
March 2018	Begin the 2018 End-to-End Census Test.
March 2020	Begin 2020 Census ISR data collection.
July 2020	End 2020 Census ISR data collection.

5.5.5 Non-ID Processing

Detailed Planning Status:	**In Production DOP published in FY 2016**

Purpose

The Non-ID Processing (NID) Operation is focused on making it easy for people to respond anytime, anywhere to increase self-response rates. The operation accomplishes this by:

- Providing response options that do not require a unique Census Identifier (ID).
- Maximizing real-time matching of NID respondent addresses to the census living quarters (LQs) address inventory.
- Accurately assigning nonmatching addresses to census basic collection units.

Changes Made Since Version 3.0 Operational Plan Release:

There have been no major changes to this operation.

Lessons Learned

Based on lessons learned from the 2010 Census studies and reviews, the following recommendations were made:

- The automated and manual NID processes should be planned and developed in parallel, rather than sequentially, as was done when preparing for the 2010 Census NID Operation.
- Involve the National Processing Center (NPC) throughout the life cycle of the 2020 Census NID Process to help prepare for the Clerical Processing component of the operation.

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- ✓ Proxy responses are used in the NRFU Operation when a resident of the nonresponding address is not available or cannot be found. Proxy responses will be allowed after the third unsuccessful contact attempt to reach a resident of a nonresponding address. Proxy responses are allowable on the first unsuccessful contact attempt for addresses deemed to be vacant or not meeting the definition of a HU.
- ✓ Based on results from the 2016 Census Test, the following staffing structure will be used: Census Field Manager, Census Field Supervisor, and enumerator. The ratio of Census Field Supervisor to enumerator will be 1:20.
- ✓ Administrative records and third-party data will be used for the identification of addresses in the NRFU workload deemed to be vacant or delete to reduce contact attempts to those addresses before any contact attempts. Administrative records and third-party data will be used for the identification and enumeration of addresses deemed to be occupied after one unsuccessful attempt at in-person enumeration. All other addresses in the NRFU workload will be subject to up to six contact attempts with cases becoming proxy eligible after the third unsuccessful attempt. Refinement of this contact strategy (e.g., additional contact attempts) may be possible if necessary to ensure an efficient and successful operational close-out.
- ✓ Field verification will be conducted using NRFU enumerators with case assignment interspersed with their NRFU assignments. For Field Verification, enumerators will be expected to locate the problem address and collect GPS coordinates for the HU using the automated instrument. There does not need to be contact with HUs.
- ✓ The operational design for the NRFU quality assurance component includes the following:
  - º Use of an improved contact strategy to increase the likelihood of self-response.
  - º Use of an automated data collection application for conducting NRFU.
  - º Use of real-time paradata and editing capabilities to validate and ensure data quality.
  - º Use of Best-Time-to-Contact model in the assignment optimization to increase the likelihood of finding respondents at home.
  - º Use of Notices of Visit to push to self-response.
  - º Use of follow-up postcard mailings to encourage self-response in the case of administrative records and third-party data vacant/nonexistent removal and occupied removal.
  - º A reinterview component designed to deter and detect enumerator falsification.
- ✓ All units identified as vacant or delete will be verified by either a proxy response or a second enumerator. Vacants from self-response will be verified by an enumerator.
- ✓ The Census Bureau will have the capability to keep cases active throughout the enumeration process to aid in obtaining adequate response rates.
- ✓ Enumerators, as part of their normal work on NRFU assignments, will not be looking for missing addresses and adding them to their workload, but they will have the capability to add addresses and enumerate those HUs if appropriate. Staff in the Area Census Offices will also have the capability to add addresses to the NRFU workload that have been deemed to be missing from the address list and require enumeration.
- ✓ Case assignments are optimized based on the location of enumerators, the location of the NRFU cases, the hours the enumerators are available to work, and Best-Time-to-Contact probabilities associated with the NRFU cases.
- ✓ The NRFU field data collection will occur from early-April 2020 through the end of July 2020. Field work in preidentified geographic areas surrounding colleges or universities with concentrations of off-campus housing will begin in early April. This is necessitated in areas where the spring semester will conclude prior to mid-May when the bulk of the NRFU workload begins.
- ✓ NRFU will receive supplemental addresses from sources such as LUCA appeals, Count Review, New Construction, and a refresh from the spring 2020 Delivery Sequence File from the Postal Service. Other sources of cases contributing to the NRFU workload include, but are not limited to, Reverse Check-ins, SRQA cases, and Self-Responding Vacant cases.

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- ✓ The tabulation system supporting the ACS will be generalized and enhanced to support both the ACS and the 2020 Census. The generalized system will be scaled to support both ACS and decennial tabulation needs during the 2020 Census production.
- ✓ The 2020 Census data products will be determined following the analysis of the feedback from the Federal Register Notice "Soliciting Feedback from Users on 2020 Census Data Products" and its extension and consultation with the Data Stewardship Executive Policy. For the 2018 End-to-End Census Test, the prototype P.L. 94-171 is the only data product that will be tabulated and released by April 1, 2019.

Design Issues to Be Resolved

There are no remaining design issues that need to be resolved for this operation.

Cost and Quality

Investment in DPD is projected to have minimal influence on the overall cost and quality of the 2020 Census.

Risks

The 2018 and 2020 Disclosure Avoidance System (DAS) algorithms are highly complex, under active development, address subtle though precisely stated mathematical privacy issues, and solve genuinely novel outstanding scientific problems. All of these factors create an environment where only rigorous software engineering standards, code review, and formal external auditing of internal code can be expected to reasonably remove major bugs from the code. In a highly unlikely scenario, a coding error may lead to noise not being infused in some subset of census geographies, implying that each datum released in these geographies in the final Microdata Detailed File would constitute a Title 13 violation. **IF** there are errors in the implementation of the DAS software, **THEN** it might result in Title 13 data being improperly disclosed.

Congress establishes the method of calculating apportionment. Also, legislation has been proposed (but not passed) in recent decades that might have provided statehood (or at least a seat in the U.S. House of Representatives) to the District of Columbia or Puerto Rico. **IF** any bill that affects either the apportionment calculation method or the allocation of U.S. House seats is passed before the legal apportionment results deadline of December 31, 2020, **THEN** the Census Bureau will need to change the 2020 Apportionment calculation programs to accommodate this change, and if it happens at the last minute, the 2020 Apportionment schedule and workflow must be condensed and/or refactored, potentially jeopardizing the quality assurance of the 2020 Apportionment results.

Milestones

Date	Activity
March 2014	Release the concept of operations for a more customer-centric, streamlined, and flexible enterprise solution for data dissemination.
July 2014	Establish the Center for Enterprise Dissemination Services and Consumer Innovation.
October 2017	Release the DPD Detailed Operational Plan (delayed).
February 2019	Complete comprehensive review of data products and finalize 2020 Census Data Products Suite.
December 2018–April 1, 2019	Deploy DAS tabulation system and dissemination platform for production and release of the P.L. 94-171 Redistricting Data Prototype.
December 2020	Provide apportionment counts to the President of the United States.
By April 1, 2021	Complete the release of the P.L. 94-171 Redistricting Data to the states, the District of Columbia, and Puerto Rico.
May 2021–September 2022	Deliver 2020 Census statistical data to the enterprise data dissemination platform for the release of quick tables and API.
April 2023	Complete release of 2020 Census data products.

5.6.2 Redistricting Data Program

Detailed Planning Status:	**In Production** **DOP published in FY 2016**

Purpose

The purpose of the 2020 Census Redistricting Data Program (RDP) is to provide to each state the legally required Public Law (P.L.) 94-171 redistricting data tabulations by the mandated deadline of 1 year from Census Day: April 1, 2021.

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of using administrative records in characteristic imputation.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level MEDIUM

Mitigation Strategies include the following:

- Identify external stakeholders that have an interest in Census Bureau policies regarding administrative record and third-party data usage.
- Develop a stakeholder communications plan for identified external stakeholders.
- Regularly communicate to and seek feedback from identified external stakeholders on design decisions and research and testing results related to the use of administrative records and third-party data for the 2020 Census.
- Assess impacts of any changes to the design based on feedback from external stakeholders and update plans accordingly.
- Monitor external factors and policies that may impact the Census Bureau's planned use of administrative records and third-party data for the 2020 Census.

Changes since the last version of the 2020 Census Operational Plan:

> The Cost Impact rating was lowered from 5 to 4. Even though there would be a cost increase associated with a higher Nonresponse Followup workload, there are processes in place to assist with rapidly up-scaling the operation as necessary. This changed the overall Impact rating to 4.

6.4 OPERATIONS AND SYSTEMS INTEGRATION

Due to the critical timing of 2020 Census operations and the potential impact of systems not being ready to support them, managers must have an accurate gauge of the progress made towards integrating the various operations and systems that support the 2020 Census. Progress towards integration must take place throughout the planning, development, and testing stages of the operations and systems.

IF the various operations and systems are not properly integrated prior to implementation, **THEN** the strategic goals and objectives of the 2020 Census may not be met.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level MEDIUM

Mitigation Strategies include the following:

- Leverage Decennial Information Technology Division's Systems Engineering and Integration (SEI) System Development Life Cycle system readiness/phase gate review process, the SEI program metrics dashboard, and various 2020 Census governance forums to provide a current sense of where all solutions providers are in the system development process and to raise issues quickly for corrective action.
- Conduct regularly scheduled reviews of the 2020 Census operations.
- Ensure all operational areas and their associated Integrated Project Teams have adequate resources assigned to integration efforts and required project artifacts are developed and approved.
- Ensure each planned census test has an approved Goals, Objectives, and Success Criteria document, adequate resources to plan and conduct are identified and assigned, a detailed test plan is developed and approved (including key milestones and roles and responsibilities), and deadlines are being met through a regular management review with the test team.
- Ensure adequate technical review sessions are planned and conducted in conjunction with SEI staff, including the systems engineers responsible for developing the solutions).
- Create an operational integration design team to support the 2020 Census through creation and distribution of artifacts which depict integration between the operations.

6.5 LATE OPERATIONAL DESIGN CHANGES

After key planning and development milestones are completed, stakeholders may disagree with the planned innovations behind the 2020 Census and propose modifications to the design, possibly resulting in late operational design changes.

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IF operational design changes are required following the completion of key planning and development milestones, **THEN** costly design changes may have to be implemented, increasing the risk for not conducting a timely and successful 2020 Census.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level MEDIUM

Mitigation Strategies include the following:

- Identify internal and external stakeholders that have an interest in the 2020 Census operational design.
- Develop a stakeholder communications plan for identified internal and external stakeholders.
- Regularly communicate with and seek feedback from identified external stakeholders on design decisions and research and testing results.
- Monitor external factors and policies that may impact the Census Bureau's planned innovations for the 2020 Census operational design.
- Establish a change-control management process to assess impacts of change requests to facilitate decision-making.
- Prepare for rapid response to address potential changes and make decisions based on the results of the change-control process.

6.6 INSUFFICIENT LEVELS OF STAFF WITH SUBJECT-MATTER SKILL SETS

The 2020 Census consists of programs and projects that require subject-matter skill sets to complete the work. The potential of not having the necessary staffing levels and staff with the appropriate competencies to satisfy objectives is an ongoing concern. This is the result of a lack of consistent strategic workforce planning throughout the 2020 Census life cycle. Staff with the necessary skill sets leave due to retirements and movement within and out of the Decennial Census Programs Directorate, hiring freezes and processes that delay or cause an inability to recruit and hire candidates that possess the knowledge, skills, and abilities to perform core functions of the 2020 Census, and budgetary constraints. In addition, with increasing numbers of staff eligible for retirement before 2020, there is also the potential of losing valuable institutional knowledge, as employees in key positions may not be accessible to share their knowledge and participate in succession planning.

IF the 2020 Census does not hire and retain staff with the necessary subject-matter skill sets at the levels required, **THEN** the additional staffing shortages may occur, making it difficult to meet the goals and objectives of the 2020 Census.

Probability 3 (Moderately likely)	Impact 4 (Substantial impact)	Exposure level MEDIUM

Mitigation Strategies include the following:

- Identify high priority competencies and staffing positions needed for the work of the 2020 Census.
- Decennial Directorate Support Services Office will continue to collaborate with the Human Resources Division to facilitate hiring.
- Employ various strategies to facilitate staff retention, development, and knowledge-sharing.

6.7 ABILITY OF IT SOLUTIONS TO SUPPORT THE 2020 CENSUS

There are 52 systems supporting the 2020 Census, including enterprise systems, vendor-developed systems, and in-house-developed systems. There is the possibility that one or more of these systems does not address all of the baselined requirements and does not function as required, negatively impacting the operations being supported. Proper development and testing is needed for each system, as well as integration testing between systems, in order to ensure a successful deployment of the IT solutions supporting the implementation of the 2020 Census operations.

IF the IT solutions supporting the 2020 Census cannot meet the baselined requirements or workloads, **THEN** the systems may require substantial modifications or manual workarounds may have to be developed, adding complexity and increasing risk for a timely and successful 2020 Census.

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E IBIT 2

Census Bureau Statement on Modifying 2020 Census Operations to Make Sure College Students are Counted

Census Bureau also announces updates to special operations, assistance program and early nonresponse followup.

MARCH 15, 2020
RELEASE NUMBER CB20-RTQ.06

MARCH 15, 2020 — The U.S. Census Bureau continues to carefully monitor the coronavirus (COVID-19) situation and follow the guidance of federal, state and local health authorities. We are adjusting some operations as outlined below with two key principles in mind: protecting the health and safety of our staff and the public and fulfilling our statutory requirement to deliver the 2020 Census counts to the President on schedule.

As of today, over 5 million have responded online to the 2020 Census. Currently, the planned completion date for data collection for the 2020 Census is **July 31, 2020**, however, that date can and will be adjusted if necessary as the situation evolves in order to achieve a complete and accurate count.

It has never been easier to respond on your own, whether online, over the phone or by mail—all without having to meet a census taker.

We are adjusting operations to make sure college students are counted.

- College students living in on-campus housing are counted through their university as part of our Group Quarters Operation, which counts all students living in university owned housing. In addition to college dormitories, the Group Quarters Operation also includes places like nursing homes, group homes, halfway houses and prisons.

- During our recent 2020 Census Group Quarters Advance Contact operation we contacted college/university student housing administrators to get their input on the enumeration methods that will allow students to participate in the 2020 Census.

- Nearly half, about 47 percent, have chosen the eResponse methodology and about 7 percent chose paper listings, both of which provide the Census Bureau directory information (electronically or via paper records) about each student. About 35 percent, however, chose drop-off/pick-up which allows students to self-respond using an Individual Census Questionnaire (or ICQ). We are contacting those schools to ask whether they would like to change that preference in light of the emerging situation.

- In general, students in colleges and universities temporarily closed due to the COVID-19 virus will still be counted as part of this process. Even if they are home on census day, **April 1**, they should be counted according to the residence criteria which states they should be counted where they live and sleep most of the time. We are asking schools to contact their students and remind them to respond.

- Per the Census Bureau's residence criteria, in most cases students living away from home at school should be counted at school, even if they are temporarily elsewhere due to the COVID-19 pandemic.

We're working with group quarters administrators to ensure we count their residents.

- The 2020 Census is designed to offer multiple ways to respond. We're encouraging administrators of group housing to choose a way to count their residents that requires less in-person contact.

- For the "group quarters" operation, which counts people in nursing homes, college dorms, prisons and other institutional living facilities, we offer a myriad of ways to respond, such as via eResponse, paper listing or self-enumeration by the facility.

- We're contacting all group quarters administrators that have requested an in-person visit and asking them to consider an eResponse or offering to drop off and later pick up paper forms to minimize in person contact with our census staff.

We're working with service providers to determine the best way forward.

- We are working with service providers at emergency and transitional shelters, soup kitchens and regularly schedule mobile food vans to adapt plans to count the populations they serve.
- The plan has been to interview each person served a meal or staying at the facility at a date and time the service providers choose **between March 30 and April 1**.
- We are now contacting the service providers to determine whether they will be open **between March 30 and April 1** and whether they would be able to provide a paper listing of census response data for each person served or staying at the facility instead.

We're delaying the start of our Mobile Questionnaire Assistance program.

- We plan to offer assistance with responding to the 2020 Census at events and locations where people naturally gather as part of our Mobile Questionnaire Assistance program.
- We now plan to offer this assistance fully across the country **on April 13**, delaying from the previously planned start of **March 30**.

We're delaying our Early Nonresponse Followup operation.

- In this operation, census takers begin following up with households that haven't responded yet around some colleges and universities. By starting early, we can count households in areas with off-campus housing before the end of the spring semester when students may leave for another residence. We're delaying the start of this effort **from April 9 to April 23**.

The Census Bureau is also making changes to its paid media campaign, earned media efforts, and partnership outreach efforts to adapt to changing conditions while continuing to promote self-response. The key message right now for anyone with questions about how COVID-19 will affect the 2020 Census: **It has never been easier to respond on your own, whether online, over the phone or by mail—all without having to meet a census taker.**

We will continue to monitor the situation, take appropriate steps in consultation with public health authorities and provide ongoing updates.

Contact

Public Information Office

301-763-3030

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Related Information

PRESS KIT | 2020

COVID-19

The U.S. Census Bureau is monitoring coronavirus (COVID-19) carefully, and the health, safety and well-being of the public and our staff is our top priority.

E IBIT 3

Case: 20-60625 Document: 00515468054 Filed: 09/23/2020 Page: 92 of 852
The 2020 Census is Happening Now. Respond Today.

FOR IMMEDIATE RELEASE: WEDNESDAY, MARCH 18, 2020

U.S. Census Bureau Director Steven Dillingham on Operational Updates

MARCH 18, 2020

RELEASE NUMBER CB20-RTQ.08

MARCH 18, 2020 — Less than one week ago, the 2020 Census fully kicked off, and invitations continue to arrive in mailboxes across the nation. **As of this morning, more than eleven million households have responded. America is stepping up to shape our future and ensure families and communities are counted.**

Beginning today, in support of guidance on what we can all do to help slow the spread of coronavirus, 2020 Census field operations will be suspended for two weeks until April 1, 2020. The Census Bureau is taking this step to help protect the health and safety of the American public, Census Bureau employees, and everyone going through the hiring process for temporary census taker positions.

During this pause in field operations, the Census Bureau will continue to evaluate all 2020 Census operations. Should any additional adjustments need to be made, the Census Bureau will communicate these changes broadly and promptly.

In late May, census takers around the nation will begin visiting households that have not yet responded to the 2020 Census to help complete the count. As we continue to monitor the evolving COVID-19 outbreak, we will adjust census taker and survey operations as necessary in order to follow the guidance of federal, state and local health authorities.

The public is strongly encouraged to respond to the 2020 Census online using a desktop computer, laptop, smartphone, or tablet, and can also respond by phone or mail. Everyone should respond to the 2020 Census as soon as they receive their invitation — and when they're finished, they can make sure their friends, families and social networks know about the importance of responding.

It has never been easier to respond to the census, and the 2020 Census will count everyone accurately. We recognize that many people plan to access the 2020 Census through other response modes, such as phone or paper, which is why the 2020 Census has such a nimble design.

On March 15, 2020, the Census Bureau announced several adaptations to our group quarters operations to accommodate recent scheduling changes on college campuses as leadership takes action to keep students and faculty safe.

For all other Census Bureau household and economic surveys separate from the 2020 Decennial Census, Bureau personnel will begin using phone calls instead of in-person visits. In the limited number of instances where an in-person visit is necessary, we are working closely with public health authorities to ensure each visit is accomplished safely.

Once again, we encourage everyone to respond online today at 2020Census.gov. With the flexibility and support of the American people, we will achieve a complete and accurate count which helps guide funding decisions for things like hospitals, roads and emergency services. Respondents can also respond by calling the number provided in their invitation or by mail once they have received a paper form.

###

Contact

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BC-DOC-0000027583

E IBIT 4

Census Bureau pdate on 2020 Census ield Operations

MARCH 28, 2020
RELEASE NUMBER CB20-RTQ.14

MARCH 28, 2020 — Based on continuing assessments of guidance from federal, state and local health authorities, the U.S. Census Bureau is suspending 2020 Census field operations for two additional weeks to April 15, 2020. The Census Bureau is taking this step to help protect the health and safety of the American public, Census Bureau employees, and everyone who will go through the hiring process for temporary census taker positions.

The Census Bureau continues to evaluate all 2020 Census field operations, and will communicate any further updates as soon as possible.

The 2020 Census is open for self-response online at 2020Census.gov (https://2020census.gov/en.html), over the phone (https://2020census.gov/en/contact-us.html) by calling the number provided in your invitation, and by paper through the mail.

###

Contact

Public Information Office

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BC-DOC-0000027586

E IBIT 5

Case: 5:20-cv-05799-LHK Document 204-6 Filed 09/23/20 Page 97 of 253

The 2020 Census is Happening Now. Respond Today.

FOR IMMEDIATE RELEASE: MONDAY, A RIL 1 , 2020

U.S. Department o Commerce Secretary il ur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational d ustments Due to CO D

APRIL 13, 2020
RELEASE NUMBER CB20-RTQ.16

A RIL 1 , 2020 — The 2020 Census is underway and more households across America are responding every day. Over 0 million households have responded to date, representing over 8 of all households in America. In light of the COVID-19 outbreak, the .S. Census Bureau is adjusting 2020 Census operations in order to

- rotect the health and safety of the American public and Census Bureau employees.
- Implement guidance from federal, state and local authorities.
- Ensure a complete and accurate count of all communities.

The Census Bureau temporarily suspended 2020 Census field data collection activities in March. Steps are already being taken to reactivate field offices beginning une 1, 2020, in preparation for the resumption of field data collection operations as quickly as possible following une 1.

In-person activities, including all interaction with the public, enumeration, office work and processing activities, will incorporate the most current guidance to promote the health and safety of staff and the public. This will include recommended personal protective equipment E and social distancing practices.

BC-DOC-0000027588

Case 3:20-cv-05799-LHK Document 264-6 Filed 09/28/20 Page 3 of 8

Office 2020 Census Operational Adjustments Due to COVID-19 This is a lengthy, thorough and scientifically rigorous process to produce the apportionment counts, redistricting information and other statistical data products that help guide hundreds of billions of dollars in public and private sector spending per year.

In order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.

nder this plan, the Census Bureau would extend the window for field data collection and self-response to October 1, 2020, which will allow for apportionment counts to be delivered to the resident by April 0, 2021, and redistricting data to be delivered to the states no later than uly 1, 2021.

###

Contact

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Related Information

2020 Census Operational Ad ustments ue to CO | -1

BC-DOC-0000027589

E IBIT 6

NCSL

OUR AMERICAN STATES The NCSL Podcast

2020 Census Delays and the Impact on Redistricting

9/9/2020



Introduction

Note: *On August 3, 2020, the U.S. Census Bureau announced that both self-response and field data collection will end by September 30—a change from October 31, the delayed deadline announced on April 13, 2020 due to the COVID-19 pandemic. Both of these dates are well past the originally planned July 31 end date to data collection.*

The April 13 announcement included a request to Congress for authority to delay the release of census data to be used for congressional apportionment by 120 days, to April 30, 2021, and census data to be used for redistricting by 120 days as well, to July 31, 2021.

The Bureau's reversal in its operational plans means a cut-back in data collection by a month and an accelerated pace to complete data collection. It signaled the Bureau's intention to deliver apportionment counts by the statutory deadline of December 31, 2020. A formal announcement has not addressed the release of data for redistricting, however informally it is believed that the Census Bureau plans to get the redistricting data out by April 1, 2021.

Information provided below was developed with the requested delays in mind. It is unclear whether Congress will take action on the delays.

The U.S. Census Bureau on April 13, 2020, delayed its field operations by about 90 days due to the COVID-19 pandemic, and at the same time asked Congress for authority to delay the release of census data by 120 days. If granted, the delay would be the first in at least 100 years. The requested delay in releasing data stems from the delay in field operations and relates to two federally mandated deadlines:

> Under current law, data to be used for reapportioning districts in the U.S. House of Representatives is to be delivered to the president by Dec. 31, 2020 (13 U.S.C. § 141). This data determines how many congressional seats each state will have for the following 10 years. **The request would delay this deadline until April 30, 2021.**
>
> Under current law, data to be used by the states for redistricting legislative and congressional seats is due to the states no later than March 31, 2021 (13 U.S.C. § 141). In previous decades, this data has been provided to the states on a rolling basis, starting at least six weeks prior to the deadline. **The request would delay this deadline until July 31, 2021.**

Congress will decide whether to grant the request for these delays. Its considerations may include:

> Whether the data release dates can be moved up without jeopardizing health and safety, or the quality and accuracy, of the data.
>
> Whether the rollout of state data will occur over the course of six weeks leading up to the July 31, 2021, deadline, or if it needs to be statutorily set.
>
> What impact these delays will have on the states.

In all states, a delay in the release of data will compress the timeline for redistricting. For some states, the requested delays would be uncomfortable; for others, the delays would mean deadlines that are established in state constitutions or statutes will be impossible to meet. States that will have the most difficulty with the requested delays include:

Two states that have legislative elections scheduled in November 2021 (New Jersey and Virginia).

Six states with constitutional redistricting deadlines in 2021 (California, Colorado, Ohio, Missouri, South Dakota and Maine).

Four states with statutory redistricting deadlines in 2021 (Delaware, Iowa, Vermont and Washington).

Fourteen states with constitutions calling for redistricting in the year after the census, effectively meaning in 2021 (Alabama, Arkansas, Connecticut, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon and Wisconsin).

Note that in most states, the regularly scheduled legislative session for 2021 is anticipated to end well before July 31.

This webpage addresses the following topics each in its own accordion folder:

States With Legislative Elections Regularly Scheduled for November 2021

Two states, New Jersey (N.J. Const., Art. IV, Sec. III, Para. 1) and Virginia (Va. Const. Art. II, Section 6), have legislative elections scheduled for November 2021. In previous decades, any states with November legislative elections have received their data earlier than other states so they could complete legislative redistricting in time for candidate filing.

Even if census data is provided to these states as early as the middle of June, preparing for a November election is nearly impossible. These states might ask a court for relief, as Virginia did in the 1981 case of *Cosner v. Dalton*. Under this scenario, the state would hold elections under current maps in 2021, under the newly redrawn maps in a special election in 2022, and again during its regularly scheduled legislative elections in 2023.

States With Constitutional Redistricting Deadlines in 2021

California (Aug. 15, Cal Const, Art. XXI § 2).*

Colorado (Sept. 1, Colo. Const. Art. V, Section 48.2, Colo. Const. Art. V, Section 44.4).

Ohio (Sept. 1, Oh. Const. Art. XI, § 1 and Sept. 30, Oh. Const. Art. XIX, § 1).

South Dakota (Dec. 1, S.D. Const. Article III, § 5).

Missouri (Mo. Const. Art. III, § 3).

Maine (June 11, Me. Const. Art. IV, Pt. 1, § 3, Me. Const. Art. IV, Pt. 2, § 2, Me. Rev. Stat. tit. 21-A, § 1206).

Washington (Nov. 15, Wash. Const. Art. II, § 43).

In California*, Maine and Ohio, with relatively early constitutional deadlines, census delays present the challenge of amending their constitutions or seeking a remedy in court. In the case of California, there is a July 1, 2020, deadline for getting a constitutional amendment on the 2020 general election ballot, and the constitution cannot be amended without a vote of the people. Ohio will have specific requirements for seeking an amendment as well, if that is the route the state chooses to follow.

Colorado's deadline is similar to California's, but the constitution provides that "the commissions may adjust the deadlines specified in this section if conditions outside of the commission's control require such an adjustment to ensure adopting a final plan..." ("Colo. Const. art. V, §§ 44.4(1), 48.2(1)). This flexibility could permit Colorado to draw maps on an accelerated timeline and still comply with its constitutional deadlines.

South Dakota, with a Dec. 1 constitutional deadline, would likely consider a special session to undertake redistricting since its regularly scheduled legislative session is scheduled to end in March 2021; it used a special session last decade.

*Please note: On July 17, 2020, the California Supreme Court granted the Legislature's emergency petition and issued a peremptory writ of mandate for a four-month extension to California's redistricting deadlines. The Commission is directed to approve and certify the final statewide maps to the Secretary of State by no later than December 15, 2021.

States With Statutory Redistricting Deadlines in 2021

Delaware (June 30, Del. Code Ann. Tit. 29, § 805)

Iowa (Sept. 15, Iowa Code § 42.3)

Vermont (Aug. 15, Vt. Stat. Ann. tit. 17, § 1905 - § 1907)

Washington (Nov. 15, Wash. Rev. Code Ann. § 44.05.100)

In these states, the legislature may choose to enact a new deadline for this decade to accommodate the delayed release of census data. Because regular legislative sessions in these states are completed before July 31, a bill in the regular session to extend the deadline would be required, along with calling a special session after the data is released.

States With Constitutional Requirements for Redistricting to Take Place in the Year After the Census

Alabama (Const. Art. IX, Sec. 199).

Arkansas (Ark. Const. Art. 8, § 4).

Connecticut (Conn. Const. Art. III., Sec. 6).

Illinois (Illinois Const., Art. IV, § 3).

Indiana (Ind. Const. Art. 4, § 5, Ind. Code Ann. § 3-3-2-1, Ind. Code Ann. § 3-3-2-2).

Louisiana (La. Const. Art. III, § 6).

Massachusetts (ALM Constitution Amend. Art. CI).

Michigan (MCLS Const. Art. IV, § 6, Mich. Comp. Laws Serv. § 3.62, Mich. Comp. Laws Serv. § 4.261).

Nevada (Nev. Const. Art. 4, § 5).

New Hampshire (N.H. Const. Pt. SECOND, Art. 9, N.H. Const. Pt. SECOND, Art. 26).

North Dakota (N.D. Const. Art. IV, § 2).

Oklahoma (Okl. Const. Art. V, § 11A).

Oregon (Ore. Const. Art. IV, § 6, Or. Rev. Stat. Ann. § 188.125).

These states' constitutions call for redistricting to take place in the year after the census is taken, not the year after the data is released. For states in this category where the legislature is full-time (Illinois, Massachusetts and Wisconsin) and can meet throughout the year, the delay in the release of data will compress the timeline. For the other states where the regular legislative session is scheduled to be over before July 31, a special session is likely to be required to complete redistricting in 2021.

North Dakota's deadline requires that redistricting occur in the legislative session immediately following the census. While this typically means years ending in 1, North Dakota considers its legislative sessions to last two years, so redistricting could occur in 2022 and be in compliance with the constitutional deadline.

States With Constitutional Requirements for Redistricting to Take Place in the Year After Census Data Is Delivered

Alaska (Alaska Const. Art. VI § 10).

Idaho (Idaho Const. Art. III, Section 2).

Montana (for congressional redistricting, if the state is awarded a second seat in the U.S. House; legislative redistricting is not required to be completed until 2023; Mont. Const., Art. V § 14).

North Carolina (N.C. Const. art. II, Section 3, N.C. Const. art. II, Section 5).

Pennsylvania (Pa. Const. Art. II, § 17).

Texas (Tex. Const. Art. III, § 28).

Utah (Utah Const. Art. IX, § 1).

Wisconsin (Wis. Const. Art. IV § 3).

These states' constitutions direct that redistricting be undertaken in the next session after the delivery of census data, rather than when the census is taken.

In preparation for the 2022 general election, all these states would need to prepare districts in time for candidate filing dates prior to 2022 primary elections. These deadlines are typically in the spring of even-numbered years.

Pennsylvania's legislature can meet year-round and could address redistricting in the fall of 2021.

The other states could redistrict in 2022, rather than as expected in 2021, or hold a special session in the fall of 2021.

Texas' legislature is biennial and does not have a regularly scheduled session in 2022, so the next regular session after census data is released would be in 2023. A special session may be a solution.

States With Other Deadlines

Missouri's legislative redistricting deadline is based on when census data is six months after the date of the appointment of commission members (Mo. Const. Art. III, § 2, Mo. Const. Art. III, § 7).

Hawaii's deadline is based on the date its commission members are certified; in effect, this would be September 2021 (HRS Const. Art. IV, § 2).

States With No Mention of Redistricting Deadlines in the Constitution or Statutes

Georgia

Arizona

Nebraska

Rhode Island

South Carolina

Tennessee

West Virginia

New Mexico

While these states do not have a redistricting deadline in their constitution or statutes, all states need to prepare districts in time for candidate filing dates for 2022 primary elections. These deadlines are typically in the spring of even-numbered years.

States With Redistricting Deadlines in 2022

Florida (Fla. Const. Art. III, § 16, for legislative redistricting).

Maryland (Md. Const. art. III, Section 5, for legislative redistricting).

Minnesota (Minn. Const., Art. IV, § 3, 12; Minn. Stat. § 204B.14).

Mississippi (Miss. Const. Ann. Art. 13, § 254, Miss. Const. Ann. Art. 4, § 36, Miss. Code Ann. § 5-3-93, Miss. Code Ann. § 5-3-123).

New York (NY CLS Const Art III, § 5-b).

Wyoming (Wyo. Const. Art. 3, § 48, for legislative redistricting).

Kansas (Kan. Const. Art. 10, § 1, May 2022, for legislative redistricting).

Kentucky (Ky. Const. § 33, April 2022, for legislative redistricting).

Some states' constitutions call for redistricting in the second year after the census is conducted; redistricting may be the first order of business when their legislative sessions begin.

What States May Consider When Facing Census Delays

For states with constitutional deadlines:

- Amending the constitution is an option (which has its own deadlines and hurdles).
- The state could file a lawsuit for relief.

For states with statutorily set deadlines, setting a new deadline is an option.

In states where a deadline is set each decade by the adoption of guidelines, the new census data release timing can be taken into account when drafting guidelines.

For states where the census data delays will make it difficult to complete redistricting before candidate filing deadlines for the state primary:

- Either the primary date or the filing data could be moved (which has its own hurdles and consequences).
- Where permitted, the state could hold a special session for redistricting; some states do this as usual practice already, such as New Mexico.

Additional Resources

NCSL's State Redistricting Deadlines

NCSL's Redistricting and the Use of Census Data

NCSL's Into the Thicket: A Redistricting Starter Kit for Legislative Staff webpage

NCSL's Redistricting Law 2020 book

NCSL's letter to the House Committee on Oversight and Reform regarding census delays and differential privacy

NCSL's letter to the Senate Committee on Homeland Security and Governmental Affairs regarding census delays and differential privacy

NCSL's letter to the Census Bureau regarding census delays and differential privacy

GAO's August 27, 2020 report on Recent Decision to Compress Census Timeframes Poses Additional Risks to an Accurate Count

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E IBIT 7

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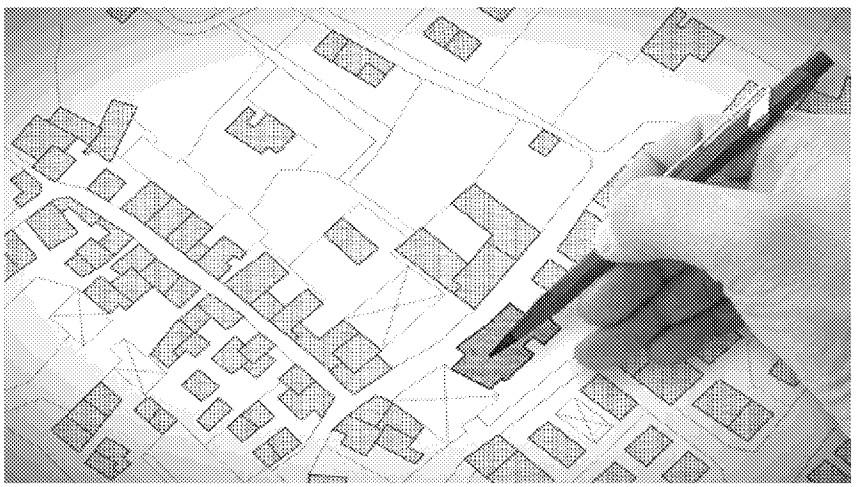
NCSL NATIONAL CONFERENCE OF STATE LEGISLATURES

OUR AMERICAN STATES The NCSL Podcast

tate Redistricting Deadlines

8/27/2020



Every 10 years following the federal decennial census, all federal, state and local election district boundaries must be redrawn or revised. Redistricting begins when the new census data is delivered to the states.

Title 13 of the United States Code requires the secretary of commerce to provide governors and the officials responsible for redistricting in each state with the census results. Public Law 94-171 directs the Census Bureau to only furnish total population counts, but the bureau does offer additional data, including tables covering voting age, race and ethnicity. These summary files provide population data from American Indian areas, counties and cities down to the census block level. The data is delivered to the states by April 1 of the year following the decennial census.

Note: *On August 3, 2020, the U.S. Census Bureau announced that both self-response and field data collection will end by September 30—a change from October 31, the delayed deadline announced on April 13, 2020 due to the COVID-19 pandemic. Both of these dates are well past the originally planned July 31 end date to data collection.*

The April 13 announcement included a request to Congress for authority to delay the release of census data to be used for congressional apportionment by 120 days, to April 30, 2021, and census data to be used for redistricting by 120 days as well, to July 31, 2021.

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The Bureau's reversal in its operational plans means a cut-back in data collection by a month and an accelerated pace to complete data collection. It signaled the Bureau's intention to deliver apportionment counts by the statutory deadline of December 31, 2020. A formal announcement has not addressed the release of data for redistricting, however informally it is believed that the Census Bureau plans to get the redistricting data out by April 1, 2021.

As a general rule, legislative and congressional redistricting must be completed before filing deadlines for the next primary elections for federal and state legislators. Some states go beyond this rule, however, and set specific redistricting deadlines. These are listed below. If you have any questions or concerns, please contact christi.zamarripa ncsl.org.

The bo allows you to conduct a full te t search or type the state name.

Type state name

tate edistri tin eadlines	
Alabama Alabama Const. Art. IX, Sec. 199	Legislative: Legislature to conduct redistricting at its first session after the taking o the decennial census. Congressional: None
Alaska Alaska Const. Art. VI, § 10	Legislative: 90 days after the board has been appointed and the official reporting (the decennial census, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. Congressional: None
Arizona	Legislative and congressional: None
Arkansas Ark. Const. Art. 8, § 4	Legislative: On or before Feb. 1 immediately following each federal census, the board shall reapportion the state for representatives. Congressional: None
California Cal Const, Art. XXI § 2	Legislative and congressional: By Aug. 15 in each year ending in the number 1, the commission shall approve four final maps that separately set forth the district boundary lines for the congressional, senatorial, assembly, and State Board of Equalization districts.* *Please note: On July 17, 2020, the California Supreme Court granted the Legislature's emergency petition and issued a peremptory writ of mandate for a four-month extension to California's redistricting deadlines. The Commission is directed to approve and certify the final statewide maps to the Secretary of State b no later than December 15, 2021.
Colorado Colo. Const. Art. V, Section 48.2, Colo. Const. Art. V, Section 44.4	Legislative: No later than Sept. 15 of the redistricting year, the commission shall adopt final senate and house plans. Congressional: No later than Sept. 1 of the redistricting year, the commission shall adopt a final plan, which must then be submitted to the supreme court for its review.

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Connecticut Conn. Const. Art. III., Sec. 6	Legislative and congressional: By Sept. 15 following the year in which the decennia census of the United States is taken.
Delaware Del. Code Ann. tit. 29, § 805	Legislative: Not later than June 30, 2021. Congressional: None
Florida Fla. Const. Art. III, § 16	Legislative: At its regular session in the second year following each decennial census. Congressional: None
Georgia	Legislative and congressional: None
Hawaii HRS Const. Art. IV, § 2	Legislative and congressional: Not more than 150 days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts.
Idaho Idaho Const. Art. III, Section 2	Legislative and congressional: Within 90 days after the commission has been organized or the necessary census data are available, whichever is later.
Illinois Illinois Const., Art. IV, § 3	Legislative: General Assembly has until June 30 in the year following each decennia census. Congressional: None
Indiana Ind. Const. Art. 4, § 5, Ind. Code Ann. § 3-3-2-1, Ind. Code Ann. § 3-3-2-2	Legislative and congressional: At the first regular session of the general assembly convening immediately following the United States decennial census.
Iowa Iowa Code § 42.3	Legislative and congressional: Not later than Sept. 1 of each year ending in 1. The legislature shall complete legislative redistricting by September 1 and for the bill to become law through Governor signature (or veto override) by September 15.
Kansas Kan. Const. Art. 10, § 1	Legislative: By the end of its regular session. Congressional: None
Kentucky Ky. Const. § 33	Legislative: The first General Assembly after the adoption of this constitution shall divide the state into 38 senatorial districts, and 100 representative districts. The General Assembly shall then, and every 10 years thereafter, redistrict the state. (Constitution was first adopted in 1792). Congressional: None

Louisiana La. Const. Art. III, § 6	Legislative: By the end of the year following the year in which the population of thi state is reported to the president of the United States for each decennial federal census. Congressional: None
Maine Me. Const. Art. IV, Pt. 1, § 3, Me. Const. Art. IV, Pt. 2, § 2, Me. Rev. Stat. tit. 21-A, § 1206	Legislative: The apportionment plan of the commission shall be submitted to the clerk of the House and the secretary of the Senate no later than June 1 of the year in which apportionment is required. The Legislature shall enact the submitted plar of the commission or a plan of its own by June 11 of the year in which apportionment is required. Congressional: In 2021 and every 10 years thereafter, the commission shall submi its plan to the clerk of the House of Representatives no later than June 1. The Legislature shall enact the submitted plan of the commission or a plan of its own i regular or special session by a vote of 2/3 of the members of each house by June 11. This action is subject to the Governor's approval.
Maryland Md. Const. art. III, Section 5	Legislative: By the 45th day after the opening of the regular session of the General Assembly in the second year following every census. Congressional: None
Massachusetts ALM Constitution Amend. Art. CI	Legislative: At its first regular session after the year in which said census was taker Congressional: None
Michigan MCLS Const. Art. IV, § 6, Mich. Comp. Laws Serv. § 3.62, Mich. Comp. Laws Serv. § 4.261	Legislative and congressional: Not later than Nov. 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house (representative districts, and congressional districts.
Minnesota Minn. Const., Art. IV, § 3, Minn. Stat. § 204B.14	Legislative and congressional: At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts.
Mississippi Miss. Const. Ann. Art. 13, § 254, Miss. Const. Ann. Art. 4, § 36, Miss. Code Ann. § 5-3-93, Miss. Code Ann. § 5-3-123	Legislative: At its regular session in the second year following the decennial censu Congressional: The members of the committee shall draw a plan to redistrict no later than thirty (30) days preceding the convening of the next regular session of tl legislature after the results of the 1980 decennial census are published and every ten (10) years thereafter.

Missouri Mo. Const. Art. III, § 2, Mo. Const. Art. III, § 3, Mo. Const. Art. III, § 7	Legislative: The non-partisan State Demographer to begin drawing maps within 10 days of when the President receives the Census counts and file a tentative plan within 6 months of when the population counts are reported to the President. The tentative plan filed by the Non-Partisan State Demographer, or adjustments to tha plan made by the House Apportionment Commission, will become final within 8 months of when the population counts are reported to the President. Not later tha five months after the appointment of the commission, the commission shall file with the secretary of state a tentative plan of apportionment and map of the proposed districts. Not later than six months after the appointment of the commission, the commission shall file with the secretary of state a final statement of the numbers and the boundaries of the district. Congressional: None
Montana Mont. Const., Art. V § 14	Legislative: The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. This is the 2023 session. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law. Congressional: Within 90 days after the final decennial census figures are available
Nebraska	Legislative and congressional: None
Nevada Nev. Const. Art. 4, § 5	Legislative: In the first session after the taking of the decennial census. (2021) Congressional: None
New Hampshire N.H. Const. Pt. SECOND, Art. 9, N.H. Const. Pt. SECOND, Art. 26	Legislative: By the end of the regular session following the decennial census Congressional: None
New Jersey N.J. Const., Art. IV, Sec. III, Para. 1	Legislative: One month of the receipt by the governor of the official decennial census or on or before Feb. 1 of the year following the year in which the census is taken, whichever date is later. Congressional: On or before the third Tuesday of each year ending in 2, or within three months after receipt in each decade by the appropriate state officer of the official statement by the clerk of the United States House of Representatives.
New Mexico	Legislative and congressional: None
New York NY CLS Const Art III, § 5-b	Legislative and congressional: There are no legislative deadlines, but the New York Independent Commission has a deadline. The Commission must combine the Senate and Assembly plans in one proposed bill and submit it to the legislature by Jan. 1, 2022 (with an allowance to submit as late as Jan. 15, 2022 if necessary). If th legislature rejects the first plan or the governor vetoes it, the commission must submit a second plan to the legislature no later than Feb. 28, 2022. If the legislatur rejects the first and second plan, there is still no deadline for the legislature itself t act.

North Carolina N.C. Const. art. II, Section 3, N.C. Const. art. II, Section 5	Legislative: At the first regular session convening after the return of every decenni census. Congressional: None
North Dakota N.D. Const. Art. IV, § 2	Legislative: Until the adjournment of the first regular session after each decennial census. (2021) Congressional: None
Ohio Oh. Const. Art. XI, § 1, Oh. Const. Art. XIX, § 1	Legislative: Not later than the first day of September of a year ending in the numeral 1. If there is no such bipartisan commission approval by that date, the commission has until Sept. 15 to try again to adopt a bipartisan approved 10 year map, or instead just a simple majority 4 year map. Congressional: Not later than the last day of September of a year ending in the numeral 1. If there is no such bipartisan legislature approval by that date, the Ohic redistricting commission has until Oct. 31 to adopt a bipartisan commission approved 10 year map; further, if there is no such bipartisan commission approva by that date, the legislature has until Nov. 30 to try again to adopt a bipartisan legislature approved 10 year map, or instead just a simple majority 4 year map.
Oklahoma Okl. Const. Art. V, § 11A	Legislative: Within 90 legislative days after the convening of the first regular sessio of the legislature following each federal decennial census. Congressional: None
Oregon Ore. Const. Art. IV, § 6, Or. Rev. Stat. Ann. § 188.125	Legislative: By July 1 of the year of the odd-numbered year regular session followir an enumeration of the inhabitants by the US government. If there is no legislative plan enacted by July 1, the Secretary of State must adopt a plan by August 15. Congressional: By July 1 of the year of the odd-numbered year regular session. If the legislature does not pass a congressional plan by July 1, a citizen can file a suit Marion County Court. The Chief Justice of the Oregon Supreme Court appoints retired judges to be on a panel that adopts a congressional plan. Then the Suprem Court reviews the plan and approves or rejects it.
Pennsylvania Pa. Const. Art. II, § 17	Legislative: No later than 90 days after either the commission has been duly certified or the population data for the commonwealth as determined by the federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan. Congressional: None
Rhode Island	Legislative and congressional: None
South Carolina	Legislative and congressional: None
South Dakota S.D. Const. Article III, § 5	Legislative: By Dec. 1 of the year in which the apportionment is required. Congressional: None

Tennessee	Legislative and congressional: None
Texas Tex. Const. Art. III, § 28	Legislative: During the first regular session after the publication of each United States decennial census, the legislature will apportion the state into senatorial anc representative districts. Texas has biennial session and the next session will be 2021. Congressional: None
Utah Utah Const. Art. IX, § 1	Legislative and congressional: No later than the annual general session next following the legislature's receipt of the census.
Vermont Vt. Stat. Ann. tit. 17, § 1905 - § 1907	Legislative and congressional: A tentative plan is due on or before July 1 of the yea following each decennial census; the final proposal is due not later than Aug. 15.
Virginia Va. Const. Art. II, Section 6	Legislative and congressional: The General Assembly shall reapportion the Commonwealth into electoral districts in the year 2011 and every 10 years thereafter.
Washington Wash. Const. Art. II, § 43; Wash. Rev. Code Ann. § 44.05.100	Legislative and congressional: Not later than Nov. 15 of the year ending in 1, Washington commission must submit its plan to the legislature. After submission, the legislature will have 30 days to amend the commission's plan.
West Virginia	Legislative and congressional: None
Wisconsin Wis. Const. Art. IV, § 3	Legislative: At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly. Congressional: None
Wyoming Wyo. Const. Art. 3, § 48	Legislative: At the first budget session of the legislature following the federal census. (2022) Congressional: None

dditional Resources

NCSL Redistricting Homepage

NCSL Redistricting Commissions: State Legislative Plans

NCSL Redistricting Commissions: Congressional Plans

NCSL Redistricting Criteria

NCSL Redistricting and Use of Census Data

NCSL Census Delays and the Impact on Redistricting

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BC-DOC-0000027608

E IBIT 8

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The 2020 Census is Happening Now. Respond Today.

FOR IMMEDIATE RELEASE: MONDAY, A ST 0 , 2020

Statement rom U.S. Census Bureau Director Steven Dillingham Delivering a Complete and ccurate 2020 Census Count

AU UST 03, 2020
RELEASE NUMBER CB20-RTQ.23

A ST , 2020 — The .S. Census Bureau continues to evaluate its operational plans to collect and process 2020 Census data. Today, we are announcing updates to our plan that will include enumerator awards and the hiring of more employees to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 1, 2020, as required by law and directed by the Secretary of Commerce. The Census Bureau's new plan reflects our continued commitment to conduct a complete count, provide accurate apportionment data, and protect the health and safety of the public and our workforce.

Complete Count A robust field data collection operation will ensure we receive responses from households that have not yet self-responded to the 2020 Census.

We will improve the speed of our count without sacrificing completeness. As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.

We will end field data collection by September 0, 2020. Self-response options will also close on that date to permit the commencement of data processing. nder this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

Accurate Data and Efficient rocessing Once we have the data from self-response and field data collection in our secure systems, we plan to review it for completeness and accuracy, streamline its processing, and prioritize apportionment counts to meet the statutory deadline. In addition, we plan to increase our staff to ensure operations are running at full capacity.

Flexible Design Our operation remains adaptable and additional resources will help speed our work. The Census Bureau will continue to analyze data and key metrics from its field work to ensure that our operations are agile and on target for meeting our statutory delivery dates. Of course, we recognize that events can still occur that no one can control, such as additional complications from severe weather or other natural disasters.

Health and Safety We will continue to prioritize the health and safety of our workforce and the public. Our staff will continue to follow Federal, state, and local guidance, including providing appropriate safety trainings and personal protective equipment to field staff.

BC-DOC-0000027610

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The Census [illegible] Executive Order 1 880 issued uly 11, 2019 and the residential Memorandum issued uly 21, 2020. A team of experts are examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.

We are committed to a complete and accurate 2020 Census. To date, 9 million households, nearly percent of all households in the ation, have responded to the 2020 Census. Building on our successful and innovative internet response option, the dedicated women and men of the Census Bureau, including our temporary workforce deploying in communities across the country in upcoming weeks, will work diligently to achieve an accurate count.

We appreciate the support of our hundreds of thousands of community-based, business, state, local and tribal partners contributing to these efforts across our ation. The 2020 Census belongs to us all. If you know someone who has not yet responded, please encourage them to do so today online at 2020census.gov, over the phone, or by mail.

###

Contact

Public Information Office

301-763-3030

pio@census.gov

BC-DOC-0000027611

E IBIT 9

2020 Census Operational d ustments Due to COVID-19

e re adapting or delaying some of our operations to protect t e ealt and safety of our staff and t e pu lic and ma e sure we get t e same population counted anot er way.

In light of the COVID-19 outbreak, the U.S. Census Bureau is continually adjusting 2020 Census operations in order to:

- Protect the health and safety of the American public and Census Bureau employees.
- Implement guidance from Federal, State, and local authorities regarding COVID-19.
- Ensure a complete and accurate count of all communities.

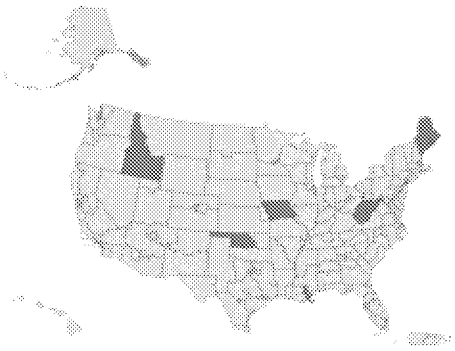
To help the Census Bureau continue to adapt to the COVID-19 pandemic, the White House Office of Management and Budget recently submitted a supplemental request of $1 billion for the 2020 Census. This funding would allow for supplemental hiring, pay incentives, additional outreach and advertising, and replenished contingency funding to provide needed flexibility as the Census Bureau conducts its largest component of the field operation, Nonresponse Followup. This flexibility is critical to helping us operate in the midst of an unprecedented public health crisis, including accelerated efforts to conduct our field data collection as quickly, and safely as possible, while ensuring a complete and accurate count and a timely delivery of quality data.

Since the suspension of field operations in mid-March, the Census Bureau has continually assessed our operational plans, taking into account Federal, state and local guidance, and the status of COVID-19 cases to ensure that we can safely fulfill our mission. Our continuing rigorous analysis led to a phased restart that began in May, and a soft launch of the Nonresponse Follow-up operation that began early in a number of area census offices in mid-July. The supplemental request is an extension of our effort to ensure we are ready to adapt to challenges in the environment.

On August 3, 2020, Census Bureau Director Steve Dillingham released a statement (https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html) on recent updates to the 2020 Census operational plan.

Census akers re ollo ing p it onresponding ouse olds

Starting July 16, census takers will begin interviewing households that have yet to respond to the 2020 Census in regions managed by the area census offices on this map -.



In subsequent weeks, the Census Bureau will announce additional census offices as it prepares to begin enumeration activities nationwide. The majority of census offices across the country will begin follow-up work on August 11.

The Census Bureau is working to complete data collection as quickly and safely as possible, while ensuring a complete and accurate count as it strives to comply with the law and statutory deadlines. All offices are schedule to complete their work by September 30, 2020.

Census takers will follow local public health guidelines when they visit. Learn more at Census Takers In Your Neighborhood.

Re ie of 2020 Census Operational lan

This presentation - updates partners, stakeholders and the public on 2020 Census operational changes.

Status of Current Operations

Self-Response ase

Online, phone and mailed self-responses continue throughout the data collection process.

lanned Sc edule

March 12 – July 31

Re ised Sc edule

March 12 - September 30, 2020

onresponse ollo up R

Census takers will interview households in person. New dates will cover areas previously scheduled for "Early NRFU."

lanned Sc edule

May 13 – July 31

Re ised Sc edule

The Census Bureau began soft-launching NRFU on July 16, 2020, and it will soon be underway across the entire country. All area census offices will complete their work by September 30, 2020.

roup uarters -Response aper numeration

Many group quarters have already begun responding through our e-Response enumeration option.

lanned Sc edule

April 2 – June 5

Re ised Sc edule

April 2 – September 3

Remote laska

Early operation to reach parts of Alaska which may be difficult to reach later in the year and whose populations depart for other activities. The operation will be mostly completed on the original planned schedule, though some areas with year-round populations will be enumerated when it is safe to do so.

lanned Sc edule

January 21 – April 30

Re ised Sc edule

January 21 – August 31

Island reas

Census takers interview households in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands. This operation is coordinated with the local Island Areas governments. Census takers use paper questionnaires to interview households.

BC-DOC-0000027616

lanned Sc edule

February 3 - June 30

Re ised Sc edule

February 3 - September 30

ield Offices at eak Operations

Managers and staff commence administrative, training, deployment and support activities for peak data collection operations. This includes selecting and hiring field staff.

lanned Sc edule

March 1

Re ised Sc edule

Phased re-opening occurred between **May 4** and **June 12**.

pdate ea e - Stateside

Census takers drop off invitations to respond and paper questionnaires at the front doors of 5 million households stateside while updating the addresses.

lanned Sc edule

March 15 – April 17

Re ised Sc edule

Phased re-opening occurred between **May 4** and **June 12**.

pdate ea e uerto Rico

Update Leave operations for the Commonwealth of Puerto Rico, approximately 1.7 million households, will be coordinated separately.

lanned Sc edule

March 15 – April 17

Re ised Sc edule

May 22

pdate numerate

Census takers interview about 2,000 households in remote parts of northern Maine and southeast Alaska.

lanned Sc edule

March 16 – April 30

Re ised Sc edule

June 14 – July 29

In- erson roup uarters numeration

Group Quarters that remain as part of our in-person group quarters enumeration efforts will begin in July.

lanned Sc edule

April 2 – June 5

BC-DOC-0000027618

Re ised Sc edule

July 1 – September 3

Ser ice Based numeration

We're working with service providers at soup kitchens, shelters, and regularly scheduled food vans to count the people they serve.

lanned Sc edule

March 30 – April 1

Re ised Sc edule

September 22 - September 24

Mo ile uestionnaire ssistance

Census Bureau staff assists people with responding online at places people gather (events, grocery stores, etc.).

lanned Sc edule

March 30 – July 31

Re ised Sc edule

To be completed on September 30

Count of eople e periencing omelessness outdoors

Census takers count people under bridges, in parks, in all-night businesses, etc.

lanned Sc edule

April 1

Re ised Sc edule

September 23 - September 24

numeration of ransitory ocations

Census takers count people staying at campgrounds, RV parks, marinas, and hotels if they do not usually live elsewhere.

lanned Sc edule

April 9 – May 4

Re ised Sc edule

September 3 – September 28

rocess pportionment Counts

After collection activities are complete, Census Bureau experts run and review output from programs to unduplicate responses, determine final housing unit status, populate any missing housing unit data on household size and finalize the universe to be included in the apportionment count file.

The statutory deadline to provide apportionment counts is December 31, 2020.

rocess Redistricting Data

Census Bureau experts run and review programs to populate any missing demographic data for each household, run differential privacy programs to ensure confidentiality and run tabulation programs for each state delivery.

The statutory deadline to provide redistricting data is March 31, 2021.

ress it COVID-19

The Census Bureau continues to carefully monitor the COVID-19 situation and follow the guidance of federal, state, and local health authorities.

Related Information

PRESS RELEASE

Statement on 2020 Census Operational d ustments Due to COVID-19

In light of the COVID-19 outbreak, the U.S. Census Bureau is adjusting 2020 Census operations.

Response Rates

How many people in your community have already responded to the 2020 Census? Keep track with this map of response rates.

2020 Census Operations

Extensive preparations for the 2020 Census began far in advance to ensure a complete and accurate count.

E IBIT 10

2020 Census Housing Unit Enumeration Progress by State

The 2020 Census will conclude data collection operations on September 30, 2020. Use this table to keep track of households in your state enumerated across all collection operations.

State	Report date: 9/20/2020 As of 9/19/2020, percentage of housing units:		
	Self-responded	Enumerated in Nonresponse Followup (NRFU)	Enumerated
U.S. Total	66.1	28.9	95.0
Alabama	62.7	25.1	87.8
Alaska	53.8	42.9	96.7
Arizona	63.1	28.4	91.5
Arkansas	60.1	37.9	98.0
California	68.5	28.2	96.7
Colorado	69.3	25.4	94.7
Connecticut	70.0	28.1	98.1
Delaware	64.0	29.7	93.7
District of Columbia	62.7	30.9	93.6
Florida	62.9	29.0	92.0
Georgia	61.6	28.3	90.0
Hawaii	62.5	36.8	99.3
Idaho	69.0	30.8	99.8
Illinois	70.5	26.2	96.8
Indiana	69.8	28.6	98.4
Iowa	70.8	22.8	93.6
Kansas	69.3	29.2	98.4
Kentucky	67.8	25.2	92.9
Louisiana	59.3	29.8	89.1
Maine	57.8	40.9	98.7
Maryland	70.3	26.1	96.3
Massachusetts	68.6	28.0	96.5
Michigan	70.8	24.6	95.4
Minnesota	74.6	23.1	97.7
Mississippi	59.6	30.0	89.6
Missouri	65.3	31.7	97.0
Montana	59.5	29.5	89.0
Nebraska	71.4	24.8	96.1
Nevada	65.8	29.2	95.0
New Hampshire	66.4	30.5	96.9
New Jersey	68.5	27.2	95.6
New Mexico	57.3	33.6	90.9
New York	63.0	32.6	95.5
North Carolina	62.3	29.0	91.3
North Dakota	64.7	31.7	96.5
Ohio	70.1	26.5	96.6
Oklahoma	60.3	33.0	93.3
Oregon	68.6	28.6	97.2
Pennsylvania	68.7	27.5	96.2
Rhode Island	64.5	31.9	96.3
South Carolina	60.1	29.6	89.6
South Dakota	66.7	27.2	93.8
Tennessee	65.4	30.5	95.9
Texas	61.8	33.4	95.2
Utah	70.4	26.7	97.1
Vermont	60.0	38.3	98.3
Virginia	70.5	24.8	95.3
Washington	71.8	26.6	98.4
West Virginia	55.9	43.9	99.8
Wisconsin	71.8	26.4	98.2
Wyoming	60.4	32.7	93.2
Puerto Rico	34.2	63.5	97.7

Note: Percentages may not sum due to rounding. A limited number of areas were part of the NRFU "soft launch" beginning July 16, 2020, and could have higher completion rates due to more time in the field. Percentages for the U.S. total do not include housing units in Puerto Rico.

Source: U.S. Census Bureau.

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For more information:
2020CENSUS.GOV

D-FS-GP-EN-039

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United States® Census 2020

FREQUENTLY ASKED QUESTIONS

How should I interpret the "Percentage of Housing Units Enumerated" column?

Of the housing units in your state, this is the percentage enumerated either through self-response or as part of our field data collection operations.

What do the three columns in the table mean?

Percentage of housing units self-responded: The percentage of self-responding housing units reported in the response rate map <https://2020census.gov/en/response-rates.html>.

Percentage of housing units enumerated in NRFU: The percentage of total housing units resolved in the field during the Nonresponse Followup (NRFU) Operation (excludes self-response). Cases completed in the field for Update Enumerate and Remote Alaska Operations are included in this rate to ensure coverage of the full housing unit universe. This rate does not reflect the progress within the NRFU operation as it is relative to total housing units and not just the NRFU workload.

Percentage of housing units enumerated: The cumulative percentage of total housing units enumerated via self-response or during the NRFU Operation as of 11:59 p.m. of the previous day. This rate will always increase.

Does the self-response rate match the rate in the 2020 Self-Response Rate map?

Yes. See the response rate map <https://2020census.gov/en/response-rates.html>.

How often will you publish this table?

We will post it to the Web site by 3 p.m. EDT daily. Updates will be provided August 19 through October 1, 2020.

Where can I find a comparable table for the 2010 Census?

The U.S. Census Bureau has not historically produced a table that shows this information by state during data collection operations.

The Operational Assessments for the 2010 Census are the most complete source of operational data from the various 2010 Census operations. You can find them at <www.census.gov/programs-surveys/decennial-census/decade/2010/program-management/cpex.html#par_list_528542037>.

What is included in the denominator?

All housing units in the United States or state. For Puerto Rico, all housing units in Puerto Rico.

How does the Census Bureau use these data?

The Census Bureau is committed to a complete and accurate count. This table provides our progress.

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E IBIT 11

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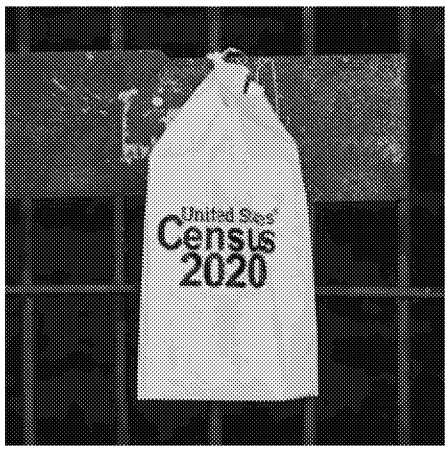
21 Lots of Questions as Census Bureau Delays the Count

By Wendy Underhill

Last week, the U.S. Census Bureau asked Congress for permission to delay its 2020 Census data releases by 120 days.



That information a) determines how many congressional seats each state will have for the next 10 years and b) provides states with the detailed data they need to redistrict. For politicos, this is huge news, and it's one more Covid-19 impact on our nation.

The bureau has delayed the beginning of its field operations until June 1, an understandable decision in light of the Covid-19 pandemic and shelter-in-place and stay-at-home orders.

It makes sense for the bureau to not have workers knocking on Americans' doors at the moment. (I have a personal interest in this: My husband is a census enumerator.) If the door-knocking starts later, it delays everything downstream. For instance, now data collection will end 90 days later than originally planned, on October 31, 2020.

Only when data collection is complete can the bureau's "lengthy, thorough and scientifically rigorous process" to prepare the data for release begin. Hence, the bureau's request to Congress, to change the Congressional apportionment due date to April 30, 2021, and the deadline for releasing redistricting data to the states to July 31, 2021.

Understandable, all of this. We are living in extraordinary times.

But these delays confound state redistricting schedules. Perhaps hardest hit are the four states that have legislative elections scheduled, as usual, in 2021: Louisiana, Mississippi, New Jersey and Virginia. If their data arrives in July, it will take some fancy legerdemain for those states to create new districts and set new filing dates and primary dates to run an election in November 2021. And that's without mentioning that local election officials need time to adjust their operations to the new maps, so that the right ballot goes to each voter.

A handful of states have constitutionally set deadlines for redistricting—and we all know it's no small task to change a state's constitution. Still more states have deadlines in statute or rules, all of which may need adjustments. NCSL has a list of state redistricting deadlines.

Everyone is thinking about whether this will be the only delay needed by the Census Bureau, given the uncertainties of the virus.

Other questions have state-specific answers: Will the delayed data releases work with the state's existing schedule? If not, can the legislature change deadlines? Will a special session for redistricting be required? Can the state wait for its 2022 session? How fast can the job be done? What will an accelerated timeframe mean for public input? Is there a backup plan in place, such as a commission or a court? Is the state required to use census data? (A few states have provisions for alternatives—not that I know of any good alternative sources yet.)

More broadly: If the states can have a unified voice before Congress on this question, what would that voice say? If you've got an answer to that, please let me know.

Wendy Underhill is the director of NCSL's elections and redistricting program.

Email Wendy.

Posted in: Elections, Census, COVID-19

Actions: E-mail | Permalink |

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This blog offers updates on the National Conference of State Legislatures' research and training, the latest on federalism and the state legislative institution, and posts about state legislators and legislative staff. The blog is edited by NCSL staff and written primarily by NCSL's experts on public policy and the state legislative institution.

Click here to read posts from our retired blog: **"The Thicket"**

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E IBIT 12

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Louisiana and the Census

The U.S. Census Bureau's goal for the federal decennial census is to **count all the people** living in the United States, **count them only once and count them in the right place**. States care about the census because its data are used for the distribution of federal funding and political power, and is used by decision-makers in the private and public sectors at all levels.

The census is a **federal project** conducted with federal funding, although **some states have allocated funding for census outreach**.

This profile includes: a) what census data means for Louisiana in terms of political and economic power, b) key demographic data for Louisiana, and c) what Louisiana is doing to encourage a full count.

POLITICAL POWER

Every decade, the seats in the U.S. House of Representatives are recalculated based on the latest census data. The new apportionment of congressional seats will be released on Dec. 31, 2020. According to Election Data Services, **Louisiana is projected to keep the same number of seats**, which is 6 congressional seats. That means Louisiana also will have the same number of electoral college seats.

Census data is also the foundation for **Louisiana's Legislature to draw congressional districts and legislative districts**.

CORE LOUISIANA STATS

Louisiana's total population was 4,533,372, according to the 2010 Census. **In 2018, the Census Bureau's estimate for Louisiana's population was 4,659,978, a growth of 2.79% in nine years**. Louisiana has the 25th largest population in the nation, and its growth rate is 32nd.

HARD TO COUNT POPULATIONS AND UNDERCOUNTS

The Census Bureau estimates **25.5% of people in Louisiana did not self-respond to the 2010 census**, representing what have come to be known as "hard to count" populations. Generally, the hard-to-count groups tend to be children younger than 5, immigrants, racial and ethnic minorities, rural residents, low-income people, homeless and Native Americans.

ECONOMIC POWER

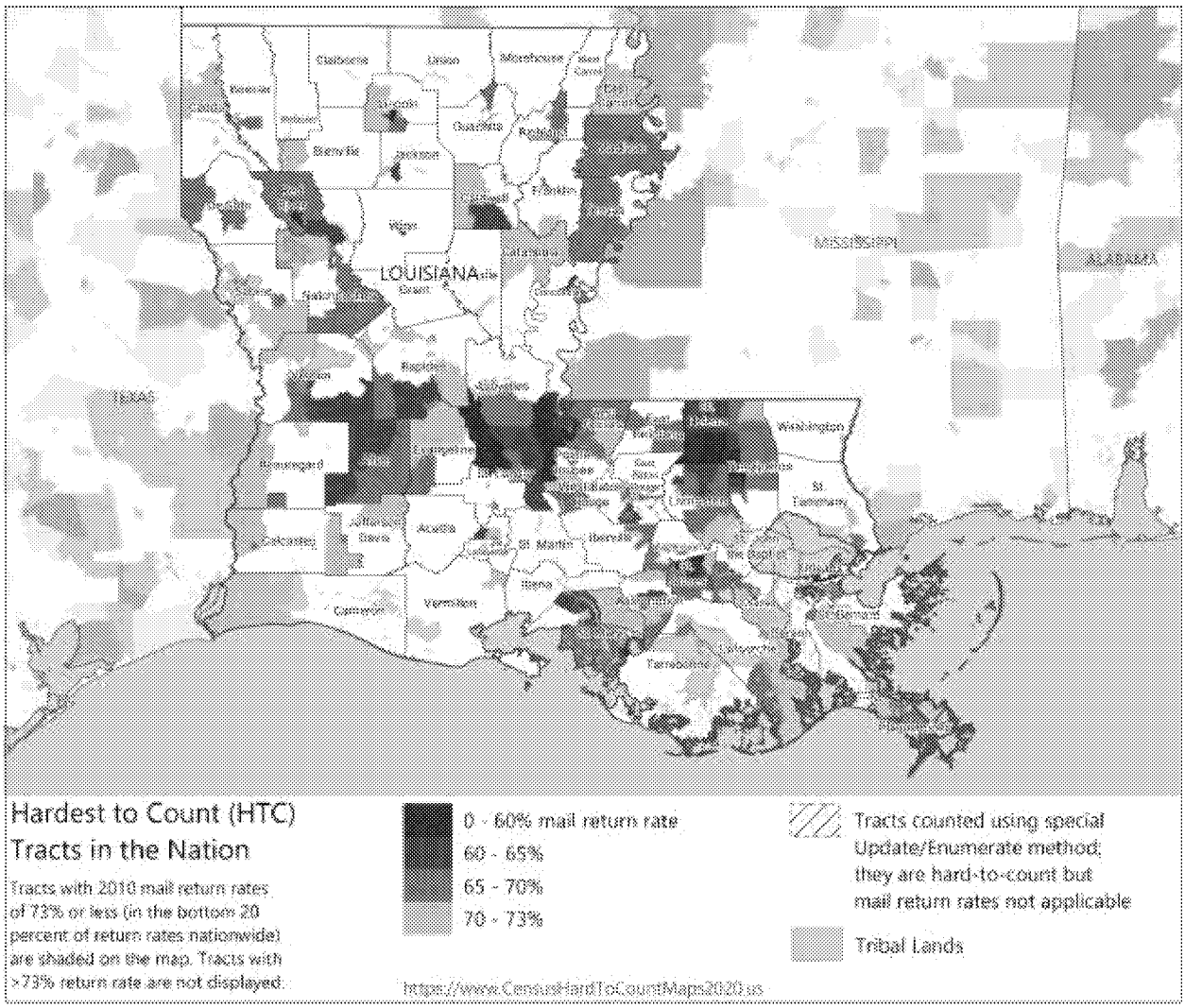
Federal funding is distributed to states and localities based on formulas that rely on census data. Based on Counting for Dollars 2020 by Andrew Reamer of George Washington University, Louisiana received $14,470,446,489 in FY2016 from federal funds distributed through 55 federal spending programs that are guided by data derived from the 2010 census. That equals $3,191.98 per Louisiana resident, on average, and every year in this decade.

Private and public sector decisionmakers often rely on census data as well. The Census Bureau has created several tools for public use, including the Economic Census and the Census Business Builder.

Nationwide, the Census Bureau estimated an overcount of 0.01% in 2010, though individual states could have either an overcount or an undercount. Both overcounts and undercounts can create inaccuracies and affect states' needs. **In Louisiana the overcount was estimated at 16,700**. Undercounts affect a state's federal funding and potentially congressional representation if they are on the cusp of losing or gaining a seat.

ENSURING A COMPLETE COUNT

Louisiana has created the **Louisiana Complete Count Committee** a complete count committee. While some states are providing additional funds, others have decided not to do. Their reasoning stems from the fact the census is a federal action and there are already many local committees and philanthropic and nonprofit agencies working to support it.



CONTACTS AND RESOURCES

- Louisiana state census contact: Dr. Tai Istre, tai.istre@la.gov
- Census Bureau's Regional Offices and Census Bureau's 2020 Census Toolkit for State and Local Officials
- POGO Report on how five federal programs affect Louisiana communities.
- NCSL's LegisBrief, State Efforts to Support the Census
- NCSL's LegisBrief, What You Need to Know about the Census
- NCSL's LegisBrief, Everyone Needs to Be Counted, But How?
- NCSL's 2020 Census Talking Points (for Legislators and Others)
- NCSL's webpage, 2020 Census Resources and Legislation
- NCSL contacts: Wendy Underhill (Wendy.underhill@ncsl.org) and Christi Zamarripa (Christi.zamarripa@ncsl.org)

Thank you to the Center for Urban Research at the CUNY Graduate Center for providing the map for this profile. An interactive version of the map is online at www.CensusHardtoCountMaps2020.us.

E IBIT 13

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Mississippi and the Census

The U.S. Census Bureau's goal for the federal decennial census is to **count all the people** living in the United States, **count them only once and count them in the right place**. States care about the census because its data are used for the distribution of federal funding and political power, and is used by decision-makers in the private and public sectors at all levels.

The census is a **federal project** conducted with federal funding, although **some states have allocated funding for census outreach**.

This profile includes: a) what census data means for Mississippi in terms of political and economic power, b) key demographic data for Mississippi, and c) what Mississippi is doing to encourage a full count.

POLITICAL POWER

Every decade, the seats in the U.S. House of Representatives are recalculated based on the latest census data. The new apportionment of congressional seats will be released on Dec. 31, 2020. According to Election Data Services, **Mississippi is projected to keep the same number of seats**, which is 4 congressional seats. That means Mississippi also will have the same number of electoral college seats.

Census data is also the foundation for **Mississippi's Legislature to draw congressional districts and legislative districts**.

CORE MISSISSIPPI STATS

Mississippi total population was 2,967,297, according to the 2010 Census. **In 2018, the Census Bureau's estimate for Mississippi population was 2,986,530, a growth of 0.65% in nine years**. Mississippi has the 34th largest population in the nation, and its growth rate is 45th.

HARD TO COUNT POPULATIONS AND UNDERCOUNTS

The Census Bureau estimates **23.6% of people in Mississippi did not self-respond to the 2010 census**, representing what have come to be known as "hard to count" populations. Generally, the hard-to-count groups tend to be children younger than 5, immigrants, racial and ethnic minorities, rural residents, low-income people, homeless and Native Americans.

Nationwide, the Census Bureau estimated an overcount of 0.01% in 2010, though individual states could have either an overcount or an undercount. Both overcounts and undercounts can create inaccuracies and affect states' needs. In **Mississippi the undercount was estimated at 6,900**. Undercounts affect a state's federal funding and potentially congressional representation if they are on the cusp of losing or gaining a seat.

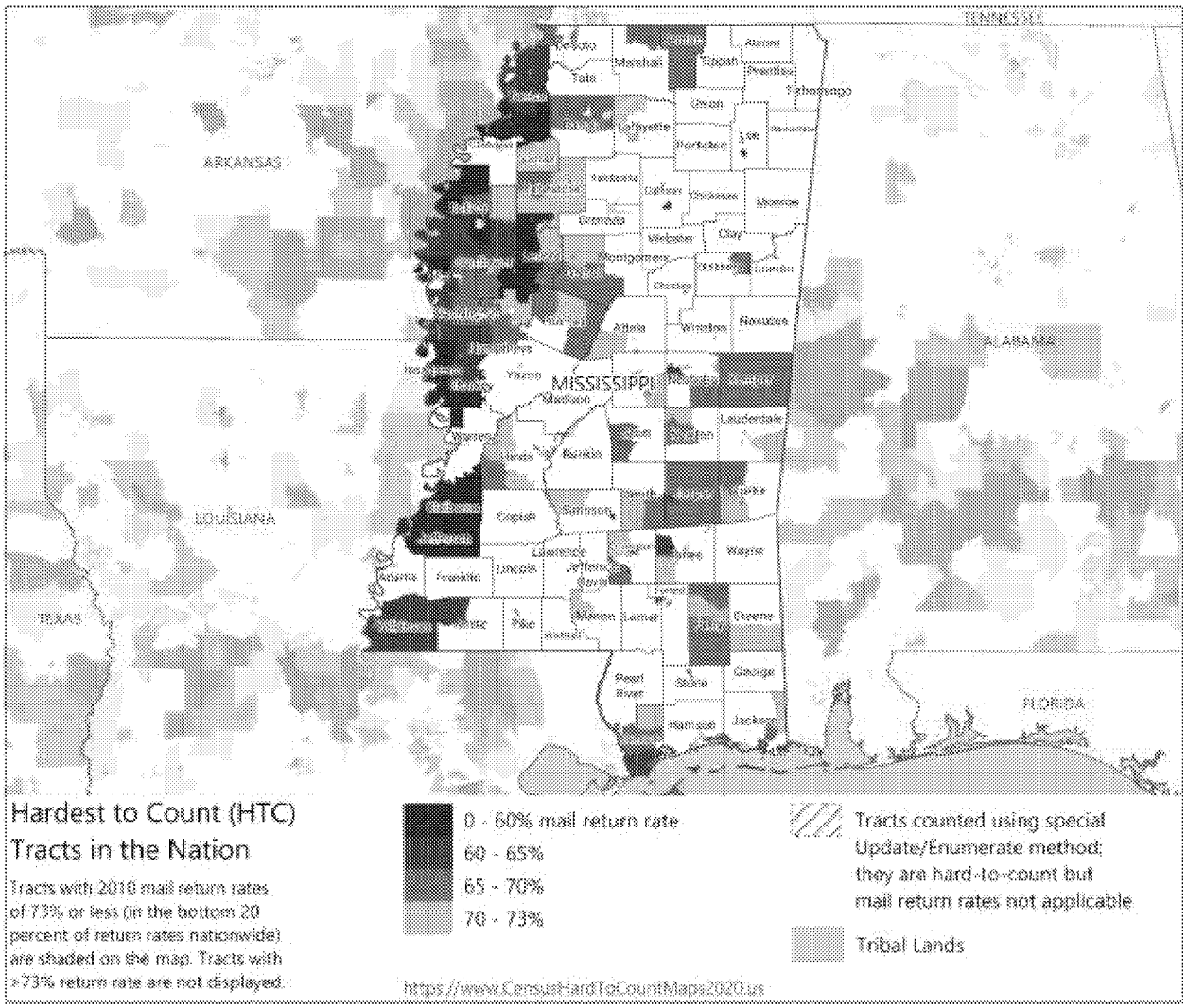
ECONOMIC POWER

Federal funding is distributed to states and localities based on formulas that rely on census data. Based on Counting for Dollars 2020 by Andrew Reamer of George Washington University, Mississippi received $10,113,194,229 in FY2016 from federal funds distributed through 55 federal spending programs that are guided by data derived from the 2010 census. That equals $3,408.22 per Mississippi resident, on average, and every year in this decade.

Private and public sector decisionmakers often rely on census data as well. The Census Bureau has created several tools for public use, including the Economic Census and the

ENSURING A COMPLETE COUNT

Mississippi has created **Mississippi's Complete Count Committee**. While some states are providing additional funds, others have decided not to do. Their reasoning stems from the fact the census is a federal action and there are already many local committees and philanthropic and nonprofit agencies working to support it.



CONTACTS AND RESOURCES

- Mississippi state census contact: Bobby Morgan, bobby.morgan@governor.ms.gov
- Census Bureau's Regional Offices
- Census Bureau's 2020 Census Toolkit for State and Local Officials
- POGO Report on how five federal programs affect Mississippi communities.
- NCSL's LegisBrief, State Efforts to Support the Census
- NCSL's LegisBrief, What You Need to Know about the Census
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Thank you to the Center for Urban Research at the CUNY Graduate Center for providing the map for this profile. An interactive version of the map is online at www.CensusHardtoCountMaps2020.us.

EXHIBIT 14

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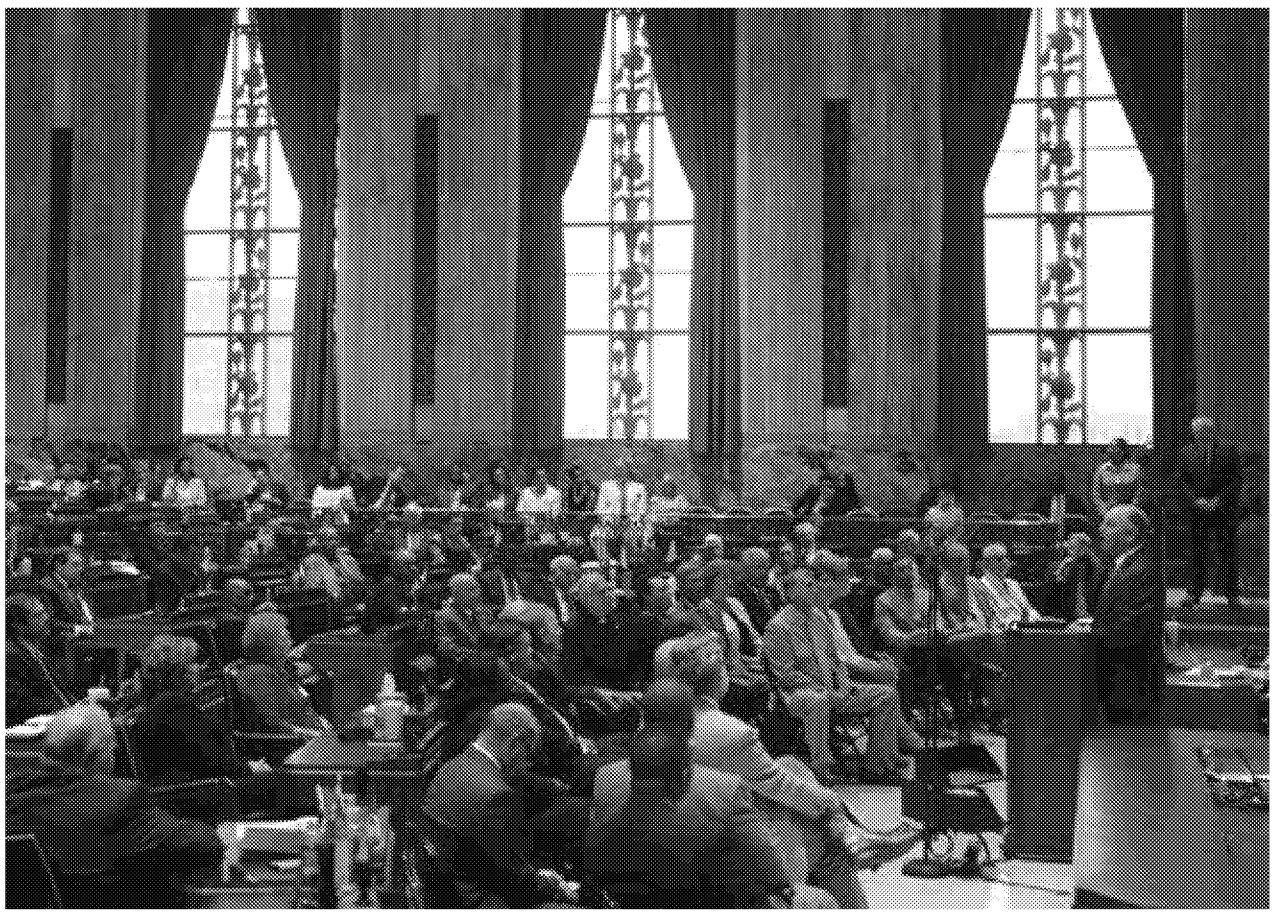
https://www.nola.com/news/politics/article_b18b9f36-212b-5cd5-82db-9685c9123a26.html

Louisiana Legislature's three special sessions cost over $1.5 million

Julia O'Donoghue, NOLA.com | The Times-Picayune
PUBLISHED JUL 20, 2018 AT 7:32 PM | UPDATED JUL 11, 2019 AT 12:38 PM



Louisiana's three special sessions held in 2018 to pass taxes cost the public over $1.5 million. (Gerald Herbert)

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The Louisiana Legislature spent $1.55 million holding three special sessions in an attempt to pass taxes in 2018, according to information provided by the state House and Senate in response to a public records request. The sessions lasted a collective 36 days and cost an average of $42,921 in public funding per day to hold.

Almost 60 percent of the $1.55 million spent went to paying lawmakers' per diem expenses and the reimbursements they receive for driving to Baton Rouge. In total, that cost the state $906,293 over three special sessions, according to the records provided.

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None of the sessions would have been necessary if the state had resolved its dispute over taxes and budgeting during the Legislature's regular session in 2017, when raising taxes could be considered. Lawmakers are prohibited by state law from considering taxes during regular sessions in even-numbered years, like 2018. That is why they had to call special sessions to deal with their tax disputes this year.

The first and second special sessions ended in failure, without the tax standoff being resolved. During the third special session, Gov. John Bel Edwards and the Legislature agreed to renew an expiring portion of the state sales tax for another seven years.

Louisiana's sales tax was originally scheduled to drop from 5 to 4 percent on June 30, but Edwards and the Legislature enacted a new rate of 4.45

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percent in order to avoid large funding reductions to health care and higher education.

Conservative lawmakers in the House had said they were happy that the Legislature didn't end up passing taxes in 2017, or even during the first special session held in 2018. Louisiana's budget gap -- which was driving the push for higher taxes -- became considerably smaller in April, after the first special session was held.

A federal tax cut this year resulted in a state income tax increase in Louisiana, which is estimated to bring an additional $346 million into the state in the current budget cycle. Had the Legislature passed new taxes in 2017, lawmakers wouldn't have known about that extra funding and the tax rate may have been higher than it needed to be.

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Early estimates -- ones used during the first special session -- for the boost in income tax collections were also lower than the later projections ended up being, as the state collected better data. The delay, conservative lawmakers have argued, ensured Louisiana didn't raise taxes as high as it might have.

Still, after the first special session ended in a meltdown, the Legislature tried to save money by holding the second special session at the end of when the Legislature's regular session was supposed to be held. Essentially, they agreed to end their regular session early -- so they could cut costs and hold the second special session during the same time period.

Records show that the second special session was the cheapest of the three in some ways. Its costs were about $38,247 per day, as opposed to the $42,865 per day that was charged during the first special session.

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"Any cost saving was used to figure the cost of the session," in the House, said Alfred Speer, Clerk of the House and keep of its public records. "The lower per day cost is reflective of expense reductions due to the 2nd special utilizing days allotted to the regular."

Senate staff, however, said its chamber didn't actually spend any additional money on the second special sessio. Yolanda Dixon, first assistant secretary of the Senate, said she would have expected the regular session to fully absorb the cost of the second special session in the Senate under normal circumstances.

"[B]ecause the 2nd special session occurred within the same time frame as a normal Regular Session, the costs for the 2nd special session are the same costs as would have been incurred during the Regular Session," wrote Dixon in an email Friday. "So actually, the costs of the 2nd special are not additional costs because they would have been incurred anyway."

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But the Legislature and Edwards failed to reach a tax agreement during the second special session -- which meant a third special session was held. And that third session was the most expensive of the bunch by some calculations. It was cheaper only because it was shorter -- lasting seven days instead of two weeks like the other two. But the per day costs of the third special session were much higher than the other two. Records show the third session cost $52,385 per day.

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TODAY'S MEETINGS, 9/20/2020

sort by date/time

No meetings are scheduled for today.

View Upcoming Meetings

2020 INTERIM INFORMATION

The 2021 Regular Legislative Session will convene at noon on Monday, April 12, 2021. Final Adjournment no later than 6:00 pm on Thursday, June 10, 2021.

The 2020 First Extraordinary Session convened on Monday, June 1, 2020. Final Adjournment on Tuesday, June 30, 2020.

The 2020 Regular Legislative Session convened on Monday, March 9, 2020. Final Adjournment on Monday, June 1, 2020.

The 2020 Organizational Session convened on Monday, January 13, 2020. Final Adjournment on Monday, January 13, 2020.

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2020 Proposed Constitutional Amendments for the November 3 Elections

2021 Regular Session House of Representatives Bulletin
2021 Regular Session Senate Bulletin

2020 First Extraordinary Session Information
- Citator Index to Acts
- Effective Dates of Acts
- Act Numbers to Bills Passed (Final update on July 16, 2020)
- Bill Numbers to Acts (Final update on July 16, 2020)
- Vetoed Bills (Final update on July 16, 2020)
- Subject Index to Acts

2020 Regular Session Information
- Citator Index to Acts
- Effective Dates of Acts
- Act Numbers to Bills Passed (Final update on June 17, 2020)
- Bill Numbers to Acts (Final update on June 17, 2020)
- Vetoed Bills (Final update on June 15, 2020)
- Subject Index to Acts

Future Session Dates

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E IBIT 16

St. John, Joseph

From: Sadik.Huseny@lw.com
Sent: Wednesday, September 23, 2020 10:47 AM
To: Alexander.V.Sverdlov@usdoj.gov; St. John, Joseph
Cc: steven.bauer@lw.com; Amit.Makker@lw.com; Shannon.Lankenau@lw.com; rick.bress@lw.com; Melissa.Sherry@lw.com; Anne.Robinson@lw.com; Tyce.Walters@lw.com; Genevieve.Hoffman@lw.com; Gemma.Donofrio@lw.com; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percivalk@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcpaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lhough@edelson.com; dpongrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Brad.Rosenberg@usdoj.gov; FedProg.ECF@usdoj.gov; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Dan.Mauler@usdoj.gov; Murrill, Elizabeth; brad@benbrooklawgroup.com; Kollmeyer, Josiah
Subject: RE: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

This email originated outside of Louisiana Department of Justice. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Scott,

We're a little confused about the timing of your potential motion here, as our lawsuit was filed over a month ago, and Louisiana's Attorney General could have reached out to us a long time ago to discuss the case/talk through any relevant issues. Given the current procedural posture, we would need to know a bit more before agreeing to anything regarding a potential motion or related briefing.

Let's proceed in this fashion. Please send us whatever motion Louisiana/any other states intend to file. Also, please let us know who at the Louisiana Governor's office you've been in touch with, along with those folks at other states you have reached out to, so that we may understand the relevant constituencies and claimed interests at play. Once we have your motion and that information, I'd be happy to get on a call with you to meet and confer; I would also be in position to separately meet and confer with the other relevant state actors. And all of that would allow us to gauge our position about the claimed interests at issue that would drive any motion to intervene, and let you know Plaintiffs' position on any such intervention.

Many thanks.

Sadik

Sadik Huseny | **LATHAM & WATKINS LLP**
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email: sadik.huseny@lw.com | web: SadikHuseny

Sverdlov, Alexander V. <Alexander.V.Sverdlov@usdoj.gov>
Wednesday, September 23, 2020 5:33 AM
St. John, Joseph <StJohnJ@ag.louisiana.gov>
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Re: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

Scott,

Please represent the Defendants' position as follows:

"Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction."

Thanks,
Aleks Sverdlov

On Sep 22, 2020, at 7:41 PM, St. John, Joseph <StJohnJ@ag.louisiana.gov> wrote:

Counsel:

As previously indicated, the State of Louisiana, potentially joined by other States, intends to intervene in the above-captioned matter. In view of the district court's stated intent to issue a ruling within 48 hours, Louisiana contemplates filing its motion tomorrow morning. Louisiana will also move for expedited action and – to the extent any party opposes – a shortened response time of 24 hours. Please let me know your position by 08:00 a.m. Central tomorrow, September 23, 2020.

Don't hesitate to call with any questions or if you would like to meet-and-confer via telephone.

Best regards,
Scott

<image001.png>

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E IBIT 17

Redistricting Timeline
as of 1/24/11
*Indicates tentative date

- December 21, 2010: President of the U.S. notified of the population of each state
- January 19, 2011: House Committee Hearing on Redistricting Rules
- February 2, 2011*: Census Data is delivered to the Legislature
- February 15, 2011*: Committee hearing on Census data

- February 17-March 1, 2011: Public Hearings around the state

February

Thursday, 17th	10:00 a.m.	Covington
Thursday, 17th	6:00 p.m.	New Orleans
Monday, 21st	10:00 a.m.	Houma
Monday, 21st	6:00 p.m.	Baton Rouge
Tuesday, 22nd	10:00 a.m.	Lake Charles
Tuesday, 22nd	6:00 p.m.	Lafayette
Monday, 28th	6:00 p.m.	Shreveport

March

Tuesday, 1st	10:00 a.m.	Monroe
Tuesday, 1st	6:00 p.m.	Alexandria

- March 17-18, 2011*: Committee Hearings on draft plans
- March 20–April 13, 2011: Extraordinary Session to establish new Legislative, Congressional, Supreme Court, Courts of Appeal, Public Service Commission, and Board of Elementary and Secondary Education (BESE) districts
- April 25-June 23, 2011: Regular Session
- End of April-May 2, 2011*: Submission of Plans for preclearance
- August 29, 2011: Deadline for Secretary of State to receive notice of preclearance of plans for Legislature and BESE for inclusion on fall ballot
- September 6 - 8, 2011: Qualifying dates for Legislative & BESE elections
- October 22, 2011: Primary Election for the legislature and BESE
- November 19, 2011: General Election
- December 31, 2011: Article III, §6 deadline for the Legislature to redistrict itself
- January 9, 2012: Inauguration Day for the legislature and statewide elected officials
- March 12-June 4, 2012: Regular Session

Dates related to the 2012 fall election cycle (except the Nov. 6, 2012, election date) are dependent upon the preclearance of Act No. 570 of the 2010 R.S. and are not included in this timeline

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE

Plaintiffs,

v.

WILBUR L. ROSS,

Defendants.

No. 5:20-cv-05799-LHK

PROPOSED ANSWER OF INTERVENOR STATES LOUISIANA AND MISSISSIPPI TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Judge: Hon. Lucy H. Koh
Action Filed: Aug. 18, 2020

INTERVENOR STATES' PROPOSED ANSWER TO AMENDED COMPLAINT

Intervenors Louisiana and Mississippi ("Intervenor States") make this Answer to Plaintiffs' Complaint in the above-captioned case. Pursuant to Federal Rule of Civil Procedure 8(b), Intervenor States deny each and every allegation contained in Plaintiffs' Complaint except for those expressly admitted herein. For the avoidance of doubt, (a) Intervenor States deny all summations, characterizations, etc. of legal authorities on the basis that such allegations state a legal conclusion as to which no response is required and that legal authorities speak for themselves, and (b) deny all headings.

INTRODUCTION

1. Admitted that this lawsuit purports to challenge a decision by Secretary of Commerce Wilbur Ross ("Ross") and Census Bureau Director Steve Dillingham ("Dillingham"). Intervenor States lack knowledge or information sufficient to determine if this purported decision was "against the judgment of the Bureau's staff"; that allegation is therefore denied. Admitted that the country is in the midst of a pandemic. Otherwise denied.
2. Admitted that the Census Bureau developed an operational plan prior to the COVID-19 pandemic, and later revised this plan in an attempt to account for difficulties associated with the pandemic. Otherwise denied.
3. Admitted that the Census Bureau released a press release on August 3, 2020, announcing that the Bureau was accelerating data collection in order to meet the statutory deadline on December 31, 2020. Otherwise denied.
4. The final sentence of this paragraph states legal conclusions as to which no response is required. To the extent a response is required, it is denied. Otherwise denied.
5. Admitted that "[d]uring Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census." Admitted that the COVID-19 pandemic has disrupted Census operations, though Intervenor States lack knowledge and information sufficient to admit to the extent of disruption claimed by the Complaint. Otherwise denied.
6. Admitted that Ross and Dillingham released a statement on April 13, 2020, announcing

TAB D

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Counsel for State Intervenors

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE *et al*

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

NOTICE OF MOTION AND MOTION TO SHORTEN TIME AND TO E PEDITE BY STATES OF LOUISIANA AND MISSISSIPPI

Judge: Hon. Lucy H. Koh
Location: San Jose Courthouse, Courtroom 8

Action Filed: Aug. 18, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Local Rule 6-3, the States of Louisiana and Mississippi (collectively, "State Intervenors") respectfully move to shorten the response time to their Motion to Intervene (ECF 204) to make any opposition due no later than 5 p.m. on September 24, 2020. State Intervenors further request that the Court rule on their Motion to Intervene promptly thereafter. In support thereof, the State Intervenors state:

1. Louisiana and Mississippi are sovereign States that have significant protectable interests in connection with the census, including the size of their Congressional delegations, proportionate allocation of limited federal resources, and the Equal Protection rights of their citizens.

2. On September 5, 2020, the Court granted Plaintiffs' motion for a temporary restraining order until a September 17, 2020, hearing on Plaintiffs' motion for a preliminary injunction. Order (ECF 84) ("TRO"). That TRO enjoined the federal defendants from implementing their current plan for the census, *id.* at 6-7, which would have reallocated Census Bureau resources to jurisdictions like Louisiana and Mississippi that are lagging in enumeration, then ceased data collection on or about September 30, 2020, *see* Fontenot Decl. (ECF 81-1) ¶¶ 95-97, 100; St. John Decl. Exhs. 10, 12, 13 (ECF 204-11, 204-13, 204-14).

3. If census data collection is extended beyond September 30, "the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021." (ECF 81-1) at ¶ 100. Like other states, Louisiana and Mississippi would suffer additional harms from that delay as their own redistricting and reapportionment procedures are delayed. A morass of litigation will likely follow.

4. Nevertheless, on September 17, this Court continued a previously-set preliminary injunction hearing to September 22, 2020, and extended its TRO until "until the Court issues its decision on the preliminary injunction motion or through September 24, 2020, whichever is sooner." Order (ECF 142) ("TRO Extension") at 3. The TRO Extension also made clear that the federal Defendants were not adequately representing the Intervenor States' interests in prompt resolution of this case. *See id.* at 13-17.

BC-DOC-0000027655

5. The Louisiana Attorney General's Office first learned of this litigation, the TRO, and the TRO Extension on the afternoon of September 17, 2020. *See* St. John Decl. ¶ 1.

6. Louisiana believed it needed to intervene to protect its interests, but recognized that drafting a Proposed Answer to Plaintiffs' 370 paragraph Amended Complaint, as required by Fed. R. Civ. P. 24, would require significant time. St. John Decl. ¶ 2. Louisiana accordingly retained local counsel and appeared on September 17, 2020, Notice of Appearance (ECF 144), then filed a Notice of Intent to Intervene (ECF 146) ("Notice of Intent") on the morning of September 18, *i.e.*, less than 24 hours after the Court entered the TRO Extension. The Notice of Intent identified in general terms Louisiana's interests, the harms this litigation poses to those interests, and Louisiana's intent to intervene.

7. During the September 22, 2020, preliminary injunction hearing, the Court stated it intended to rule on Plaintiffs' motion for a preliminary injunction within 24 to 48 hours. The Court expressly noted the likelihood of expedited appellate proceedings.

8. After the preliminary injunction hearing, counsel for Louisiana emailed counsel for the parties:

> As previously indicated, the State of Louisiana, potentially joined by other States, intends to intervene in the above-captioned matter. In view of the district court's stated intent to issue a ruling within 48 hours, Louisiana contemplates filing its motion tomorrow morning. Louisiana will also move for expedited action and – to the extent any party opposes – a shortened response time of 24 hours. Please let me know your position by 08:00 a.m. Central tomorrow, September 23, 2020.

St. John Decl. Exh. 1.

9. Counsel for Defendants responded at 7:40 a.m. Central Time:

> Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction.

St. John Decl. Exh. 1.

10. Counsel for Plaintiffs delayed responding until 10:45 a.m. Central Time, and they demanded wholly irrelevant information such as "who at the Louisiana Governor's office you've been in touch with, along with those folks at other states you have reached out to" before meeting and conferring. St. John Decl. Exh. 1. Counsel for Plaintiffs did not provide a position on Louisiana's contemplated motions. *See id.*

11. Thereafter, Louisiana, joined by Mississippi, moved to intervene at approximately noon Pacific Time on September 23, 2020. Motion to Intervene (ECF 204).

12. Counsel for Louisiana then again emailed counsel for Plaintiffs seeking their position on a motion to shorten response time and to expedite, and offered to meet-and-confer via telephone. St. John Decl. Exh. 1. Plaintiffs did not respond. St. John Decl. ¶ 5.

13. As detailed in State Intervenors' Motion to Intervene and under Plaintiffs' allegations, State Intervenors have been and are being irreparably harmed by the TRO and TRO Extension because Census Bureau resources are being diverted to other jurisdictions, despite the lagging enumeration in Louisiana and Mississippi and their significant hard-to-count populations. State Intervenors will be further harmed by any preliminary injunction.

14. Although intervention at the appellate stage is permissible, the standard is demanding. *See, e.g.*, *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (en banc); *Bates v. ones*, 127 F.3d 870, 873 (9th Cir. 1997). State Intervenors seek a shortened response time and expedited resolution of their Motion to Intervene to ensure they can participate in the expedited appellate proceedings that this Court noted are likely to follow any preliminary injunction.

15. State Intervenors have not previously requested any time modifications in this case. The requested time modification should not have any effect on other aspects of this case.

CONCLUSION

Federal Courts have recognized the interest of States in the census and have accordingly permitted States to intervene in disputes over the census. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 459 (2002). To ensure that Louisiana and Mississippi can protect their interests and participate in any expedited appellate proceedings, they respectfully request that this Court make any response to their Motion to Intervene due no later than 5 p.m. Pacific Time on September 24, 2020, and rule on that motion promptly thereafter.

Dated: September 23, 2020

Respectfully submitted,

BENBROOK LAW GROUP, P.C.

/s/ Bradley A. Benbrook

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Counsel for the State of Louisiana

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE *et al*,

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

DECLARATION OF JOSEPH S. ST. JOHN ISO LOUISIANA AND MISSISSIPPI'S MOTION TO SHORTEN RESPONSE TIME AND TO E PEDITE

Judge: Hon. Lucy H. Koh
Action Filed: Aug. 18, 2020

BC-DOC-0000027659

DECLARATION OF JOSEPH S. ST. JOHN

I, Joseph Scott St. John, am employed by the Louisiana Department of Justice; I serve as counsel to the State of Louisiana in connection with the above-captioned matter. I make this declaration in support of Louisiana and Mississippi's Motion to Shorten Response Time and to Expedite. I am competent to testify as to the matters set forth herein.

1. I am informed and believe that the Louisiana Attorney General's Office first learned of this litigation, the TRO, and the TRO Extension on the afternoon of September 17, 2020.

2. Although Louisiana decided on September 17, 2020, that it likely needed to intervene to protect its interests, I recogni ed that drafting a Proposed Answer to Plaintiffs' 370 paragraph Amended Complaint, as re uired by Fed. R. Civ. P. 24, would re uire significant time.

3. I performed an initial review of the facts in this case, then researched and drafted a Notice of Intent to Intervene overnight on September 17-18, 2020 so as to timely alert the Court and the parties about Louisiana's interests and the impact of this litigation on those interests. That Notice was filed on the morning of September 18, 2020.

4. Attached hereto as Exhibit 1 is a true and accurate copy of email correspondence between counsel regarding Louisiana's contemplated Motion to Intervene and Motion to Shorten Time and Expedite.

5. As of 5:30 p.m. Central Time, Counsel for Plaintiffs has not responded to Louisiana's offer to meet-and-confer telephonically.

6. Further declarant sayeth naught.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA AND THE STATE OF LOUISIANA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed in New Orleans, Louisiana this 23rd day of September 2020.

/s/ Joseph S. St. John

E IBIT 1

St. John, Joseph

From: St. John, Joseph
Sent: Wednesday, September 23, 2020 2:4 PM
To: Sadik.Huseny@lw.com ; Alexander.V.Sverdlov@usdoj.gov
Cc: steven.bauer@lw.com; Amit.Makker@lw.com; Shannon.Lankenau@lw.com; rick.bress@lw.com; Melissa.Sherry@lw.com; Anne.Robinson@lw.com; Tyce.Walters@lw.com; Genevieve.Hoffman@lw.com; Gemma.Donofrio@lw.com; kclarke@lawyerscommittee.org; jgreenbaum@lawyerscommittee.org; erosenberg@lawyerscommittee.org; dspence@lawyerscommittee.org; asaini@lawyerscommittee.org; mjordan@lawyerscommittee.org; pchaudhuri@lawyerscommittee.org; mike.feuer@lacity.org; kathleen.kenealy@lacity.org; danielle.goldstein@lacity.org; mike.dundas@lacity.org; weiserw@brennan.law.nyu.edu; wolf@brennan.law.nyu.edu; percivalk@brennan.law.nyu.edu; legalwebmail@ci.salinas.ca.us; michaelmu@ci.salinas.ca.us; dmcpaul@nndoj.org; jasearle@nndoj.org; mrosenbaum@publiccounsel.org; rbalabanian@edelson.com; lhough@edelson.com; dpongrace@akingump.com; dfrommer@akingump.com; Rebecca.hirsch2@cityofchicago.org; David.Holtzman@hklaw.com; Brad.Rosenberg@usdoj.gov; FedProg.ECF@usdoj.gov; david.m.morrell@usdoj.gov; alexander.haas@usdoj.gov; Dan.Mauler@usdoj.gov; Murrill, Elizabeth; brad@benbrooklawgroup.com; Kollmeyer, Josiah
Subject: RE: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

Sadik:

Plaintiffs' actions are harming Louisiana; Plaintiffs never sought the Louisiana Attorney General's input before taking those actions; and Louisiana is taking prompt action to protect its interests and the interests of its citizens. I'm disappointed that a large California law firm feels the need for an extensive back-and-forth over whether Louisiana and its citizens should be heard. Nevertheless, I'm available to discuss the simple question of a shortened response time and expedited relief at any time in the next hour. You can reach me at 225-485-2458. Otherwise, we will state that Plaintiffs declined to provide a response.

Best regards,
Scott

---

r Sadik.Huseny@lw.com [mailto:Sadik.Huseny@lw.com]
Wednesday, September 23, 2020 10:47 AM
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RE: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

CAUTION: *This email originated outside of Louisiana Department of Justice. Do not click links or open attachments unless you recognize the sender and know the content is safe.*

Hi Scott,

We're a little confused about the timing of your potential motion here, as our lawsuit was filed over a month ago, and Louisiana's Attorney General could have reached out to us a long time ago to discuss the case/talk through any relevant issues. Given the current procedural posture, we would need to know a bit more before agreeing to anything regarding a potential motion or related briefing.

Let's proceed in this fashion. Please send us whatever motion Louisiana/any other states intend to file. Also, please let us know who at the Louisiana Governor's office you've been in touch with, along with those folks at other states you have reached out to, so that we may understand the relevant constituencies and claimed interests at play. Once we have your motion and that information, I'd be happy to get on a call with you to meet and confer; I would also be in position to separately meet and confer with the other relevant state actors. And all of that would allow us to gauge our position about the claimed interests at issue that would drive any motion to intervene, and let you know Plaintiffs' position on any such intervention.

Many thanks.

Sadik

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From: Sverdlov, Alexander V. <Alexander.V.Sverdlov@usdoj.gov>
Sent: Wednesday, September 23, 2020 5:33 AM
To: St. John, Joseph <StJohnJ@ag.louisiana.gov>
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Subject: Re: National Urban League et al v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal.)

Scott,

Please represent the Defendants' position as follows:

"Defendants consent, but respectfully urge the Court not to delay resolution of Plaintiffs' motion for a preliminary injunction."

Thanks,
Aleks Sverdlov

On Sep 22, 2020, at 7:41 PM, St. John, Joseph <StJohnJ@ag.louisiana.gov> wrote:

Counsel:

As previously indicated, the State of Louisiana, potentially joined by other States, intends to intervene in the above-captioned matter. In view of the district court's stated intent to issue a ruling within 48 hours, Louisiana contemplates filing its motion tomorrow morning. Louisiana will also move for expedited action and – to the extent any party opposes – a shortened response time of 24 hours. Please let me know your position by 08:00 a.m. Central tomorrow, September 23, 2020.

Don't hesitate to call with any questions or if you would like to meet-and-confer via telephone.

Best regards,
Scott

<image001.png>

Joseph Scott St. John
Deputy Solicitor General
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE *et al*,

Plaintiffs,

v.

WILBUR L. ROSS *et al*,

Defendants.

No. 5:20-cv-05799-LHK

PROPOSED ORDER

Judge: Hon. Lucy H. Koh
Action Filed: Aug. 18, 2020

PROPOSED ORDER

The Motion to Shorten Time and to Expedite file by the States of Louisiana and Mississippi is GRANTED. Any response to their Motion to Intervene (ECF 204) shall be filed no later than 5 p.m. Pacific Time on September 24, 2020.

HON. LUCY H. KOH
UNITED STATES DISTRICT JUDGE

BC-DOC-0000027666

TAB E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, et al.,

Defendants.

Case No. 20-CV-05799-LHK

ORDER GRANTING PLAINTIFFS' MOTION FOR STAY AND PRELIMINARY INJUNCTION

Re: Dkt. No. 36

Plaintiffs 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; Adrian Garcia; National Association for the Advancement of Colored People; City of Chicago, Illinois; County of Los Angeles, California; Navajo Nation; and Gila River Indian Community (collectively, "Plaintiffs") sue Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S. Department of Commerce; the Director of the U.S. Census Bureau Steven Dillingham, and the U.S. Census Bureau ("Bureau") (collectively, "Defendants") for violations of the Enumeration Clause and the Administrative Procedure Act ("APA").

Before the Court is Plaintiffs' motion for stay and preliminary injunction ("motion for preliminary injunction"). Having considered the parties' submissions; the parties' oral arguments at the September 22, 2020 hearing and numerous case management conferences; the relevant law; and the record in this case, the Court GRANTS Plaintiffs' motion, STAYS the Replan's September

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30, 2020 and December 31, 2020 deadlines, and preliminarily ENJOINS Defendants from implementing these deadlines.

I. BACKGROUND

A. Factual Background

The 2020 Census is "a 15.6 billion dollar operation years in the making." Defendants' Opp. to Plaintiffs' Motion for Stay and Preliminary Injunction at 1 ("PI Opp."). As a result, after nearly a decade of preparation, Defendants adopted a final operational plan for the 2020 Census in December 2018 called the Operational Plan Version 4.0. However, in March 2020, shortly after the beginning of data collection, the COVID-19 pandemic upended Defendants' Operational Plan and necessitated more time for census operations. Accordingly, on April 13, 2020, Defendants adopted the COVID-19 Plan, which elongated the schedule for data collection and processing and the Secretary of Commerce's reports of population "tabulations" to the President and the states. *See* 13 U.S.C. § 141(b), (c). On August 3, 2020, Defendants announced the Replan, which reduced the COVID-19 timeframes for data collection and processing by half.

Below, the Court first describes census data collection, data processing, and reporting in general terms. The Court then details the deadlines for these operations under the Operational Plan Version 4.0; the COVID-19 Plan; and the Replan.

1. Deadlines for data collection, data processing, and the Secretary's reports to the President and the states.

As relevant here, there are four key deadlines in the 2020 Census. First is the deadline for self-responses to census questionnaires. At the end of the self-response period, the Census Bureau stops accepting responses to the census.

Second is the deadline on which Non-Response Follow-Up ("NRFU") ceases. NRFU refers to the process of "conduct[ing] in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire." Fontenot Decl. ¶ 48. "The NRFU Operation is entirely about hard-to-count populations." ECF No. 37-5 at 219. NRFU is thus "the most important census operation to ensuring a fair and accurate count." Thompson Decl. ¶ 15.

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Together, self-responses and NRFU comprise the census's data collection.

Third is the deadline for data processing after data collection. Data processing refers to the Bureau's "procedures to summarize the individual and household data that [the Bureau] collect[s] into usable, high quality tabulated data products." Fontenot Decl. ¶ 66.

Lastly, at the end of data collection and processing, the Secretary of Commerce issues two reports pursuant to the Census Act: (1) "the tabulation of total population by States" for congressional apportionment to the President by December 31, 2020, *see* 13 U.S.C. § 141(b); and (2) a tabulation of population for redistricting to the states by April 1, 2021, *see id.* § 141(c).

2. The Operational Plan Version 4.0, adopted in December 2018, provided a total of 54 weeks for the 2020 Census.

Defendants' sole declarant, Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the U.S. Census Bureau,[1] describes the Bureau's extensive work over nearly a decade to develop the Operational Plan Version 4.0 (hereafter, "Operational Plan"). For example, Associate Director Fontenot discusses eight significant census tests the Bureau performed in 2013, 2014, 2015, 2016, and 2018 to improve their field operations. Fontenot Decl. ¶ 71. Associate Director Fontenot describes partnerships with stakeholders such as organizations, tribes, and local governments. *E.g.*, Fontenot Decl. ¶¶ 12, 28. The Operational Plan reflects the conclusions of subject-matter experts such as statisticians, demographers, geographers, and linguists. *See, e.g.*, ECF No. 37-5 at 79, 144 (2020 Census Operational Plan—Version 4.0).

Under the Operational Plan adopted in December 2018, self-responses spanned 20.5 weeks from March 12 to July 31, 2020. NRFU spanned 11.5 weeks from May 13 to July 31, 2020. Data processing spanned 22 weeks from August 1 to December 31, 2020. These operational dates would culminate in the Secretary of Commerce issuing his reports by the statutory deadlines. Specifically, by December 31, 2020, the Secretary would report "the tabulation of total population

[1] For an organizational chart of the Census Bureau, *see* Census Bureau Organizational Chart, https://www.census.gov/about/who.html, ECF No. 150-3. Director Steven Dillingham and Deputy Director Ron Jarmin head the Bureau, and their direct reports are Associate Directors.

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by States" to the President for the purpose of Congressional apportionment. By April 31, 2021, the Secretary would report the tabulation of population to the states for the purpose of redistricting. 13 U.S.C. § 141(b).

3. COVID-19 pandemic causes suspension of census operations.

Six days after the self-response period began on March 12, 2020, the Bureau announced on March 18, 2020 that it would suspend all field operations for two weeks because of the COVID-19 pandemic. *See* 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.

The Bureau foresaw an eight-week operational delay, according to an internal Bureau document dated March 24, 2020 and sent by the Bureau Deputy Director's Chief Advisor, Enrique Lamas, to senior staff. The document stressed the importance of maintaining an uncompressed schedule. Reasons for maintaining an uncompressed schedule included completing the workload remaining and operations that ensured a complete count of all population groups:

- The document stated that "staff had covered only about 10% of the workload when [the Bureau] had to stop." DOC_7087.
- The document further noted that operations "focused on counting populations not living in traditional housing, such as nursing home residents, college students, the military, prisoners, the homeless, and the transitory populations are being planned and will be conducted as it is safe for Census employees and the public to engage in face-to-face activities. These operations and our nonresponse follow-up operation, all need to be completed before the Census Bureau can begin processing the data to ensure that we have a complete count of the population and not undercount specific population groups." DOC_7088.

In line with the Bureau's expectation of a long delay, the Bureau announced another two-week suspension on March 28, 2020. Press Release, *Census Bureau Update on 2020 Census Field Operations* (Mar. 28, 2020), https://www.census.gov/newsroom/press-releases/2020/update-on-2020-census-field-operations.html. Further delays followed.

Ultimately, the Bureau's projected eight-week delay was nine weeks plus phased restarts.

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The Chief of Staff to Secretary Ross, Michael Walsh, analyzed the issues for the Secretary on May 8, 2020. He wrote that "[p]ursuant to OMB guidance, the Census Bureau *completely* suspended decennial field operations for 47 days between March 18 and May 4," and then resumed operations in phases thereafter. DOC_2287 (emphasis in original) ("Operational Timeline" memo). Walsh flagged issues with two operations especially important to avoiding undercounts, enumerator onboarding and "Update Leave":

- Onboarding enumerators "entails recruitment, selection, acceptance and gathering of any additional information, fingerprinting, background checks, onboarding, and training" approximately 340,000–500,000 enumerators. *Id.* "The suspension of field operations curtailed preparation for this [onboarding], as much of it required personal contact." *Id.* After onboarding, enumerators "visit non-responding households and conduct in-person interview to obtain census responses." DOC_2287.
- Update Leave, as Walsh wrote, "helps reach 5 million homes in the USA in rural and remote areas that lack city-style mail." *Id.* Update Leave reaches those homes by having Census "field staff hand-deliver questionnaires," *id.* at 6, to "areas where the majority of the housing units do not have mail delivery . . . or the mail delivery information for the housing unit cannot be verified." Fontenot Decl. ¶ 46. Before the complete suspension of operations, "approximately 10% of the initial [Update Leave] workload had been completed." DOC_2287. By contrast, "[u]nder initial projections, 100% of the Update Leave workload should have been completed by April 17." *Id.*

The May 8, 2020 Operational Timeline memo also foresaw problems with "[d]ata processing and integrity." *Id.* (emphasis omitted). "[T]he pandemic has made impacts that will require additional processing and expertise because populations have temporarily shifted." *Id.* As a result, the memo suggested that the 2018 Operational Plan's provision of 152 days (about 22 weeks) for data processing was not enough. *Id.*

As field operations began restarting under the COVID-19 Plan detailed below, the Bureau encountered COVID-related challenges. In particular, the Bureau had trouble retaining enumerators and conducting in-person visits in NRFU. On retaining enumerators, Associate Director for Field Operations Tim Olson wrote to other senior officials on July 23, 2020 that "[the Bureau] had a huge quit rate from training to deployed in field (and this does not mirror past censuses at all – it is MUCH higher, almost a debilitating higher quit rate). And this translate[d]

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into much slower production in the field because we have less than half the number of enumerators (38%) we need to get the job done." DOC_7737.

Issues with NRFU visits were flagged in a June 10, 2020 presentation sent by the Chief of Staff to Director Dillingham, Christa Jones, to Deputy Director Jarmin and the Chief of Staff to the Deputy Secretary of Commerce, Dan Risko. DOC_6545. On a slide titled "Risks and Challenges Due to COVID-19," the presentation stated that COVID-19 had "le[]d to new risks and unknowns for the operation." *Id.* Four risks stood out: (1) a lower case resolution rate because respondents "may be less likely to answer their door"; (2) challenges with staffing and training; (3) a complex schedule; (4) and a "de-scoped" early NRFU operation that presumably had been delayed by COVID. *Id.*

By July 30, 2020—by which time the Bureau had already been directed to create the Replan, as discussed below—enumerator staffing was still low. DOC_8623. Many cities across several Area Census Offices had roughly 50% shortfalls in enumerator staffing compared to the Bureau's internal target. *Id.* Plaintiffs' affidavits allude to similar issues with finding enumerators. In Monterey County, California, for instance, the pandemic made it harder to hire and retain enumerators "because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19." Gurmilan Decl. ¶ 13.

4. The COVID-19 Plan, adopted on April 13, 2020, provided 71.5 weeks for the 2020 Census.

As a result, on April 13, 2020, the Bureau issued an adjustment to its Operational Plan to account for the impact of COVID-19 (the "COVID-19 Plan"). ECF No. 37-3 (April 13, 2020 statement of Secretary of Commerce Wilbur Ross and Census Bureau Director Steven Dillingham). The COVID-19 Plan extended the deadlines. Specifically, first, the COVID-19 Plan expanded the deadlines for self-responses from 20.5 weeks to 33.5 weeks (March 12 to October 31, 2020) to account for the pandemic's disruptions to Bureau operations and the public's ability to respond to the census. Second, NRFU likewise expanded from 11.5 weeks (May 13 to July 31, 2020) to 12 weeks (August 11 to October 31, 2020).

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Third, given the pandemic's effects on "the quality of the data, especially for groups that are less likely to self-respond (often hard to count populations)," post-data collection quality control was deemed especially important. ECF No. 37-7 at 18. Data processing for congressional apportionment thus expanded from 22 weeks (August 1 to December 31, 2020) to 26 weeks (November 1, 2020 to April 30, 2021). The processing was to include an independent review of the final address list, analysis by subject-matter experts, and the remediation of software errors. Fontenot Decl. ¶ 89.

Lastly, the press release announcing the COVID-19 Plan stated that "the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts." ECF No. 37-3 at 3. The COVID-19 Plan would thus "extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021." *Id.*

Although these delays would result in the Bureau missing statutory deadlines, the President of the United States and Bureau officials publicly stated that meeting the December 31, 2020 deadline would be impossible in any event. On the day the COVID-19 Plan was announced, President Donald J. Trump stated, "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 it. I think 120 days isn't nearly enough." ECF No. 131-16 at 4.

On May 26, 2020, the Bureau's Associate Director for Field Operations, Timothy Olson, stated that "[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore. We -- we've passed that for quite a while now." Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY.

Likewise, on July 8, Associate Director Fontenot, Defendants' sole declarant, confirmed 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

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20–21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

The Bureau's internal view on missing the statutory deadlines was similar. Days after announcing the COVID-19 Plan, the Bureau prepared for a call on April 28, 2020 with Congressman Jamie Raskin, Chair of the House Oversight Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. In preparation for that call, the Bureau's Chief of Congressional Affairs, Christopher Stanley, circulated a memo to Director Dillingham and other senior officials. *See* DOC_2224. The memo answered possible questions about missed deadlines.

Two questions and answers ("Q&As") stood out. The first Q&A contemplated that any data collection after August 14 would make meeting the deadlines infeasible. The Q&A asked why the Bureau couldn't "collect data after August 14 and still deliver redistricting data on time?" DOC_2227. The answer was that the Bureau had "examined [the] schedule and compressed it as much as [the Bureau] c[ould] without risking significant impacts on data quality. Given the important uses of census data collection processing, it is vital that [the Bureau] not shortcut these efforts or quality assurance steps." *Id.*

The second Q&A asked whether "delaying the apportionment data [was] constitutional?" The answer was that "[t]he proposal underwent a constitutional review, and we believe it is constitutional and that the adjusted schedule will help us fulfill the constitutional requirement of a complete and accurate census. . . . In history, especially for the many of the earlier censuses, data collection and reporting the counts shifted beyond the zero year." DOC_2228. By "counts shifted beyond the zero year," the Bureau presumably was referring to census reports that had been made in the calendar year after the statutory deadline. Those reports were for the censuses of 1810, 1820, 1830, and 1840. ECF No. 203 (explaining examples); *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (second *post hoc* extension of September 1, 1841 for original deadline missed by over nine months). In those censuses, after one or more deadlines had passed without the enumeration having been completed, Congress extended the relevant deadlines after the fact. *See*

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ECF No. 203.

On May 8, 2020, Secretary Ross's Chief of Staff, Michael Walsh, sent the "Operational Timeline" memo to the Secretary. The Operational Timeline memo found that:

> If the Census Bureau could fully restart today, under ideal conditions . . . the earliest you could finish NRFU, even with the ability to restart immediately every state, is approximately September 1, 2020. By finishing NRFU on September 1, 2020, apportionment counts could not be delivered until January 31, 2021, already after the statutory deadline. Redistricting information would be provided to states by April 30, 2021, already after the statutory deadline.
>
> **Based on the initial suspension of field activities in line with OMB guidance, the Census Bureau can no longer meet its statutory deadlines for delivering apportionment and redistricting data, even conducting operations under unrealistically ideal conditions.**

DOC_2288 (emphasis in original) (bullet points omitted).

All the above operational concerns were ultimately reflected in the census response data. As of June 2020, "self-response rates var[ied] widely across states and counties," with "markedly different operational environments and challenges" facing the Bureau "from one locale to another." ECF No. 37-7 at 6 (citing self-response rates "below 3 percent" in counties in Alaska, Texas, Utah, and South Dakota).

5. The Replan, adopted on August 3, 2020, reduced the time for the 2020 Census from 71.5 weeks to 49.5 weeks.

On July 21, 2020, President Trump issued a memorandum declaring the United States' policy to exclude undocumented immigrants from the congressional apportionment base.

On July 23, 2020, Associate Director Fontenot started an email thread with several senior Bureau officials, including Deputy Director Ron Jarmin and Associate Director for Field Operations Timothy Olson. Associate Director Fontenot began the thread by stating that on July 27, he would tell the Department of Commerce about the "reality of the COVID Impacts and challenges":

> On Monday at DOC [Department of Commerce] I plan to talk about the difference between goal and actual case enumeration (Currently a shortfall (11 % goal vs 7% actual) and attribute it to the higher drop out rate and (ideally with reasons) and

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what we are going to do to address the technology drop outs.)

I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges.

Does anyone have any problems with my approach?

DOC_7737. In response, Associate Director Olson "agree[d] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about." DOC_7738. Those reasons are not in the administrative record.

Associate Director Olson then "sound[ed] the alarm" on "deliver[ing] apportionment by 12/31" in the strongest possible terms:

> We need to sound the alarm to realities on the ground – people are afraid to work for us and it is reflected in the number of enumerators working in the 1a ACOs [Area Census Offices]. And this means it is ludicrous to think we can complete 100% of the nation's data collection earlier than 10/31 and any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.

Id. One reason that accelerating the schedule would be "ludicrous," Associate Director Olson stated, was the "awful deploy rate" of enumerators about 62% below target. *Id.* Driving that shortfall was "almost a debilitating higher quit rate":

> Another tack is to provide crystal clear numbers by the 1a ACOs that shows the awful deploy rate - field selected the right number (big number) to training, training show rate was on par with prior censuses (albeit a few points lower ... but overall in line with past censuses). And then we had a huge quit rate from training to deployed in field (and this does not mirror past censuses at all - it is MUCH higher, almost a debilitating higher quit rate). And this translates into much slower production in the field because we have less than half the number of enumerators (38%) we need to get the job done.

DOC_7737.

On the same day as Associate Director Olson's email (July 23, 2020), the Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared a so-called "Elevator Speech" memo with GAO official Ty Mitchell and senior Bureau officials. *See* DOC_8026 (sending to GAO). The purpose of the Elevator Speech, Chief Styles wrote, was "to explain, in layman's terms, why we need a schedule extension." The Speech begins with a "High

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Level Message," which in its entirety reads:

> Curtailing census operations will result in a census that is of unacceptable quality. The Census Bureau needs the full 120 days that the Administration originally requested from Congress to have the best chance to produce high quality, usable census results in this difficult time. Shortening the time period to meet the original statutory deadlines for apportionment and redistricting data will result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.

DOC_8070.

On July 31, 2020, the Bureau removed from its website the October 31, 2020 deadline for data collection without any announcement or explanation. *Compare* ECF No. 37-8 (July 30 Operational Adjustments Timeline), *with* ECF No. 37-9 (July 31 Operational Adjustments Timeline).

By August 1, 2020, the Bureau had prepared several versions for a presentation to Secretary Ross on Monday, August 3, 2020 ("August 3 Presentation"). The parties identify one version as a key document. ECF Nos. 161 at 2 (Defendants' identification of DOC_10275), 190 at 6 (Plaintiffs' identification of same). The Presentation's very first slide, titled "Overview," concludes that "to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved":

> Due to COVID-19 impacts, the conclusion of field operations for the 2020 Census was previously scheduled to end on October 31. In order to meet the statutory date of December 31, 2020 for apportionment, field operations must now conclude no later than September 30, 2020. Accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved.

DOC_10275–76.

On August 3, 2020, the Bureau issued a press release announcing a "new plan," which the Bureau called the "Replan." U.S. Census Bureau, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), ECF No. 37-1 ("August 3 Press Release"). In his declaration, Associate Director Fontenot avers that the Secretary approved the Replan on the day it was announced. Fontenot Decl. ¶ 85.

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In the words of the August 3 Press release, the Replan "accelerate[d] the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." ECF No. 37-1. The time for the 2020 Census was reduced from 71.5 weeks to 49.5 weeks. Specifically, self-response compressed from 33.5 weeks to 29 weeks, with the deadline advancing from October 31 to September 30. Fontenot Decl. ¶ 100. NRFU compressed from 11.5 weeks to 7.5 weeks, with the deadline advancing from October 31 to September 30. Lastly, data processing was halved from 26 weeks to 13 weeks, with the deadline advancing from April 30, 2021 to December 31, 2020.

As of August 3, 2020, less than 63% of households had responded to the 2020 Census. ECF No. 37-1.

6. The Government Accountability Office found that the Replan increases the risks to obtaining a complete and accurate 2020 Census.

In June 2020, the Government Accountability Office ("GAO") issued a Report on the 2020 Census entitled, "COVID-19 Presents Delays and Risks to Census Count," in which the GAO noted, among other things, that staffing shortages were experienced at the Bureau's call centers and at the Bureau's contractor responsible for printing the six mail-in self-response forms.[2] ECF No. 37-7 at 8 (GAO, COVID-19 Presents Delays and Risks to Census Count (June 2020)). The Report also noted that as of June 1, 2020, counties in Alaska, Texas, Utah, and South Dakota had

[2] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts take judicial notice of information, such as reports of the Government Accountability Office ("GAO"), Census Scientific Advisory Committee ("CSAC"), and Department of Commerce Office of Inspector General ("OIG"), which are found on government agency websites. *See Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *5–6 (N.D. Cal. Sept. 9, 2008) (citing circuit and district court cases). However, to the extent any facts in the documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of matters of public record . . . . But a court may not take judicial notice of a fact that is subject to reasonable dispute.") (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

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reported self-response rates below 3 percent. *Id.* at 9.[3]

In August 2020, the GAO issued a Report on the 2020 Census entitled "Recent Decision to Compress Census Timeframes Poses Additional Risks to an Accurate Count." https://www.gao.gov/assets/710/709015.pdf. The Report stated: "Delays to data collection operations, public reluctance to participate in door-to-door interviews, and compressed timeframes for data collection and processing response data may affect the accuracy, completeness, and quality of the count." *Id.* at ii (cover memo). The Report also noted that implementation of untested procedures and continuing challenges such as COVID-19 could "undermine the overall quality of the count." *Id.* at 1.

7. The Bureau's Scientific Advisory Committee unanimously supports extension of the census schedule.

Associate Director Fontenot's September 22, 2020 declaration states: "In the midst of major West Coast fires and air quality issues that have accelerated since September 11, and the current impacts of Hurricane Sally across the states of Louisiana, Mississippi, Alabama, the Florida panhandle area, parts of Georgia, and South Carolina, I stated publicly on September 17, 2020 in the Census Scientific Advisory Committee meeting that I did not know whether Mother Nature would allow us to meet the September 30 date." ECF No. 196-1 ¶ 14.

The next day, on September 18, 2020, the Census Scientific Advisory Committee ("CSAC") unanimously concluded that the Census schedule should be extended. *See* Allison Plyer, Census Scientific Advisory Committee Chair, *Recommendations and Comments to the Census Bureau from the Census Scientific Advisory Committee Fall 2020 Meeting* (September 18, 2020), https://www.documentcloud.org/documents/7213520-Recommendations-and-Comments-

[3] The reports of the GAO, CSAC, and OIG are not in the administrative record. However, the Court is permitted to go outside the administrative record "for the limited purpose of background information." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The Court thus considers those reports for background information alone. The Court does not consider the reports for APA analysis. That said, many of the documents on which the OIG Report is based are included in the partial administrative record, which is the basis of the Court's APA analysis.

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to-the-Census.html#document/p2/a581794. Specifically, the CSAC found the following:

> To ensure a successful completion of the 2020 Census in a way that is consistent with its mandate of counting everyone once and in the right place, and based on its scientific and methodological expertise, CSAC recommends that the 2020 Census operational timeline be extended per the Bureau's April 2020 request. Counting everyone once and in the right place, using untested and never-before-used technologies, that must work together with precision, requires time. When the weather isn't right, we postpone the launching of rockets into space. The same should be true of the decennial enumeration, the results of which will impact apportionment, redistricting, funding decisions, legal mandates and regulatory uses of decennial Census data over the next decade.

Id. at 2.

8. The Commerce Department's Office of Inspector General found that the Replan increases the risks to obtaining a complete and accurate 2020 Census.

On September 21, 2020, the Department of Commerce's Office of Inspector General ("OIG") released a report entitled "The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census." Final Management Alert No. OIG-20-050-M (Sept. 18, 2020), https://www.oig.doc.gov/OIGPublications/OIG-20-050-M.pdf. The Report drew upon Bureau and Commerce Department documents that were produced to the OIG (the "OIG production" stated below), as well as interviews with senior Bureau officials and Director Steven Dillingham. *Id.* at 2. The report made two findings. First, "[t]he decision to accelerate the Census schedule was not made by the Census Bureau." Information Memorandum for Secretary Ross from Peggy E. Gustafson at 1 (Sept. 18, 2020). Second, "[t]he accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census." *Id.*

On the first finding, the report detailed that:

> As of mid-July 2020, the Bureau still viewed the statutory extension as necessary in order to conduct the 2020 Census completely and accurately. This view is consistent with previous public statements made by senior Bureau officials that the Bureau would no longer be able to meet the December 31, 2020, statutory deadline.
>
> Then, in the late afternoon of Wednesday, July 29, 2020, a senior Department official told the Bureau to put together options for meeting the apportionment deadline of December 31, 2020, and brief the Secretary on those options on Monday morning, August 3, 2020.

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Id. at 7. On the second finding, the report detailed that "senior Bureau officials believed that the largest risk to data collection posed by the accelerated plan was the decreased time to recover from possible external contingencies affecting local areas or regions." *Id.* at 8.

As of September 21, 2020, the Census Bureau had resolved 99% of housing units in only four states. ECF No. 196-1 ¶ 13. The Bureau had stated internally in its August 3 Presentation that "[i]n order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved." DOC_1026.[4]

B. Procedural History

The procedural history of this case highlights why the instant Order is based on a stipulated but incomplete administrative record. At first, Defendants stated that no administrative record existed. Defendants then disclosed that there are documents that were considered by agency decisionmakers at the time of the decision to adopt the Replan. The Court subsequently ordered production of the administrative record. Despite the order, Defendants did not produce the administrative record. Because of the exigency of the motion for preliminary injunction and the imminent September 30, 2020 deadline for data collection, the parties stipulated to an incomplete administrative record for purposes of the instant motion. The Court details each event in turn.

1. At first, Defendants stated that no administrative record existed.

On August 18, 2020, Plaintiffs filed suit to challenge the Census Bureau's August 3, 2020 Replan, which advanced the 2020 Census deadlines for self-responses to Census questionnaires, Non-Response Follow-Up ("NRFU") field operations, data processing, and reporting Census counts to the President and the states.

To allow Plaintiffs to effectively challenge the Replan, including the September 30, 2020 end of data collection, the parties stipulated to a briefing schedule and hearing date of September

[4] The Court notes these later extra-record developments for context, but does not weigh them in its APA analysis. *But cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. . . . [B]ut we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.))).

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17, 2020 on Plaintiffs' motion for preliminary injunction. ECF No. 35. Pursuant to that schedule, Plaintiffs filed a motion for a preliminary injunction on August 25, 2020 based on their claims under the Enumeration Clause and the APA. ECF No. 36.

On August 26, 2020, the Court held a case management conference, at which Defendants repeatedly denied the existence of an administrative record. *E.g.*, ECF No. 65 at 9:22–24 (The Court: "Is there an administrative record in this case?" Defendants: "No, Your Honor. On behalf of the Defendants, no, there's not."), 10:17–18 ("[A]t this point there is no administrative record."). Rather, Defendants suggested that the only document that provided the contemporaneous reasons for the Replan was the Bureau's August 3, 2020 press release. *Id.* at 20:6–7 ("[A]t this point I'm not aware of any other documents, but I would propose that I check with my client . . . ."). Even so, the Court instructed Defendants that "[i]f there's an administrative record, it should be produced. [The Court] will need it to make a decision in this case." *Id.* at 10:13–14.

2. Defendants then disclosed that there are documents considered by agency decisionmakers at the time the Replan was adopted.

At the September 4, 2020 hearing on the September 3, 2020 motion for a temporary restraining order ("TRO"), ECF No. 66, Defendants reiterated their position that no administrative record existed. ECF No. 82 at 10:21–23, 33:13–15. However, Defendants disclosed that there were documents considered by agency decisionmakers at the time the Replan was adopted. Defendants stated:

> The Census Bureau generates documents as part of its analysis and as part of its decisions and as part of its deliberations. And there are documents that the Replan was not cooked up in a vacuum, it was part of the agency's ongoing deliberations. And so certainly there are going to be documents that reflect those documents [sic].

Id. at 33:2–7. That said, Defendants stated they would only have to submit the documents "if there is an administrative record on final agency action, which is there is [sic] none here." *Id.* at 33:14–16. In Defendants' view, the lack of final agency action meant that "the documents that fed into the operational plans and the operational decisions are internal documents that are subject to the deliberative process privilege." *Id.* at 32:13–16.

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Only a few minutes later, however, Defendants retracted their assertion of deliberative process privilege. *Id.* at 36:15–17 ("[T]o be clear, we are not asserting the deliberative process privilege because there is no record and there's nothing to consider."). Defendants conceded that "[i]f there is final agency action that is reviewable and the APA applies, we would have an obligation to produce the administrative record." *Id.* at 35:24–36:1. However, Defendants urged the Court to rely solely on Associate Director Fontenot's declaration that Defendants would file that evening with Defendants' opposition to the motion for preliminary injunction. *E.g.*, *id.* at 16:21–23 ("We will not be filing documents in addition to the declaration."). Indeed, when Defendants filed their opposition that night, Defendants' only evidence was Associate Director Fontenot's declaration. ECF No. 81. After full briefing and the hearing, the Court issued a TRO on September 5, 2020. ECF No. 84.

3. The Court ordered production of the administrative record.

At the September 8, 2020 case management conference, Defendants again stated that "there is no administrative record in this case because there is no APA action." ECF No. 98 at 62:15–16. Even so, Defendants confirmed their statements from the TRO hearing that the Replan is "indeed codified." *Id.* at 21:7. The Replan simply was "not necessarily codified in one particular document." *Id.* at 21:9–10. Accordingly, Plaintiffs asked the Court to order Defendants to produce the administrative record. *E.g.*, *id.* at 44:10–13.

After full briefing, the Court issued its Order to Produce the Administrative Record, which addressed threshold arguments before ordering production. ECF No. 96. However, because of the competing need to resolve the motion for preliminary injunction as quickly as possible, the Court ordered a narrowed portion of the administrative record to be produced on September 13 and 16, 2020, before the September 17, 2020 preliminary injunction hearing. *Id.* at 21. Given these production deadlines, the Court continued the deadline for Plaintiffs' reply in support of their motion for preliminary injunction from September 10 to September 15, 2020.

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4. Despite the Court's order, Defendants did not produce the administrative record.

Twelve hours before the production deadline on September 13, 2020, Defendants produced 58 unredacted documents and 14 heavily redacted documents. ECF No. 105; *see* ECF No. 177 (providing number of documents in September 13 Production). Many of the redacted documents contained little information other than the email metadata that Defendants included in their privilege log. *See, e.g.*, ECF No. 105-1 at 37 (DOC_225: heavily redacted email); id. at 65 (DOC_253: same); *id.* at 173 (DOC_361: same); *id.* at 177 (DOC_365: same). Defendants also stated that "[r]eview of the remaining documents remains ongoing" and that "[b]ecause review of the remaining documents remains ongoing, and due to the volume of documents involved, Defendants will be unable to produce or log any additional documents today." *Id.* Moreover, Defendants did not identify when they would complete the September 13 Production.

At the September 14, 2020 case management conference, Defendants stated that their next production would be on September 16, 2020, but that they "d[id] not anticipate" completing the September 13, 2020 Production on September 16, 2020. ECF No. 126 at 22:6. Moreover, Defendants stated that they were still collecting documents for the September 16 Production and did not know how many documents would be responsive. *See, e.g.*, *id.* at 20:6–10. Overall, Defendants stated that they would be unable to comply with the Court's Order to Produce the Administrative Record because compliance would be "a physical impossibility." *Id.* at 41:16–17.

5. The parties stipulated to an incomplete administrative record for purposes of the motion for preliminary injunction.

In response to Defendants' failure to comply with the Court's order on September 13, 2020, Plaintiffs filed the Department of Commerce Inspector General's August 13, 2020 Information Memorandum for Secretary of Commerce Wilbur Ross, which included the following Request for Information:

> To assist the OIG ["Office of Inspector General"] in its oversight responsibilities, please provide all documents or communications, including but not limited to email, instant messages, and text messages:
>
> 1. Discussing or referring in any manner to the decision to accelerate the

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2020 Census schedule as described in the August 3, 2020 press release.

2. Detailing the persons involved, and their respective involvement, in the decision to accelerate the 2020 Census schedule.

3. Detailing the reasons for the decision to accelerate the 2020 Census schedule.

Please provide all requested documents and communications by close of business Monday, August 17, 2020. You may also produce any additional documentation or information you deem relevant to this request for information.

ECF No. 111-2 at 5. Plaintiffs also noted that Associate Director Fontenot's declaration had averred that the Census Bureau had produced many documents to the OIG. ECF No. 111 at 5 (citing Fontenot Decl., ECF No. 81-1 at 36 ¶ 103). Associate Director Fontenot did not disclose the OIG's Request for Information about the Replan, but rather spoke in more general terms: "We produce a massive amount of documents and other information to the Office of Inspector General and the General Accounting Office every week, and these organizations interview Census Bureau staff on almost a daily basis." ECF No. 81-1 at 36 ¶ 103. In other words, Defendants had neither disclosed to the Court the OIG's Request for Information nor produced the OIG documents in response to the Court's Order to Produce the Administrative Record. *See* ECF No. 111-2 at 5.

Given the exigency, both parties ultimately agreed that "in the short term, focusing on the OIG documents for purposes of getting to a PI ruling and whatever appeal follows makes sense." *Id.* at 72:19–21; *see id.* at 33:14–22, 41:6–9 (Defendants' agreement). The Court thus ordered Defendants to produce the OIG documents that would constitute the administrative record or would be included in the administrative record, stayed the Order to Produce the Administrative Record until a case management conference after the impending preliminary injunction decision, and continued the preliminary injunction hearing to Tuesday, September 22, 2020. *Id.* at 71–77; *see* ECF No. 132. As the Court found, both the parties and the Court were "running out of time." ECF No. 141 at 38:6, 71:14.

On September 15, 2020, Plaintiffs filed their reply, for which they only had the benefit of Defendants' incomplete September 13, 2020 production of the administrative record as described above. ECF No. 130 ("Reply").

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On September 18, 2020, Defendants produced the OIG documents. Over the weekend on September 19 and 20, 2020, after full briefing, United States Magistrate Judges Nathanael Cousins, Susan van Keulen, and Thomas Hixson resolved the parties' privilege disputes. Defendants produced the documents that the judges had deemed non-privileged on September 19, 20, and 21, 2020.[5] The resulting set of all non-privileged OIG documents comprise the administrative record for the instant motion.

The Court allowed the parties to file supplemental briefs on the motion for preliminary injunction to address Defendants' productions. Specifically, on September 20, 2020, the parties filed supplemental briefs that addressed Defendants' September 18, 2020 production. *See* ECF No. 176 ("Defs. 1st Supp. Br."); ECF No. 178 ("Pls. 1st Supp. Br."). On September 22, 2020, the parties filed supplemental briefs that addressed Defendants' September 19, 20, and 21, 2020 productions. ECF Nos. 196 ("Defs. 2nd Supp. Br."); ECF No. 197 ("Pls. 1st Supp. Br."). However, on September 22, 2020, Defendants also filed another Associate Director Fontenot declaration that discussed injunction harms to Defendants that Associate Director Fontenot did not include in his September 5, 2020 declaration in support of Defendants' opposition to the motion for preliminary injunction. ECF No. 196-1. The Court held a hearing on the motion for preliminary injunction on September 22, 2020.

II. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking the injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). "A preliminary injunction is 'an extraordinary and drastic remedy, one that should

[5] To minimize any intrusion into Defendants' privileges, this Court only reviewed documents in the OIG Production that the United States Magistrate Judges deemed non-privileged. The Court did not itself review *in camera* the OIG Production.

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not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

III. REVIEWABILITY

Defendants argue that Plaintiffs are not entitled to a preliminary injunction both because the instant case is unreviewable due to a number of threshold issues, PI Opp. at 4–23, and because the four relevant factors weigh against issuance of a preliminary injunction, *id.* at 23–35. The Court first considers the threshold reviewability questions before turning to the four preliminary injunction factors.

Defendants argue that the instant case is unreviewable on five grounds: (1) the Replan presents a political question; (2) Plaintiffs lack standing; (3) the Replan is not agency action; (4) the Replan is not "final"; and (5) the Replan is committed to agency discretion by law. The Court addresses each ground in turn and then briefly addresses the APA requirements that Defendants do not address, namely that Plaintiffs lack an adequate alternative to judicial review and suffer prejudice from the Replan.

A. The Replan does not present a political question.

Defendants argue that Plaintiff's Administrative Procedure Act claim is not justiciable because it presents a political question. PI Opp. at 4–9. The Court disagrees.

A "political question" is one which is "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Tellingly, Defendants fail to offer a case that finds that the political question doctrine bars review of decisions regarding the administration of the census. Instead, Defendants point the Court to two defining hallmarks of a political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving" the dispute. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *accord Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004). Defendants argue that both are present here because (1) the Enumeration Clause vests Congress with the authority to conduct "actual Enumeration," PI Opp. at 5–6, and (2) there is no evident standard by which the Court

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could evaluate the Bureau's decision. PI Opp. at 6–7. Neither argument is convincing.

First, Defendants cite no case—and the Court is aware of none—in which a court declined jurisdiction over a census case on political question grounds. To the contrary, the Supreme Court and lower courts have repeatedly rejected the argument that the political question doctrine bars review of census-related decisionmaking. *See, e.g.*, *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458–59 (1992) (holding that the "political question doctrine presents no bar"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 n.2 (1992) (noting that the Court "recently rejected a similar argument" in *Montana* that "the courts have no subject-matter jurisdiction over this case because it involves a 'political question'"); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam) (rejecting the Census Bureau's argument that "allegations as to mismanagement of the census made in the complaint involve a political question," and holding the case reviewable under the Constitution and APA) (quotation omitted); *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 791 (S.D.N.Y. 2018) (rejecting political question doctrine in citizenship question litigation; and collecting cases); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (rejecting political question doctrine), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (same); *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (same); *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992) (same); *City of N.Y. v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 764 (E.D.N.Y. 1990) (same); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 95 (D.D.C. 1998) (three-judge court) (same; and stating "the court sees no reason to withdraw from litigation concerning the census"), *aff'd*, 525 U.S. 316 (1999); *see also Utah v. Evans*, 536 U.S. 452 (2002) (engaging in review without noting any jurisdictional defect stemming from political question doctrine); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996) (same); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000) (same), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished); *Prieto v. Stans*, 321 F. Supp. 420, 421 (N.D. Cal. 1970) (finding jurisdiction over a motion to preliminarily enjoin the census's "mail-out, mail-back procedure" and "community education and follow-up procedures").

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Second, precedent supports the determination that there is a discoverable and manageable standard by which the Court can review the agency action at issue here. For example, the Census Act "imposes 'a duty 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) (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing 2 U.S.C. § 2a). Similarly, the text, structure, and history of the Constitution evinces "a strong constitutional interest in accuracy." *Utah*, 536 U.S. at 455–56.

Thus, in its decision on the census citizenship question last year, the Supreme Court rejected Defendants' claim that there is "no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. at 2568 (quoting *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)). The standard is provided by the Census Act, the Constitution, and APA. Accordingly, it is no surprise that Defendants do not cite, and the Court could not find, a case in which the political question doctrine barred judicial review of census-related decisionmaking.

In sum, the political question doctrine does not bar the Court from reviewing the instant case.

B. Plaintiffs have standing to challenge the Replan.

"To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2565. Plaintiffs here allege—and support with affidavits—the same four injuries that the Supreme Court found supported standing in the citizenship question case: "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." *Id.* at 2565 (upholding findings as not clearly erroneous). The Court discusses each of Plaintiffs' four alleged injuries.

1. Plaintiffs are likely to lose federal funds that turn on census data.

The administrative record shows that the Replan will likely lead to an undercount that

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results in "loss of crucial federal funds for programs that affect [Plaintiffs'] daily life." A. Garcia Decl. ¶ 4. The Supreme Court has specifically agreed that the loss of federal funding "is a sufficiently concrete and imminent injury to satisfy Article III." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565. Thus, the Court agrees that the possible loss of federal funds is a sufficient injury to establish Article III standing as explained below.

Local government Plaintiffs are recipients of multiple sources of federal funding that turn on census data. King County, Washington; the City of Los Angeles; and Harris County, Texas are leading examples. The Replan's shortened schedule for data collection and processing will likely diminish each locality's funding because each locality has many hard to count persons who risk being undercounted. M. Garcia Decl. ¶¶ 7–8; Dively Decl. ¶ 5; Briggs Decl. ¶¶ 7, 11; *see also* Hillygus Decl. ¶¶ 12, 19, 39 (explaining the statistics of undercounting subpopulations). Specifically, the Court notes the following:

- In King County, three-quarters of the County's record population growth of 15% since 2010 is attributable to "populations that are less likely to self-respond to the census." Dively Decl. ¶ 5. As a result, "[s]hortening the enumeration period risks creating a population undercount." *Id.* Any undercount would reduce King County's allocation of funds "proportionately disbursed by census population counts." *Id.* ¶ 7. These funds include Community Development Block Grants, HOME Investment Partnership Program, and Emergency Solutions Grants from the U.S. Department of Housing and Urban Development. *Id.* ¶ 7. Transit Formula Grants to the Seattle region, of which King County is a part, also turn on census data, and totaled $108 million in fiscal year 2019.
- Los Angeles County is "the hardest to count in the nation." M. Garcia Decl. ¶ 7. 57% of the residents in the City of Los Angeles, which is home to roughly 4 million people, live in census block groups that are hard or very hard to count. *Id.* As a result, Los Angeles' self-response rate of 54.5% (as of August 19, 2020) is well below the city's 2010 response rate of 68% and the state's 2020 response rate of 65.9%.
- "[T]he City of Los Angeles receives tens of millions of dollars from the federal government each year based upon the ratio of population derived from the decennial census." Westall Decl. ¶ 35. In times of national emergency, cities such as Los Angeles receive relief based on census population. *Id.* ¶ 34 (discussing $20 million received under the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act).
- In Harris County, the Replan's shortening of the self-response and NRFU timelines risks causing "unprecedented undercounts in the 2020 Census." Briggs Decl. ¶ 11.

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"[A]pproximately $90,529,359 of the grants expended by Harris County in FY2019 depended on accurate census data." Wilden Decl. ¶ 5. Among the grants affected are those that enable "sustainable financing of local health departments" such as Harris County Public Health, which has helped manage COVID-19 for approximately 4.7 million people. Shah Decl. ¶¶ 4, 8.

An undercount in any locality matters greatly. Even a *small* undercount of a *subset* of the hard to count population would result in the loss of federal funding. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2565 ("[I]f noncitizen households are undercounted by as little as 2% . . . [states] will lose out on federal funds"). Thus, like in *Department of Commerce v. New York*, Plaintiffs that receive federal funds based on census population suffer "a sufficiently concrete and imminent injury to satisfy Article III." *Id.*

2. Plaintiffs will likely be deprived of their fair share of political representation.

Plaintiffs allege that the undercount resulting from the Replan will likely result in an unfair apportionment that will deprive local government Plaintiffs, individual Plaintiffs, and members of organizational Plaintiffs of their fair share of representation. The resulting "threat of vote dilution," whether Congressional or intrastate, is an injury in fact. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999).

For example, given the historically low census response rates in the City of Los Angeles and City of Salinas in California, the Replan creates a substantial risk that their residents will not be counted, and a substantial risk of diminished political representation. *See* M. Garcia Decl. ¶¶ 8–15; Gurmilan Decl. ¶¶ 6, 8–14. Specifically:

- In the City of Los Angeles, the Replan "will result in extreme inaccuracy" because it would leave "just over six weeks to complete enumeration of roughly half of the exceptionally diverse households of the nation's second-most-populous city—in the midst of a once-in-a-lifetime pandemic." M. Garcia Decl. ¶ 8; *see* Westall Decl. ¶ 36 (stating it is "likely" that undercounts will "disproportionally impact Los Angeles" and "cause the City to miss out on a portion of [] funding for an entire decade").
- Similarly, the City of Salinas comprises 38.5% of Monterey County's hard to count population, and the City's response rate is 9.5% below its response rate from the 2010 Census and 8% below the current state average. Gurmilan Decl. ¶ 6.

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The undercount wrought by the Replan will not only "compromise the success of the apportionment count" for Congressional representation, but also "severely compromise the quality of the redistricting data" for state and local representation. Louis Decl. ¶ 43; *see* Thompson Decl. ¶ 23. In fact, it is undisputed that census data is used to redraw district boundaries for federal, state, and local legislatures, and that drawing districts with unequal population can be unlawful. *See, e.g.*, Westall Decl. ¶¶ 14–29. An undercount from a truncated self-response period, lower-quality NRFU, and rushed data processing all mean that Plaintiffs' federal, state, and local political representation will be diminished. *See, e.g.*, Westall Decl. ¶¶ 27 ("[R]esidents in Council Districts with large concentrations of undercounted residents would be denied equal representation."); Soto Decl. ¶ 11 (same); Ellis ¶ 12 ("An undercount on the 2020 Census will also put me at serious risk of political underrepresentation in the U.S. Congress, and in the Texas legislature.").

3. The Replan will likely degrade census data that Plaintiffs use to deploy services and allocate capital.

The local government Plaintiffs allege that the Replan will degrade granular census data that they rely on to deploy services and allocate capital. "[B]y virtue of the Constitution and the Census Act, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data." *New York v. Trump*, No. 20-CV-5770, 2020 WL 5422959, at *18 (S.D.N.Y. Sept. 10, 2020) (three-judge court); *see also* Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209, Pub. L. No. 105-119, 111 Stat. 2440, 2481 (1997) ("1998 Appropriations Act") (codified at 13 U.S.C. § 141 note) ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States . . . .").

The degradation of data is thus an informational injury analogous to those that have supported Article III standing. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 611 (S.D.N.Y. 2019) (finding that "degradation in the quality of census data" supported standing), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019); *see also, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (collecting

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cases finding that "deprivation of information" supports standing); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114 (9th Cir. 2017) (finding standing partly because a statute, 15 U.S.C. § 1681e(b), requires "follow[ing] reasonable procedures to assure maximum possible accuracy" of information). For instance, King County, Los Angeles, and Harris County all rely on granular census data:

- King County, Washington uses census data to place public health clinics, plan transportation routes, and mitigate hazards. Dively Decl. ¶ 6.
- The City of Los Angeles uses "reliable, precise, and accurate population count data" to deploy the fire department, schedule trash-pickups, and acquire or improve park properties. Westall Decl. ¶ 32.
- Recently, Harris County has used census data "to estimate the impact of COVID-19 to specific communities at a granular level," which has helped the county tailor "communications in multiple languages with audience and age-specific prevention messaging and share information about availability of testing or vaccine sites." Shah Decl. ¶ 7. Inaccurate or incomplete data would "increase risk of misinterpreting the prevalence of the disease in disproportionately impacted communities." *Id.*

In sum, the Replan's harm to the accuracy of census data will harm Plaintiffs' concrete uses of the data.

4. Plaintiffs have diverted and will continue diverting resources to mitigate the undercount that will likely result from the Replan.

Plaintiffs will divert resources to mitigate the undercounting that will likely result from the Replan. The result is "concrete and demonstrable injury to [Plaintiffs'] activities—with the consequent drain on [their] resources." *New York*, 2020 WL 5422959, at *19 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Am. Diabetes Ass'n v. U.S. Dep't of Army*, 938 F.3d 1147, 1154 (9th Cir. 2019) (discussing *Havens Realty*, and finding injury in fact where plaintiffs "had altered their resource allocation" that they would have spent on some other organizational purpose).

The City of Salinas, Harris County, Black Alliance for Just Immigration, League of Women Voters, and National Urban League detail many examples of diverted resources:

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- The City of Salinas already promoted the October 31 deadline "on social media and in thousands of paper flyers." Gurmilan Decl. ¶¶ 11–12. Thus, "some residents who received the City's messaging will fail to respond before the R[eplan] deadline because the City has limited remaining resources to correct what is now misinformation." *Id.* ¶ 12. Moreover, the City "is still advertising for census enumerator job listings because traditional applicant groups like senior citizens have concerns about the risk of catching COVID-19. With fewer enumerators working, every extra day the City has to use [] existing staff to support the count . . . ." *Id.* ¶ 13.
- Harris County "participated in over 150 events," including "food distribution events," during which it "announced the October 31, 2020 deadline for the 2020 Census." Briggs Decl. ¶ 12. Consequently, "Harris County will be forced to expend additional resources to clear confusion about the last date for self-response during the Census, to ensure that people who have not responded are counted in time." *Id.* ¶ 16.
- The Black Alliance for Just Immigration already "publicized the October 31 deadline for self-response during digital events between April and July" and is diverting resources to publicize the new September 30 deadline. Gyamfi Decl. ¶¶ 13–14.
- The League of Women Voters "has already had to spend time and financial resources" developing and distributing public education materials on the Replan timeline. Stewart Decl. ¶ 12.
- The National Urban League has similarly had "to divert resources from other programs and projects" to "alleviate the confusion" about the change in deadlines. Green Decl. ¶ 15.

Indeed, even now, the Census Bureau boasts of how its communications program was "more integrated than ever before" with Plaintiffs such as National Urban League. Fontenot Decl. ¶ 40. Mitigating those now-counterproductive education campaigns and a likely undercount will only be harder in the midst of a pandemic. *E.g.*, M. Garcia Decl. ¶¶ 14–15; Gurmilan Decl. ¶¶ 11–14; Briggs Decl. ¶¶ 11–12, 15–17. The result that Plaintiffs have diverted and will continue to divert resources from their organization mission to mitigate the effects of the Replan.

5. Plaintiffs' injuries are fairly traceable to the Replan and redressable by a stay of the Replan.

The above harms are "concrete, particularized, and actual or imminent." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). They are also "fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Id.* (quoting *Davis*, 554 U.S. at 733). As the Supreme Court

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stressed last year, "Article III 'requires no more than de facto causality.'" *Id.* at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). "[T]he defendant's conduct need not be 'the very last step in the chain of causation.'" *New York*, 2020 WL 5422959, at *21 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

Here, Plaintiffs' theory of standing rests "on the predictable effect of Government action on the decisions of third parties"—specifically, the predictable harms of accelerating census deadlines and curtailing key operations, without warning, after months of publicly operating under a plan tailored to COVID-19. *Id.* Accordingly, enjoining the implementation of the Replan's September 30, 2020 deadline for data collection and December 31, 2020 deadline for reporting the population tabulations to the President would redress those harms. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 328–34 (affirming injunction against the planned use of statistical sampling to prevent apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing injunction to prevent "the loss of political representation and the degradation of information").

All told, Plaintiffs suffer injuries in fact that are fairly traceable to the Replan and redressable by the relief Plaintiffs seek. Plaintiffs thus have Article III standing.

C. The Replan constitutes agency action.

Defendants' three remaining arguments against reviewability arise under the APA, not the Constitution. To start, Defendants argue that the Replan is not reviewable because it is not a discrete "agency action." PI Opp. at 17. They thus claim that Plaintiffs' suit is "an improper, programmatic attack on the Bureau's efforts to conduct the 2020 Census." *Id.* The Court disagrees. The Replan is agency action.

"The bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 478 (2001) (citations omitted). Thus, agency action is broadly defined to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Each word in that definition

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has its own expansive definition. A "rule," for example, includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4).

To be sure, a reviewable agency action must be one that is "circumscribed" and "discrete." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62–63 (2004). This requirement "precludes [a] broad programmatic attack" on an agency's operations. *Id.* at 64. Defendants thus analogize this case to *NAACP v. Bureau of the Census*, 945 F.3d 183 (4th Cir. 2019), and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 893 (1990).

In *NAACP*, the plaintiffs brought a challenge in 2018 to the census "methods and means," and "design choices." *NAACP*, 945 F.3d at 186. The *NAACP* plaintiffs challenged as insufficient the numbers of enumerators, the networks of area census offices, the Bureau's plan to rely on administrative records, and partnership program staffing. *Id.* at 190. The Fourth Circuit found that "'[s]etting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *Id.* (citing *S. Utah Wilderness All.*, 542 U.S. at 66–67). In concluding that there was not final agency action, the Fourth Circuit emphasized that its holding was "based on the broad, sweeping nature of the allegations that the plaintiffs have elected to assert under the APA." *Id.* at 192.

NAACP is inapposite for two reasons. First, the relief Plaintiffs seek here would not "inevitably [] lead to court involvement in 'hands-on' management of the Census Bureau[]." *Id.* at 191. Plaintiffs do not ask the Court to manage the Bureau's day-to-day operations or to enforce free-floating standards of "sufficiency." *See NAACP*, 945 F.3d at 191 (quoting claims of "insufficient network of area census offices," "insufficient partnership program staffing," "insufficient testing of 'new protocols,'" and more). Rather, Plaintiffs challenge the Defendants' failure to consider important aspects of the problem and lack of reasoned explanation for the Bureau's change in position. Reply at 14. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*

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Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (finding that agency's explanation for rescission was not the product of reasoned decisionmaking); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (setting aside agency's "change in position" for lacking reasoned explanation).

Second, the Replan is a circumscribed, discrete agency action. Indeed, Defendants treated the Replan accordingly. Defendants named it the "Replan" or "Replanned Operational Schedule." *E.g.*, DOC_10276 (version of August 3, 2020 slide deck identified as key by the parties); DOC_8929 (July 30, 2020 email from Barbara LoPresti, Chief of the Decennial Information Technology Division, to senior officials discussing "this proposed replan"); DOC_10066 (email thread titled "Replan" with senior officials); DOC_11918 (August 3, 2020 email to the Chief of Staff for the Deputy Secretary of Commerce with subject "Revised Replan Deck").

The Secretary directed the Bureau to develop the Replan. *See, e.g.*, August 3 Press Release, ECF No. 37-1 ("directed by the Secretary"). In response to the Secretary's direction, the Bureau presented the Replan to the Secretary in a single slide deck. *See, e.g.*, DOC_10276. The Secretary made an explicit decision to adopt the Replan. Fontenot Decl. ¶ 85. Census Bureau Director Dillingham announced the Replan in a single press release on August 3, 2020. ECF No. 37-1. Defendants consistently treated the Replan as a circumscribed, discrete agency action.

Defendants' comparison to *Lujan v. National Wildlife Federation* is also misplaced. *See* PI Opp. at 17. In *Lujan*, plaintiffs challenged a "so-called 'land withdrawal review program'"—"so-called" because the term "land withdrawal review program" was "simply the name by which [the agency] [] occasionally referred to the continuing (and thus constantly changing) operations of the" agency. *Lujan*, 497 U.S. at 890. The term was "not derived from any authoritative text." Any "land withdrawal review program" in fact comprised at least "1250 or so individual classification terminations and withdrawal revocations." *Id.*

The *Lujan* plaintiffs recognized as much. In their complaint, the *Lujan* plaintiffs challenged: (1) reclassification of some withdrawn lands; (2) the return of other lands to the public domain; (3) petitioners' failure to develop, maintain, and revise land use plans; (4) petitioners' failure to submit recommendations as to withdrawals in the 11 Western States to the President;

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(5) petitioner's failure to consider multiple uses for disputed lands; (6) petitioners' failure to provide public notice of decisions; and (7) petitioners' failure to provide a detailed environmental impact statement in every recommendation or report on major federal actions significantly affecting the quality of the human environment. *Id.* at 879. Moreover, the *Lujan* plaintiffs "[a]ppended to the amended complaint . . . a schedule of specific land-status determinations" that listed several land status-determinations that were each identified by a listing in the Federal Register. *Id.*

By contrast, Plaintiffs here challenge a circumscribed, discrete agency action: the Replan. "Replan" is not an "occasional[]" informal name for "constantly changing" operations, *id.* at 890, but is a codified term for the agency action directed and adopted by the Secretary. *E.g.*, DOC_11918. Nor is the Replan a disconnected series of hundreds of individual determinations with enough independent significance to be published in the Federal Register like the program in *Lujan*. Rather, the Replan is a census operational plan that replaced the COVID-19 Plan. As *Lujan* held plainly, though, judicial "intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns." *Lujan*, 497 U.S. at 894.

Again, in sum, as Justice Scalia stated: "[t]he bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power. It is rather in the word 'final.'" *Whitman*, 531 U.S. at 478 (citations omitted). It is to that finality requirement that the Court now turns.

D. The Replan constitutes final agency action.

Defendants argue that even if the Replan were agency action, "it is not 'final' agency action that is subject to judicial review under § 704." PI Opp. at 19. "To maintain a cause of action under the APA, a plaintiff must challenge 'agency action' that is 'final.'" *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton*, 542 U.S. at 61–62).

An agency's action is final if two conditions are met. First, the action "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or

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interlocutory nature." *Bennett*, 520 U.S. at 177–78. Second, the action "must be one by which 'rights or obligations have been determined,' or from 'which legal consequences will flow.'" *Id.* (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Five years earlier, the Supreme Court found that the same two requirements applied in a census case. *Franklin*, 505 U.S. at 797 (the central question "is [1] whether the agency has completed its decisionmaking process, and [2] whether the result of that process is one that will directly affect the parties."). Courts should take a "'pragmatic' approach" to finality. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

The Court finds the Replan is final agency action for purposes of APA review because the Replan meets both criteria, each of which the Court addresses in turn.[6]

1. The Census Bureau completed its decisionmaking process: Defendants have adopted and implemented the Replan.

As to the first factor of final agency action, which is "whether the agency has completed its decisionmaking process," *Franklin*, 505 U.S. at 797, the Replan marks the consummation of the Bureau's and Department of Commerce's decisionmaking process because the Replan is "not subject to further agency review." *Sackett v. EPA.*, 566 U.S. 120, 127 (2012); *see also Hawkes*, 136 S. Ct. at 1813–14 (holding that an agency action was final because the determination was "typically not revisited"); *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 593 (9th Cir. 2008) (holding that an agency's action was final where "[n]o further agency decisionmaking on the issue can be expected"). The Secretary made an explicit decision to adopt the Replan. August 3 Press Release; *see* Fontenot Decl. ¶ 85. The Bureau has implemented

[6] In *Hawkes Co.*, the Supreme Court expressly reserved whether an agency action that satisfies only the first condition—consummation of the agency's decisionmaking process—can still be final. 136 S. Ct. at 1813 n.2. The Court did not reach that question in *Hawkes Co.* because the agency action under review "satisfie[d] both prongs of *Bennett*." *Id.* Similarly, the Replan satisfies both prongs. Thus, the Court need not decide whether the first condition alone would suffice to constitute a "final" agency action.

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the Replan. No further agency decisionmaking will be conducted on the Replan.

Norton v. Southern Utah Wilderness Alliance, a decision cited by Defendants, is readily distinguishable from the instant case. *See* Defs. 1st Supp. Br. at 1 (citing *Norton*, 542 U.S. at 61–62). In *Norton*, the United States Supreme Court found that the plaintiffs' challenges to the Bureau of Land Management's land use plans failed. The *Norton* Court reasoned that the plans were not a "legally binding commitment" that were enforceable under the APA. 542 U.S. at 72. Specifically, the plaintiffs claimed that BLM "failed to comply with certain provisions in its land use plans," which "describe[], for a particular area, allowable uses, goals for future condition of the land, and specific next steps." 542 U.S. at 59, 67. The Federal Land Policy and Management Act of 1976 "describes land use plans as tools by which 'present and future use is *projected*.'" *Id.* at 69 (emphasis in original) (quoting 43 U.S.C. § 1701(a)(2)).

Thus, the *Norton* Court observed that "[t]he implementing regulations make clear that land use plans are a *preliminary* step in the overall process of managing public lands—designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." *Id.* (emphasis added). As a result, "a land use plan is not ordinarily the medium for affirmative decisions that implement the agency's 'project[ions].'" *Id.* (quoting 43 U.S.C. § 1712(e)). Similarly, "the regulation defining a land use plan declares that a plan 'is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.'" *Id.* at 69–70. In sum, by contrast to a "final" agency action, the type of land use plan challenged by the *Norton* plaintiff "is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." *Id.* at 71.

Here, the Replan was not a "preliminary step" toward deciding the Census schedule. Nor was the Replan a "statement of priorities" that merely "guides and constrains actions." *See id.* at 69, 71. Instead, the Replan constitutes a commitment to terminate the collection of data, analyze that data, and report "[t]he tabulation of total population" to the President by December 31, 2020. 13 U.S.C. § 141(b).

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Moreover, termination of data collection is practically irreversible. In his September 5, 2020 declaration, Defendants' own declarant, Associate Director Fontenot, requests that if the Court enjoins Defendants, the Court do so earlier than later because it is difficult to rehire field staff who have been terminated:

> Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

Fontenot Decl. at ¶ 98.

In sum, the Replan provides that all data collection, including field operations, cease by September 30, and truncated data processing begin the next day. Absent a preliminary injunction, those practically irrevocable steps are only days away. The Replan is thus the completion of Defendants' decisionmaking process on how the 2020 Census will be conducted.

2. The Replan directly affects the parties.

As to the second factor of final agency action, which is whether an agency action "will directly affect the parties," the Replan certainly does affect the parties and will continue to do so. *Franklin*, 505 U.S. at 797; *see also Bennett*, 520 U.S. at 177–78 (holding that, "[a]s a general matter," a final action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'" (citation omitted)). The Court analyzes the Replan's effect on the Plaintiffs and Defendants then distinguishes Defendants' main case, *Franklin v. Massachusetts*.

a. The Replan's undercount will directly affect and harm Plaintiffs.

The Replan "will directly affect" Plaintiffs and result in "legal consequences." *Franklin*, 505 U.S. at 797; *Bennett*, 520 U.S. at 177–78. Specifically, the Replan will directly affect Plaintiffs in three ways: (1) by undercounting hard to count populations; (2) barring governmental

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Plaintiffs' constituents and organizational Plaintiffs' members from participating in the 2020 Census after September 30, 2020; and (3) exposing those same people to violations of federal law and fines.

First, the Replan will likely undercount hard to count populations in the decennial census. This undercount necessarily affects the Secretary's "tabulation of total population by States" and the President's apportionment calculations, which "must be based on decennial census data alone." *New York*, 2020 WL 5422959, at *26 (discussing text, legislative history, and the Executive's longstanding understanding of 13 U.SC. § 141(a) and 2 U.S.C. § 2a(a)). In other words, the Replan will likely result in an undercount in both the numbers that the Secretary reports to the States and the numbers that the President—who must draw on "decennial census data"—reports to Congress.

That undercount, as discussed in the Court's standing analysis above, injures Plaintiffs in legally cognizable ways. For instance, an undercount harms the "crucial representational rights that depend on the census," *Dep't of Commerce v. New York*, 139 S. Ct. at 2569, and deprives local government Plaintiffs of federal funds they are entitled to, *cf. City of Kansas City, Mo. v. U.S. Dep't of Hous. & Urban Dev.*, 861 F.2d 739, 745 (D.C. Cir. 1988) (discussing procedural rights arising under Community Development Block Grants, which at least King County and Los Angeles receive). These harms and others will last through 2030, if not later. Congress has determined as much by finding that:

> the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted.

1998 Appropriations Act, § 209(a)(8), 111 Stat. at 2480–81. Thus, because the Replan will likely result in an inaccurate enumeration, the Replan is an action from which legal consequences will flow.

Second, the Replan bars people who seek to participate in the Census—such as

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governmental Plaintiffs' constituents and organizational Plaintiffs' members—from participating after September 30, 2020. *See Sackett*, 566 U.S. at 126 (holding that an agency action determined rights and obligations of property owners where it "severely limit[ed] [the owners'] ability to obtain a permit . . . from [the agency]"); *Alaska, Dep't of Environmental Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (holding that an agency action determined rights and obligations where its effect was to halt construction at a mine facility). These people will be unable to participate despite their potential reliance on the Census Bureau's previous, widely publicized representations that they could participate until October 31, 2020. For example:

- The League of Women Voters has over 65,000 members across 800 state and local affiliates. Stewart Decl. ¶ 4. Thus, "[w]hen the Census Bureau extended the deadline for counting operations to October 31, 2020," the League of Women Voters "published blog posts advertising the new timeline," "shared numerous letters with [] state and local affiliates providing information about the new timeline," and "publicized the deadline in letters and [emails]." *Id.* ¶ 11.
- The City of Los Angeles is home to about 4 million people. M. Garcia Decl. ¶ 7. The City "conducted a public education campaign publicizing the October 31, 2020 date for self-response." *Id.* ¶ 14. For example, the City announced the date in bus shelter posters and social media toolkits. *Id.*
- National Urban League has 11,000 volunteers across 90 affiliates in 37 states. Green Decl. ¶ 4. "[W]hen the Census Bureau announced its extension of the timeline for collecting responses to the 2020 Census, the National Urban league informed all members of the 2020 Census Black Roundtable that the deadline had become October 31, 2020. The members in turn conveyed to their own networks and constituents, causing a cascading effect." *Id.* ¶ 14.

Third, the Replan exposes the same people—people who believe that October 31, 2020 is still the Census deadline—to fines and violations of federal law. By way of background, the Census Act imposes a "clear legal duty to participate in the decennial census." *California v. Ross*, 362 F. Supp. 3d 727, 739 (N.D. Cal. 2018) (Seeborg, J.) (citing 13 U.S.C. § 221). Specifically, 13 U.S.C. § 221(a) provides that any adult who "refuses or willfully neglects . . . to answer, to the best of his knowledge, any of the questions on" the census "shall be fined not more than $100." 13 U.S.C. § 221(a). "[E]ach unanswered question" risks an additional fine. *Morales v. Daley*, 116 F.

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Supp. 2d at 809; *accord United States v. Little*, 317 F. Supp. 1308, 1309 (D. Del. 1970) ("Presumably there could be a separate violation for each unanswered question."). The 2020 Census form has nine questions for the first person in a household and seven questions for each additional person. *See* U.S. Census Bureau, *2020 Census Questionnaire* (last revised Mar. 7, 2020), https://www.census.gov/programs-surveys/decennial-census/technical-documentation/questionnaires/2020.html. The resulting liability for "refus[ing] or willfully neglect[ing]" to answer an entire Census questionnaire is thus significant. 13 U.S.C. § 221(a).

Because of the excellent publicizing of the COVID-19 Plan, the Replan increases the risk that people will incur that liability. Before the Replan was announced on August 3, 2020, the Bureau and its partners (such as Plaintiff National Urban League) advertised for months that the deadline for census responses was October 31, not September 30, 2020. *See supra* Section III-B-4. Now, some people may refuse to respond to the questionnaire—or an enumerator's non-response follow-up—on the misunderstanding that they still have another month to comply. This "increase [in] *risk* of incurring penalties in a future enforcement proceeding" still "constitute[s] 'legal consequences' under *Bennett*." *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 957–59 (D.C. Cir. 2019) (emphasis in original) (holding also that "the agency's exercise of prosecutorial discretion" is not enough to render agency action non-final).

b. The Replan directly affects Defendants by binding them for 10 years to a less accurate tabulation of total population.

For Defendants, the Replan gives rise to legal consequences because it effectively binds Defendants—for the next decade—to a less accurate "tabulation of total population by States" under the "decennial census." 13 U.S.C. § 141(b). The Replan does this by committing Defendants to compressing census self-response from 33.5 weeks to 29 weeks; Non-Response Follow Up ("NRFU") from 11.5 weeks to 7.5 weeks; and data processing from 26 weeks to 13 weeks. *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319–20 (D.C. Cir. 2011) ("[T]he Guidance binds EPA regional directors and thus qualifies as final agency action.").

The result of this significant compression in these extraordinary times will be inaccuracies

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in the "tabulation of total population." Inaccuracies in the tabulation harm constitutional and statutory interests. *See, e.g.*, *Evans*, 536 U.S. at 478 (finding a "strong constitutional interest in accuracy"); 1998 Appropriations Act, § 209, 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible . . . ."). Those constitutional and statutory harms—and Defendants' choice of speed over accuracy—will endure until 2030.

A less weighty and more easily revocable constraint on the Government was found final in *Hawkes Co.*, 136 S. Ct. at 1814. There, an internal memorandum of agreement between two federal agencies provided that the Army Corps of Engineers could issue "jurisdictional determinations" ("JDs") that were generally "binding on the Government" for five years. *Id.* The Supreme Court held that the JDs were final agency action under *Bennett v. Spear* even though (1) the JDs could be appealed and "revisited," *see id.* at 1813–14; and (2) the JDs' source of authority, the memorandum of agreement, never went through notice and comment and was represented as *non*-binding by the United States. *See id.* at 1817 (opinions of Kennedy, J., concurring; and Ginsburg, J., concurring in part and concurring in the judgment). By contrast, here (1) Defendants do not waver in their commitment to end data collection by September 30, 2020 and to report population data to the President by December 31, 2020; and (2) there is no doubt that the Replan will bind the United States to this Census and "tabulation of total population" until 2030.

Thus, because the Replan determines rights and obligations and gives rise to legal consequences, the Replan constitutes final agency action.

c. *Franklin v. Massachusetts* shows why the Replan is final agency action.

To argue that the Replan does not constitute final agency action, Defendants rely on the Supreme Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). PI Opp. 19–20. That case concerned the Secretary of Commerce's transmission of the census report to the President. *Franklin*, 505 U.S. at 797–98. There, the data presented to the President—the allocation of overseas military personnel to states based on their "home of record"—was still subject to

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correction by the Secretary. *Id.* In addition, the President could instruct the Secretary to reform the census. *Id.* at 798. The Secretary's report to the President thus was a "moving [target]" or a "tentative recommendation," rather than a "final and binding determination." *Id.* It carried "no direct consequences for the reapportionment." *Id.* Based on these characteristics, the transmission of the census report was not final agency action. *Id.* at 798.

Franklin underscores why the Replan constitutes final agency action. The Replan is neither a "tentative recommendation" nor a decision that will be reviewed by a higher official. *Id.* Rather, the Secretary directed the Bureau to develop the Replan on July 29, 2020 and approved the Replan on August 3, 2020. Moreover, as a practical matter, no time remains for agency reconsideration. The Replan's field operations will irreversibly wind down on September 30, 2020. Fontenot Decl. ¶ 98.

The Replan also has "direct consequences for the reapportionment." *Id.* The Replan determines when data collection will end—past which people can no longer participate in the census—and solidifies an undercount that will carry through to Congressional reapportionment, federal funding, and more for a decade. By contrast, in *Franklin*, the data the Secretary reported could have had zero effect. The President could have "reform[ed] the census" and allocated already-counted servicemembers not by "home of record," but by "legal residence," "last duty station," or no "particular State[]." *Id.* at 792, 794; *see also U.S. House of Reps. v. U.S. Dep't of Commerce*, 11 F. Supp. 2d at 93 (distinguishing *Franklin* on the same ground).

In any event, "[e]ven in the [*Franklin*] Court's view, the Secretary's report of census information to recipients other than the President would certainly constitute 'final agency action.'" *Franklin*, 505 U.S. at 815 n.14 (Stevens, J., concurring in part and concurring in the judgment). That is because only the President may order the Secretary "to reform the census, even after the data are submitted to him." *Id.* at 798. Data recipients such as the states can do no such thing. Accordingly, the Secretary's reporting of "counts as they are used for intra-state *redistricting* and for *federal fund allocation* . . . is final agency action for purposes of APA review." *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 918–19 (E.D.N.Y. 1993) (emphasis in original)

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(challenging guidelines that led Secretary not to adjust undercount), *vacated on non-APA grounds*, 34 F.3d 1114 (2d Cir. 1994), *rev'd sub nom. Wisconsin v. City of New York*, 517 U.S. at 12 n.7 (noting that "[plaintiffs] did not appeal the District Court's treatment of their statutory claims" to the Second Circuit). Plaintiffs here likewise challenge the Replan's undercount as it will be used in intra-state redistricting and federal fund allocation.

Last year's citizenship question cases further underscore why the Replan is final agency action. In those cases, the United States conceded that adding the citizenship question to the census questionnaire constituted final agency action. *See New York*, 351 F. Supp. 3d at 645; *Kravitz v. Dep't of Commerce*, 336 F. Supp. 3d 545, 566 n.13 (D. Md. 2018). There is no reason that a memorandum announcing the addition of a question would mark the agency "complet[ing] its decisionmaking process" and "directly affect[ing] the parties," *Franklin*, 505 U.S. at 797, but the Replan would not. In both cases, the Secretary directed the development of and adopted the Replan; the Bureau viewed the Secretary's decision as binding; and the decision directly affects the parties. In sum, the Replan is final agency action.

E. The Replan is not committed to agency discretion by law.

Defendant's last argument on reviewability is that the administration of the census—including the Replan—is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Court disagrees.

The APA creates a "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015). One exception includes those actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). However, courts have read this exception quite narrowly. This exception encompasses situations where Congress explicitly precludes review, or "'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). This latter exception has generally been limited to "certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion . . . such as a decision not to

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institute enforcement proceedings . . . or a decision by an intelligence agency to terminate an employee in the interest of national security." *Dep't of Commerce*, 139 S. Ct. at 2568 (citations and quotation marks omitted) (citing *Hecker v. Chaney*, 470 U.S. 821, 831–32 (1985) and *Webster v. Doe*, 486 U.S. 592, 600–01 (1988)).

Department of Commerce v. New York controls. There, the Supreme Court concluded that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion." 139 S. Ct. at 2568. Collecting case law, the Supreme Court noted that "courts have entertained both constitutional and statutory challenges to census-related decisionmaking." *Id.* (citing, *e.g.*, *Carey*, 637 F.2d at 839, in which the Second Circuit concluded that the Bureau's decision not to use "Were You Counted" forms or to compare census records with records of Medicaid-eligible people "was not one of those 'rare instances' where agency action was committed to agency discretion"); *see also City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 869 n.6 (9th Cir. 2002) (rejecting argument that the Bureau's decision not to adopt statistically adjusted population data was committed to agency discretion by law). The Supreme Court explained that there were meaningful standards against which to judge the taking of the census, including the Census Act, which requires that the agency "conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Id.* at 2568–69 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in judgment)).

Here, Plaintiffs challenge the Replan—a set of deadlines for "the taking of the census." *Id.* at 2568. Plaintiffs' claims, like those in *Department of Commerce v. New York*, arise under the Enumeration Clause and the APA. Here too, the Census Act provides a meaningful standard against which to judge Defendants' action. The Replan's change in deadlines affects the accuracy of the enumeration, as did the decision to omit certain records in *Carey* or reinstate the citizenship question in *New York*. Accordingly, the Replan is not committed to agency discretion.

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F. Plaintiffs lack an adequate alternative to judicial review and suffer prejudice from the Replan.

To avoid any doubt that the instant case is reviewable, the Court briefly addresses two remaining APA requirements even though Defendants waive one and forfeit the other. *See generally United States v. Olano*, 507 U.S. 725, 733 (1993) ("[F]orfeiture is the failure to make the timely assertion of a right; waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

The first is that "an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court." *Hawkes Co.*, 136 S. Ct. at 1815 (citing 5 U.S.C. § 704). Defendants waived this argument at the September 22, 2020 preliminary injunction hearing, and for good reason. Tr. of Sept. 22, 2020 Preliminary Injunction Hearing, ECF No. 207, at 41:13–17 (The Court: "But you are not arguing that they have an adequate alternative to APA review in Court; is that correct?" Defendants: "That is not an argument that we have presented in our papers, Your Honor."). The effects of a census undercount now would irrevocably reverberate for a decade. Congress has reached the same conclusion. *See* 1998 Appropriations Act, § 209, 111 Stat. at 2481 (providing that if "enumeration is conducted in a manner that" is unlawful, it would be impracticable for the "courts of the United States to provide[] meaningful relief after such enumeration has been conducted").

The second APA requirement is that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706; *accord Organized Vill. of Kake v. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc) ("[N]ot every violation of the APA invalidates an agency action; rather, it is the burden of the opponent of the action to demonstrate that an error is prejudicial."). Defendants do not raise this argument in their briefs and so forfeit it. In any event, as the above analysis of Plaintiffs' injuries shows, *see supra* Section III-B, the Replan's violation of the APA prejudices Plaintiffs in four ways. First, Plaintiffs risk losing important federal funding from undercounting. Second, Plaintiffs state that an inaccurate apportionment will violate their constitutional rights to political representation. Third, Plaintiffs will need to expend resources to mitigate the undercounting that will result from the Replan. Lastly, local government Plaintiffs' costs will

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increase because those Plaintiffs rely on accurate granular census data to deploy services and allocate capital. Thus, an APA error would be prejudicial.

IV. MERITS

A party seeking a preliminary injunction must show (1) a likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the party's favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. The Court concludes that Plaintiffs meet all four factors and discusses each factor in turn below.[7]

A. Plaintiffs are likely to succeed on the merits of their claim that the Replan was arbitrary and capricious in violation of the APA.

Plaintiffs argue that they are likely to succeed on the merits with respect to their constitutional claim, which is brought under the Enumeration Clause, Mot. at 25–28, as well as their statutory arbitrary and capricious claim and pretext claim, which are both brought under the APA, *id.* at 14–25. Although Plaintiffs' constitutional and statutory claims overlap substantially because they both challenge the extent to which the Replan can accomplish a "full, fair, and accurate" count, Plaintiffs' constitutional and statutory claims present distinct bases on which the Court may grant injunctive relief.

Because the Court holds below that Plaintiffs are likely to succeed on the merits of their APA arbitrary and capricious claim, the Court need not reach Plaintiffs' Enumeration Clause claim or APA pretext claim. *See, e.g.*, *New York*, 2020 WL 5422959, at *2 (finding that the plaintiffs were entitled to a permanent injunction on their statutory claim and thus declining to "reach the

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[7] Under Ninth Circuit precedent, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *accord Short v. Brown*, 893 F.3d 671675 (9th Cir. 2018) (holding that these factors are "on a sliding scale"). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits.'" *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *All. for the Wild Rockies*, 632 F.3d at 1135). In the instant case, the Court finds not only serious questions going to the merits, but also a likelihood of success on the merits.

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overlapping, albeit distinct, question of whether the [challenged action] constitutes a violation of the Constitution itself").

Before discussing Plaintiffs' APA arbitrary and capricious claim, though, the Court addresses the scope of its review. As the procedural history sets forth, Defendants have resisted producing the administrative record. Defendants also have explicitly conceded that if the Court finds that the Replan constitutes final agency action, then Defendants lose on likelihood of success on the merits. ECF No. 88 at 4. Defendants even "ask[ed] that the Court simply enter the TRO as a preliminary injunction" on September 8, 2020. ECF No. 98 at 65:18–20. Defendants have made these statements repeatedly:

- September 8, 2020 brief regarding whether Defendants must produce the administrative record:
  - "[W]ere the Court to brush past the threshold justiciability and jurisdiction bars, and conclude, contrary to the Fourth Circuit's holding in *NAACP*, that the Replan is discrete, circumscribed final agency action subject to the APA—then the appropriate course would be to consider Mr. Fontenot's declaration, and to find against the Defendants on the likelihood of success on the merits prong if that declaration is insufficient." ECF No. 88 at 4.
- September 8, 2020 further case management conference:
  - "Your Honor, we ask that the Court simply enter the TRO as a preliminary injunction at this point. I think that will serve everybody's interests best." ECF No. 98 at 65:18–20.
  - "Our position is that if the Court rejects the five threshold arguments that we have made, determines that there was final agency action and determines that an explanation was required under the APA and finds that Mr. Fontenot's declaration does not provide that explanation, then the conclusion would have to be that the Government loses on the likelihood of success on the merits prong of the PI." ECF No. 98 at 55:6–13.

Accord Tr. of Sept. 14, 2020 Further Case Management Conference, ECF No. 126 at 35:20–36:6 (conceding same); Tr. of Sept 15, 2020 Hearing on Allegations of Potential Non-Compliance with TRO, ECF No. 141 at 52:24–53:8, 62:10–13 (conceding same).

The Court has found that the Replan is reviewable final agency action. Thus, if the Court

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finds that Associate Director Fontenot's declaration is insufficient, Defendants have conceded that Defendants lose on likelihood of success on the merits.

Associate Director Fontenot's declaration is facially insufficient to serve as a basis for APA review of whether the agency action was arbitrary and capricious. APA review "is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1913 (2020). To assess those grounds, "the focal point for judicial review should be the administrative record." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Litigation affidavits are "merely 'post hoc' rationalizations which have traditionally been found to be an inadequate basis for review." *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1972) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–169 (1962)); *accord Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (R. Ginsburg, Thomas, Sentelle, JJ.)) (holding that "[t]he use of an affidavit by the agency decisionmaker was manifestly inappropriate for a case" under the APA); *see also Regents*, 140 S. Ct. at 1909 (rejecting Secretary of Homeland Security's post-litigation memorandum). The Court thus views Plaintiffs' claims through the lens of the administrative record.[8]

On review of the administrative record, the Court agrees that Plaintiffs are likely to succeed on the merits of their APA arbitrary and capricious claim for five reasons: (1) Defendants failed to consider important aspects of the problem, including their constitutional and statutory obligations to produce an accurate census; (2) Defendants offered an explanation that runs counter to the evidence before them; (3) Defendants failed to consider alternatives; (4) Defendants failed to articulate a satisfactory explanation for the Replan; and (5) Defendants failed to consider reliance interests. Although likelihood of success on the merits of one of the five reasons would support a preliminary injunction, the Court finds that Plaintiffs are likely to succeed on all five. Below, the Court analyzes the five reasons in turn.

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[8] As stated in the procedural history, the administrative record for the purposes of the preliminary injunction comprises Defendants' non-privileged OIG documents. United States Magistrate Judges adjudicated Defendants' assertions of privilege after *in camera* review.

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1. Plaintiffs are likely to succeed on the merits of their claim that Defendants failed to consider important aspects of the problem.

Plaintiffs argue that, by failing to adequately provide for the fulfillment of its constitutional and statutory duty to conduct an accurate enumeration, Defendants neglected to consider important aspects of the problem in violation of the APA. Mot. at 18–21.

The arbitrary and capricious standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In order to meet this requirement, the agency must consider the "important aspect[s]" of the problem before it. *State Farm*, 463 U.S. at 43.

The Court concludes that Defendants failed to consider "important aspect[s]" of the problem before them. *State Farm*, 463 U.S. at 43. Rather, Defendants adopted the Replan to further one alleged goal alone: meeting the Census Act's statutory deadline of December 31, 2020 for reporting congressional apportionment numbers to the President. In the process, Defendants failed to consider how Defendants would fulfill their statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline.

Defendants' constitutional and statutory obligations are "important aspects" of the problem before them. *See Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency has overlooked 'an important aspect of the problem,' . . . turns on what [the] relevant substantive statute makes 'important.'"); *see, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84 (2020) ("If the Department did not look to [the Religious Freedom Restoration Act's] requirements or discuss [RFRA] at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem."). Here, the relevant constitutional and statutory provisions focus first and foremost on the obligation to produce an accurate census.

As a constitutional matter, the Enumeration Clause evinces a "strong constitutional interest in [the] accuracy" of the census. *Evans*, 536 U.S. at 478. This interest in accuracy is driven by "the

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constitutional purpose of the census, [which is] to determine the apportionment of the Representatives among the States." *Wisconsin v. City of New York*, 517 U.S. at 20.

In turn, the Census Act imposes a statutory duty of accuracy. "[B]y mandating a population count that will be used to apportion representatives, *see* § 141(b), 2 U.S.C. § 2(a), the [Census] Act imposes 'a duty 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. at 2568–69 (quoting *Franklin*, 505 U.S. at 819–20 (Stevens, J., concurring in part and concurring in the judgment)). Congress has underscored this duty in legislation amending the Census Act. *See* 1998 Appropriations Act, § 209(a), 111 Stat. at 2480–81 (codified at 13 U.S.C. § 141 note) (finding that "it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States"). Thus, the Census Act requires the Defendants to produce an accurate census.

Defendants failed to sufficiently consider these constitutional and statutory obligations when adopting the Replan. As the administrative record shows, the Replan will decrease the census's accuracy and undercount historically undercounted individuals. The Replan cuts Non-Response Follow Up ("NRFU") from 11.5 weeks to 7.5 weeks. The Replan cuts data processing from 26 weeks to 13 weeks. The effect of this shorter timeframe will be particularly pronounced due to the pandemic. COVID-19 has not only made it more difficult to hire enumerators, but also made it more difficult for enumerators to conduct safe and effective NRFU. ECF No. 37-7 at 8, 18. After all, the goal of NRFU is to "conduct in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire." Fontenot Decl. ¶ 48.

The record before the agency demonstrates the effect of these significant cuts on census accuracy. Several internal Bureau documents are especially illustrative.

First, a March 24, 2020 set of talking points explained the effect of reducing operations on accuracy. These talking points were circulated by Enrique Lamas, Chief Advisor to Deputy Director Ron Jarmin, to senior Bureau officials as late as July 21, 2020 on "urgent" notice. DOC_7085–86. "Call me please," he wrote to Senior Advisor for Decennial Affairs, James B.

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Treat. DOC_7075. The talking points stated: "The 2020 Census operations are designed to cover specific populations for a complete count of the population. If specific operation are cut or reduced, the effect would be to miss specific parts of the population [and] lead to an undercount of specific groups. That is why operations like Update Leave targeting rural populations or group quarters enumeration are critical to full coverage and need to be done in specific orders." DOC_7086.

A set of April 17, 2020 talking points regarding the COVID-19 Plan, which were drafted by Assistant Director for Decennial Programs Deborah Stempowski, stated: "We have examined our schedule and compressed it as much as we can without risking significant impacts on data quality." DOC_265. Bureau officials repeated this statement to Congressman Jamie Raskin, who chairs the House Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. *See* DOC_2224.

On July 23, 2020, the Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared a so-called "Elevator Speech" memo with GAO official Ty Mitchell and senior Bureau officials. *See* DOC_8026 (sending to GAO). The purpose of the Elevator Speech, Chief Styles wrote, was "to explain, in layman's terms, why we need a schedule extension." The Speech begins with a "High Level Message," which in its entirety reads:

> Curtailing census operations will result in a census that is of unacceptable quality. The Census Bureau needs the full 120 days that the Administration originally requested from Congress to have the best chance to produce high quality, usable census results in this difficult time. Shortening the time period to meet the original statutory deadlines for apportionment and redistricting data will result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity.

ECF No. 155-8 at 295, 332 (DOC_8070).

The rest of the Speech makes three overarching points that are similarly grim. The first point is that "[s]hortening field data collection operations will diminish data quality and introduce risk." The main reason is that "COVID-19 presents an unprecedented challenge to field data collection. . . . Areas that are now low risk for COVID will become high risk and vice versa, and

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the Census Bureau will need to adapt NRFU on an almost daily basis to conduct data collection using the Administration's gating criteria." *Id.* Other necessary adaptations include "development of systems for an outbound telephone operation," "significantly increasing selections for field positions to compensate for a much higher dropout rate from enumerator training," and finding ways to count people who lived in group quarters and in college. *Id.* "All of these adapted operations are intended to produce the most accurate census possible, and cannot be rushed without diminishing data quality or introducing unacceptable risk to either operations or field staff." *Id.*

The second point is that "[s]hortening post processing operations will diminish data quality and introduce risk." *Id.* "[I]t is not possible to shorten the schedule appreciably without directly degrading the quality of the results and introducing great risk." *Id.* The reason is that "[e]ach and every step in post processing is necessary and eliminating any step would result in a diminished data product. . . . [N]o step can be eliminated or overlap with another step." For instance:

> Some of these steps provide for quality reviews. While it may be tempting to think that quality reviews can be shortened, through decades of experience[,] the Census Bureau has learned that quality reviews are essential to producing data products that do not need to be recalled, products that stand the test of time. [The Bureau] routinely discover[s] items that need to be corrected during data review and appreciably shortening data review would be extremely unwise.

Id. Furthermore, "[t]he Census Bureau needs 30 [more] days for risk mitigation." Risks include natural disasters, "e.g., a hurricane, or a COVID outbreak," and "to account for additional processing steps and reviews made necessary by the COVID adaptations (e.g., extra time for processing responses related to college students)." *Id.*

The Elevator Speech's last overarching point is that "[c]urtailing either field operations or post-processing may result in loss of public confidence in the census results such that census results would be unusable regardless of quality." DOC_8071. Specifically, "[t]he administration already requested 120 days and Census officials have repeatedly said we need this time." *Id.* Changing tack could "result in great skepticism about the numbers and unwillingness to use them." *Id.* That is because "[t]here are always winners and losers in census results." *Id.* As a result,

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"[c]ensus results have always been about confidence . . . confidence in the Census Bureau's ability to produce high quality, impartial data, free from political interference. In this sense being seen to produce politically-manipulated results is as much of a danger as low quality data." *Id.*

Many of the fears expressed in the Elevator Speech were borne out by the time the Replan was ordered, adopted, and announced:

- The Secretary directed the Bureau to develop a plan with an accelerated schedule within days, which led to the drafting of the Replan. *See* DOC_10183.
- The Replan shortened both data collection and data processing.
- Four days before the Replan was announced, enumerator staffing was roughly 50 percent of the Bureau's target at some sites within major regions such as the Los Angeles Region. *See* DOC_8631.
- On the date of the Replan's announcement, COVID-19 had resurged in much of the country, Hurricane Hanna had hit Texas, and Hurricane Isaias had almost made landfall in North Carolina.[9]

On July 23, 2020, the same day that the Bureau circulated the Elevator Speech, several senior Bureau officials, including Deputy Director Ron Jarmin, Defendants' sole declarant Associate Director Fontenot, and Associate Director for Field Operations Timothy Olson, conferred in an email thread. Associate Director Fontenot began the thread by stating he would soon tell the Department of Commerce about the "reality of the COVID Impacts and challenges":

> On Monday at DOC [Department of Commerce] I plan to talk about the difference between goal and actual case enumeration (Currently a shortfall (11 % goal vs 7% actual) and attribute it to the higher drop out rate and (ideally with reasons) and what we are going to do to address the technology drop outs.)

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[9] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Accordingly, the Court takes judicial notice that Hurricane Hanna hit Texas on July 25, 2020, while Hurricane Isaias made landfall on the coast of North Carolina on August 3, 2020 at 11 pm Eastern Time. *See Hurricane Hanna*, https://www.weather.gov/crp/Hurricane_Hanna; *Hurricane Isaias*, https://www.weather.gov/mhx/HurricaneIsaias080420#:~:text=Isaias%20marked%20the%20earliest%20ninth,peak%20intensity%20of%2085%20mph.&text=Across%20eastern%20North%20Carolina%2C%20Isaias,minor%20storm%20surge%20and%20tornadoes.

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> I think it is critical to lay the groundwork for the reality of the COVID Impacts and challenges.
>
> Does anyone have any problems with my approach?

DOC_7737. In response, Associate Director Olson "agree[d] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about." DOC_7738.

"All the reasons we know about" are not described in the administrative record. Olson does allude, however, to the reason of "political motivation." DOC_7737. In doing so, he "sound[s] the alarm" on "deliver[ing] apportionment by 12/31" in the strongest possible terms:

> We need to sound the alarm to realities on the ground – people are afraid to work for us and it is reflected in the number of enumerators working in the 1a ACOs. And this means it is ludicrous to think we can complete 100% of the nation's data collection earlier than 10/31 and any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation.

Id. One reason that accelerating the schedule would be "ludicrous," Associate Director Olson stated, was the "awful deploy rate" of enumerators about 62% below target. *Id.* Driving that shortfall was an "almost [] debilitating quit rate":

> Another tack is to provide crystal clear numbers by the 1a ACOs that shows the awful deploy rate - field selected the right number (big number) to training, training show rate was on par with prior censuses (albeit a few points lower ... but overall in line with past censuses). And then we had a huge quit rate from training to deployed in field (and this does not mirror past censuses at all - it is MUCH higher, almost a debilitating higher quit rate). And this translates into much slower production in the field because we have less than half the number of enumerators (38%) we need to get the job done.

DOC_7559.[10] The email thread thus showed senior Bureau officials' serious concerns

[10] At the preliminary injunction hearing, Defendants had no comment on Associate Director Olson's email or other documents in the administrative record. In response to Associate Director Olson's email, for instance, Defendants stated: "to the extent that the Court does undertake some sort of APA or record review, then in an APA case the Court acts as an appellate tribunal and reviews the record[,] and the record speaks for itself." Tr. of Sept. 22, 2020 Preliminary Injunction

about the Replan only days before July 29, 2020, the day Associate Director Fontenot asserts that the Secretary ordered the development of the Replan. The staffing shortfall persisted. In the Bureau's July 30, 2020 Periodic Performance Management Reports slideshow, the Bureau acknowledged that "[s]taffing remains a challenge." DOC_9423.

Like field operations, data processing also needed more time in order to yield an accurate census. On July 24, 2020, a memo titled "2020 Decennial Census – Apportionment Data Processing" was circulated by Chief of Decennial Communciations Stakeholder Relationships Kathleen Styles to senior staff, including Associate Director Fontenot and Assistant Director Stempowski. DOC_8019. The Apportionment Data Processing memo explained that "[t]he time spent on data processing is essential to ensuring an accurate and complete count." DOC_8019. The Bureau further acknowledged that "[t]he three month delay in the largest field data collection operations, which impacted more than 35 percent of all responding households, will require additional data processing to ensure people are accurately counted in the correct location." *Id*. The Bureau explained the shortfalls to accuracy that would result if data processing were cut short:

- Actions that would condense or remove parts of [data processing] run the risk of:
    - Incorrect geographic placement of housing units or missing units that were added through peak field operations.
    - Duplicative or conflicting data for certain households.
    - Unreliable characteristic data for redistricting files.
    - Additional legal challenges of apportionment counts, redistricting results, or other data products as a result of diminished quality of decennial data.

DOC_8019.

Despite the Bureau's conclusions that it needed more time, the Bureau was directed just

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Hearing, at 13:25–14:3, ECF No. 207; *accord id.* at 18:20–19:1 (The Court: "Would [Defendants] like to comment on this document [the 'Elevator Speech']?" Defendants: "No, I don't have any further comment, Your Honor. I think for the reasons we said that the documents speak for themselves.").

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before or on July 30, 2020[11] to create the Replan and present it to the Secretary on August 3, 2020. *Cf.* Fontenot Decl. ¶ 81 ("July 29, the Deputy Director informed us that the Secretary had directed us . . . ."). Although the Bureau had taken nearly a decade to develop the Operational Plan Version 4.0 for the 2020 Census, the Bureau developed the Replan in the span of 4 or 5 days at most. On July 30, 2020, the Chief of the Population Division, Karen Battle, sent an email with the subject "EMERGENCY MEETING on 12_31 Delivery of Appo__." DOC_8364. Thereafter, senior Bureau officials met at 11 a.m., and again at 5:00 p.m. that day. The officials then conferred in an email thread that extended to at least 10:57 p.m. DOC_8353. In the thread, the Chief of the Geography Division, Deirdre Bishop, thanked fellow senior officials for "exhibiting patience and kindness as we brainstormed and adjusted the schedule." DOC_8356.

Even as the Bureau began to develop the Replan at the Secretary's direction, the Bureau continued to acknowledge that the Replan would present an unacceptable level of accuracy. On July 31, 2020, the Chief of the Decennial Statistical Studies Division, Patrick Cantwell, sent an email to senior Bureau officials that mentioned "global risks":

- "Many of these changes delay activities required for developing the remaining data products following apportionment, some of them (but not all) until after 12/31/20, increasing the risk that they will not be completed on time, whatever that schedule becomes."
- "Many of these changes, separately or in combination, have not been previously studied or analyzed for their effects on data quality. We risk decreasing the accuracy of apportionment counts and other statistics released later."
- "With these changes to the original operational plan and schedule, we increase the chance of subsequent data concerns. For example, it may be necessary to release tabulations later that are not all completely consistent."

DOC_9073–74.

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[11] The administrative record does not contain any communications from Deputy Director Jarmin on July 29, 2020, let alone a specific communication between Deputy Director Jarmin and Associate Director Fontenot. Because Associate Director Fontenot's declaration is not the administrative record, the Court relies on the July 30 "EMERGENCY MEETING" email discussed below and subsequent communications for the latest date of the Secretary's order.

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In a later July 31, 2020 email chain, senior Bureau officials, including Victoria Velkoff, the Associate Director for Demographic Programs; Christa Jones, the Chief of Staff to Director Dillingham; John Maron Abowd, Associate Director for Research & Methodology; Michael T. Thieme, Assistant Director for Decennial Census Programs (Systems & Contracts), and Benjamin J. Page, Chief Financial Officer, signed off on the following document describing the Replan:

> All of the changes below, taken together, reduce the time required for post-processing such that, when combined with the operational changes above in this document, make it possible to deliver the apportionment package in time to meet the current statutory deadline. All of these activities represent abbreviated processes or eliminated activities that will reduce the accuracy of the 2020 Census. Additionally, the downstream effect of separating apportionment and redistricting processing activities could not be assessed. This results in additional risk to the delivery of the redistricting products in order to meet the statutory deadline and will have a negative impact on the accuracy of the redistricting data.

DOC_9496.

Because of the Replan's negative impact on accuracy, top Bureau staff hesitated to "own" the Replan. On August 1, 2020, Christa Jones, Chief of Staff to Director Dillingham, wrote in an email to other senior officials: "I REALLY think we need to say something on page 2 [of the Bureau's presentation on the Replan] that this is what we've been directed to do or that we are presenting these in response to their direction/request. This is not our idea and we shouldn't have to own it." DOC_10183. Jones also wrote that "I think we need to include the language about the quality that we have on the Word document. We really shouldn't give this as a presentation without making this clear up front." That Word document, "Options to meet September 30_v11," was circulated to senior Bureau officials by the Chief of the Decennial Census Management Division, Jennifer Reichert. The document stated that "accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at[ ]least 99% of Housing Units in every state must be resolved." DOC_9951; *accord* DOC_8779 (another version of "Options to meet September 30" circulated by Assistant Director Stempowski on July 31, 2020, that states "[a]cceptable quality measure: 99% if HUs

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resolved (similar to 2010)").

The same significant concerns were presented to Secretary Ross on August 3, 2020 ("August 3 Presentation").[12] That presentation began, like the Elevator Speech and the "Options to meet September 30" document, with a tough assessment: "Accelerating the schedule by 30 days introduces significant risk to the accuracy of the census data. In order to achieve an acceptable level of accuracy, at least 99% of Housing Units in every state must be resolved." DOC_10276. The August 3 Presentation then described the many changes in field operations that the Replan will necessitate, such as reducing the number of NRFU visits from six to three or one.[13] *See* DOC_10281–82.

In addition to detailing those changes in field operations, the August 3 Presentation also details the Replan's impact on data processing. Among these impacts is possible harm to a different statutory deadline—the deadline for the Secretary's report of redistricting data to the states:

> Additionally, the downstream effect of separating apportionment and redistricting processing activities could not be assessed, but we anticipate it will, at a minimum, reduce the efficiency in data processing and could further reduce the accuracy of the redistricting data if there is a similar requirement to deliver that data by the current statutory deadline of March 31, 2021 [sic; should be April 1, 2021].

DOC_10281. The August 3 Presentation thus contemplated sacrificing not only the accuracy of the December 31, 2020 congressional apportionment figures, but also the accuracy and timeliness of

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[12] Like Defendants had done with the Elevator Speech, Defendants produced several versions of the August 3 Presentation as non-privileged and not pre-decisional. However, the parties identified one version, DOC_10275, as a key document. ECF Nos. 161, 190. The Court thus mainly analyzes that version of the document. *See* 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party . . . .").

[13] On September 8, 2020, Defendants sua sponte filed a notice regarding compliance with the Court's September 5, 2020 TRO. ECF No. 86. The notice attached the "Guidance for Field Managers related to Action Required following the 9/5 Court Order" in which Defendants stated that the Replan reduced the number of visits from six to one. ECF No. 86 Attachment C ("We will resume making six contact attempts to confirm vacant housing units, instead of the one contact attempt set forth in the Replan").

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the April 1, 2021 redistricting numbers.

In sum, the Bureau concluded internally that trying to get the count done by the December 31, 2020 statutory deadline would be unacceptable to the Bureau's statutory and constitutional interests in accuracy. These conclusions were consistently and undisputedly reflected in documents leading up to the August 3 Press Release, including in the contemporaneous August 3, 2020 Presentation.

However, Director Dillingham's August 3 Press Release, which is less than one and a half pages, did not consider how the Replan would feasibly protect the same essential interests that the Bureau had identified. Rather, the August 3 Press Release based its decision on one statutory deadline and the Secretary's direction. The August 3 Press Release "accelerate[d] the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, *as required by law and directed by the Secretary of Commerce*." *Id.* (emphasis added).

The August 3 Press Release then asserts that the Replan's shortening of data collection and processing will not affect census accuracy: "We will improve the speed of our count without sacrificing completeness. . . . Under this plan, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities." *Id.* To support these assertions, the August 3 Press Release tersely mentions three operational changes related to enumerators conducting NRFU; data processing; and staffing:

- [*Enumerators conducting NRFU*] "As part of our revised plan, we will conduct additional training sessions and provide awards to enumerators in recognition of those who maximize hours worked. We will also keep phone and tablet computer devices for enumeration in use for the maximum time possible."
- [*Data processing*] "Once we have the data from self-response and field data collection in our secure systems, we plan to review it for completeness and accuracy, streamline its processing, and prioritize apportionment counts to meet the statutory deadline."
- [*Staffing*] "In addition, we plan to increase our staff to ensure operations are running at full capacity."

These announcements, and nothing more, comprised the August 3 Press Release's explanation of changes that would ensure an accurate count. The August 3 Press Release thus did not grapple

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with the Bureau's contemporaneous, detailed, and unqualified internal concerns.

Moreover, the Bureau's internal documents undermine the August 3 Press Release's claims of efficiency. As to enumerators and staffing, the Bureau's head of field operations had "sound[ed] the alarm" on July 23, 2020. DOC_7738. "Crystal clear numbers" showed that "people are afraid to work for us." DOC_7738. Specifically, the Bureau had an "awful deploy rate" and "less than half the number of enumerators (38%) [it] need[ed] to get the job done." *Id.* How "awards" and "additional training sessions" in the midst of a pandemic would close that 62% gap was unclear. A week later, the "High-Level Summary Status" dated July 30, 2020 confirmed the staffing shortfall. In sites and Area Census Offices across the county, the Bureau lacked about half of the enumerators "compared to [its] goal." DOC_8623.

As for data processing, senior Bureau officials had received on July 29, 2020 a "High Level Summary of the Post-Data Collection" from the Director's Senior Advisor for Decennial Affairs, James Treat. DOC_8337. The High Level Summary unambiguously concluded that:

> Any effort to concatenate or eliminate processing and review steps to reduce the timeframes will significantly reduce the accuracy of the apportionment counts and the redistricting data products. Decades of experience have demonstrated that these steps and time are necessary to produce data products that do not need to be recalled, meet data user expectations and needs, [are] delivered on time, and stand the test of time.

Id.; *accord* DOC_8086 (July 27, 2020 memo from Treat with similar language).

Similarly, in the very August 3 Presentation on the Replan, the Bureau found that 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." DOC_10285.

Although the Operational Plan Version 4.0 took nearly a decade to develop, the Replan was developed in four to five days. All told, in the four or five days that the Bureau developed the Replan, Defendants did not sufficiently consider how the Replan would fulfill their statutory and constitutional duty to conduct an accurate census. Rather, the Bureau followed the Secretary's orders even though "[s]hortening the time period to meet the original statutory deadlines for

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apportionment and redistricting data w[ould] result in a census that has fatal data quality flaws that are unacceptable for a Constitutionally-mandated activity." DOC_8022.

2. Defendants offered an explanation that runs counter to the evidence before the agency.

An agency action is "arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. "Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). If an agency has offered an explanation that runs counter to the evidence before the agency, the agency's action is arbitrary and capricious. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 851–52 (9th Cir. 2020) (concluding that an agency's rule was arbitrary and capricious because the agency's reasoning "runs counter to the evidence before the agency"); *Mo. Pub. Serv. Comm'n.*, 337 F.3d at 1075 (concluding that the agency's action was arbitrary and capricious because the agency "had adopted a new rationale premised on old facts that were no longer true").

Defendants' alleged justification for the Replan is the need to meet the December 31, 2020 statutory deadline for the Secretary of Commerce to report to the President "the tabulation of total population by States" for congressional apportionment because Congress failed to grant an extension. However, before the adoption of the Replan, the President and multiple Bureau officials repeatedly stated, publicly and internally, that the Bureau could not meet the December 31, 2020 statutory deadline. For instance:

- On April 3, 2020, the day the COVID-19 Plan was announced, President Donald J. Trump publicly stated, "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 it. I think 120 days isn't nearly enough." ECF No. 131-16 at 4.
- On May 7 and 8, 2020, Associate Director for Communications Ali Ahmad wrote to Secretary Ross's Chief of Staff and other senior officials. Ahmad stated that "[his memo] shows that if we could snap restart everywhere we would still need legislative fix. It also then explains why we can't [snap restart] and estimates when we can start in the last places, getting us to the October 31, 2020 end date for data collection, and then explains

why we need an additional 30 for risk mitigation." DOC_365. Risks included "another system shock, such as a Hurricane hitting the [S]outh during NRFU." *Id.*

- On May 8, 2020, Secretary Ross's Chief of Staff sent the Secretary a memo that among other things stated, "**Based on the initial suspension of field activities in line with OMB guidance, the Census Bureau can no longer meet its statutory deadlines for delivering apportionment and redistricting data, even conducting operations under unrealistically ideal conditions.**" DOC_2287 (emphasis in original).
- On May 26, 2020, the head of census field operations, Tim Olson, publicly stated that "[w]e have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore. We – we've passed that for quite a while now." Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native at 1:17:30–1:18:30, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY.
- On July 8, 2020, Associate Director Fontenot publicly confirmed 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 20–21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

As the Replan's adoption drew near, the Bureau found that they could potentially miss even the COVID-19 Plan's data collection deadline of October 31, 2020—to say nothing of the Replan's data collection deadline of September 30, 2020.

- On July 23, 2020, Chief of Decennial Communications and Stakeholder Relationships, Kathleen Styles, shared the "Elevator Speech" memo with GAO. *See* DOC_8026 (sending to GAO). The Elevator Speech echoed Associate Director Ahmad's concerns about natural disasters: "[t]he Census Bureau needs [] 30-days for risk mitigation[] in case we are not able to complete data collection operations everywhere by October 31 (e.g., a hurricane, or a COVID outbreak)." DOC_8022.
- Also on July 23, 2020, several senior officials stated internally that meeting the deadline was impossible. Associate Director Fontenot identified "the difference between goal and actual case enumeration[,] [c]urrently a shortfall (11% goal vs 7% actual)." DOC_7739. He thus thought it "critical to lay the groundwork for the reality of the COVID Impacts and challenges" in an upcoming meeting with the Department of Commerce. Associate Director of Field Operations Olson agreed. He concluded that "any thinking person who would believe we can deliver apportionment by 12/31 has either a mental deficiency or a political motivation." DOC_7737.

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- On July 27, 2020, the Director Dillingham's Senior Advisor for Decennial Affairs, James B. Treat, circulated a memo intended for Deputy Director Jarmin and authored by Associate Director Fontenot. The memo stated that "appreciably shortening the quality checks and reviews would be extremely unwise. Each and every step in post data collection processing is necessary." DOC_8085. Furthermore, hurricane season, early snow events, and COVID-19 all "increased the risk of our ability to complete the field data collection operations by the [COVID-19 Plan] deadline of October 31, 2020." DOC_8086.
- On July 29, 2020, the Senior Advisor for Decennial Affairs to Director Dillingham, James Treat, circulated to Associate Director Fontenot and other senior officials a "High Level Summary of the Post-Data Collection." DOC_8337. The High Level Summary repeated the Bureau's strong concerns. It stressed that "[d]ecades of experience have demonstrated that [processing and review] steps and time are necessary to produce data products that do not need to be recalled, meet data user expectations and needs, [are] delivered on time, and stand the test of time." DOC_8337.

Even less than two weeks before the Replan's September 30, 2020 data collection deadline, the Bureau expressed uncertainty about its ability to meet the September 30 deadline. One reason was that the natural disasters about which Bureau officials had warned had come to pass. On September 17, 2020 at a meeting of the Census Scientific Advisory Committee, Associate Director Fontenot, Defendants' sole declarant, stated "that [he] did not know whether Mother Nature would allow us to meet the September 30 date." ECF No. 196-1 at ¶ 14 (Fontenot's September 22, 2020 declaration). Mother Nature had wreaked "major West Coast fires," "air quality issues," and "Hurricane Sally across the states of Louisiana, Mississippi, Alabama, the Florida panhandle area, parts of Georgia, and South Carolina." *Id.*

The timing of Congressional *action* further belies Defendants' claim that Congressional inaction on the deadline justified the Replan. In the weeks and days leading up to Secretary Ross's direction to develop the Replan, Congress took major steps toward extending statutory deadlines. On May 15, 2020, the House passed a bill extending deadlines, The Heroes Act. *See* H.R. 6800, https://www.congress.gov/bill/116th-congress/house-bill/6800.[14] On June 1, 2020, the Senate

[14] The Court takes judicial notice of the congressional hearing dates. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or

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placed The Heroes Act on the legislative calendar. On July 23, 2020 at 10 a.m. Eastern, the Senate's Small Business and Entrepreneurship Committee held a hearing on The Heroes Act.

Yet during that hearing, senior Bureau officials were strategizing how to resist the Department of Commerce's ongoing pressure to accelerate census operations. On July 23, 2020, Associate Director Fontenot wrote at 10:31 a.m. that "[o]n Monday at DOC I plan to talk about the difference between goal and actual case enumeration[,] [c]urrently a shortfall (11% goal vs 7% actual). . . . [I]t is critical to lay the groundwork for the reality of the COVID Impacts and challenges." DOC_7739. Associate Director Olson responded at 11:19 a.m., "agree[ing] that elevating the reality is critical, especially in light of the push to complete NRFU asap for all the reasons we know about." DOC_7738. Lastly, by 11:48 a.m., Associate Director Olson "sound[ed] the alarm to realities on the ground." *Id.*

In fact, the Commerce Department's pressure on the Bureau had started at least a few days earlier. Three days before the July 23, 2020 Senate hearing, the Bureau's Chief Financial Officer, Ben Page, asked other senior officials whether the Bureau still supported Congressional extension of the statutory deadlines. DOC_6852 (July 20, 2020 email to Director Dillingham et al.). Page wrote:

> Among the first questions I am getting is "Does the Census bureau still need the change in the statutory dates?" Can we find a time to discuss how we should respond to that question? Given that the Senate may introduce a bill today or tomorrow, I anticipate we'll need a set answer for discourse over the next 24-48 hours.

Id. The answer to Page's question was, of course, no.

By July 28, 2020, the Bureau asked Congress for $448 million for a timely completion of the Census without an extension of the statutory deadline. DOC_8037 (July 28, 2020 email from Secretary Ross's Director of Public Affairs, Meghan Burris, to Secretary Ross).

"can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). As stated above, the Court is permitted to go outside the administrative record "for the limited purpose of background information." *Thompson*, 885 F.2d at 555.

Moreover, at the House Oversight and Reform hearing on July 29, 2020, Director Dillingham did not support extending the statutory deadline. Rather, he sidestepped questions about whether the "Administration has [] reversed direction on [the extension], and is now suggesting that they want the Census to be wrapped up quickly so that th[e] tabulation . . . could actually happen before the end of the year." Oversight Committee, *Counting Every Person* at 3:50:42–3:51:40, YouTube (July 29, 2020), https://youtu.be/SKXS8e1Ew7c?t=13880 (questions by Congressman John Sarbanes). Director Dillingham's response was that "I'm not aware of all the many reasons except to say that the Census Bureau and others really want us to proceed as rapidly as possible." *Id.* at 3:51:48–3:52:02.

Accordingly, Defendants' explanation—that the Replan was adopted in order to meet the December 31, 2020 statutory deadline because Congress failed to act—runs counter to the facts. Those facts show not only that the Bureau could not meet the statutory deadline, but also that the Bureau had received pressure from the Commerce Department to cease seeking an extension of the deadline. In other words, Defendants "adopted a new rationale premised on old facts that were no longer true": assumptions that the Bureau could possibly meet the deadline and that Congress would not act. *Mo. Pub. Serv. Comm'n.*, 337 F.3d at 1075. Thus, because Defendants "offered an explanation for its decision that runs counter to the evidence before the agency," Plaintiffs are likely to succeed on the merits of their claim that Defendants' decision is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

3. Defendants failed to consider an alternative.

In order to meet APA standards, an agency "must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (alterations in original) (quoting *State Farm*, 463 U.S. at 51). An agency that fails to consider alternatives may have acted arbitrarily and capriciously. *See Regents*, 140 S. Ct. at 1913 (concluding that the DACA Termination was arbitrary and capricious because the Secretary, confronted with DACA's illegality, failed to consider alternative actions short of terminating DACA, such as eliminating DACA benefits); *State Farm*, 463 U.S. at 43

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(holding that the National Highway Traffic Safety Administration had acted arbitrarily and capriciously by not considering airbags as an alternative to automatic seatbelts).

Defendants similarly failed to consider an alternative here: not adopting the Replan while striving in good faith to meet statutory deadlines. By adopting the Replan, Defendants sacrificed adequate accuracy for an uncertain likelihood of meeting one statutory deadline. Defendants "did not appear to appreciate the full scope of [their] discretion." *Regents*, 140 S. Ct. at 1911. Specifically, Defendants could have taken measures short of terminating the census early only to *possibly* meet the deadline. These measures could have included good faith efforts to meet the deadline coupled with an operational plan that would—at least in the Bureau's view—generate results that were not "fatal[ly]" or "unacceptabl[y]" inaccurate. Elevator Speech, DOC_8070.

Because agencies must often fulfill statutory obligations apart from deadlines, case law is replete with agency actions that missed statutory deadlines but nevertheless survived judicial review. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157, 171–72 (2003) (upholding the Social Security Commissioner's late assignment of beneficiaries to coal companies despite the fact that it "represent[ed] a default on a statutory duty, though it may well be a wholly blameless one"); *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action"); *Linemaster Switch Corp. v. EPA*, 938 F.3d 1299, 1304 (D.C. Cir. 1991) (explaining that the Court did not want to restrict the agency's powers "when Congress . . . has crafted less drastic remedies for the agency's failure to act").[15]

In fact, single-mindedly sacrificing statutory objectives to meet a statutory or judicial

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[15] Defendants cite *Forest Guardians v. Babbitt*, which explains that "when Congress . . . sets a specific deadline for agency action, neither the agency nor any court has discretion." 174 F.3d 1178, 1190 (10th Cir. 1999). But *Forest Guardians* addresses the question of whether a court can compel an agency's late action, not the question of whether an agency's late action can be upheld by a court. Under the Supreme Court's reasoning in *Barnhart*, the Bureau's action after the deadline would be upheld by a court. *See, e.g.*, *Barnhart*, 537 U.S. at 157, 171–72 (upholding the Social Security Commissioner's late assignment despite the fact that "represent[ed] a default on a statutory duty, though it may well be a wholly blameless one").

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deadline can itself violate the APA. Examples abound because the Census Act is far from the only statute that sets a deadline for agency action. Environmental regulation and occupational safety are just two illustrative examples.

Environmental statutes have set hundreds of deadlines, of which only a fraction have been met. *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, Law & Contemp. Probs., Autumn 1991, at 311, 323–28 (noting that "EPA has met only about 14 percent of the congressional deadlines imposed"). For example, in *Environmental Defense Fund v. Environmental Protection Agency*, the D.C. Circuit set a "court-imposed schedule" after the EPA violated statutory deadlines for studying and designating hazardous mining wastes. 852 F.2d 1316, 1331 (D.C. Cir. 1988); *see id.* at 1319–31 (discussing interlocking deadlines). The D.C. Circuit set judicial deadlines that were years *after* the missed statutory deadlines. *See id.*[16] The D.C. Circuit's order thus allowed the EPA to continue violating the statutory deadlines so that the EPA could fulfill its other statutory duties.

Moreover, when the EPA promulgated a rule to comply with the judicial deadlines—and to stanch the ongoing violation of statutory deadlines—the D.C. Circuit set that rule aside. *See Am. Min. Cong. v. EPA*, 907 F.2d 1179, 1191–92 (D.C. Cir. 1990). The D.C. Circuit reasoned that the rule was unsupported by the data. *See id.* at 1191. It was immaterial that the rule lacked support only because the EPA felt compelled to comply with the deadlines. "That an agency has only a brief span of time in which to comply with a court order cannot excuse its obligation to engage in reasoned decisionmaking under the APA." *Id.* at 1192.

In the area of occupational safety, the Occupational Safety and Health Act of 1970 set a "statutory timetable" in "mandatory language" for rulemaking. *Nat'l Cong. of Hispanic Am.*

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[16] The deadlines at issue in *Environmental Defense Fund v. EPA* were complicated. In simple terms, the statutory deadlines were for the EPA to conduct studies by October 21, 1983, and to list wastes under Subtitle C of the Resource Conversation and Recovery Act within six months of completing those studies. *See* 852 F.2d at 1319–20. The D.C. Circuit set deadlines of July 31, 1989 for completion of the studies, and August 31, 1988 for relisting of six specific wastes. *See id.* at 1331.

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Citizens (El Congreso) v. Marshall, 626 F.2d 882, 883–84 & n.3 (D.C. Cir. 1979) (discussing 29 U.S.C. § 655(b)(1)–(4), which provides that the Secretary "shall publish" rules within certain numbers of days). When the Secretary of Labor missed those deadlines, a "14-year struggle to compel the Secretary of Labor" to promulgate a rule ensued. *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 614 (D.C. Cir.), *vacated sub nom. as moot*, *Farmworkers Justice Fund, Inc. v. Brock*, 817 F.2d 890 (D.C. Cir. 1987).

As relevant here, when the Secretary of Labor first missed the deadlines, the district court ordered him to follow them. *See id.* at 884. Despite even the "mandatory language" of the statutory deadline, the D.C. Circuit reversed. The D.C. Circuit held that "the mandatory language of the Act did not negate the 'implicit acknowledgement that traditional agency discretion to alter priorities and defer action due to legitimate statutory considerations was preserved.'" *Id.* (quoting *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196, 1200 (D.C. Cir. 1977) (Clark, J.)). The D.C. Circuit reasoned that the Secretary could "giv[e] priority to the most severe hazards" rather than those demanded by the statutory deadline. *Id.* at 891 & n.44. Agencies cannot and should not ignore their full range of legal obligations to prioritize meeting statutory deadlines at all costs.

So too here. Secretary Ross and the Census Bureau could have given priority to avoiding "fatal data quality flaws that are unacceptable for a Constitutionally-mandated national activity." ECF No. 155-8 at 332 (Bureau's Elevator Speech). The Census Act's "mandatory language" of "shall" on deadlines did not displace Defendants' duty to consider other express statutory and constitutional interests. *Compare, e.g.*, 1998 Appropriations Act, § 209, 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible . . . ."), *and Utah*, 536 U.S. at 478 (finding a "strong constitutional interest in [the] accuracy" of the census), *with, e.g.*, 29 U.S.C. § 655(b)(1)–(4) ("shall publish" rules within certain timetable), *and Nat'l Cong. of Hispanic Am. Citizens*, 554 F.2d at 1198 (reversing order to follow deadlines and finding "traditional agency discretion to alter priorities" despite statutory deadlines because the statute provided feebly that "in determining the priority for establishing

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standards . . . the Secretary shall give due regard to the urgency of the need" (quoting 29 U.S.C. § 655(g))).

Indeed, in analyzing the COVID-19 Plan—but never the Replan—the Bureau itself concluded that missing the statutory deadline was constitutional and in line with historical precedent. Bureau officials included these conclusions in their notes for their April 28, 2020 call with Congressman Jamie Raskin, Chair of the House Oversight Subcommittee on Civil Rights and Civil Liberties, which has jurisdiction over the census. DOC_2224. The notes stated that the COVID-19 proposal "underwent a constitutional review, and we believe it is constitutional." DOC_2228; *see also* DOC_1692 (preparation materials for April 19, 2020 briefing with House Oversight Committee, stating that the COVID-19 plan "went through inter-agency review, including review by the Department of Justice," and "[t]heir view is that there is not a constitutional issue with the proposal").

The notes further stated that "in history, especially for [] many of the earlier censuses, data collection and reporting in the counts shifted beyond the zero year." DOC_2228. Officials in charge of the census have previously missed statutory deadlines imposed by Congress. Assistants conducting four different censuses failed to transmit returns to marshals or the Secretary of State within the deadline imposed by Congress. In each case, only after the deadline had passed without the required transmission did Congress act by extending the statutory deadlines. This post-deadline extension took place in four censuses: the 1810, 1820, 1830, and 1840 Censuses. ECF No. 203 (explaining examples); *see, e.g.*, Act of Sept. 1, 1841, ch. 15, § 1, 5 Stat. 452, 452 (1841) (*post hoc* extension of September 1, 1841 for original deadline missed by over nine months).

Defendants' failure "to appreciate the full scope of [their] discretion" also resembles the Secretary of Homeland Security's decisionmaking in *Regents*, 140 S. Ct. 1891. There, the Secretary terminated the DACA program by relying on the Attorney General's determination that DACA was unlawful. *Id.* at 1903. The government argued that the decision was not arbitrary and capricious because it was based on the Attorney General's binding legal conclusion. The Supreme Court agreed that the Attorney General's conclusion was binding but set aside the Secretary's

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decision anyway. *Id.* at 1910. The Court held that the Secretary failed to consider the full scope of her discretion, which would have permitted her to take measures short of terminating the program to address the illegality of the program. *Id.* at 1911.

Like the Secretary in *Regents*, Defendants argue that binding law compels their decision. Similarly, the Court agrees that the Census Act's statutory deadlines bind Defendants. Even so, Defendants should have "appreciate[d] the full scope of their discretion" to preserve other statutory and constitutional objectives while striving to meet the deadlines in good faith. *Regents*, 140 S. Ct. at 1911. By not appreciating their discretion, Defendants failed to consider important aspects of the problem before them. That failure was likely arbitrary and capricious under the APA.

4. Plaintiffs are likely to succeed on the merits of their claim that Defendants failed to articulate a satisfactory explanation for the Replan.

Plaintiffs argue that the Defendants failed to articulate a satisfactory explanation for its decision to adopt the Replan. The Court concludes that Plaintiffs are likely to succeed on the merits of this claim.

An agency must "examine the relevant data and articulate a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The agency must have "considered the relevant factors, weighed [the] risks and benefits, and articulated a satisfactory explanation for [its] decision." *Dep't of Commerce*, 139 S. Ct. at 2570. In evaluating agency action, the Court must ensure that "the process by which [the agency] reache[d] its result [was] logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). "[T]he agency's explanation [must be] clear enough that its 'path may reasonably be discerned.'" *Encino Motorcars*, 136 S. Ct. at 2125 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 2127 (quoting *State Farm,* 463 U.S. at 43).

When an agency changes position, the agency must provide a "reasoned explanation" why

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it has done so. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). At a minimum, this explanation must "display awareness that [the agency] is changing position" and "show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. In addition, "sometimes [an agency] must" "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.*

More detail is required "when, for example, [the agency's] new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515–16); *see also Organized Vill. of Kake*, 795 F.3d at 968 ("[A]n agency may not simply discard prior factual findings without a reasoned explanation."). "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 136 S. Ct. at 2126 (alteration in original) (*quoting Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *see, e.g.*, *Humane Society v. Locke*, 626 F.3d 1040, 1049–50 (9th Cir. 2010) (concluding that an agency acted arbitrarily and capriciously where the agency took a "seemingly inconsistent approach" with the approach it had taken previously).

Defendants took an inconsistent approach that failed to "articulate a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The facts before the Defendants included the COVID-19 pandemic, its significant effect on census operations, and the inability to conduct an accurate count by September 30, 2020. *See supra* Section IV-A-1 (contemporaneous statements from Bureau officials explaining how it was impossible to complete an accurate count by the statutory deadline); Section IV-A-2 (contemporaneous statements from Bureau officials explaining how they were past the point of being able to finish the count by the statutory deadline, even if they replanned the census).

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Defendants never articulated a satisfactory explanation between these facts and the decision to adopt the Replan. All Defendants offer is the August 3, 2020 Press Release, which is less than one-and-a-half pages in length. *See* Tr. of August 26, 2020 Case Management Conference, ECF No. 65 at 20 (The Court: "[T]he Plaintiffs point to a press release as the reason for advancing the date and -- are there other documents that provide the contemporaneous reasons for advancing the date, other than the press release?" Defendants: "Your Honor, at this point I'm not aware of any other documents, but I would propose that I check with my client and answer that in the September 2nd filing.").[17] In less than a page and a half, the August 3 Press Release simply asserts that Defendants planned to deliver an accurate census in time for the statutory deadline. *See* Section IV-A-1 (analyzing the assertions in the press release and determining that they contradicted the facts before the Bureau). The August 3 Press Release never explains why Defendants are "required by law" to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy. ECF No. 37-1.

The August 3 Press Release stands in stark contrast to Secretary Ross's memorandum on adding a citizenship question to the 2020 Census. *See Dep't of Commerce*, 139 S. Ct. at 2569. In that memorandum, Secretary Ross outlined the four options available to him and the benefits and drawbacks of each option. *See* Ross Memorandum at 2–5, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), ECF No. 173 at 1314–17. He also explained the potential impact of each option on depressing 2020 Census response rates, drew on empirical evidence available to the Bureau, and weighed concerns voiced by census partners. *Id.* at 1317–19. Finally, he explained how his decision followed from the evidence and relevant considerations. *Id.* at 1319–20. The Supreme Court held that the memorandum provided adequate explanation because the Secretary "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision." *Dep't of Commerce*, 139 S. Ct. at 2570.

The August 3 Press Release contains nowhere close to the same level of reasoned

[17] Defendants did not mention any other documents in their September 2, 2020 filing. ECF No. 63.

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explanation. Here, Defendants failed to explain the options before them, failed to weigh the risks and benefits of the various options, and failed to articulate why they chose the Replan. In other words, Defendants failed to "articulate a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Specifically, Defendants failed to explain why they disregarded the facts and circumstances that underlay their previous policy: the COVID-19 Plan. The facts underlaying the COVID-19 Plan include the rapid spread of the coronavirus pandemic across the United States and its significant effect on Census operations, which are well-documented throughout the record. *See, e.g.*, DOC_2287 ("Operational Timeline" memo from Secretary Ross's Chief of Staff, Michael Walsh, to the Secretary on May 8, 2020).

In fact, in the August 3, 2020 Press Release, Defendants never acknowledged or mentioned the COVID-19 Plan or COVID-19, let alone the ongoing pandemic. It follows that this "'[u]nexplained inconsistency' in agency policy" renders the Replan arbitrary and capricious. *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Brand X*, 545 U.S. at 981).

5. Plaintiffs are likely to succeed on the merits of their claim that Defendants failed to consider reliance interests.

Plaintiffs also argue that the Replan was arbitrary and capricious in violation of the APA because Defendants failed to consider the reliance interests of their own partners, who relied on the October 31 deadline and publicized it to their communities. The Court concludes that Plaintiffs are likely to succeed on the merits of this claim.

When an agency is reversing a prior policy, the agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515). "It would be arbitrary and capricious [for the agency] to ignore such matters." *Fox Television*, 556 U.S. at 515. An agency reversing a prior policy must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1913.

Where an agency fails to consider reliance interests, its action is arbitrary and capricious.

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Regents, 140 S. Ct. at 1913 (holding that termination of the Deferred Action for Childhood Arrivals ("DACA") policy was arbitrary and capricious because the agency failed to consider reliance interests); *see also Encino Motorcars*, 136 S. Ct. at 2126 (declining to defer to the Department of Labor's regulation because of failure to consider the reliance interests of car dealerships when newly permitting service advisors to receive overtime pay). In fact, reliance interests should be considered even where the document giving rise to reliance expressly disclaims conferring any rights. *See Regents*, 140 S. Ct. at 1913–14 (holding that "disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance").

Defendants ignored reliance interests when Defendants developed and adopted the Replan. Defendants' COVID-19 Plan had engendered serious reliance interests on the part of municipalities and organizations who encouraged people to be counted and publicized the COVID-19 Plan's October 31, 2020 deadline for data collection.

Defendants themselves acknowledge the important role that their partners play in encouraging participation in the Census. Associate Director Fontenot describes at length the Bureau's partnerships with community organizations—including Plaintiffs such as National Urban League. He explains that the Bureau "depend[s] on [its] partners to seal the deal with communities that may be fearful or distrustful of the government"; to supplement and verify address lists; and to identify locations to best count people experiencing homelessness. Fontenot Decl. ¶¶ 40–42; *see id.* ¶¶ 12, 22. Overall, the Bureau engages in "[e]xtensive partnerships." *Id.* ¶ 28.

Accordingly, when the COVID-19 pandemic began to spread in March 2020, Defendants concluded that "[t]he virus will cause operational changes for the census, and may necessitate changes in our planned communications approach." DOC_970 (March 13, 2020 "COVID-19 Contingency Planning" sent by Program Analyst Christopher Denno to Director Dillingham et al.). Defendants thus stated that they would "[d]evelop[] talking points to share with our partners" about the pandemic. *Id.* Once Defendants adopted the COVID-19 Plan, Defendants' partners began to rely on the extended deadlines. For instance:

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- The City of Los Angeles is home to about 4 million people. M. Garcia Decl. ¶ 7. The City "conducted a public education campaign publicizing the October 31, 2020 date for self-response." *Id.* ¶ 14. For example, the City announced the date in bus shelter posters and social media toolkits. *Id.*
- Harris County, Texas "participated in over 150 events," including "food distribution events," during which it "announced the October 31, 2020 deadline for the 2020 Census." Briggs Decl. ¶ 12.
- The City of Salinas promoted the October 31, 2020 deadline "on social media and in thousands of paper flyers." Gurmilan Decl. ¶¶ 11–12.
- The League of Women Voters has over 65,000 members across 800 state and local affiliates. Stewart Decl. ¶ 4. Thus, "[w]hen the Census Bureau extended the deadline for counting operations to October 31, 2020," the League of Women Voters "published blog posts advertising the new timeline," "shared numerous letters with [] state and local affiliates providing information about the new timeline," and "publicized the deadline in letters and [emails]." *Id.* ¶ 11.
- National Urban League has 11,000 volunteers across 90 affiliates in 37 states. Green Decl. ¶ 4. "[W]hen the Census Bureau announced its extension of the timeline for collecting responses to the 2020 Census, the National Urban League informed all members of the 2020 Census Black Roundtable that the deadline had become October 31, 2020. The members in turn conveyed to their own networks and constituents, causing a cascading effect." *Id.* ¶ 14.

However, Defendants quietly removed the October 31 deadline from its website on July 31, 2020 without any explanation or announcement. *Compare* ECF No. 37-8 (July 30 Operational Adjustments Timeline), *with* ECF No. 37-9 (July 31 Operational Adjustments Timeline). Then on August 3, 2020, the Bureau advanced data collection deadlines to September 30.

As a result, people who believe they could submit their census responses in October and try to do so would not be counted. *See, e.g.*, Gurmilan Decl. ¶ 12 ("some residents who received the City [of Salinas]'s messaging will fail to respond before the R[eplan] deadline because the City has limited remaining resources to correct what is now misinformation."). Moreover, Plaintiffs' efforts to mitigate the widely advertised the Bureau's October 31 deadline and now-counterproductive education campaigns will only be harder in the midst of a pandemic. *E.g.*, M. Garcia Decl. ¶¶ 14–14; Gurmilan Decl. ¶¶ 11–14; Briggs Decl. ¶¶ 11–12, 15–17.

Accordingly, "[i]n light of the serious reliance interests at stake, [Defendants'] conclusory

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Northern District of California

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statements do not suffice to explain [their] decision." *Encino Motorcars*, 136 S. Ct. at 2127. The Replan is thus arbitrary and capricious on this ground as well.

B. Plaintiffs will suffer irreparable harm without an injunction.

As to irreparable harm, Plaintiffs identify and support with affidavits four potential irreparable harms that Plaintiffs will suffer as a result of inaccurate census data. First, Plaintiffs risk losing important federal funding from undercounting. Second, Plaintiffs state that an inaccurate apportionment will violate their constitutional rights to political representation. Third, Plaintiffs will need to expend resources to mitigate the undercounting that will result from the Replan. Lastly, local government Plaintiffs' costs will increase because those Plaintiffs rely on accurate granular census data to deploy services and allocate capital.

These harms are potentially irreparable in two ways. First, at least part of the harms may be constitutional in nature, and "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Second, to the extent the harm involves expending money or resources, "[i]f those expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers).

Plaintiffs aver that implementation of the Replan deadlines would lead to an undercount of their communities. PI Mot. at 28. Because the decennial census is at issue here, an inaccurate count would not be remedied for another decade. An inaccurate count would affect the distribution of federal and state funding, the deployment of services, and the allocation of local resources. Similar harms have thus justified equitable relief in previous census litigation. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 328–34 (affirming injunction against the planned use of statistical sampling in census and citing apportionment harms, among others); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing injunction and finding irreparable "the loss of political representation and the degradation of information"). Accordingly, the Court concludes that Plaintiffs have demonstrated that they are likely to suffer irreparable harm in the absence of a stay of the Replan. *Winter*, 555 U.S. at 22.

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C. The balance of the hardships tips sharply in Plaintiffs' favor.

Plaintiffs would suffer several irreparable harms without a preliminary injunction. In his September 5, 2020 declaration, Defendants' own declarant, Associate Director Fontenot, stated that the sooner the Court enjoined Defendants, the fewer field staff Defendants would terminate and not be able to rehire:

> Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

Fontenot Decl. at ¶ 98. Thus, Fontenot's declaration underscores Plaintiffs' claims of irreparable harm because Defendants would have difficulty rehiring terminated field staff.[18]

Furthermore, Defendants' stated reason for the August 3, 2020 Replan is to get the Census count to the President by December 31, 2020 instead of April 30, 2021 as scheduled in the COVID-19 Plan. Fontenot Decl. ¶ 81. However, the President, Defendants' sole declarant, and other senior Bureau officials have stated, even as recently as September 17, 2020, that meeting the statutory deadline is impossible. *See supra* Section IV-A-2; ECF No. 196-1 ¶ 14. These statements show that the hardship imposed on Defendants from a stay—missing a statutory deadline they had expected to miss anyway—would be significantly less than the hardship on Plaintiffs, who will suffer irreparable harm from an inaccurate census count.

Thus, the Court finds that the balance of hardships tips sharply in favor of Plaintiffs.

D. A preliminary injunction is in the public interest.

As to the public interest, when the government is a party, the analysis of the balance of the

[18] Associate Director Fontenot's untimely September 22, 2020 declaration, ECF No. 196-1, claims that the Court's TRO dictates case assignments to enumerators. Neither the Court's TRO nor the instant Order dictate case assignments to enumerators.

BC-DOC-0000027742

hardships and the public interest merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As the United States Supreme Court recognized, Congress has codified the public's interest in "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. at 2569 (quoting *Franklin*, 505 U.S. at 819–820 (Stevens, J., concurring in part and concurring in judgment)) (discussing the Census Act, 2 U.S.C. § 2a). Other courts have held that "the public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures" and that "it is in the public interest that the federal government distribute its funds . . . on the basis of accurate census data." *Carey*, 637 F.2d at 839. Thus, an injunction is in the public interest.

E. The scope of the injunction is narrowly tailored.

The Bureau has explained that data processing cannot begin until data collection operations are completed nationwide. Because the steps are sequential, the Bureau cannot grant relief to particular geographic regions and not others. Specifically, the Bureau explained in its Elevator Speech, circulated to high level Bureau officials and to the GAO, "[n]or can post processing operations begin until data collection operations are completed everywhere. There is no option, e.g., to begin post processing in one region or state of the country while other areas are still collecting data." Elevator Speech, DOC_8071.

Associate Director Fontenot's September 22, 2020 declaration affirmed this point: "[P]ost data collection processing is a particularly complex operation, and the steps of the operation must generally be performed consecutively. . . . It is not possible, however, to begin final census response processing in one region of the country while another region is still collecting data." Fontenot Decl. ¶ 19–20.

The Court is aware of the ongoing debate regarding nationwide injunctions and their scope. *See U.S. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J.,

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concurring) (criticizing the "routine issuance of universal injunctions").[19] Nevertheless, the Supreme Court has upheld nationwide injunctions in the limited circumstance in which they are necessary to provide relief to the parties. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (leaving in place a nationwide injunction with respect to the parties and non-parties that are similarly situated). The Supreme Court has followed this practice in past cases involving the census. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 343–44 (affirming district court's nationwide injunction against the Census Bureau's proposed use of statistical sampling for apportionment purposes in the 2000 Census). This reflects the longstanding principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Court finds that this is an instance in which the injunction must be nationwide in order to grant necessary relief to the Plaintiffs.

Moreover, although Plaintiffs' motion for preliminary injunction sought to stay Defendants' August 3, 2020 Replan and to enjoin Defendants from implementing the August 3, 2020 Replan, at the September 22, 2020 preliminary injunction hearing, Plaintiffs narrowed their request to a stay and injunction of the August 3, 2020 Replan's September 30, 2020 and December 31, 2020 deadlines. Specifically, Plaintiffs stated:

> So I want to be clear about this. Our APA action challenges the timelines in the Replan. It is very discrete in that respect.
>
> The final agency action is the announcement on August 3rd that they are going to shorten the deadlines for completing the Census, two deadlines in particular, leaving the October 31st one to September 30th for data collection and moving the April date to December 31st for reporting to the President. That is our APA

---

[19] *Compare, e.g.*, Hon. Milan D. Smith Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 Notre Dame L. Rev. 2013 (2020) (criticizing the rise in universal injunctions, but acknowledging that they are justified in certain contexts), *with* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. ___ (forthcoming 2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3599266 (arguing that the APA § 706's provision that "[t]he reviewing court shall . . . hold unlawful and set aside agency action" permits universal vacatur).

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challenge, the moving and shortening and accelerating of those particular deadlines. Tr. of Sept. 22, 2020 Preliminary Injunction Hearing at 23:21–24:5, ECF No. 207. Plaintiffs may narrow the scope of their requested injunctive relief. *See Vasquez v. Rackauckas*, 734 F.3d 1025, 1037 (9th Cir. 2013) (recognizing that plaintiffs "clarified and narrowed" the injunctive relief that they sought). Thus, the Court grants Plaintiffs' narrowed requested relief. By this order, the Court in no way intends to manage or direct the day-to-day operations of Defendants.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT, effective as of the date of this Order: The U.S. Census Bureau's August 3, 2020 Replan's September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President are stayed pursuant to 5 U.S.C. § 705; and Defendants Commerce Secretary Wilbur L. Ross, Jr.; the U.S. Department of Commerce; the Director of the U.S. Census Bureau Steven Dillingham, and the U.S. Census Bureau are enjoined from implementing these two deadlines.

IT IS SO ORDERED.

Dated: September 24, 2020

Lucy H. Koh

LUCY H. KOH
United States District Judge

BC-DOC-0000027745

From: Burris, Meghan (Federal) [MBurris@doc.gov]
Sent: 8/6/2020 11:30:23 AM
To: Ahmad, Ali M [ali.m.ahmad@census.gov]
CC: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: RE: From Michael Wines, The New York Times

b(5) - DP Thanks!

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Thursday, August 6, 2020 11:29 AM
To: Burris, Meghan (Federal) <MBurris@doc.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Re: From Michael Wines, The New York Times

b(5) - DP/AC legal b(5) - DP/AC

b(5) - DP/AC

Ali Ahmad, Associate Director
Communications Directorate
U.S. Census Bureau
O: 301-763-8789| M: b(6)
Ali.M.Ahmad@census.gov
census.gov | @uscensusbureau

From: Burris, Meghan (Federal) <MBurris@doc.gov>
Sent: Thursday, August 6, 2020 11:00 AM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: RE: From Michael Wines, The New York Times

b(5) - DP

b(5) - DP

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Thursday, August 6, 2020 8:39 AM
To: Burris, Meghan (Federal) <MBurris@doc.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Re: From Michael Wines, The New York Times

Two very minor updates b(5) - DP

b(5) - DP

Ali Ahmad, Associate Director

Communications Directorate
U.S. Census Bureau
O: 301-763-8789 | M b(6)
Ali.M.Ahmad@census.gov
census.gov | @uscensusbureau

From: Burris, Meghan (Federal) <MBurris@doc.gov>
Sent: Wednesday, August 5, 2020 9:34 PM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Re: From Michael Wines, The New York Times

Good to me!

On Aug 5, 2020, at 7:43 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

How's this?

b(5) - DP

On Aug 5, 2020, at 7:22 PM, Walsh, Michael (Federal) <MWalsh@doc.gov> wrote:

Agree

Sent from my iPhone

On Aug 5, 2020, at 6:38 PM, Burris, Meghan (Federal) <MBurris@doc.gov> wrote:

Mike, thoughts on b(5) - DP/AC

b(5) - DP/AC

On Aug 5, 2020, at 6:35 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

Added that in and tweaked a bit

b(5) - DP

On Aug 5, 2020, at 6:29 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

b(5) - DP

On Aug 5, 2020, at 6:28 PM, Burris, Meghan (Federal) <MBurris@doc.gov> wrote:

b(5) - DP

On Aug 5, 2020, at 6:25 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

b(5) - DP

On Aug 5, 2020, at 6:06 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

Here's my proposed response b(5) - DP

b(5) - DP

Ali Ahmad, Associate Director

Communications Directorate
U.S. Census Bureau
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Ali.M.Ahmad@census.gov
census.gov | @uscensusbureau

From: Burris, Meghan (Federal) <MBurris@doc.gov>
Sent: Wednesday, August 5, 2020 4:46 PM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Re: From Michael Wines, The New York Times

b(5) - DP

On Aug 5, 2020, at 4:46 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

We got same inquiry directly.

On Aug 5, 2020, at 4:20 PM, Burris, Meghan (Federal) <MBurris@doc.gov> wrote:

Begin forwarded message:

From: Michael Wines <miwine@nytimes.com>
Date: August 5, 2020 at 3:53:00 PM EDT

To: mburris@doc.gov
Subject: From Michael Wines, The New York Times

Meghan,

Another request for comment.

I'm in possession of an August 4 memorandum to Census Bureau officials seeking to implement President Trump's order to exclude undocumented immigrants from population totals used for reapportionment. It tasks those officials with finding ways to gather granular details on the undocumented population, state-by-state, including whether a person is in detention, has overstayed a visa, is facing a hearing on his or her status and so on. It also asks them to develop options for using administrative records to compile totals of legal noncitizens.

And it asks for a broad range of acts related to imputation, including using a variety of imputation categories (housing unit status imputation, occupancy imputation, household size imputation and so on) to categorize people whose legal status cannot be otherwise determined. It also orders the officials to examine "the feasibility of utilizing various imputation methodologies, and the potential scope thereof" and "producing state level estimates or counts using residual methodologies."

Among career census professionals, the memorandum has set off alarm bells. The request for such detailed information for apportionment purposes is unprecedented, at least in recent census history. There is widespread concern that the data could be used to produce final counts for reapportionment that are skewed to the administration's political benefit.

So, can you tell me why these requests were made? Were they ordered, or was the memorandum written by Nathaniel Cogley, the new deputy director of the Census Bureau or his aide, Adam Korzeniewski? Is there consideration of altering current longstanding methods used to impute the characteristics of nonresponding households? If so, why? Are there plans for the Department of Commerce to be involved in producing alternate methods for calculating state population totals for purposes of Apportioning Congress?

Asking for a story I'm writing today. Unclear precisely when it might run, but I do not expect it to be held beyond tomorrow morning.

Thanks and regards,

Michael

--
Michael Wines
The New York Times
202.862.0377o
914.334.1686m
skype: michaelwines
messages/facetime: miwine@mac.com
twitter: @miwine
--
No passion in the world is equal to the passion to alter someone else's draft.
- H. G. Wells (1866 - 1946)

b(5) - DP

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) [ali.m.ahmad@census.gov]
Sent: 8/5/2020 6:06:33 PM
To: Burris, Meghan (Federal) [MBurris@doc.gov]
CC: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: Re: From Michael Wines, The New York Times
Attachments: b(5) - DP

Here's my proposed response b(5) - DP

b(5) - DP

Ali Ahmad, Associate Director
Communications Directorate
U.S. Census Bureau
O: 301-763-8789| M: b(6)
Ali.M.Ahmad@census.gov
census.gov | @uscensusbureau

From: Burris, Meghan (Federal) <MBurris@doc.gov>
Sent: Wednesday, August 5, 2020 4:46 PM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Re: From Michael Wines, The New York Times

b(5) - DP

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Begin forwarded message:

From: Michael Wines <miwine@nytimes.com>
Date: August 5, 2020 at 3:53:00 PM EDT
To: mburris@doc.gov
Subject: From Michael Wines, The New York Times

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And it asks for a broad range of acts related to imputation, including using a variety of imputation categories (housing unit status imputation, occupancy imputation, household size imputation and so on) to categorize people whose legal status cannot be otherwise determined. It also orders the officials to examine "the feasibility of utilizing various imputation methodologies, and the potential scope thereof" and "producing state level estimates or counts using residual methodologies."

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Asking for a story I'm writing today. Unclear precisely when it might run, but I do not expect it to be held beyond tomorrow morning.

Thanks and regards,

Michael

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202.862.0377o
914.334.1686m
skype: michaelwines
messages/facetime: miwine@mac.com
twitter: @miwine

--
No passion in the world is equal to the passion to alter someone else's draft.

- H. G. Wells (1866 - 1946)

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) [ali.m.ahmad@census.gov]
Sent: 8/5/2020 4:55:39 PM
To: Burris, Meghan (Federal) [MBurris@doc.gov]
CC: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: Re: From Michael Wines, The New York Times

Do you want to see the text of the memo in question?

Ali Ahmad, Associate Director
Communications Directorate
U.S. Census Bureau
O: 301-763-8789| M: b(6)
Ali.M.Ahmad@census.gov
census.gov | @uscensusbureau

From: Burris, Meghan (Federal) <MBurris@doc.gov>
Sent: Wednesday, August 5, 2020 4:46 PM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Cc: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Re: From Michael Wines, The New York Times

b(5) - DP

On Aug 5, 2020, at 4:46 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:

We got same inquiry directly.

On Aug 5, 2020, at 4:20 PM, Burris, Meghan (Federal) <MBurris@doc.gov> wrote:

Begin forwarded message:

From: Michael Wines <miwine@nytimes.com>
Date: August 5, 2020 at 3:53:00 PM EDT
To: mburris@doc.gov
Subject: From Michael Wines, The New York Times

Meghan,

Another request for comment.

I'm in possession of an August 4 memorandum to Census Bureau officials seeking to implement President Trump's order to exclude undocumented immigrants from population totals used for reapportionment. It tasks those officials with finding ways to gather granular details on the undocumented population, state-by-state, including whether a person is in detention, has overstayed a visa, is facing a hearing on his or her status and so on. It also asks them to develop options for using administrative records to compile totals of legal noncitizens.

And it asks for a broad range of acts related to imputation, including using a variety of imputation categories (housing unit status imputation, occupancy imputation, household size imputation and so on) to categorize people whose legal status cannot be otherwise determined. It also orders the officials to examine "the feasibility of utilizing various imputation methodologies, and the potential scope thereof" and "producing state level estimates or counts using residual methodologies."

Among career census professionals, the memorandum has set off alarm bells. The request for such detailed information for apportionment purposes is unprecedented, at least in recent census history. There is widespread concern that the data could be used to produce final counts for reapportionment that are skewed to the administration's political benefit.

So, can you tell me why these requests were made? Were they ordered, or was the memorandum written by Nathaniel Cogley, the new deputy director of the Census Bureau or his aide, Adam Korzeniewski? Is there consideration of altering current longstanding methods used to impute the characteristics of nonresponding households? If so, why? Are there plans for the Department of Commerce to be involved in producing alternate methods for calculating state population totals for purposes of Apportioning Congress?

Asking for a story I'm writing today. Unclear precisely when it might run, but I do not expect it to be held beyond tomorrow morning.

Thanks and regards,

Michael

--
Michael Wines
The New York Times
202.862.0377o
914.334.1686m
skype: michaelwines
messages/facetime: miwine@mac.com
twitter: @miwine

--

No passion in the world is equal to the passion to alter someone else's draft.
- H. G. Wells (1866 - 1946)

To: Burris, Meghan (Federal)[MBurris@doc.gov]; Walsh, Michael (Federal)[MWalsh@doc.gov]
From: Olson, Stephanie (Federal) b(6)
b(6)
Sent: Mon 8/3/2020 7:53:17 AM (UTC-04:00)
Subject: FW: Washington Times: Experts cast doubt on Trump census order: 'It's not possible to do it accurately'

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

From: Cannon, Michael (Federal) <MCannon@doc.gov>
Sent: Monday, August 3, 2020 7:53 AM
To: Heller, Megan (Federal) <MHeller@doc.gov>; Creech, Melissa L <melissa.l.creech@census.gov>; Ryan, Miles F III <miles.f.ryan.iii@census.gov>; DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Sharma, Sapna (Federal) <SSharma@doc.gov>
Subject: Fwd: Washington Times: Experts cast doubt on Trump census order: 'It's not possible to do it accurately'

FYI

Sent from my iPhone
Begin forwarded message:

> **From:** "Davis, Caitlin (Federal)" <CDavis4@doc.gov>
> **Date:** August 3, 2020 at 7:35:09 AM EDT
> **To:** "Burris, Meghan (Federal)" <MBurris@doc.gov>, "Ambrosini, Vanessa (Federal)" <VAmbrosini@doc.gov>, "Tucker, Caroline (Federal)" <CTucker@doc.gov>, "Samberg, David (Detailee/Intern)" <DSamberg@doc.gov>, "Cowles Pullen, Karen (Federal)" <KCPullen@doc.gov>, "Sowah, Alicia (Federal)" <ASowah@doc.gov>, "Foye-McFadden, Areaka (Federal)" <AFoye-McFadden@doc.gov>, "Ahmad, Ali M" <ali.m.ahmad@census.gov>, "Cook, Michael C" <michael.c.cook@census.gov>, "Cannon, Michael (Federal)" <MCannon@doc.gov>
> **Subject: Washington Times: Experts cast doubt on Trump census order: 'It's not possible to do it accurately'**
>
> Experts cast doubt on Trump census order: 'It's not possible to do it accurately'
> By Stephen Dinan | August 2, 2020
>
> --
>
> The man who designed the method Homeland Security uses to estimate the number of illegal immigrants says there's just too much margin for error to use it to carry out President Trump's new executive order to strip illegal immigrants out of the census count used to apportion congressional seats.
>
> Most of the public debate over Mr. Trump's order centers on whether it's legal.
>
> But Robert Warren, a demographer who used to work for the government and is now at the Center for Migration Studies in New York, told The Washington Times whatever the legality — which he very much doubts — it's also unworkable.

Given the tools the government has right now, he can't see how they could come up with a number accurate enough to rely on for something as important as doling out seats in the U.S. House for the next decade.

"It's not possible to do it accurately," Mr. Warren says. "The problem is that the estimates are not precise enough."

Mr. Trump's order does not affect who's counted by the census. Illegal immigrants will be tallied like everyone else.

But when the administration produces the count to be used to assign the 435 seats in the House of Representatives to the various states, Mr. Trump wants to delete the number of illegal immigrants as much as practicable, arguing they distort political power by unfairly boosting the populations of some states.

Census Bureau Director Steven Dillingham told Congress last week his agency is just at the beginning of trying to figure out how to carry out the president's order.

"We are going to analyze the data that we have and look at the methodologies that might be employed for that purpose," he said.

The key to Mr. Trump's order is getting good state counts of the population without illegal immigrants.

Mr. Warren says the system used by the government begins by trying to estimate the foreign-born population based on the American Community Survey.

That's what used to be the census's long form, a lengthy set of questions sent to a much smaller subset of people than the full 2020 census will reach. The ACS asks about place of birth — and, ironically, also asks about current citizenship, a question that was deeply controversial when Mr. Trump suggested including it in the full census.

Once the foreign born estimate is known, analysts subtract the known number of people admitted legally by year, and subtract that from the foreign born. They also factor in mortality and emigration, and what's left over is an estimate of the unauthorized population.

That can also be done by state.

But one problem, Mr. Warren said, is the emigration calculation is based on calculations from 40 years ago.

More troubling for apportionment purposes, there's no way to account for internal migration. So someone who applied for a green card from California in 1990 is assumed to still be living there, even though he may have moved many times since.

So even if the government could give a decent estimate of the unauthorized population nationally, accurately placing them state-by-state is not possible given the method the feds use.

"I do not think it can be done. On any data system that I've heard proposed, it cannot be done,"
Mr. Warren says.

He says the methodology he now uses at CMS is more accurate. He starts with the universe of people who say they entered after 1982 — the effective date of the last major amnesty — then subtracts those who have a high probability of being legal, based on things like their use of government programs only open to legal residents.

He makes other adjustments, such as for undercounting in the census itself, and ends up with a universe of people in the country illegally — which he can then identify by the state they listed in the ACS.

The Times asked whether, if the government came calling, he would share his data. He said he hasn't been asked, and seemed skeptical CMS would be willing to participate in Mr. Trump's project anyway.

Mr. Trump's executive order was vague on how the government should go about trying to delete illegal immigrants from the count.

The most obvious option would be to use statistical methods like the ones Mr. Warren created.

But the administration could also try to knock out individual people it figures are illegally present, by matching names, addresses and ages in the census data with information Homeland Security has in its own files.

That would involve taking lists of people known to be here illegally, such as people in deportation proceedings or who have pending asylum claims. The government probably knows specific identities of a few million illegal immigrants or other unauthorized residents based on their current efforts to adjust status or claim protections under humanitarian programs, said Steven A. Camarota, a demographer at the Center for Immigration Studies.

But that's a fraction of the total population, which experts say is at least 10 million.

It also leaves tricky questions about whether people with DACA or Temporary Protected Status would be counted as legal or illegal residents.

Amy O'Hara, the former chief of administrative records at the Census Bureau and now a professor at Georgetown University, told Science magazine that the systems just don't exist to sort out all immigrants by legal status.

"I don't know what set of data sources the bureau could identify for that purpose," she said. "And for the ones they have, it's not clear how they would operationalize them."

Whatever method Mr. Trump's team does try, it's going to be snared in the courts for years, with the questions raised by Mr. Warren likely to poke holes in whatever answers the government comes up with.

"As a practical matter, it's very difficult to actually do," Mr. Camarota said.

But he said it is an important conversation for the country to have, because it underscores some of the

consequences of illegal immigration.

"If they're included, American citizens lose political representation in some areas of the country to give to other areas of the country where a large fraction of the people are illegal immigrants," he said.

In estimates he published last year, Mr. Camarota said the difference between counting or excluding illegal immigrants shifts three seats. With illegal immigrants included, California, Texas and New York each have an additional seat. Without them, those seats would go to Ohio, Alabama and Minnesota.

Republicans point out that some of the official census count is already a guess.

If a household doesn't reply, statisticians "impute" data for that home by extrapolating from nearby households that did provide answers.

"There are times when we have reason to believe, evidence, that someone is living in that household but we are unable to communicate with them, that in fact we do have an imputation accepted method that has been accepted by the courts," Mr. Dillingham told Congress.

Rep. Chip Roy, Texas Republican, was more blunt: "It means that we make stuff up," he said.

Mr. Roy also pointed out that the American Community Survey, which is an estimate and not an actual count, is already used for enforcing the Voting Rights Act. He said it's not a big leap from that to using ACS calculations to come up with reapportionment data.

Multiple lawsuits have been filed to block Mr. Trump's order. All of them argue he's violating the Constitution's 14th Amendment, approved in the wake of the Civil War.

That amendment 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."

In a congressional hearing last week, four past directors of the Census Bureau were asked if that covers illegal immigrants. All four said it does.

But Attorney General William P. Barr, at a different hearing on Capitol Hill, said the "whole number of persons" section is usually read to mean inhabitants. Congress, he said, has the right to define who qualifies as an inhabitant, and it has delegated that to the Commerce Department within the executive branch — meaning the president can decide.

"So as the law stands now we think the Commerce secretary as the delegate of congressional power can define that term," he said. "That's a reasonable argument to make."

Immigration — legal and illegal — plays a massive role in determining how much a single citizen's vote counts.

In California's 21st Congressional District, for example, nearly 30% of the adult population is not a citizen. By contrast, in the state's 1st District just 3.4% are not citizens, according to Mr. Camarota's data.

In 2018 a Democrat won a tight election in the 21st District with just 57,239 votes out of about 114,000 cast. California's 1st District saw a Republican win more comfortably, with 160,046 votes out of more than 291,000 cast. That means each voter in the 1st District counted less than half what a voter in the 21st District counted when it came to selecting a representative.

In Texas, meanwhile, more than 300,000 votes were cast in the 25th Congressional District in 2018, and a Republican won with about 163,000. Up the state in the 33rd District, fewer than 120,000 votes were cast and a Democrat won with about 91,000.

Mr. Camarota says on average about half of non-citizens are in the country illegal, with variability among the

states — the rate is a little lower in California, and a little higher in Texas.

Caitlin J. Davis
Deputy Press Secretary
U.S. Department of Commerce
(m) b(6)
cdavis4@doc.gov

To: Brebbia, Sean (Federal)[SBrebbia@doc.gov]; Walsh, Michael (Federal)[MWalsh@doc.gov]; Kumar, Harry (Federal)[HKumar@doc.gov]; Olson, Stephanie (Federal)[SOlson@doc.gov]
From: Foti, Anthony b(6)
b(6)
Sent: Wed 7/22/2020 4:06:24 PM (UTC-04:00)
Subject: Fwd: Letter for The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce
2020-07-22.CBM to Ross re Witness Invite.pdf
ATT00001.htm

See attached.

Anthony Foti
Performing the delegated duties of the
Assistant Secretary for Legislative and Intergovernmental Affairs
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230
202-482-1148
Begin forwarded message:

From: "Foti, Anthony (Federal)" <AFoti@doc.gov>
Date: July 22, 2020 at 4:05:40 PM EDT
To: "Goss, Trinity" <Trinity.Goss@mail.house.gov>
Cc: "Kim, Janet" <Janet.Kim@mail.house.gov>, "Anderson, Tori" <Tori.Anderson@mail.house.gov>, "Whitcomb, Max" <Max.Whitcomb@mail.house.gov>, "LaNier, Elisa" <Elisa.LaNier@mail.house.gov>, "MacPherson, Cameron" <Cameron.MacPherson@mail.house.gov>, "Jones, Taylor" <Taylor.Jones@mail.house.gov>, "Bush, Anthony" <Anthony.Bush@mail.house.gov>
Subject: Re: Letter for The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce

Thanks, Trinity. Acknowledging receipt.

Anthony Foti
Performing the delegated duties of the
Assistant Secretary for Legislative and Intergovernmental Affairs
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230
202-482-1148

On Jul 22, 2020, at 4:03 PM, Goss, Trinity <Trinity.Goss@mail.house.gov> wrote:

Hello—

Please see the letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce.

Please acknowledge receipt of letter.

Thank you,

Trinity Goss

Trinity M. E. Goss | Executive Team Coordinator

Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform
Trinity.Goss@mail.house.gov | (202) 225-5051

CAROLYN B. MALONEY
CHAIRWOMAN

ONE HUNDRED SIXTEENTH CONGRESS

JAMES COMER
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5051
MINORITY (202) 225–5074
https://oversight.house.gov

July 22, 2020

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Secretary Ross:

Yesterday, President Trump issued a memorandum directing you to exclude undocumented immigrants from the 2020 Census apportionment calculations for the House of Representatives.[1] This action directly violates the Constitution and the laws passed by Congress, and it appears to be a blatant attempt to politicize the 2020 Census, depress participation, and undermine its accuracy. Because the Administration is taking this step in the middle of the ongoing Census, the Committee on Oversight and Reform requests that you appear for an emergency hearing on Wednesday, July 29, 2020.

Background

The President's unconstitutional memorandum comes after the Trump Administration failed in its last attempt to politicize the Census. Beginning in 2017, the Administration attempted to add an unlawful citizenship question to the 2020 Census—a decision that was struck down by the Supreme Court last year. The Administration argued repeatedly—including before this Committee—that the attempt to add the citizenship question was not for the purposes of excluding undocumented immigrants from the 2020 Census apportionment calculations.

Despite these assertions, a study written by a Republican gerrymandering expert who provided input on the Administration's effort to add the citizenship question stated that excluding undocumented immigrants from the redistricting counts "would be advantageous to Republicans and Non-Hispanic Whites."[2] After this document was made public, the Supreme Court ruled that the Administration's rationale for adding the question was "contrived" and that

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[1] The White House, *Memorandum on Excluding Illegal Aliens from the Apportionment Based Following the 2020 Census* (July 21, 2020) (online at www.documentcloud.org/documents/6999106-July-21-2020-Memorandum-On-Excluding-Illegal.html).

[2] Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting* (2015) (online at https://assets.documentcloud.org/documents/6111284/May31-2019-Unredacted-Exhibits.pdf).

the effort to add it was illegal.[3] Now, the Administration has dropped all pretense of upholding the Constitution and ensuring a fair, full, nonpartisan, and accurate census and ordered you to exclude undocumented immigrants from the 2020 Census apportionment calculations.

Even prior to the coronavirus pandemic, experts testified to the Committee that the Census Bureau was at risk of failing in critical aspects of Census preparations, which could impact the ability to conduct a complete and accurate count.[4] Since the outbreak of the pandemic, the Census Bureau has faced serious new challenges. For example, the pandemic has led to repeated delays in Census operations, leading the Bureau to push back its timeline from August 1, 2020, to October 31, 2020.[5]

Request for Hearing Testimony

The decennial census is a cornerstone of our democracy. Article I of the Constitution requires the federal government to conduct a Census every ten years and to count every person in the United States. Article I, Section 2 of the Constitution specifically assigns Congress the authority to direct the census in "in such manner as they shall by law direct."[6] Our nation's laws require that "the President shall transmit to the Congress a statement showing the whole number of persons."[7] The Supreme Court has reaffirmed the principle of counting every person.[8]

The President's memorandum violates these constitutional and statutory mandates and appears to be an attempt to sow confusion, reduce participation, and distort the count in the ongoing 2020 Census. For all these reasons, the Committee on Oversight and Reform requests your testimony at a hearing on July 29, 2020, at 10:00 a.m., in room 2154 of the Rayburn House Office Building.

The enclosed Witness Instruction Sheet provides information for witnesses appearing before the Committee. Please note the procedures for submitting written testimony at least two business days prior to the hearing. Please contact the Committee by July 24, 2020, to confirm your attendance. If you have any questions, please contact Committee staff at (202) 225-5051.

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[3] *Dept. of Commerce., v. New York*, 139 S. Ct. 2551 (2019).

[4] Committee on Oversight and Reform, *Hearing on Reaching Hard-to-Count Communities in the 2020 Census* (Jan. 9, 2020) (online at https://oversight.house.gov/legislation/hearings/reaching-hard-to-count-communities-in-the-2020-census).

[5] Census Bureau, *2020 Census Operational Adjustments Due to COVID-19* (last viewed July 21, 2020) (online at https://2020census.gov/en/news-events/operational-adjustments-covid-19.html).

[6] U.S. Const., Art. 1, sec. 2.

[7] 2 U.S.C. 2(a).

[8] *Knox v. Lee*, 79 U.S. 457 (1871); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

Sincerely,

Carolyn B. Maloney
Chairwoman

Enclosure

cc: The Honorable James R. Comer, Ranking Member

Committee on Oversight & Reform
Witness Instruction Sheet

1. Witnesses should provide their testimony, biography, and "Truth in Testimony" disclosure and certification form via email to Oversight_Clerks@mail.house.gov no later than 10:00 a.m. two business days prior to the hearing.

2. Witnesses should also provide a short biographical summary and include it with the electronic copy of testimony provided to the Clerk.

3. At the hearing, each witness will be asked to summarize his or her written testimony in five minutes or less in order to maximize the time available for discussion and questions. Written testimony will be entered into the hearing record and may extend to any reasonable length.

4. Written testimony will be made publicly available and will be posted on the Committee's website and the U.S. House of Representatives Document Repository. It is therefore recommended that personally identifiable information, such as addresses and phone numbers, not be included in the biographical information.

5. The Committee does not provide financial reimbursement for witness travel or accommodations. Witnesses with extenuating circumstances, however, may submit a written request for such reimbursements to Robin Butler, Financial Administrator, 2157 Rayburn House Office Building, at least one week prior to the hearing. Reimbursements will not be made without prior approval.

6. Witnesses with disabilities should contact Committee staff to arrange any necessary accommodations.

7. Please note that Committee Rule 16(b) requires counsel representing an individual or entity before the Committee or any of its subcommittees, whether in connection with a request, subpoena, or testimony, promptly submit a notice of appearance to the Committee. If this applies to you, please email the address above to acquire this form.

For inquiries regarding these rules and procedures, please contact the Committee on Oversight and Reform at (202) 225-5051.

Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: _____

Subcommittee: _____

Hearing Date: _____

Hearing Subject:

Witness Name: _____

Position/Title: _____

Witness Type: ○ Governmental ○ Non-governmental

Are you representing yourself or an organization? ○ Self ○ Organization

If you are representing an organization, please list what entity or entities you are representing:

If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.*

If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.*

False Statements Certification

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

_____ _____

Witness signature Date

If you are a <u>non-governmental witness</u>, please ensure that you attach the following documents to this disclosure. Check both boxes to acknowledge that you have done so.

☐ Written statement of proposed testimony

☐ Curriculum vitae

*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

To: Walsh, Michael (Federal)[MWalsh@doc.gov]
From: Brebbia, Sean (Federal) b(6)
b(6)
Sent: Wed 6/17/2020 9:54:15 AM (UTC-04:00)
Subject: FW: Tri-Caucus 6-15-20
06-15-2020 DRAFT RESPONSE to Castro et al on EO 13880.docx
Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf

CUI//PRIV
Mike, **b(5) - DP/AC**

Congress of the United States
Washington, DC 20515

February 21, 2020

The Honorable Wilbur Ross
Secretary of Commerce
United States Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dr. Steven Dillingham
Director
United States Census Bureau
4600 Silver Hill Road
Washington, DC 20233

Dear Commerce Secretary Ross and Census Bureau Director Dillingham,

As Chairs of the Congressional Tri-Caucus Chairs – composed of the Congressional Asian Pacific American Caucus (CAPAC), Congressional Black Caucus (CBC), and Congressional Hispanic Caucus (CHC) – we write to express our profound concerns regarding the implementation of President Trump's Executive Order 13880 (EO), dated July 11, 2019.[1] The President issued the EO after the Supreme Court ruled that the Administration could not place a citizenship question on the 2020 Census. President Trump's EO directs all federal and state executive departments and agencies to provide the Department of Commerce with access to administrative records in order to determine the number of citizens and non-citizens living in the United States. The EO directs the Department of Commerce to collect this information concurrently with the execution of the 2020 Census. We respectfully urge the Department of Commerce to delay the implementation of the Executive Order and invite Secretary Ross and Census Director Dillingham to meet with our Members to discuss our questions and concerns. The Tri-Caucus would also like to request a Member-level briefing on the EO and its underlying efforts.

President Trump singles out the Department of Homeland Security (DHS), Department of State, and the Department of Health and Human Services (HHS) to comply and to share access to its administrative records on citizenship and immigration data with the Department. In the EO, President Trump also directs the Commerce Department to instruct the Census Bureau Director to organize an inter-agency working group to help facilitate access to this administrative citizenship data. The Census Bureau Director is to act as chair of the working group, and each agency must designate a representative to handle requests from the chair. The EO also directs state governments to share their citizenship administrative records with the department. Lastly, the EO directs the Commerce Secretary to develop strategies to ensure a citizenship question is included in the 2030 Census.

Given that the President's EO is a direct response to the Supreme Court's decision to block the citizenship question from the 2020 Census, and given recent evidence that the effort to add a citizenship question was motivated by a desire to disadvantage communities of color in the redistricting process, the Tri-Caucus Chairs have the following concerns:

1. Although the EO's request is comprehensive, the time provided to collect this data and to develop a statistical model of this scope is alarmingly rushed, lacks transparency, relies on stale and notoriously

[1] https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connection-with-the-decennial-census

PRINTED ON RECYCLED PAPER

BC-DOC-0000027804

inaccurate citizenship data, and may be in violation of federal law and regulation under the Privacy Act of 1974. For example, the disclosure of the personally identifiable information of individuals with pending or approved immigration applications for victim-based immigration benefits is prohibited under 8 U.S.C. § 1367.[2] Ultimately, this process may inhibit the Bureau from achieving a complete and accurate count in the 2020 Census.

2. While the Bureau has strong data protection policies in place for all respondents to the census questionnaire, it has failed to mitigate the various significant data privacy risks and concerns that this process raises. DHS outlines these privacy risks in its Privacy Impact Assessment (PIA) dated December 20, 2019. This PIA includes eight major concerns, most notably the lack of transparency on the privacy policies in place to protect personally identifiable information, the training in place for Census and employees granted Special Sworn Status (SSS) to properly handle sensitive DHS data, the length of time that the Commerce department will house DHS data, the process for destroying the data safely, and lastly, the risk of integrating inaccurate immigration data.[3]
3. The EO has the potential to function as a continuation of the Administration's efforts to alienate non-citizens and disenfranchise communities of color through the redistricting process.
4. The overall lack of transparency in the data-collection process, and questions related to the integrity of the creation of a data product that may inform important policies at the national, state, and local level, including long term changes to our nation's immigration policies.

Given these concerns, the Tri-Caucus Chairs invite Commerce Secretary Ross and Census Bureau Director Dillingham to respond to the following questions via letter and to meet with our Members to discuss our questions and concerns.

Document Requests and Questions

1. Could you please provide all copies of the Memorandum of Understanding (MOU) reached on data-sharing between the Department of Commerce and the Department of Homeland Security in compliance with the President's EO from this decennial cycle?
2. Can the Commerce Secretary provide a complete update and timeline for the data-collection process being developed to determine the number of citizens and non-citizens currently living in the United States per the President's EO? Could you also please provide a copy of the data already received and set to be received, including from all state and county entities, not just data from the executive branch?
    a. Which Department of Commerce political appointee(s) advised or are advising the Secretary on how the Department and Bureau will implement the EO?
    b. Who at the Department of Commerce will be responsible for integrating the administrative immigration data received from federal and state agencies?
        i. How many employees will have access to this data?
        ii. Which divisions do these employees work for in the department?
    c. When can we expect the design of this data collection model to be complete? Will the Department of Commerce announce this information publicly? We understand there is a public announcement planned for March 31st, 2020 related to the EO; can you confirm or deny this? When can we expect this data collection process to be completed?
3. Has the Secretary or any Commerce official spoken with any official at the Department of Justice (DOJ) and DHS regarding the implementation of the EO?
    a. If so, who and when? What was discussed?
4. Has the Secretary spoken with any official at DOJ regarding the apportionment of congressional seats?
5. If so, who and when? What was discussed? Has the Secretary or any Commerce official spoken with any official in the White House regarding the apportionment of congressional seats?

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[2] https://www.law.cornell.edu/uscode/text/8/1367

[3] https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf

BC-DOC-0000027805

a. If so, who and when? What was discussed?

6. Has the Secretary or any Commerce official spoken with any official at the Department of Homeland Security regarding the apportionment of congressional seats?
    a. Is so, who and when? What was discussed?
7. What portion of the Department's workforce and the funds appropriated through Congress will be directed towards collecting this immigration data and what portion will go towards the completion of the 2020 Census?
8. Can the Commerce Secretary and Bureau Director address concerns that these simultaneous efforts will discourage people from participating in the 2020 Census?
9. Can the Commerce Secretary provide a full list of which federal and state executive agencies it has requested citizenship data from, and which have agreed to share their data?
10. Can the Commerce Secretary share information on the data protection policies in place to ensure the safety of this sensitive data during the collection process and once the statistical model is complete?
    a. How long will the Department of Commerce house this data? What is the process for safely destroying this data?
    b. Will individuals be notified that their information has been shared as part of this process? Will individuals be notified once their information is no longer housed by the Department?
11. Can the Commerce Secretary and the Census Bureau Director speak to how both are working to ensure that this statistical model meets the standard for statistical accuracy and integrity of all Census Bureau products? Can you provide a copy of the Bureau's data quality policies for evaluating the integrity of data sets?
    a. How can we be assured that disclosure avoidance does not impact the accuracy and integrity of the statistical file that will be available for states to use?
12. Can the Commerce Secretary assure our Members that the updated immigration data will not be used for immigration enforcement like expedited deportations in contravention of the privacy protections and requirements found in Title 13?
13. Can the Bureau Director provide an update on the inter-agency working group ordered by the President to meet this goal?
    a. Which federal and state agencies and/or departments are part of this inter-agency working group? Of those agencies, can the Bureau Director provide a list of the representatives for each of the departments and agencies?
14. Can the Bureau Director address concerns that this statistical model will affect census participation among Hard-to-Count communities like Latino, African American, and Asian American and Pacific Islander communities?
    a. Can the Bureau Director speak to its outreach and messaging to ensure that this model does not reduce participation in the decennial census among Hard-to-Count populations?

We look forward to your response by Wednesday March 4th and to engaging with you on this important matter.

Sincerely,

Joaquin Castro
Member of Congress
CHC Chair

Karen Bass
Member of Congress
CBC Chair

Judy Chu
Member of Congress
CAPAC Chair

BC-DOC-0000027806

To: Walsh, Michael (Federal)[MWalsh@doc.gov]
Cc: Olson, Stephanie (Federal)[SOlson@doc.gov]
From: Brebbia, Sean (Federal)[b(6)
b(6)]
Sent: Fri 6/12/2020 9:55:27 AM (UTC-04:00)
Subject: FW: Tri-Caucus Response
05-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880 v5.docx
Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf

CUI//PRIV

Mike, let's touch base on these when you have a chance

Congress of the United States
Washington, DC 20515

February 21, 2020

The Honorable Wilbur Ross
Secretary of Commerce
United States Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dr. Steven Dillingham
Director
United States Census Bureau
4600 Silver Hill Road
Washington, DC 20233

Dear Commerce Secretary Ross and Census Bureau Director Dillingham,

As Chairs of the Congressional Tri-Caucus Chairs – composed of the Congressional Asian Pacific American Caucus (CAPAC), Congressional Black Caucus (CBC), and Congressional Hispanic Caucus (CHC) – we write to express our profound concerns regarding the implementation of President Trump's Executive Order 13880 (EO), dated July 11, 2019.[1] The President issued the EO after the Supreme Court ruled that the Administration could not place a citizenship question on the 2020 Census. President Trump's EO directs all federal and state executive departments and agencies to provide the Department of Commerce with access to administrative records in order to determine the number of citizens and non-citizens living in the United States. The EO directs the Department of Commerce to collect this information concurrently with the execution of the 2020 Census. We respectfully urge the Department of Commerce to delay the implementation of the Executive Order and invite Secretary Ross and Census Director Dillingham to meet with our Members to discuss our questions and concerns. The Tri-Caucus would also like to request a Member-level briefing on the EO and its underlying efforts.

President Trump singles out the Department of Homeland Security (DHS), Department of State, and the Department of Health and Human Services (HHS) to comply and to share access to its administrative records on citizenship and immigration data with the Department. In the EO, President Trump also directs the Commerce Department to instruct the Census Bureau Director to organize an inter-agency working group to help facilitate access to this administrative citizenship data. The Census Bureau Director is to act as chair of the working group, and each agency must designate a representative to handle requests from the chair. The EO also directs state governments to share their citizenship administrative records with the department. Lastly, the EO directs the Commerce Secretary to develop strategies to ensure a citizenship question is included in the 2030 Census.

Given that the President's EO is a direct response to the Supreme Court's decision to block the citizenship question from the 2020 Census, and given recent evidence that the effort to add a citizenship question was motivated by a desire to disadvantage communities of color in the redistricting process, the Tri-Caucus Chairs have the following concerns:

1. Although the EO's request is comprehensive, the time provided to collect this data and to develop a statistical model of this scope is alarmingly rushed, lacks transparency, relies on stale and notoriously

[1] https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connection-with-the-decennial-census

PRINTED ON RECYCLED PAPER

BC-DOC-0000027809

inaccurate citizenship data, and may be in violation of federal law and regulation under the Privacy Act of 1974. For example, the disclosure of the personally identifiable information of individuals with pending or approved immigration applications for victim-based immigration benefits is prohibited under 8 U.S.C. § 1367.[2] Ultimately, this process may inhibit the Bureau from achieving a complete and accurate count in the 2020 Census.

2. While the Bureau has strong data protection policies in place for all respondents to the census questionnaire, it has failed to mitigate the various significant data privacy risks and concerns that this process raises. DHS outlines these privacy risks in its Privacy Impact Assessment (PIA) dated December 20, 2019. This PIA includes eight major concerns, most notably the lack of transparency on the privacy policies in place to protect personally identifiable information, the training in place for Census and employees granted Special Sworn Status (SSS) to properly handle sensitive DHS data, the length of time that the Commerce department will house DHS data, the process for destroying the data safely, and lastly, the risk of integrating inaccurate immigration data.[3]
3. The EO has the potential to function as a continuation of the Administration's efforts to alienate non-citizens and disenfranchise communities of color through the redistricting process.
4. The overall lack of transparency in the data-collection process, and questions related to the integrity of the creation of a data product that may inform important policies at the national, state, and local level, including long term changes to our nation's immigration policies.

Given these concerns, the Tri-Caucus Chairs invite Commerce Secretary Ross and Census Bureau Director Dillingham to respond to the following questions via letter and to meet with our Members to discuss our questions and concerns.

Document Requests and Questions

1. Could you please provide all copies of the Memorandum of Understanding (MOU) reached on data-sharing between the Department of Commerce and the Department of Homeland Security in compliance with the President's EO from this decennial cycle?
2. Can the Commerce Secretary provide a complete update and timeline for the data-collection process being developed to determine the number of citizens and non-citizens currently living in the United States per the President's EO? Could you also please provide a copy of the data already received and set to be received, including from all state and county entities, not just data from the executive branch?
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[2] https://www.law.cornell.edu/uscode/text/8/1367

[3] https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf

BC-DOC-0000027810

a. If so, who and when? What was discussed?

6. Has the Secretary or any Commerce official spoken with any official at the Department of Homeland Security regarding the apportionment of congressional seats?
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    a. Can the Bureau Director speak to its outreach and messaging to ensure that this model does not reduce participation in the decennial census among Hard-to-Count populations?

We look forward to your response by Wednesday March 4th and to engaging with you on this important matter.

Sincerely,

Joaquin Castro
Member of Congress
CHC Chair

Karen Bass
Member of Congress
CBC Chair

Judy Chu
Member of Congress
CAPAC Chair

BC-DOC-0000027811

From: Olson, Stephanie (Federal) [SOlson@doc.gov]
Sent: 5/28/2020 4:18:00 PM
To: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: CIU/PRIV FW: FYI - new Oversight majority release and bill
Attachments: fair and accurate census act.pdf

CUI/PRIV

b(5) - DP/AC

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

From: Cannon, Michael (Federal) <MCannon@doc.gov>
Sent: Thursday, May 28, 2020 11:41 AM
To: DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>; Heller, Megan (Federal) <MHeller@doc.gov>
Cc: Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Preston, Robert (Federal) <RPreston@doc.gov>
Subject: FW: FYI - new Oversight majority release and bill

CUI//PRIVILEGE//FED ONLY

FYI, a new bill introduced in the House yesterday regarding the Census.

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

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From: Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>
Sent: Thursday, May 28, 2020 11:35 AM
To: Cannon, Michael (Federal) <MCannon@doc.gov>
Subject: Fw: FYI - new Oversight majority release and bill

FYI.

From: Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>
Sent: Wednesday, May 27, 2020 12:52 PM
To: Foti, Anthony (Federal) <afoti@doc.gov>; Michael Walsh <mwalsh@doc.gov>; Sean Brebbia <sbrebbia@doc.gov>; Stephanie Olson <solson@doc.gov>
Cc: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Subject: FYI - new Oversight majority release and bill

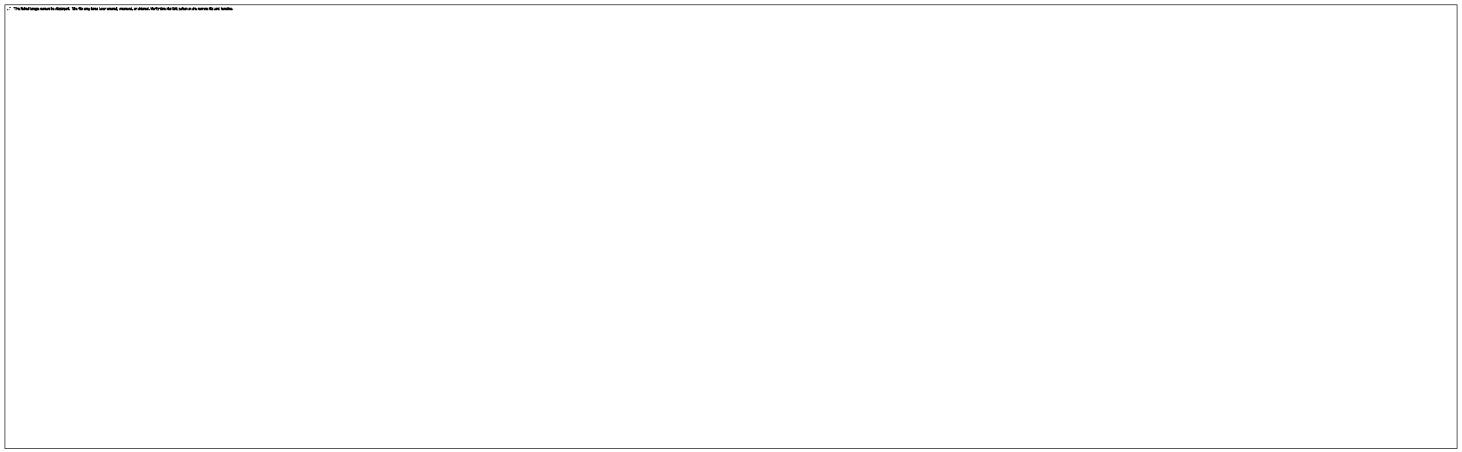
CONFIDENTIAL - DELIBERATIVE

The attached bill b(5) - DP/AC

b(5) - DP/AC

Here is their release.

From: Oversight Committee Democrats Press Office <OversightPress@mail.house.gov>
Date: May 27, 2020 at 10:52:20 EDT
To: Oversight Committee Democrats Press Office <OversightPress@mail.house.gov>
Subject: RELEASE: Oversight Committee Introduces Fair and Accurate Census Act



FOR IMMEDIATE RELEASE: May 27, 2020
CONTACT: Aryele Bradford, (202) 226-5181

Oversight Committee Introduces
Fair and Accurate Census Act

Washington, D.C. (May 27, 2020)—Today, Oversight and Reform Committee Chairwoman Carolyn B. Maloney, Committee Vice Chairman Jimmy Gomez, Government Operations Subcommittee Chairman Gerry Connolly, Civil Rights and Civil Liberties Subcommittee Chairman Jamie Raskin, and Committee Member John Sarbanes issued the following statements after introducing legislation to support a fair and accurate 2020 Census in light of the delays caused by the coronavirus pandemic:

"The Fair and Accurate Census Act provides the Census Bureau with the authority and tools to navigate the obstacles of the coronavirus pandemic," said Chairwoman Maloney. "It implements a request by the Trump Administration to extend several key deadlines, and it also ensures greater transparency with Congress and allows the Bureau to focus on achieving a successful Census without unnecessary distractions or diversion of resources."

"In the midst of the COVID-19 pandemic, extending our nation's 2020 Census operations is a safe and essential step in ensuring all communities are represented and accurately counted," said Vice Chairman Gomez. "We simply cannot allow an undercount of our communities to result in millions of lost federal funding to support small businesses, schools, healthcare systems, and other critical services and resources. There is far too much at stake – especially for hard-to-count communities in

Los Angeles and across the country – to leave the U.S. Census Bureau unchecked. Through the Fair and Accurate Census Act, we can help provide much-needed oversight of the U.S. Census Bureau to ensure a fair and accurate count where everyone has a voice in our democracy."

"The coronavirus has created significant challenges to carrying out the decennial Census," said Chairman Connolly. "The Fair and Accurate Census Act will provide flexibility and transparency to ensure a fair and complete count."

"I'm delighted to introduce the Fair and Accurate Census Act with my Oversight colleagues," said Chairman Raskin. "Congress has a responsibility to uplift the Census and this legislation will enable us to meet the challenges of the ongoing public health emergency by extending key deadlines and ensuring the Census Bureau has the resources necessary for capturing a full and fair count."

"Across the country, states like Maryland depend on an accurate decennial census to allocate critical federal resources and ensure fair representation for our communities," said Congressman Sarbanes. "Compounding the Trump Administration's efforts to undermine the 2020 Census, the COVID-19 pandemic has presented several obstacles to the Census Bureau as it aims to reach each and every community in the country. This new federal effort will help provide the Bureau with the flexibility and accountability needed to ensure an accurate count."

The Fair and Accurate Census Act will:

- modify 2020 Census apportionment and redistricting data delivery deadlines at the request of the Administration and to ensure data accuracy;
- require the Census Bureau to submit monthly operational and technological status reports to Congress;
- allow colleges and universities to provide necessary data to the Census Bureau; and
- ensure the Census Bureau has adequate resources to achieve a complete and accurate count.

In March 2020, the Census Bureau announced initial delays due to coronavirus. Although the Committee asked for operational updates from the Bureau, the Bureau did not provide updates to the Committee, and the Administration did not reply to multiple requests about the Bureau's plans to execute the Census amid the coronavirus pandemic.

In April 2020, the Administration announced that it would delay key operations further, extending the timeframe for data collection to October 31, 2020.

As a result, the bill promotes greater cooperation and transparency with Congress in order to ensure that the Bureau can successfully execute a fair and accurate 2020 Census for the American people.

This bill also addresses issues identified during a Member briefing with Census Bureau Director Steven Dillingham and senior Census officials, as well as Secretary Ross's and the Trump Administration's requests for Congress to delay key statutory deadlines.

Click here to read the Fair and Accurate Census Act.

###

Carolyn B. Maloney

(Original Signature of Member)

116TH CONGRESS
2D SESSION

H. R. _____

To modify the deadline for completing the 2020 decennial census of population and related tabulations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mrs. CAROLYN B. MALONEY of New York introduced the following bill; which was referred to the Committee on _____

A BILL

To modify the deadline for completing the 2020 decennial census of population and related tabulations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair and Accurate Census Act".

SEC. 2. CENSUS DEADLINE MODIFICATION.

Notwithstanding the timetables provided in sections 141(b) and (c) of title 13, United States Code, and section

22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for an apportionment of Representatives in Congress", approved June 18, 1929 (2 U.S.C. 2a(a)), for the 2020 decennial census of the population—

(1) the tabulation of total population by States required by section 141(a) of such title for the apportionment of Representatives in Congress among the several States shall be completed and reported by the Secretary to the President within 13 months after the decennial census date of April 1, 2020, and shall be made public by the Secretary no later than the date on which it is reported to the President;

(2) the President shall 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 under an apportionment of the then existing number of Representatives, as required by such section 22(a), and determined solely as described therein, within 14 days after receipt of the tabulation reported by the Secretary; and

(3) the tabulations of populations required by section 141(c) of such title shall be completed by the Secretary as expeditiously as possible after the cen-

sus date of April 1, 2020, taking into account each State's deadlines for legislative apportionment or districting, and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall be completed, reported, and transmitted to each respective State within 16 months after the decennial census date of April 1, 2020.

SEC. 3. REPORTING REQUIREMENTS FOR 2020 CENSUS.

On the first day of each month during the period between the date of enactment of this Act and July 1, 2021, the Director of the Bureau of the Census shall submit, to the Committee on Oversight and Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Committees on Appropriations of the House and the Senate, a report regarding the 2020 decennial census of population containing the following information:

(1) The total number of field staff, sorted by category, hired by the Bureau compared to the num-

ber of field staff the Bureau estimated was necessary to carry out such census.

(2) Retention rates of such hired field staff.

(3) Average wait time for call center calls and average wait time for each language provided.

(4) Anticipated schedule of such census operations.

(5) Total appropriations available for obligation for such census and a categorized list of total disbursements.

(6) Non-Response Follow-Up completion rates by geographic location.

(7) Update/Enumerate and Update/Leave completion rates by geographic location.

(8) Total spending to date on media, advertisements, and partnership specialists, including a geographic breakdown of such spending.

(9) Post-enumeration schedule and subsequent data aggregation and delivery progress.

SEC. 4. PROVIDING BUREAU OF THE CENSUS ACCESS TO INFORMATION FROM INSTITUTIONS OF HIGHER EDUCATION.

(a) IN GENERAL.—Notwithstanding any other provision of law, including section 444 of the General Education Provisions Act (commonly known as the "Family

Educational Rights and Privacy Act of 1974''), an institution of higher education may, in furtherance of a full and accurate decennial census of population count, provide to the Bureau of the Census information requested by the Bureau for purposes of enumeration for the 2020 decennial census of population.

(b) APPLICATION.—

(1) INFORMATION.—Only information requested on the official 2020 decennial census of population form may be provided to the Bureau of the Census pursuant to this section. No institution of higher education may provide any information to the Bureau on the immigration or citizenship status of any individual.

(2) NOTICE REQUIRED.—Before information can be provided to the Bureau, the institution of higher education shall give public notice of the categories of information which it plans to provide and shall allow 10 days after such notice has been given for a student to inform the institution that any or all of the information designated should not be released without the student's prior consent. No institution of higher education shall provide the Bureau with the information of any individual who has objected to the provision of such information.

(3) USE OF INFORMATION.—Information provided to the Bureau pursuant to this section may only be used for the purposes of enumeration for the 2020 decennial census of population.

(c) DEFINITION OF INSTITUTION OF HIGHER EDUCATION.—In this section, the term "institution of higher education" has the meaning given that term in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002).

(d) SUNSET.—The authority provided in this section shall expire at the conclusion of 2020 census operations.

SEC. 5. LIMITATION.

The Bureau of the Census may not compile, produce, or publish any data product or tabulation as part of, in combination with, or in connection with, the 2020 decennial census of population or any such census data produced pursuant to section 141(c) of title 13, United States Code, that includes topics specific to the 2020 Census that were not part of the report submitted pursuant to section 141(f)(1) of title 13, United States Code, on March 28, 2017, and the 2018 End-to-End Census Test conducted in Providence County, Rhode Island.

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05/20/2020 10:28
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[Discussion Draft]

(Original Signature of Member)

[DISCUSSION DRAFT]

I

116th CONGRESS
2d Session

H. R. __

IN THE HOUSE OF REPRESENTATIVES

Mrs. Carolyn B. Maloney of New York
introduced the following bill; which was referred to the Committee on _____

A BILL

To modify the deadline for completing the 2020 decennial census of population and related tabulations,

and for other purposes.

1.
Short title
This Act may be cited as the Fair and Accurate Census Act
.

2.
Census Deadline Modification
Notwithstanding the timetables provided in sections 141(b) and (c) of title 13, United States Code, and section 22(a) of the Act entitled An Act to provide for the fifteenth and subsequent decennial censuses and to provide for an apportionment of Representatives in Congress
, approved June 18, 1929 (2 U.S.C. 2a(a)), for the 2020 decennial census of the population—

(1)
the tabulation of total population by States required by section 141(a) of such title for the apportionment of Representatives in Congress among the several States shall be completed and reported by the Secretary to the President within 13 months after the decennial census date of April 1, 2020, and shall be made public by the Secretary no later than the date on which it is reported to the President;

(2)
the President shall 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 under an apportionment of the then existing number of Representatives, as required by such section 22(a), and determined solely as described therein, within 14 days after receipt of the tabulation reported by the Secretary; and

(3)
the tabulations of populations required by section 141(c) of such title shall be completed by the Secretary as expeditiously as possible after the census date of April 1, 2020, taking into account each State's deadlines for legislative apportionment or districting, and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall be completed, reported, and transmitted to each respective State within 16 months after the decennial census date of April 1, 2020.

3.
Reporting requirements for 2020 census
On the first day of each month during the period between the date of enactment of this Act and July 1, 2021, the Director of the Bureau of the Census shall submit, to the Committee on Oversight and Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Committees on Appropriations of the House and the Senate, a report regarding the 2020 decennial census of population containing the following information:

(1)
The total number of field staff, sorted by category, hired by the Bureau compared to the number of field staff the Bureau estimated was necessary to carry out such census.

(2)
Retention rates of such hired field staff.

(3)
Average wait time for call center calls and average wait time for each language provided.

(4)
Anticipated schedule of such census operations.

(5)
Total appropriations available for obligation for such census and a categorized list of total disbursements.

(6)
Non-Response Follow-Up completion rates by geographic location.

(7)
Update/Enumerate and Update/Leave completion rates by geographic location.

(8)
Total spending to date on media, advertisements, and partnership specialists, including a geographic breakdown of such spending.

(9)
Post-enumeration schedule and subsequent data aggregation and delivery progress.

4.
Providing Bureau of the Census access to information from institutions of higher education

(a)
In general
Notwithstanding any other provision of law, including section 444 of the General Education Provisions Act (commonly known as the Family Educational Rights and Privacy Act of 1974
), an institution of higher education may, in furtherance of a full and accurate decennial census of population count, provide to the Bureau of the Census information requested by the Bureau for purposes of enumeration for the 2020 decennial census of population.

(b)
Application

(1)
Information
Only information requested on the official 2020 decennial census of population form may be provided to the Bureau of the Census pursuant to this section. No institution of higher education may provide any information to the Bureau on the immigration or citizenship status of any individual.

(2)
Notice required
Before information can be provided to the Bureau, the institution of higher education shall give public notice of the categories of information which it plans to provide and shall allow 10 days after such notice has been given for a student to inform the institution that any or all of the information designated should not be released without the student's prior consent. No institution of higher education shall provide the Bureau with the information of any individual who has objected to the provision of such information.

(3)
Use of information
Information provided to the Bureau pursuant to this section may only be used for the purposes of enumeration for the 2020 decennial census of population.

(c)
Definition of institution of higher education
In this section, the term institution of higher education
has the meaning given that term in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002).

(d)
Sunset
The authority provided in this section shall expire at the conclusion of 2020 census operations.

5.
Limitation
The Bureau of the Census may not compile, produce, or publish any data product or tabulation as part of, in combination with, or in connection with, the 2020 decennial census of population or any such census data produced pursuant to section 141(c) of title 13, United States Code, that includes topics specific to the 2020 Census that were not part of the report submitted pursuant to section 141(f)(1) of title 13, United States Code, on March 28, 2017, and the 2018 End-to-End Census Test conducted in Providence County, Rhode Island.

From: Keller, Catherine (Federal) [CKeller@doc.gov]
Sent: 9/18/2020 8:13:55 PM
To: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: Fwd: OIG Management Alert: The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census (OIG-20-050-M)
Attachments: OIG-20-050-M.pdf

FYA

Begin forwarded message:

From: "Brebbia, Sean (Federal)" <SBrebbia@doc.gov>
Date: September 18, 2020 at 8:11:52 PM EDT
To: "Keller, Catherine (Federal)" <CKeller@doc.gov>, "Kourkoumelis, Aristidis (Federal)" <AKourkoumelis@doc.gov>, "Meredith, Ethan (Federal)" <EMeredith@doc.gov>
Subject: Fwd: OIG Management Alert: The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census (OIG-20-050-M)

Privileged and Confidential

Begin forwarded message:

From: "Green, Wade" <EGreen@OIG.DOC.GOV<mailto:EGreen@OIG.DOC.GOV>>
To: "Brebbia, Sean (Federal)" <SBrebbia@doc.gov<mailto:SBrebbia@doc.gov>>, "Cannon, Michael (Federal)" <MCannon@doc.gov<mailto:MCannon@doc.gov>>
Subject: OIG Management Alert: The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census (OIG-20-050-M)

Sean and Mike –

The attached final management alert was just transmitted to the Secretary. It will be posted to the OIG's website at 2 pm EST, on Monday, September 21, 2020. If you believe any part(s) of this alert is privileged, please assert the specific privilege(s) that applies to the specific portion(s) of the text by Monday, September 21, 2020 at 1:30 pm EST for our consideration. The alert will otherwise be posted to the OIG's website in unredacted format at that date and time.

Best,

Wade

From: Johnston, Robert <rjohnston@oig.doc.gov<mailto:rjohnston@oig.doc.gov>>
Sent: Friday, September 18, 2020 7:50 PM
To: b(6) - DOC Exec Sec
Cc: Kelley, Karen <KKelley@doc.gov<mailto:KKelley@doc.gov>>; Steven.Dillingham@census.gov<mailto:Steven.Dillingham@census.gov>; Williams, Allaire (Federal) <AWilliams2@doc.gov<mailto:AWilliams2@doc.gov>>; Hawkins, Tanika (Federal) <THawkins@doc.gov<mailto:THawkins@doc.gov>>; McDermott, Ryan (Federal)

<RMcDermott1@doc.gov<mailto:RMcDermott1@doc.gov>>; Owens, Derrick
<DOwens@doc.gov<mailto:DOwens@doc.gov>>; Gustafson, Peg
<pgustafson@oig.doc.gov<mailto:pgustafson@oig.doc.gov>>
Subject: OIG Management Alert: The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census (OIG-20-050-M)

Secretary Ross:

Greetings. On August 3, 2020, the U.S. Census Bureau issued a press release announcing a decision "to accelerate" the 2020 Census. Following the announced schedule acceleration, our office received several Congressional inquiries expressing concern about the expedited schedule. News articles also highlighted these changes, as did former Directors of the U.S. Census Bureau in a joint statement.

In response, beginning on August 12, 2020, we issued requests for information and notices of interviews. This is our management alert on these pressing and emerging issues that we continue to monitor.

In our review of the circumstances surrounding the accelerated 2020 Census schedule, we found the following:

I. The decision to accelerate the Census schedule was not made by the Census Bureau.

II. The accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census.

We are providing a copy of the report for your review. The final report will be publicly posted on OIG's website on Monday, September 21, 2020.

If you have any questions concerning this management alert, please contact OIG at (202) 482-4661.

Attachment

Robert Johnston
Chief of Staff

U.S. Department of Commerce
Office of Inspector General
Direct: (202) 482-2566
RJohnston@oig.doc.gov<mailto:RJohnston@oig.doc.gov>

The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census

FINAL MANAGEMENT ALERT NO. OIG-20-050-M

SEPTEMBER 18, 2020



U.S. Department of Commerce

Office of Inspector General

BC-DOC-0000027831

UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

September 18, 2020

INFORMATION MEMORANDUM FOR SECRETARY ROSS

FROM: Peggy E. Gustafson
Inspector General

SUBJECT: *The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census*
Final Management Alert No. OIG-20-050-M

On August 3, 2020, the U.S. Census Bureau (the Bureau) issued a press release announcing a decision "to accelerate" the 2020 Census.[1] Following the announced schedule acceleration, our office received several Congressional inquiries expressing concern about the expedited schedule. News articles also highlighted these changes, as did former Directors of the U.S. Census Bureau in a joint statement.

In response, beginning on August 12, 2020, we issued requests for information and notices of interviews. This is our management alert on these pressing and emerging issues that we continue to monitor.

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[1] U.S. Department of Commerce, U.S. Census Bureau, August 3, 2020. *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, Release Number CB20-RTQ.23. Suitland, MD: DOC Census.

If you have any questions concerning this report, please contact me at (202) 482-4661.

Attachment

cc: Karen Dunn Kelley, Deputy Secretary of Commerce
Dr. Steven Dillingham, Director, U.S. Census Bureau

BC-DOC-0000027833

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Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.

BC-DOC-0000027834

Introduction

The U.S. Census Bureau (the Bureau) spent more than a decade planning how it would count the U.S. population in the 2020 Census. In early August 2020, those plans were significantly condensed in a matter of days, despite serious operational interruptions from the coronavirus disease 2019 (COVID-19) pandemic and warnings from senior Bureau personnel that an accelerated schedule would exacerbate risks. Ultimately, the decision to accelerate the Census schedule was not made by the Bureau.

Following the August 3, 2020, announced schedule acceleration,[1] our office received several Congressional inquiries expressing concern about the expedited schedule.[2] Specifically, we were asked "to closely monitor and assess the implications of operational 'streamlining' and changes to the [original post-COVID-19] operational plan for data quality and accuracy."[3] Our office was also asked to "examine the Bureau's efforts to uphold the highest standards for data quality and analyze whether a compressed schedule interferes with the Bureau's ability to ensure data quality."[4]

Numerous news outlets also highlighted the changes and threats to accuracy from the accelerated schedule. Further, four former Directors of the U.S. Census Bureau issued a joint statement expressing concern over the announced accelerated plan and stating that an end result will be the under-representation of certain populations.[5]

In response, we issued requests for information and notices of interviews beginning on August 12, 2020. This is our management alert on these pressing and emerging issues that we continue to monitor.

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[1] U.S. Department of Commerce, U.S. Census Bureau, August 3, 2020. *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, Release Number CB20-RTQ.23. Suitland, MD: DOC Census. Available online at https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html (accessed September 15, 2020).

[2] Attached as appendix A.

[3] Vice Chair Jeanne Shaheen to Peggy E. Gustafson, August 10, 2020. *Letter from the Vice Chair of the Senate Subcommittee on Commerce, Justice, Science and Related Agencies to the Inspector General of the U.S. Department of Commerce*, p. 2. See appendix A for the complete letter.

[4] Chairman José E. Serrano to Peggy E. Gustafson, August 21, 2020. *Letter from the Chairman of the House Subcommittee on Commerce, Justice, Science, and Related Agencies to the Inspector General of the U.S. Department of Commerce*, p. 2. See appendix A for the complete letter.

[5] Vincent Barabba, Kenneth Prewitt, Robert Groves, and John Thompson, August 4, 2020. *Statement by Former U.S. Census Bureau Directors, August 4, 2020, On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve A Fair and Accurate Enumeration of the United States*. Available online at https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html (accessed September 15, 2020).

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Background

I. The Office of Inspector General

The Office of Inspector General (OIG) is an independent and objective unit which provides oversight of the programs and operations of the U.S. Department of Commerce (Department), including those of the Bureau.[6] OIG is statutorily entitled to timely access to all records of the Department,[7] and Department employees are obligated to cooperate with OIG.[8] For this management alert, which is part of our ongoing work on the 2020 Census, we reviewed documents from both the Department and the Bureau. We also interviewed senior career Bureau officials working on the 2020 Census, as well as the Director of the Bureau, Dr. Steven Dillingham. We prepared this management alert in alignment with OIG's quality control standards and the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Federal Offices of Inspector General,*[9] which require that we conduct our work with integrity, objectivity, and independence.

II. Overview of the 2020 Census

The decennial census is mandated by the Constitution of the United States. The Constitution requires the "actual Enumeration" of the "whole number of persons" every 10 years, to provide a basis to apportion representatives in the U.S. House of Representatives among the states.[10] Not only does the decennial census fulfill this critical constitutional role, but census data is used for redistricting Congressional districts, state legislative districts, and school districts.[11] Census data is also used to enforce voting rights and civil rights legislation.[12] Furthermore, the data shapes communities across the country for the next 10 years because the data is key to the appropriation of hundreds of billions of dollars in federal funds every year to local communities, as well as to the decision-making of local governments, businesses, and non-profits who need accurate data to carry out their activities.[13]

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[6] Inspector General Act of 1978, as amended (IG Act), 5 U.S.C. App. § 2.

[7] IG Act, § 6(a)(1)(A).

[8] DOC Office of the Secretary, April 26, 2013. *Inspector General,* DOO 10-13. Washington, DC: DOC OS, § 4.01.

[9] Council of the Inspectors General on Integrity and Efficiency, August 2012. *Quality Standards for Federal Offices of Inspector General.* Washington, DC: CIGIE.

[10] U.S. Const. art 1, § 2 & amend. XIV, § 2.

[11] DOC Census Bureau, December 2018. *2020 Census Operational Plan: A New Design for the 21st Century*, Version 4.0. Suitland, MD: DOC Census, p. 5. Available online at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf (accessed September 15, 2020).

[12] *Id.* at 5

[13] Census Bureau. *Importance of the Data* [online]. https://2020census.gov/en/census-data.html (accessed September 15, 2020); *2020 Census Operational Plan*, p. 5.

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Congress set by statute the deadline of December 31, 2020, for the 2020 Census tabulation of total population by states, as required for the apportionment of House representatives.[14]

To fulfill these duties, Congress delegated responsibility to conduct the decennial census to the Secretary of Commerce (Secretary), who ultimately oversees the Bureau.[15] The Bureau is headed by a Director, who is appointed by the President with the advice and consent of the U.S. Senate.[16] The Bureau's *2020 Census Operational Plan* was developed over more than a decade, with the stated goal "to count everyone once, only once, and in the right place."[17]

The 2020 Census is conducted in two phases. The first phase is *data collection*—how the Bureau counts persons and acquires characteristic information about those persons. An example of data collection is self-response, during which people respond to the 2020 Census online, by phone, or by mail.[18] An additional component of data collection is nonresponse followup (NRFU), where Bureau representatives visit households that have not already responded to the 2020 Census.[19] The second phase is *data processing*—how the Bureau takes the data it collected and converts it into accurate and usable information. This phase is sometimes referred to as "post-processing"[20] and must occur after data collection ends. As one senior Bureau official stated, if the data is not collected, "there's nothing to process." A few examples of data processing include

- resolving duplicate data,
- repairing missing or conflicting data,
- applying data codes to write-in responses to facilitate data tabulation,
- identifying and resolving potential fraudulent returns,
- identifying the return of record for housing units with multiple returns,[21]
- ensuring all addresses are reflected in the correct geography, and
- using subject matter reviews to identify errors.

One senior official described the processing stage as "vitally important to the census" and used the following illustration: "the census is a bit like sausage making. A lot of bits and pieces go into it, and they've got to be sorted and cleaned and fixed. … [T]hat's the part of

[14] See 13 U.S.C. § 141(b).

[15] 13 U.S.C. §§ 2, 4, & 141(a).

[16] *Id.* § 21(a)(1).

[17] *2020 Census Operational Plan*, sec. 2.1, p. 5.

[18] *Id.* at 208.

[19] Census Bureau. *Nonresponse Followup Completion Rates* [online]. https://2020census.gov/en/response-rates/nrfu-completion.html#:~:text=SHARE%3A,by%20returning%20their%20completed%20questionnaire (accessed September 15, 2020).

[20] *2020 Census Operational Plan*, p. 12.

[21] *Id. at* 132.

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the census that … people don't see." In sum, to produce a quality 2020 Census, both the data collection and data processing components are critical.

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Findings and Conclusion

I. The Decision to Accelerate the Census Schedule Was Not Made by the Census Bureau

On August 3, 2020, the Bureau issued a press release announcing the decision "to accelerate" the 2020 Census.[22] The schedule change was not the Bureau's decision, nor was it the first time the 2020 Census schedule had been changed. Senior officials at the Bureau, including the Director, did not know who ultimately made the decision to accelerate the Census schedule. As a consequence, this management alert does not identify the decision maker. Some Bureau officials speculated the decision came from the Department, while others thought the decision likely came from the White House. However, Bureau officials confirmed that the decision was not the Bureau's.

A. The Bureau extended the Census schedule in April 2020 to account for the COVID-19 pandemic

In response to the COVID-19 pandemic, the Bureau temporarily suspended certain 2020 Census operations in March 2020. Then, on April 13, 2020, the Department and the Bureau issued a joint statement adjusting the 2020 Census operations.[23] The statement said in part:

> In order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.
>
> Under this plan, the Census Bureau would extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021.[24]

The language in the statement appeared to condition the extension of the data collection phase to October 31, 2020, on obtaining a statutory extension to the apportionment deadline. It noted that the Bureau "would extend the window" for data collection while seeking a 120-day statutory extension to deliver final apportionment counts.

Multiple Bureau officials confirmed that the feasibility of extending the data collection phase to October 31, 2020, was dependent on receiving statutory relief from the apportionment deadline. This is because the data collection and data processing phases

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[22] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

[23] DOC Census Bureau, April 13, 2020. *U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19*, Release Number CB20-RTQ.16. Suitland, MD: DOC Census. Available online at https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html (accessed September 15, 2020).

[24] *Id.*

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of the 2020 Census are sequential. As previously described in the **Background** section of this management alert, data collection must end before the data can be processed. And the time allotted for data processing cannot be truncated beyond a certain point. If the data collection phase were to extend to October 31, 2020, the time needed for the subsequent data processing phase would extend beyond the December 31, 2020, apportionment deadline, thus requiring an extension of the statutory deadline.

After the April 13, 2020, press release, Bureau officials planned to conduct data collection through October 31, 2020. They did so under the belief that a statutory extension to the apportionment date would be forthcoming because there was no resistance to the extension. One senior Bureau official stated, "we got feedback that both sides of both houses of [C]ongress were supportive." Bureau personnel also believed that the Department, and specifically the Secretary, were supportive of this approach. In fact, before the April 13 extension, the Bureau planned to request a 90-day extension, but the Secretary said they should ask for a 120-day extension to account for possible unknowns, like natural disasters.

The announced October 31, 2020, deadline for data collection shifted the Bureau's planned duration for field data collection activities to account for the COVID-19 shutdown. This shift would allow the Bureau to follow the planned operations it had spent a decade developing.

B. *It was not the Bureau's decision to accelerate the 2020 Census schedule*

From the publicized schedule extension in April through mid-July of 2020, Bureau officials continued to believe that a statutory extension to the apportionment deadline was forthcoming. Indeed, both the House of Representatives and Senate introduced legislation that would extend the apportionment deadline for the 2020 Census,[25] though only the House of Representatives passed a bill extending this deadline.[26]

By mid-July 2020, several events occurred that led Bureau officials to believe that executive and legislative branch support for a statutory extension may be in doubt. First, the Department began asking Bureau personnel questions about speeding up field operations, although it was not clear to the Bureau if the Department was motivated by accelerating the 2020 Census schedule to satisfy current statutory deadlines or simply completing necessary fieldwork before any further COVID-19 interruptions. Several Bureau officials felt this pressure from the Department. Second, the Bureau did not see continued movement in Congress to extend the statutory deadline. Third, the Office of Management and Budget (OMB) informed the Bureau that OMB was requesting supplemental appropriations from Congress for the Bureau, in part to "maintain timely delivery." The OMB request did not address the schedule extension issue, and OMB's motivation was unclear to Bureau officials. Fourth, the President issued "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census"

[25] See, e.g., Fair and Accurate Census Act, H.R. 7034, 116th Cong., § 2; Fair and Accurate Census Act, H.R. 7974, 116th Cong., § 2; Fair and Accurate Census Act, S. 4048, 116th Cong., § 2.

[26] See The Heroes Act, H.R. 6800, 116th Cong., § 70201.

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on July 21, 2020.[27] This Presidential Memorandum set forth the Administration's policy to exclude "illegal aliens" from the 2020 Census calculations that allocate Congressional representatives, and directed the Secretary to take all actions that would allow the President to carry out this policy.[28] As one senior Bureau official told our office, "I think that the Presidential Memorandum had to have played some role in -- in changing … what I would say the [A]dministration's policy is … on the deadline." Another official shared that perspective.

Despite these events in mid-July 2020, the Bureau was not told by Department personnel or external stakeholders that the statutory extension was no longer supported. Nor did the Bureau have an operational plan to meet the December 31, 2020, statutory deadline. According to a senior Bureau official, "[W]e had no plan for … accelerating the schedule at that time." As of mid-July 2020, the Bureau still viewed the statutory extension as necessary in order to conduct the 2020 Census completely and accurately. This view is consistent with previous public statements made by senior Bureau officials that the Bureau would no longer be able to meet the December 31, 2020, statutory deadline.[29]

Then, in the late afternoon of Wednesday, July 29, 2020, a senior Department official told the Bureau to put together options for meeting the apportionment deadline of December 31, 2020, and brief the Secretary on those options on Monday morning, August 3, 2020. Our office heard testimony and reviewed documents demonstrating that the Bureau worked tirelessly over the weekend to analyze its options and devise a plan for meeting the December 31, 2020, apportionment deadline. The Bureau determined that to complete both the data collection and data processing phases by the statutory deadline, it must end field data collection by September 30 instead of October 31, 2020. According to one senior Bureau official:

> [I]f you can't complete the data collection – the input to the census until the end of October, you can't deliver those apportionment counts by the legislative requirement of December 31st. You – you can't do it. There's not enough time in … November and December to put out a quality product with all of the backend processing that has to happen.

The Bureau's analysis, termed the "replan," removed some scheduled operations altogether and streamlined others, creating risks to a complete and accurate count as described below. The Bureau briefed the replan to the Secretary on August 3, 2020, as

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[27] White House, July 21, 2020. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*. Washington, DC: White House. Available online at https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (accessed September 15, 2020).

[28] *Id.* at §§ 2–3.

[29] (1) National Congress of American Indians, May 26, 2020. *2020 Census Webinar: Census Bureau Roundtable Discussion* [online]. https://www.youtube.com/watch?v=F6lyJMtDDgY (accessed September 17, 2020); and (2) U.S. Census Bureau, July 8, 2020. *Operational Press Briefing – 2020 Census Update*. Available online at https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf (accessed September 17, 2020).

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requested. It was the impression of a senior Bureau official that if the plan was feasible, it would be adopted. According to Bureau officials at the meeting, the Secretary reacted favorably to the replan and gave the impression that it should be executed. Later that day, the Bureau issued the press release announcing the acceleration of the 2020 Census schedule.[30]

The decision to accelerate the 2020 Census schedule was not made by the Bureau. Senior career officials at the Bureau perceived that this decision resulted from the Administration no longer supporting the schedule extension, but ultimately they lacked visibility into this decision process. Bureau leaders continued to believe that the statutory extension was preferable, and would give the Bureau the best chance to create a high-quality, usable census. A statutory extension would permit the Bureau to adhere, as closely as practicable, to the 2020 Census plan it developed over a decade instead of the replan it developed over a weekend. However, a senior official acknowledged, "we at the Census Bureau … were bound by the statute … in developing and executing the best possible plan to deliver the results according to the schedule set up by the [C]ongress."

A statutory extension would permit the Bureau to adhere, as closely as practicable, to the 2020 Census plan it developed over a decade instead of the replan it developed over a weekend.

II. The Accelerated Schedule Increases the Risks to Obtaining a Complete and Accurate 2020 Census

Based on our review of Bureau and Department documents, as well as interviews with senior Bureau officials, we found that the accelerated schedule increases the risks to the accuracy of the 2020 Census. This was the consensus view of the senior Bureau officials we interviewed. The accelerated replan increases risks to both phases of the 2020 Census—i.e., data collection and data processing.

A. The accelerated timeline for data collection increases risk that the Bureau may not collect sufficient data for an accurate and complete count

Under the accelerated replan, the time set aside for NRFU went from approximately 80 days to approximately 56 days.[31] Other changes to data collection included reducing certain contact attempts from six to one, such as contact attempts to housing units with conflicting information.

We found that senior Bureau officials believed that the largest risk to data collection posed by the accelerated plan was the decreased time to recover from possible external contingencies affecting local areas or regions. As one senior official put it, there is no "time to spare in the operations anymore." This risk exists despite efforts to mitigate

[30] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

[31] These numbers are approximate because some NRFU operations were started earlier under the accelerated replan. It should also be noted that the self-response option stays open until the end of data collection.

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the condensed schedule, such as awards to enumerators for increased productivity and maximizing the in-use time for devices in the field.[32] One of the biggest threats mentioned was weather—including hurricanes—and the possibility of shutdowns from COVID-19. As one senior official stated, "One of the big concerns right now obviously is whether we can get out of the field by September 30th because, you know, we don't usually do field work for the census during hurricane season. And … you do that for a reason." The senior official continued that "there's no time in the schedule to recover from a really major storm that affects a large number of … housing units." Multiple officials expressed concern about natural disasters that could prevent the completion of data collection by September 30, 2020—i.e., shutdowns in operations or in communities due to COVID-19; wildfires out West; or an earthquake.

The accelerated schedule raises risk besides the potential for natural disasters. As one official explained, the Bureau "no longer [has] the runway" of time to correct discovered errors through re-enumeration, as was necessary in the field portion of the 2010 and 2000 Censuses.

The Bureau "no longer [has] the runway" of time to correct discovered errors through re-enumeration.

As described by one **senior Bureau official**

Given this accelerated schedule, the Bureau views "resolving" or "completing" at least 99 percent of housing units in every state, at the end of data collection, to be an acceptable level of accuracy and completeness.[33] "Resolving" or "completing" a housing unit means determining: (1) whether it is in-fact a housing unit; (2) whether it is occupied or vacant; and (3) how many people live there and their basic census characteristics. The 99 percent resolution rate is based on the resolution rates achieved in the fieldwork of the 2010 and 2000 Censuses. Bureau officials expressed confidence that the Bureau could reach the 99 percent figure by the end of data collection.

[32] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

[33] DOC Census Bureau, August 17, 2020. *Review of 2020 Operational Plan Schedule*. Suitland, MD: DOC Census, p. 9. Available online at https://2020census.gov/content/dam/2020census/materials/news/2020-operational-plan-schedule-review.pdf (accessed September 15, 2020).

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Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way. If data collection ends before 99 percent completeness is met in every state, the Bureau will not achieve what it views as an acceptable level of accuracy and completeness. But, if data collection extends beyond September 30, 2020, that will either further condense an already compressed schedule for data processing—which carries its own risks—or the Bureau will miss the December 31, 2020, statutory deadline. According to several senior Bureau officials, the Bureau will miss the December 31, 2020, deadline if data collection goes beyond September 30, 2020.

Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way.

B. *The streamlined data processing under the accelerated plan poses a myriad of risks to accuracy and completeness*

The accelerated replan announced on August 3, 2020, "streamlined"[34] the data processing component of the 2020 Census. The Bureau determined that to meet the December 31, 2020, deadline, as the Department asked, data processing must begin October 1, 2020. That, in turn, shortened the time that the Bureau had to process the data from 150 days to 90 days. One official described the accelerated processing this way: the Bureau now has "a plan in place that would enable us to get the processing done by December 31st. The plan has taken out some operations and streamlined others. It has an element of increased risk over the plan that we've spent the decade designing." Several senior Bureau officials thought the streamlined data processing portion of the replan posed the greatest risk to the 2020 Census, with one official calling it the Bureau's "biggest concern" and "the most vulnerable to risk." One official represented that it was the consensus view of the Bureau's career staff that the accelerated processing schedule will negatively impact the accuracy of the 2020 Census. The official continued that "[o]nce you start to cut quality assurance programs … you assume that will have a negative impact on accuracy."

Senior Bureau officials identified several risks in the data processing phase. One risk is that the processing time has been so compressed that if an error is found, and a program needs to be started again, the Bureau may not be able to do so and still meet the December 31, 2020, statutory deadline. As one official explained, "all these changes squeeze out all of the … slack that was in the schedule that is there for a reason

[34] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

BC-DOC-0000027844

because we often encounter, you know, oddities … problems that need to be solved." This official gave the following overview, given that the census is only conducted once a decade:

> it's not like a lot of [the Bureau's] other processes or the data processing where [the Bureau is] doing it all the time …. So the kinks are worked out … we typically have some … instances in … processing a census where some oddities show up in the data or some errors … in coding or something like that, that … requires someone to investigate the problem, diagnose the problem, fix the thing, and then rerun, … to correct the errors … those often are not known beforehand. And so, typically when … we're done in the field in July and, you know, at worst, early August … that gives us enough time … if there are those problems, to make sure they get fixed … but what we have now for the backend schedule is staff are working weekends, holidays … the schedule is completely crashed. And if you have one of these things … it may be difficult to recover from and keep us on the critical path to getting done by 12/31.

"[T]he schedule is completely crashed."
As described by one **senior Bureau official**

In addition, certain planned data processing reviews have been shortened or removed entirely. One official described the risks from the streamlined processing this way: "the processes … that were … abbreviated or eliminated were things that the Census Bureau had developed and put into plan … because it in fact … makes the census more accurate." The official continued that those reviewers are people who are "very intimately … knowledgeable of the data, … and not just the data in the sort of a general processing sense, but many of those reviews take place with people who are very close … to the small area data." Such reviews have in the past helped the Bureau gain geographic accuracy. The senior official warned that while the Bureau does not expect one of the eliminated reviews to find many errors, that review did find errors in the 2000 and 2010 Censuses.

III. Conclusion

The COVID-19 pandemic prevented the Bureau from implementing its decade of planning for the 2020 Census. The April 2020 extension to the 2020 Census schedule acknowledged these realities and attempted to mitigate for lost time. However, we found that when that schedule was subsequently accelerated in August 2020, the decision came from outside the Bureau and further increased the risks to the accuracy and completeness of the 2020 Census.

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Appendix A: Related Congressional Correspondence

RICHARD C. SHELBY, ALABAMA, CHAIRMAN
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United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025
http://appropriations.senate.gov

August 10, 2020

Inspector General Peggy E. Gustafson
U.S. Department of Commerce
Office of the Inspector General
1401 Constitution Ave. NW
Washington, DC 20230

Dear Inspector General Gustafson:

I write to express my concerns about the U.S. Census Bureau's expedited schedule for 2020 Decennial Census data collection and processing operations announced in an August 3, 2020, statement.[1] I am very worried that the rushed schedule will lead to a significant undercount in hard-to-count communities, which puts the accuracy and quality of the Constitutionally-mandated count at risk. Further, I believe that this deviation in schedule is driven not by expert opinions of career Census Bureau employees but by external pressure from the White House and the Department of Commerce for perceived political gain. I request that you investigate whether the decision to expedite operations comports with the statutory requirements under title 13, U.S. Code. I also ask that as the data collection and processing operations unfold, you continue to monitor and assess changes from both the original and April 2020 pandemic-adjusted Decennial Census operational plans and schedules that might impact data quality and, ultimately, the accuracy of the results.

The COVID-19 pandemic has understandably necessitated modification of the original 2020 Decennial Census schedule. The largest and most important field data collection operation, nonresponse followup, was originally scheduled to take place from May 13 to July 31, 2020. However, due to the pandemic, Census Bureau Director Steven Dillingham and Secretary of Commerce Wilbur Ross released a joint statement on April 13, 2020, announcing that the Census Bureau would delay field operations, including nonresponse followup, by three months to protect public health. The release states: "The Census Bureau would extend the window for field data collection and self-response to October 31, 2020."[2] As part of the statement, Secretary Ross and Director Dillingham also requested a four-month delay in the statutory deadlines for reporting apportionment and redistricting counts to no later than April 30, 2021, and July 31, 2021, respectively.

[1] "Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count," U.S. Census Bureau, 3 August 2020, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html.
[2] "U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19," U.S. Census Bureau, 13 April 2020, https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020.

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However, over the past several weeks it was widely reported in the press that the Trump Administration was looking to rush 2020 Decennial Census operations in order to allow the Secretary of Commerce to transmit the apportionment counts to the president by December 31, 2020.[3] Then, on August 3, 2020, Director Dillingham announced that field data collection and self-response operations will be shortened by a month, ending on September 30, 2020. I fear that compressing these critical operations will force the Census Bureau to reduce the number of attempts to enumerate households and significantly increase the use of administrative records, proxy interviews and whole household imputations. The greater use of enumeration methods that are known to produce less reliable data could lead to a substantial undercount, especially in historically hard-to-count communities.

Director Dillingham also announced that data processing operations will be "streamlined." This clearly suggests that quality check, data processing and external review operations, which were originally expected to take about five months, will have to be compressed by several months and curtailed to meet the December 31, 2020, deadline. Given that most data collection operations will occur long after the April 1, 2020, Census Day due to pandemic-related disruptions and delay, careful quality check and data processing activities will be particularly important to ensure that individuals are counted in the correct location and duplicates are removed.

Previous statements from career Census Bureau leadership lead me to believe that this new, rushed schedule is not based on the need to execute a complete and accurate count, but instead on external pressure. For the past several months, Census Bureau experts consistently have made clear that additional time provided by delaying the statutory deadlines is needed for a successful count. In May, Tim Olson, director of field operations for the 2020 Decennial, stated, "We have passed the point where we could even meet the current legislative requirement of Dec. 31…We can't do that anymore."[4] In July, Albert Fontenot, Jr., associate director for Decennial Census Programs, said in reference to the statutory deadlines, "We are past the window of being able to get those counts by those dates at this point."[5] Further, Bureau experts believe that the results of accelerating the data collection operations under current conditions could be disastrous. An unnamed career official stated, "I'm very fearful we're going to have a massive undercount."[6]

It is critical that the Census Bureau execute a complete and accurate 2020 Decennial Census for the purposes of apportionment of the House of Representatives, as well as distribution of $1.5 trillion annually in Federal funding to States, localities, individuals and businesses. I request that the Department of Commerce (DOC) Office of Inspector General

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[3] Wines, M. (2020, July 28). New Census Worry: A Rushed Count Could Mean a Botched One. *New York Times*, https://www.nytimes.com/2020/07/28/us/trump-census.html

[4] Lo Wang, H. (2020, May 27). 'We're Running Out Of Time': Census Turns To Congress To Push Deadlines. *National Public Radio*, https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/863290458/we-re-running-out-of-time-census-turns-to-congress-to-push-deadlines

[5] Lo Wang, H. (2020, July 28) Republicans Signal They're Willing To Cut Census Counting Short, *National Public Radio*, https://www.npr.org/2020/07/28/895744449/republicans-signal-theyre-willing-to-cut-short-census-counting

[6] Lo Wang, H. (2020, July 30). Census Door Knocking Cut A Month Short Amid Pressure To Finish Count. *National Public Radio*, https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals

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(OIG) investigate whether compressing data collection and processing operations comports with the relevant statutory requirements, as well as traditional lines of authority for making relevant decisions governing the execution of the Decennial Census. Further, I request that the OIG continue to closely monitor and assess the implications of operational "streamlining" and changes to the April 13, 2020, Decennial Census operational plan for data quality and accuracy. I ask that you report periodically on your findings to the Senate and House Committees on Appropriations, the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs.

The OIG plays a crucial role in informing Congress and the public of Census Bureau operations. The OIG has received $3,556,000 in each of fiscal years 2019 and 2020 by transfer from the Census Bureau to carry out investigations and audits related to the 2020 Decennial Census. I appreciate the work of the OIG thus far to help improve the planning, execution and outcome of the Census. I expect DOC employees to fully cooperate and assist the OIG, in this, and all other investigative matters. I request that you keep me and my staff informed of any attempts to prevent you from completing your work in direct contravention of the Inspector General Act of 1978. I look forward to the results of your investigation.

Sincerely,

Jeanne Shaheen
Vice Chair
Subcommittee on Commerce,
Justice, Science and Related Agencies

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Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

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SHALANDA YOUNG
CLERK AND STAFF DIRECTOR
(202) 225-2771

August 21, 2020

Inspector General Peggy E. Gustafson
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, D.C. 20230

Dear Inspector General Gustafson:

I write to express my deep concerns regarding the Department of Commerce's conduct around the 2020 Decennial Census operation and potential external pressures to expedite the U.S. Census Bureau's ("the Bureau") schedule outside of the recommendations of senior career professional staff. I request the Office of Inspector General (OIG) examine the timing and justification for decisions around the various schedules consistent with your authorities under the Office of Inspector General Act of 1978.

Several actions taken by the Department in the past several weeks raise serious concerns about the integrity and accuracy of the 2020 Census. For example, due to the challenges resulting from the novel coronavirus pandemic in early 2020, the Associate Director of Decennial Census Programs and the Associate Director of Field Operations repeatedly informed congressional staff on weekly phone calls that the Bureau would need to continue its field operations, specifically Non-Response Follow-up, until October 31, 2020 to ensure an accurate count and to ensure the health and safety of those conducting the enumeration as well as the public. Further, these career staff communicated that it was simply no longer possible for the Bureau to finish its operations and report initial results by the December 31, 2020 statutory deadline. However, despite the rising number of coronavirus cases this summer and passage by the House of Representatives of a measure that would allow for statutory deadline extensions[1], as initially requested by the Department, it is my understanding that the Secretary subsequently requested that the Bureau develop a new plan to comply with statutory deadlines. This request was made only after the

[1] The House of Representatives took immediate action and included this request to shift the decennial statutory deadlines as part of the HEROES Act (H.R. 6800, Sec. 70201). Additionally, the HEROES Act included an additional $400 million to allow the Bureau to address any additional issues that may arise through the remainder of the 2020 Decennial Census operation.

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arrival of two new political appointees in mid-July and the issuance of the Presidential Memorandum on July 21, 2020. The revised plan abandons the Department's prior proposal for legislative relief that would result in a four-month delay in the completion of the 2020 Decennial Census[2]. Additionally, as part of this new effort, the Administration communicated a $1 billion supplemental funding request to support this expedited schedule. However, this communication was sent only to Majority staff of the Senate Appropriations Committee, rather than to all relevant House and Senate Appropriations staff.

It appears that in the three months after the House passage of a statutory extension and the arrival of now three[3] new political appointees, rather than working with the Senate to support the legislative action taken by the House, the Administration opted to work on a plan to unnecessarily expedite the Bureau's revised schedule, against the recommendations of senior career staff.

I would like to further note that the compressed schedule will also force a shortened timeframe for data processing, ultimately cutting that time in half, compared to both the Bureau's original and initial revised plans. I am gravely concerned that a compressed timeline will greatly impact the quality of data used to ensure an accurate and complete count which will inform congressional apportionments, legislative redistricting, and future Federal spending. It is deeply troubling that this Administration appears to be politicizing the Bureau's operation – one that was a decade in the making. These actions jeopardize our ability to ensure an accurate count, especially for hard-to-count communities.

I request that the Office of Inspector General review: the process used to arrive at the revised schedule announced on August 3rd, 2020 to ensure the proposed changes were and are absent political considerations, whether these changes were made after intervention from political appointees at the Department or from individuals employed at the White House, and if partisan influence impacted communications with Congress about these proposed changes and associated funding needs. Additionally, I request that the OIG examine the Bureau's efforts to uphold the highest standards for data quality and analyze whether a compressed schedule interferes with the Bureau's ability to ensure data quality. Lastly, I request that the OIG determine whether any violations of law, regulation, or policy occurred as a result of actions taken at the Department concerning the 2020 Census since July 1, 2020.

Thank you for your attention to this important matter. I appreciate the work the OIG has done toward ensuring transparency in the 2020 Decennial operation and trust that DOC employees will assist you in your investigation. However, I would ask that you swiftly notify us if there are any attempts to contravene your efforts. I further ask that you periodically update the House and

[2] Under 13 USC 141(b), the Secretary of Commerce is required to complete and report to the President within 9 months after the decennial census date (defined as the first day of April) the tabulation of the total population by State as required for apportionment of the Representatives in Congress among the several States. The legislation requested by the Administration in early April 2020 extended that deadline for the 2020 Census to 13 months after the census date of April 1, 2020.

[3] Lo Wang, H. (2020, August 17). Amid Partisan Concerns Another Trump Appointee Joins Census Bureau Top Ranks. *National Public Radio*, https://www.npr.org/2020/08/17/903229947/amid-partisan-concerns-another-trump-appointee-joins-census-bureaus-top-ranks.

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Senate Committees on Appropriations, as well as the House Oversight and Reform and Senate Homeland Security and Governmental Affairs Committees on your findings.

Sincerely,

José E. Serrano
Chairman
Subcommittee on Commerce, Justice, Science, and Related Agencies

BC-DOC-0000027851

To: Walsh, Michael (Federal)[MWalsh@doc.gov]
From: Olson, Stephanie b(6)
b(6)
Sent: Sun 4/19/2020 9:02:39 PM (UTC-04:00)
Subject: CUI//PRIV Briefs
81 - Reply in support of MTD.pdf
64 - response in opp'n to MTD.pdf
60 - Defs.' Mot. to Dismiss.pdf

Hi Mike,

Please find attached the Motion to Dismiss, Response, and Reply in *La Union Del Pueblo Entero v. Ross*.

Thank you,

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*, Defendants.	No. 8:19-cv-02710-PX

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

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INTRODUCTION

After more than a year of arguing that Defendants should collect citizenship data using administrative records rather than a citizenship question on the census, Plaintiffs return to challenge the exact decision they previously desired—the use of administrative records to gather citizenship data. Now, though, Plaintiffs do not challenge any "procedures that the defendants intend to use, or not use, in conducting the Census." *NAACP v. Bureau of the Census*, 945 F.3d 183, 193 (4th Cir. 2019). Nor do Plaintiffs challenge the "past well-planned, measured collection of citizenship data" that can "determine citizenship status for approximately 90 percent of the population." Pls.' Opp'n at 29, ECF No. 64; Exec. Order No. 13880 [the Executive Order], 84 Fed. Reg. 33821 (July 11, 2019).

Instead, Plaintiffs now contend that *if* Defendants collect more administrative records under the Executive Order, *if* the Census Bureau is able to "produce citizenship population tabulations" using these additional administrative records, *if* the Census Bureau provides "[S]tates with citizenship data" based on administrative records, *if* States choose to "use [citizen voting age population (CVAP)] as a population base for drawing congressional and state legislative redistricting plans in 2021," and *if* States choose to use the Census Bureau's administrative-record data to do so, *then* and only then will Plaintiffs suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts." *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [Defs.' Mem.] at 15–16, ECF No. 60-1 (quoting Plaintiffs' First Amended Complaint [FAC] ¶¶ 59–62, 87).

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Article III does not allow this case in search of a controversy. The Executive Order and the Census Bureau's administrative-record collection have absolutely no effect on private parties; it is only, as alleged by Plaintiffs, when their *States* choose to "discriminatorily" use citizenship data in redistricting that Plaintiffs could possibly suffer any injury. Plaintiffs do not contend otherwise, readily admitting that they "challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." Pls.' Opp'n at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). And Plaintiffs rely on little more than inapposite "census cases" to sidestep the pure speculation that gives rise to their purported redistricting injury. So Plaintiffs lack standing and this case is not ripe for review.

Even if Plaintiffs could establish this Court's jurisdiction (they cannot), their claims fail. Nothing challenged in this case obligates any action, prohibits any activity, or in any way impacts private parties, so Plaintiffs are left to again rely on speculative CVAP-based redistricting to support their APA and Fifth Amendment claims. But the mere collection (or production) of citizenship data is neither "agency action" for APA purposes, nor does it cause a "disparate impact" for equal protection purposes. And despite using 13 pages to explain how less than 13 paragraphs of the FAC allege discriminatory motive, Plaintiffs are no closer to connecting the supposedly discriminatory Hofeller documents—which "concluded that a citizenship question must be added to the 2020 census," FAC ¶ 81—to the collection of administrative records. Plaintiffs' claim under 42 U.S.C. § 1985(3) fails

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for similar reasons, but is also barred at the outset by a lack of statutory authorization for injunctive relief and sovereign immunity.

This case is a CVAP-redistricting challenge five steps removed, and it should be left to future plaintiffs who actually suffer a redistricting injury sometime after April 2021. Plaintiffs' FAC is meritless and should be dismissed.

ARGUMENT

I. This is Not a Census Case

Throughout Plaintiffs' justiciability argument, they repeatedly invoke inapposite "census cases," and, in particular, *Department of Commerce v. U.S. House of Representatives*. *See* Pls.' Opp'n at 5–10, 12–15. In that case—which involved a challenge to the use of statistical sampling in the 2000 Census—there was not only a federal statute allowing plaintiffs to challenge statistical sampling before the census, but the Supreme Court recognized that "if the [Census] Bureau is going to alter its plan to use sampling in the 2000 census, it must begin doing so by March 1999." 525 U.S. 316, 332 (1999). And because total population data derived from census itself would cause the alleged injury, the Court found it was "certainly not necessary" to "wait until the census has been conducted" because "such a pause would result in extreme—possibly irremediable—hardship."[1] *Id.*

[1] *House of Representatives* was also the exception, not the rule. As one district court recognized, the idea of challenging census procedures before the census "flies in the face of decades of litigation that legions of plaintiffs have brought . . . *after* . . . the census had

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The Fourth Circuit recently followed this rationale in allowing a pre-census suit because "the injuries that the plaintiffs assert[ed] . . . ar[o]se from procedures that the defendants intend to use, or not use, in conducting the Census." *NAACP*, 945 F.3d at 193.

But this is not a census case. Plaintiffs do not challenge "procedures that the defendants intend to use, or not use, in conducting the Census," *id.*, or the census's total population figures. They instead fear "vote dilution and loss of representation" if States employ CVAP data—derived from administrative records and possibly other sources—to exclude "non-citizens from the population base used for redistricting." FAC ¶ 87.

This is therefore a hypothetical CVAP-redistricting case. And Plaintiffs do not (and cannot) cite any case in which a State's redistricting plan was adjudicated *before* a State redistricted, much less before it received the Census Bureau's redistricting data. All redistricting cases concerning a State's chosen redistricting plan—including those concerning the proper population base—occur *after* States have redistricted. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (explaining that "[p]laintiffs who complain of racial gerrymandering in their State" must challenge the existing redistricting plan "district-by-district"); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1125 (2016) (explaining that the plaintiffs "sought a permanent injunction barring use of the *existing* Senate map in favor of a map that would equalize the voter population in each district" (emphasis added)). That makes

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been conducted." *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349, 369 (D. Md. 2019), *aff'd in part, rev'd in part* 945 F.3d 183 (4th Cir. 2019).

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sense because, in redistricting cases like this one, there is no redistricting plan to challenge until a redistricting plan exists. So Plaintiffs' cited "census cases" only serve to highlight a critical distinction that demonstrates a lack of standing and ripeness here.

II. Plaintiffs Lack Standing

A. Plaintiffs' purported harm is not traceable to any action of Defendants and not redressable by the Court.

As Defendants previously explained, it is only "independent action of some third party not before the court" —States and localities using redistricting data—that could possibly cause Plaintiffs' alleged redistricting injury, and no court order is likely to redress that injury. Defs.' Mem. at 11–15 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs concede, as they must, that States make "unfettered choices" about how to redistrict. *See* Pls.' Opp'n at 8. From there, they advance only conclusory assertions and inapposite cases to avoid the inescapable conclusion that the Court lacks jurisdiction.

Plaintiffs first advance the novel argument that their purported CVAP-redistricting injuries are traceable to Defendants' collection of administrative records because "the sole purpose of Defendants' decision to create and provide a redistricting citizenship dataset to states is so that they will use these data in redistricting." *Id.* But even if that were

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true,[2] subjective intent is relevant only to the merits, not standing. It would upend the entire Article III framework for this Court's jurisdiction to hinge on the subjective intentions of defendants.

Plaintiffs' cited cases make this point clear. In *Lansdowne*, a homeowners association sued a cable-service provider, alleging that that the provider "entered into a series of contracts that conferred upon [the provider] the exclusive right to provide video services to the [housing] development." 713 F.3d 187, 191 (4th Cir. 2013). The Fourth Circuit indeed noted "that the whole purpose of [the defendant's] agreements was to preclude [the homeowners association] from contracting with competing cable providers." *Id.* at 196. But it did not find traceability on that basis. Rather, the Fourth Circuit found the injury traceable to the defendant provider—not the "competing companies" who chose "not to offer video service to [the homeowners association]"—because the defendant's exclusivity agreements had the "determinative or coercive effect" of forcing competing providers to forego cable-service offerings. *Id.* at 197.

Here, in contrast, Plaintiffs do not advance any allegation or argument that Defendants' collection of citizenship data somehow coerces States into using that data for

[2] As Defendants previously explained, the Executive Order lists other reasons for collecting and tabulating citizenship data, including to "implement specific [public-benefits] programs and to evaluate policy proposals for changes in those programs." *See* Defs.' Mem. at 6–8 (quoting E.O. 13880, 84 Fed. Reg. at 33822).

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CVAP redistricting, or somehow makes CVAP redistricting a foregone conclusion. *Contra Baltimore v. Trump*, 2019 WL 4598011, at *17 (D. Md. Sept. 20, 2019) (finding traceability where "immigrants and their families will react in 'predictable ways' to the changes in the [Foreign Affairs Manual]"). This "fundamental problem" torpedoes Plaintiffs' standing because "courts are unable to evaluate with any assurance the likelihood that decisions will be made a certain way by policymaking officials acting within their broad and legitimate discretion." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *see Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.").

It is entirely possible that States may choose *not* to use CVAP data for redistricting in the upcoming redistricting cycle, which would render this lawsuit meaningless.[3] *See*

[3] The Governor of Pennsylvania contends that this argument "asks the Court to resolve the factual question of whether CVAP will be used without considering any evidence." Br. of Tom Wolf, Governor of Pennsylvania, at 5, ECF No. 65. But the Court does not need any factual development to find that Plaintiffs have not plausibly alleged standing, as is their burden at this stage. Defs.' Mem. at 10. And perhaps more alarmingly, what type of factual development do Plaintiffs and the Governor envision on this point? A survey of voters in Arizona, Texas, and Washington to determine if they will elect legislators in 2020 that will favor CVAP redistricting in 2021? Depositions of every elected legislator in those three States to determine if they will actually vote in favor of CVAP redistricting in 2021? That would be absurd, and it only proves that Plaintiffs' redistricting "injury" is both speculative and not traceable to Defendants.

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Defs.' Mem. at 13–14. Indeed, many state legislators—who, in most States, would be responsible for redistricting in 2021—will not even be elected until later this year. It is also possible that States may choose to use CVAP data for redistricting *regardless* of whether Defendants are enjoined from "collecting data as dictated by EO 13380." FAC at 31. Despite Plaintiffs' protestations, States' use of census data to "equalize[] *total population*" in "the overwhelming majority of cases" says nothing about the data States would use equalize *citizen-voting-age population* or *voter-eligible* population in 2021.[4] *See* Pls.' Opp'n at 9–10; FAC ¶ 53 (emphasis added). In fact, Texas (where three individual Plaintiffs reside) recently argued to the Supreme Court that "[a]lthough its use of total-population data from the census was permissible . . . it could have used [American Community Survey] CVAP data instead." *Evenwel*, 136 S. Ct. at 1126; *see Davidson v. City of Cranston*, 837 F.3d 135, 144 (1st Cir. 2016) ("[T]he use of total population from the Census for apportionment is the constitutional default, but certain deviations are permissible, such as the exclusion of non-permanent residents, inmates, or non-citizen immigrants."). Plaintiffs lack standing both ways: either States' use of CVAP in redistricting is unknown—mean-

[4] In Missouri, for example, there is a proposed constitutional amendment that would "repeal[] the requirement that districts be based on data as reported in the federal decennial census." *See* Missouri Senate, Proposed Amendment, https://www.senate.mo.gov/20info/BTS_Web/Bill.aspx?SessionType=R&BillID=26838179.

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ing that any redistricting injury is speculative and not traceable to Defendants—or "jurisdictions in which Plaintiffs reside *will* redistrict using CVAP data as a population base"—meaning that they have independently made the decision and the Court's intervention will have no effect.[5] *See* Pls.' Opp'n at 9–10 (emphasis added).

As Defendants previously explained, Plaintiffs' quarrel lies with their respective States, and they can sue those States (or the relevant state officials) if they use CVAP redistricting for discriminatory purposes. *See* Defs.' Mem. at 14–15. But if Plaintiffs have standing to challenge Defendants' mere collection of citizenship data on the theory it could be provided to States and *States* may choose to improperly use that data, then the federal government could be barred from its most routine intergovernmental activities. Could the Federal Bureau of Investigation be enjoined from providing law-enforcement information to local police departments for fear that the police may use the information to conduct unconstitutional searches? Could the Department of Education be enjoined from providing statistical information to colleges for fear that colleges could use the information to implement a discriminatory policy? Could the Department of Health and Human Services be enjoined from providing healthcare information to hospitals for fear that hospitals could use the information to discriminate against particular patients?

[5] Fourth Circuit law is clear that even if Defendants' citizenship data—which may or may not be derived from administrative records collected under the Executive Order—makes it easier for States to redistrict based on CVAP, this "does not alter the analysis." *Frank Krasner Enter., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 236 (4th Cir. 2005).

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Surely not. Those plaintiffs' disputes would rest with the police, colleges, and hospitals that improperly used the data, not the federal agency that supplied it.

This Court lacks jurisdiction for the straightforward reason that Plaintiffs' purported redistricting injury "is not directly linked to the challenged [conduct] because an intermediary . . . stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." *Frank Krasner Enter., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 236 (4th Cir. 2005); *Lane v. Holder*, 703 F.3d 668, 673–74 (4th Cir. 2012).

B. Plaintiffs' purported harm is far from certainly impending.

Plaintiffs now readily admit that they "challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." Pls.' Opp'n at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). That concession alone is fatal to their standing because their only asserted injury is that States may employ CVAP data to exclude "non-citizens from the population base used for redistricting." FAC ¶ 87. And Plaintiffs nowhere allege, nor could they, that anyone is "injured" by the mere collection of administrative records or the production of citizenship data.

Dispositive concessions aside, Defendants also explained that Plaintiffs lack standing because they will not suffer any harm absent a speculative chain of events, including that Defendants would collect more administrative records under the Executive Order and that those records would be usable. Defs.' Mem. at 15–19. Plaintiffs' primary response is that this chain of events is "not speculative at all" because "nothing in either

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EO 13880 or Sectary Ross's directive indicates that Defendants will not create and provide states with a redistricting citizenship dataset if the citizenship data is spotty or unreliable according to Census Bureau standards." Pls.' Opp'n at 6.

This entirely misses the point. The Census Bureau will no doubt provide CVAP data to the States, as it has for the last 20 years.[6] But the citizenship data provided to States may not come from administrative records gathered under the Executive Order. As Defendants previously explained, the Census Bureau *already had* administrative records to "determine citizenship status for approximately 90 percent of the population." Defs.' Mem. at 16 (quoting E.O. 13880, 84 Fed. Reg. at 33821–22). Not to mention that the extent of citizenship records acquired under the Executive Order is still unknown, the usability of any such records is still unknown, and the methodology used to produce any citizenship data for States is still unknown. Defs.' Mem. at 16–18. The FAC contains no allegation that the Executive Order or any other decree obligates the Census Bureau to use unreliable administrative records, even *if* they are acquired from other agencies sometime in the next year.

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[6] *See* U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity (CVAP)*, https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html ("This special tabulation was created after Census 2000 and again after the 2010 Census. Since its publication in February of 2011, it has been produced annually and is usually published in the first week of February.").

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The remainder of Plaintiffs' argument relies almost exclusively on standing in "census cases." *See* Pls.' Opp'n at 5–7. As Defendants explained above, those cases are inapplicable to this hypothetical CVAP-redistricting case. *See* Section I., *supra*.

C. Plaintiffs will suffer no injury to a legally protected interest.

Defendants previously explained that Plaintiffs do not allege "an invasion of a *legally protected* interest" because CVAP redistricting is currently allowable. Defs.' Mem. at 19–21. (*Wikimedia Found. v. NSA*, 857 F.3d 193, 207–08 (4th Cir. 2017)). Plaintiffs' only response is that this "improperly collapse[s] a standing argument into a merits argument." Pls.' Opp'n at 7. But it is Plaintiffs who defined their own alleged "injury" as the (speculative) result of legal conduct. *See* FAC ¶ 87. That cannot suffice for standing. Put differently, "standing doctrine, of course, depends not upon the merits, but on whether the plaintiff is the proper party to bring the suit." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460 (4th Cir. 2005) (alterations and quotations omitted). And the proper parties to bring this suit are future plaintiffs subjected to CVAP redistricting who decide sue their respective States (or the relevant state officials). *See* Defs.' Mem. at 14–15.

D. Organizational Plaintiffs lack standing.

Plaintiffs now concede that they have not pleaded facts supporting standing for LUPE and PAZ to sue on their own behalves. *See id.*; Pls.' Opp'n at 10–12. Instead, they rely only on the purported standing of PAZ's and LUPE's members. Pls.' Opp'n at 10–12. But as Defendants explained, PAZ lacks standing because it does not identify a single

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member who may suffer an injury. Defs.' Mem. at 21–22. PAZ does not dispute this shortcoming, countering that "Defendants cite to no Fourth Circuit case that stands for the proposition that organizational plaintiffs must name a member with standing at the pleading stage." Pls.' Opp'n at 11.

That is an inexplicable argument given both binding Supreme Court precedent and Fourth Circuit cases upholding dismissal *at the pleading stage* due to organizations' failure to identify at least one specific member. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm."); *see, e.g., S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (upholding dismissal for lack of standing at the pleading stage because the plaintiff "failed to identify a single *specific member* injured by the [conduct at issue]"). Regardless, PAZ and all other Plaintiffs lack standing for the reasons explained above.

III. Plaintiffs' Claims Are Not Ripe

Plaintiffs argue this case is ripe because they "challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not, as Defendants disingenuously claim, redistricting based on CVAP." Pls.' Opp'n at 12 (citations omitted). But even under Plaintiffs' own formulation, Defendants have not "release[d] a redistricting citizenship dataset for use in the 2021 redistricting cycle." *Id.* That is important because the extent of citizenship records acquired under the Executive Order is still unknown, the

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usability of any such records is still unknown, and the methodology used to produce any citizenship data for States is still unknown. *See* Section II.B., *supra*; Defs.' Mem. at 15–19. This case is therefore "not ripe for judicial review" because "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (citations omitted).

Nor do Plaintiffs identify any "hardship . . . of withholding court consideration." *Id.* Defendants' collection of administrative records and production of citizenship data (whether based on administrative records or otherwise) does not affect Plaintiffs in any way. And Plaintiffs' reliance on prior "census cases" is misplaced for the reasons explained above. *See* Section I., *supra*; *see also Virginia v. Reno*, 117 F. Supp. 2d 46, 52 (D.D.C. 2000) (three-judge court) (finding a dispute about adjusted census data unripe because the Census Bureau would not "make its final decision on whether to release adjusted data [until] after it evaluates the quality and accuracy of the [post-enumeration] process"), *aff'd*, 531 U.S. 1062 (2001).

IV. Plaintiffs' APA Claims Should be Dismissed

Plaintiffs now seemingly concede that they cannot use the APA to challenge the Executive Order, instead arguing that they are challenging "Defendants' decision to create and provide a redistricting citizenship dataset [to States] in accordance with EO 13880." Pls.' Opp'n at 15, 18. It is unclear how challenging "Defendants' decision . . . in

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accordance with EO 13880" differs in any meaningful way from challenging the Executive Order itself.[7] *Compare* FAC at 31 (seeking to "[d]eclare that Secretary Ross's decision to follow EO 13380" violates the APA and to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380") *with* Pls.' Opp'n at 15 (explaining that Plaintiffs' "APA claims are not focused on EO 13880"). But it doesn't matter. Regardless of how Plaintiffs reframe their APA claims, they still cannot explain how anything challenged in this case has an "immediate and practical impact" or "alter[s] the legal regime in which it operates." *See* Defs.' Mem. at 24–31 (quoting *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019)).

Plaintiffs first attempt to deflect this fatal flaw by doubling down on their argument that "Defendants [ ] mischaracterize Plaintiffs' claims as merely challenging EO 13880" instead of "Defendants' decision to create and provide a redistricting citizenship dataset in accordance with EO 13880." Pls.' Opp'n at 18. Even if that were true (it is not),

[7] This is especially true because, contrary to Plaintiffs' contentions, the Secretary never "deci[ded] to create and provide citizenship data for states to use in redistricting." Pls.' Opp'n at 15. Plaintiffs cite to only a July 2019 OMB submission for "evidence" that the Secretary made this decision. *See* Pls.' Opp'n at 15, 21; FAC ¶ 65. But they conveniently overlook a September 2019 OMB submission—predating this lawsuit—that superseded the July 2019 OMB submission. That September submission said nothing about any Secretarial decision, noting only: "the President issued an Executive Order that found that the [Supreme] Court's ruling has made it impossible, as a practical matter, to include a citizenship question in the 2020 Census." *See* Office of Information and Regulatory Affairs, 2020 Census Supporting Statement A (Sept. 9, 2019), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201909-0607-001.

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Plaintiffs entirely miss the point. Defendants' collection of administrative records "to create and provide a redistricting citizenship dataset" does not determine the rights or obligations of anyone; it does not impact private parties, obligate any action, or prohibit any activity. *See City of New York*, 913 F.3d at 431.

Plaintiffs' remaining arguments are simply an attempt to obfuscate this straightforward conclusion. For example, Plaintiffs contend that "the rights of Plaintiffs are impaired by the vote dilution and reduction in Plaintiffs' political representation that flow from the challenged agency action."[8] Pls.' Opp'n at 18. But as Plaintiffs themselves explain, they are challenging "Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." *Id.* at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). So the only "immediate and practical impact," *City of New York*, 913 F.3d at 431, of the Census Bureau "creat[ing] and provid[ing] a redistricting citizenship dataset" is that States will receive "a redistricting citizenship dataset." How States then decide to use that dataset is irrelevant to whether there is "agency action" because "[i]t is not enough for plaintiffs to simply identify a governmental action that ultimately

[8] Plaintiffs also claim that they "will be injured by the unreliable and faulty citizenship data created and provided by Defendants for use in redistricting." Pls.' Opp'n at 18. As explained above, this is pure speculation—not only because the reliability of any future administrative records is unknown, but also because the Census Bureau will only use administrative records to produce citizenship data when administrative records and their connections to census data are both of "high quality." Defs.' Mem. at 17–18. In any event, even providing defective citizenship data to States would not determine the rights or obligations of anyone.

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affected them through the independent responses and choices of third parties." *Id.* (citations omitted).

Plaintiffs then badly mischaracterize *Franklin*, trying in vain to avoid its inevitable holding. As Defendants explained, if the Secretary's tabulation of final census results—including administrative records—is not "final agency action" under the APA, then the mere gathering of administrative records parallel to the census cannot constitute "final agency action" either. Defs.' Mem. at 28 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Plaintiffs' only response is to disingenuously quote the D.C. Circuit's discussion of *Franklin*'s presidential-action holding, not *Franklin*'s final-agency-action holding.[9] Pls.' Opp'n at 21. Again, the Supreme Court held that the Secretary's tabulation of census results did not constitute "final agency action" because "the action that . . . has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." *Franklin*, 505 U.S. at 797. So too here. The actions that would have a "direct effect" on Plaintiffs are the States' (speculative) redistricting decisions, not the Census Bureau's collection and production of citizenship information.

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[9] Plaintiffs claim that "*Franklin* is limited to 'those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties.'" Pls.' Opp'n at 21 (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996)). But Plaintiffs conveniently omit the first half of the quoted sentence, which explains that the D.C. Circuit was merely discussing "*Franklin*'s denial of judicial review of presidential action." *Chamber of Commerce*, 74 F.3d at 1327 (alterations omitted) (quoting *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993)).

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Plaintiffs also try, and fail, to distinguish the overwhelming weight of controlling Fourth Circuit Law. They claim, for example, that *Golden & Zimmerman*—a challenge to the 2005 Reference Guide informing gun licensees about compliance with the Gun Control Act—is inapplicable because "Defendants' decision does not merely 'inform' agencies, stakeholders, and individuals, but directs the preparation and distribution to states of a new redistricting citizenship dataset." Pls.' Opp'n at 20. That conclusory assertion is nonsensical. After admitting that they are not challenging CVAP-based redistricting, *id.* at 12, Plaintiffs are left with only the Census Bureau's collection and production of citizenship data using administrative records from other agencies. But APA "challenges are 'properly directed at the effect that agency conduct has on private parties,' not the agencies themselves." *NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 425 (D. Md.) (quoting *City of New York*, 913 F.3d at 431), *aff'd in part, rev'd on other grounds*, 945 F.3d 183 (4th Cir. 2019). And Plaintiffs conveniently avoid the fact—critical in *Golden & Zimmerman*—that Defendants' authority to collect administrative records derives from the Census Act, not a recent presidential or secretarial directive. *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432–33 (4th Cir. 2010) (rejecting APA challenge because "legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations"). Plaintiffs similarly fail to rebut Defendants' other cited cases. *Compare* Defs.' Mem. at 29–31 *with* Pls.' Opp'n at 19 n.9–10.

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Plaintiffs also state, without elaboration, "that Defendants' decision to create and provide citizenship data for the purpose of redistricting, as alleged, changes the legal regime related to redistricting and political representation." Pls.' Opp'n at 19. But Plaintiffs nowhere elucidate how "creat[ing] and provid[ing] a redistricting citizenship dataset" impacts any legal determinations or exposes anyone to civil or criminal penalties. *See* Defs.' Mem. at 27–28 (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997) and *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002)). And the simple creation of "a redistricting citizenship dataset" is a far cry from Plaintiffs' only cited case, which held that "revisions to the [Foreign Affairs Manual] alter[ed] the visa application regime [for immigrants] by eliminating, in effect, a safe harbor once extended to the receipt of non-cash benefits."[10] *Baltimore*, 2019 WL 4598011, at *27–28.

[10] Plaintiffs erroneously cite *Jersey Heights Neighborhood Association v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) for the proposition that "discrimination determines rights and renders agency action reviewable under the APA." Pls.' Opp'n at 20. But there, the Fourth Circuit merely recognized that the agency action—a Record of Decision approving a highway bypass—discriminatorily precluded residents from "exercise[ing] their participatory rights" under the Federal Aid Highway Act. *Jersey Heights*, 174 F.3d at 186. Here, in contrast, the collection and production of citizenship data does not affect Plaintiffs, or their rights, in any way. Plaintiffs are fully able to sue their respective States (or the relevant state officials) if they use CVAP for redistricting.

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Because Plaintiffs have not—and cannot—plausibly allege that Defendants' actions have given rise, in any way, to "legal consequences, rights, or obligations," *Flue-Cured Tobacco*, 313 F.3d at 858, their APA claims should fail.

V. Plaintiffs' Equal Protection Claim Should be Dismissed

A. Disparate impact is a required element for equal protection claims that Plaintiffs cannot satisfy.

Defendants explained that Plaintiffs' equal protection claim fails at the outset because the mere collection of administrative records does not impact anyone, let alone disparately impact Plaintiffs. Defs.' Mem. at 32. Perhaps recognizing this flaw, Plaintiffs argue that disparate impact is not a "necessary element of an equal protection claim," but that they have nonetheless alleged a disparate impact because "[r]edistricting based on CVAP as a population base will result in a disproportionate harm to Latinos and non-U.S. citizens." Pls.' Opp'n at 32–33. They're wrong.

The Fourth Circuit has consistently held that "[t]o succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001); *see Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017) (same); *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016) (same). More simply, "[t]o establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989). It is no surprise, then, that

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numerous cases in this district—including one in which Plaintiffs themselves participated—echo the disparate-impact requirement of equal protection claims. *See LUPE v. Ross*, 353 F. Supp. 3d 381, 393 (D. Md. 2018) (explaining, in a case involving three of the same Plaintiffs here, that "[t]o state an Equal Protection claim under the Fifth Amendment, Plaintiffs have to plausibly allege that Defendants' decision was motivated by discriminatory animus and its application has an adverse effect on a protected group"); *see United States v. Taylor*, 2019 WL 5625975, at *3 (D. Md. Oct. 31, 2019) ("To state a cognizable claim for denial of equal protection, [a plaintiff] must allege discriminatory intent as well as disparate impact."); *Samuel v. Hogan*, 2018 WL 1243548, at *7 (D. Md. Mar. 9, 2018) (same); *Blankumsee v. Galley*, 2016 WL 270073, at *8 (D. Md. Jan. 21, 2016) (same); *Usher v. Maryland*, 2005 WL 8174442, at *4 (D. Md. July 14, 2005) (same). Plaintiffs cannot escape the disparate-impact requirement.

Nor have they plausibly alleged a disparate impact. Plaintiffs only argument is that "[r]edistricting based on CVAP as a population base will result in a disproportionate harm to Latinos and non-U.S. citizens." Pls.' Opp'n at 32. But in Plaintiffs' own words: "Plaintiffs challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." *Id.* at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). And there is no impact on anyone, let alone any disparate impact on Plain-

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tiffs, from the Census Bureau's mere "creat[ion] and provi[sion] [of] a redistricting citizenship dataset to states." *See* Defs.' Mem. at 11–15, 32. Plaintiffs' equal protection claim fails on this basis alone.

B. Plaintiffs do not plausibly allege a discriminatory intent to gather administrative records.

Plaintiffs also fail the equal-protection inquiry's second prong. As Defendants explained, "the FAC contains no facts plausibly suggesting that discriminatory intent motivated any action at issue," whether "examined individually or collectively, through the lens of the Fourth Circuit's factors or not." Defs.' Mem. at 37. In response, Plaintiffs use 13 pages attempting to explain how less than 13 paragraphs in the FAC "nudge [their] claim of purposeful discrimination across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (alterations and quotations omitted). They fail.

Plaintiffs do not contest Defendants' point that there is no "'consistent pattern' of actions by the [decisionmaker] disparately impacting members of a particular class of persons." Defs.' Mem. at 33–35 (quoting *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 635 (4th Cir. 2016)). As Defendants' explained, Plaintiffs "name only one incident, Defendants' failed inclusion of a citizenship question on the 2020 Census, as the touchstone of discriminatory motivation here," but "one event can hardly be called a 'consistent pattern,' especially because the attempt to include a citizenship question was enjoined and could not possibly have 'disparately impact[ed] members of a particular class of persons.'" *Id.*; *contra N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir.

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2016) (finding discriminatory motivation where "[t]he record [wa]s replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans").

And Plaintiffs' arguments about the "historical background of the decision" and the "specific sequence of events" boil down to a single point: "the decision to accomplish CVAP redistricting was rooted in a study that advocated for the creation of a redistricting citizenship dataset and the failed attempt to add a citizenship question to the Census." Pls.' Opp'n at 26. But Defendants already debunked this theory based on Plaintiffs' own FAC. There are no allegations that the sole decisionmaker with statutory authority to add a citizenship question—*i.e.*, the Secretary, see 13 U.S.C. § 141(f)(2)—ever read, received, or was even aware of Dr. Hofeller or his supposedly incendiary documents. *See* Defs.' Mem. at 34 & n.17. And the Hofeller-related allegations (focused only on a citizenship question) are still significantly removed from anything at issue in this case.[11] *Id.* (citing FAC ¶¶ 81–82); *see Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding a facially neutral Presidential directive despite previous versions of the same policy found by lower courts to discriminate on the basis of religion); *Karnoski v. Trump*, 926 F.3d 1180,

[11] As Judge Hazel observed in reassigning this case, treating the citizenship question and the collection of administrative records as "part of a larger conspiracy" requires "the Court to view the cases at a high level of generality." Opinion at 6, ECF No. 50. The Court's review of this case should only relate to "the intent behind Executive Order 13880 and Secretary Ross' directive." *Id.*

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1199 (9th Cir. 2019) (analyzing anew a policy barring transgender persons from military service—after a prior version was enjoined—because "the 2018 Policy is significantly different from the 2017 Memorandum in both its creation and its specific provisions").

As for substantive and procedural departures from the normal process, Plaintiffs' position is particularly risible. Exactly one year ago, Plaintiffs themselves were arguing that the Secretary's collection of citizenship data through administrative records was "objectively superior" to employing a census citizenship question "by every relevant metric." *See* Defs.' Mem. at 6 & n.7. So it is especially bizarre for Plaintiffs to now claim that the Secretary "ignored the known shortcomings of citizenship data derived from administrative sources." Pls.' Opp'n at 29–30. Plaintiffs even concede that they "do not challenge past well-planned, measured collection of citizenship data for other purposes (e.g., validating ACS responses)," but have no response to Defendants' point that those *same* administrative records—which "determine citizenship status for approximately 90 percent of the population"—will be used to tabulate citizenship data, Defs.' Mem. at 35 (quoting E.O. 13880, 84 Fed. Reg. at 33821–22), and that the effect of any *newly gathered* administrative records is entirely unknown. *See* Section II.B., *supra*. That is probably why Plaintiffs support their argument with only inapplicable and conclusory paragraphs from the FAC, Pls.' Opp'n at 28 (citing FAC ¶¶ 3, 91, 108), and procedural irregularities in the process

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leading up to the *citizenship question*, *id.* at 28 ("Plaintiffs allege that Secretary Ross added a citizenship question to the 2020 Census . . . just two years before the 2020 Census.").[12]

Lastly, Plaintiffs contradict their own claim of discriminatory animus by arguing that Defendants previously "'contrived' a reason for gathering citizenship information from the total U.S. population," but now "Defendants and the President publicly reveal[] their real reason to create and provide citizenship data—to conduct redistricting and apportionment based on CVAP instead of total population." *Id.* at 31. As Plaintiffs themselves recognize, officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," *id.* at 30, so Plaintiffs' admission that Defendants have "publicly revealed their real reason" belies any claim of any discriminatory motive.[13]

Contrary to Plaintiffs' lengthy contentions (based on 13 short paragraphs of the FAC), they have not even "adequately pleaded that [a] discriminatory purpose [ ] infected

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[12] Plaintiffs note the non sequitur that the Census "Bureau began to plan the contents of the Redistricting Data File at least as early as 2014" and "[i]t was not until December 2018, however, that the Bureau first mentioned including citizenship data in this file." Pls.' Opp'n at 28–29. But Plaintiffs do not allege anything out of the ordinary about this sequence. To the contrary, Plaintiffs' own cited sources explain the timeline for the Redistricting Data Program, which includes the bulk of operational steps from 2017 through early 2021. *See* FAC ¶ 40 n.10 (citing https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html?).

[13] Plaintiffs' again cite to Dr. Hofeller's study that noted CVAP redistricting would be "advantageous to . . . Non-Hispanic Whites." Pls.' Opp'n at 31. But, as explained above, Plaintiffs again fail to link Dr. Hofeller or his study to any relevant decisonmakers.

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the decision to add a citizenship question to the 2020 Census," much less that anything "at issue in this case is similarly motivated." *Id.* at 27.

VI. Plaintiffs' 42 U.S.C. § 1985(3) Claim Should be Dismissed

A. Section 1985 does not authorize courts to award injunctive relief.

Defendants previously explained that Plaintiffs' § 1985(3) claim—which seeks only injunctive relief—should be dismissed because injunctive relief is not available under § 1985(3). Defs.' Mem. at 37–38. Plaintiffs provide no meaningful response, instead relying on two non-binding, thinly reasoned cases from the 1970s and the general proposition that federal courts retain their equitable powers. Pls.' Opp'n at 36–37. The Court should reject Plaintiffs' feeble attempt to advance their § 1985(3) claim.

Defendants already debunked Plaintiffs' cited cases. Defs.' Mem. at 38 n.18. And as for the Court's general equitable powers, it is true that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). But just such a "necessary and inescapable inference" exists here. As Defendants previously explained—and Plaintiffs do not contest—both § 1985(3) and § 1983 were enacted as part of the Ku Klux Klan Act of 1871. Defs.' Mem. at 37–38. Yet § 1985(3) provides only "for the recovery of damages," while § 1983 authorizes "action[s] at law, *suit[s] in equity*, or other proper proceeding[s] for redress."

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42 U.S.C. § 1983 (emphasis added). This was not an accident. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018) ("[T]his Court has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'"); *Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). The "inescapable inference" is that injunctive relief is not available under § 1985(3).

Like Defendants' cited cases—left unaddressed by Plaintiffs—this Court should conclude that "the statutory relief available under § 1985 is limited to the recovery of damages," and that Plaintiffs' claim fails because they request only injunctive relief. *See* Defs.' Mem. at 38.

B. Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

Plaintiffs' § 1985(3) claim is also barred by sovereign immunity. Defendants previously argued, and multiple circuits have held, that sovereign immunity bars § 1985(3) suits against federal officers in their official capacities. *See* Defs.' Mem. at 39–40; *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999); *Unimex, Inc. v. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979).

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Plaintiffs neither dispute those cases' central holdings, nor do they cite a single case holding that sovereign immunity does *not* bar § 1985(3) claims for injunctive relief against federal officers sued in their official capacities.[14] Instead, Plaintiffs simply note that Defendants' cited cases primarily concerned claims for damages under § 1985(3), not injunctive relief. *See* Pls.' Opp'n at 37 n.17. True enough. But that only proves Defendants' point: injunctive relief is unavailable under § 1985(3). *See* Section VI.A., *supra*.

In any event, even if injunctive relief were available, sovereign immunity would apply equally to § 1985(3) claims for both damages and injunctive relief. In *Unimex*, for example, the Fifth Circuit held that a plaintiff's claims were not only barred by sovereign immunity because "the monetary damages, if awarded, would be paid from the public fisc," but also because "each official was sued in an official capacity" and "the complaint does not allege any specific misconduct by either of them in his or her private capacities." *Unimex*, 594 F.2d at 1061–62. And Plaintiffs expressly acknowledge that, although there was little discussion of the plaintiffs' request for injunctive relief in *Affiliated Professional Home Health*, the Fifth Circuit nonetheless barred the plaintiff's § 1985(3) claim on sovereign-immunity grounds. *See* Pls.' Opp'n at 37 n.17. This Court should therefore conclude that Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

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[14] Plaintiffs cite *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), but that case involved § 1985(3) claims against federal officials in their *individual* capacities. Regardless, the Court dismissed the § 1985(3) claims on another threshold immunity ground and did not discuss sovereign immunity. *Id.* at 1865–69.

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C. Plaintiffs fail to state a claim under § 1985(3).

In any event, "[b]ecause of the high threshold that a Plaintiff must meet to establish a prima facie case under section 1985, courts often grant motions of dismissal." *Davis v. Hudgins*, 896 F. Supp. 561, 571 (E.D. Va. 1995), *aff'd*, 87 F.3d 1308 (4th Cir. 1996). This case should be no different; Plaintiffs themselves barely defend their § 1985(3) claim.

Plaintiffs make no effort to rebut Defendants' argument that Plaintiffs have not alleged "an overt act committed by the defendants in connection with the conspiracy" that "results in injury to" them. Defs.' Mem. at 41 (quoting *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995)). Nobody is injured by the mere collection of administrative records or the provision of citizenship data to States. *Id.*

And Plaintiffs essentially concede that their allegations of discriminatory motive do not focus on the collection of administrative records, but focus exclusively on the 2020 Census citizenship question. Pls.' Opp'n at 39 n.19. Their only response is that "there is no requirement that all conspirators be involved at every step of the conspiracy." *Id.* Yet, even if that were true, Plaintiffs nowhere explain how various purported conspirators could have reached "an agreement" or a "meeting of the minds" on a "joint plan" to gather administrative records in order to deprive Plaintiffs of their constitutional rights. Defs.' Mem. at 42–43. Here, as in many other cases, Plaintiffs' § 1985(3) claim should be summarily rejected. *See, e.g., Soc'y Without A Name v. Virginia*, 655 F.3d 342, 347 (4th Cir. 2011) (rejecting a § 1985 claim where the plaintiff "fail[ed] to allege with any specificity

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the persons who agreed to the alleged conspiracy, the specific communications amongst the conspirators, or the manner in which any such communications were made"); *Hejirika v. Maryland Div. of Correction*, 264 F. Supp. 2d 341, 347 (D. Md. 2003) (rejecting a § 1985 claim where the plaintiffs "allege various instances of discrimination and then, in a conclusory fashion, state a conspiracy claim).[15]

CONCLUSION

The Court should dismiss Plaintiffs' FAC for the reasons explained above and in Defendants' prior memorandum of law.

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[15] Defendants explained that Plaintiffs' § 1985(3) claim should also be dismissed in light of the intracorporate-conspiracy doctrine because Executive Branch officials are legally incapable of forming a conspiracy. Defs.' Mem. at 43–44. Plaintiffs counter with the odd argument that the intracorporate-conspiracy doctrine should not apply because it is "unsettled law." Pls.' Opp'n at 40–41. But the Fourth Circuit has squarely held that the doctrine applies to § 1985(3) claims. *See Buschi v. Kirven*, 775 F.2d 1240, 1251–53 (4th Cir. 1985). The Court should decline Plaintiffs' invitation to disregard binding Fourth Circuit law. *See Facey v. Dae Sung Corp.*, 992 F. Supp. 2d 536, 542 (D. Md. 2014) (applying the intracorporate-conspiracy doctrine to bar a § 1985 claim). And to the extent Plaintiffs argue that the intracorporate-conspiracy doctrine does not bar § 1985(3) claims alleging unauthorized acts, that contention is also unavailing. The unauthorized-acts exception is "less well recognized" than other exceptions, *Buschi*, 775 F.2d at 1253 n.4, and applies to only individual-capacity cases, not official-capacity cases. *See id.* at 1252–53. If the exception applied any time a defendant's action was alleged to be unauthorized, as Plaintiffs seemingly contend, the exception would swallow the rule because every § 1985(3) conspiracy is by definition unlawful and unauthorized.

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DATED: February 6, 2020

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce, *et al.*, Defendants.	No. 8:19-cv-02710-PX

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Since 2017, Defendants have sought to diminish the political representation of Latinos, non-U.S. citizens, and other minority groups by manipulating the Census Bureau's information collection and reporting processes. First, Defendants sought to accomplish their discriminatory purpose by adding a question to the 2020 decennial census ("2020 Census") questionnaire that would have collected citizenship information from every individual in the United States. After this plan was blocked by various courts, including this Court and the Supreme Court, Defendants proceeded to plan b: create and provide to states a census redistricting dataset that purports to show citizenship for every person in the United States. The sole purpose of the redistricting citizenship dataset is to enable states to subtract purported non-U.S. citizens from the population used to draw new political boundaries, thereby drastically reducing the political strength and representation of Latinos and others.

Defendants' attempt to create a person-by-person redistricting citizenship dataset is a direct response to being thwarted in their effort to ask a citizenship question of all people responding to the 2020 Census. The attempt to add a citizenship question to the 2020 Census was accompanied by a "contrived" claim of enforcing the federal Voting Rights Act ("VRA"). *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). By contrast, Executive Order 13880 ("EO 13880"), and Secretary Ross's directive, state their discriminatory goal overtly—create a redistricting citizenship dataset so that "State and local legislative districts [can redistrict] based on the population of voter-eligible citizens."[1]

[1] ECF No. 41, First Amended Complaint ("FAC") ¶ 60 (quoting *Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census* at § 1 (July 11, 2019), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/).

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Defendants' actions are nothing more than an attempt to perpetuate a scheme already halted once by the courts, and the First Amended Complaint more than adequately pleads a case and controversy. Plaintiffs challenge Defendants' attempt to use administrative records to create a redistricting citizenship dataset that is specific to every person in the country, and then share that information with the states for the purpose of redistricting—an effort that is neither routine nor a natural development of prior agency practices.

This effort to use administrative records to compile a person-by-person redistricting citizenship dataset is not decades in the making as claimed by Defendants. It is new and radical. Its goal is to equip, and invite, states to exclude certain immigrant populations when drawing political lines, thereby conducting "redistricting [that] would be advantageous to Republicans and Non-Hispanic Whites." Plaintiffs First Amended Complaint ("FAC") ¶ 81. In the words of one expert who urged the acquisition of citizenship data for redistricting, it would be a "radical departure" from prior redistricting practice. *Id.*

Defendants mischaracterize the First Amended Complaint as simply challenging the "routine" collection of administrative records, ECF. No. 60-1, Memorandum of Law in Support of Defendants Motion to Dismiss ("MTD") at 3, or "the use of administrative records to gather citizenship data," MTD at 8, before claiming that their actions are too innocuous to be challenged, *see* MTD at 21 (claiming Defendants are "merely tabulat[ing] citizenship data."). Defendants' failure to engage with Plaintiffs' claims, which are much different from Defendants' straw men, dooms the Motion to Dismiss.

Plaintiffs' First Amended Complaint more than adequately alleges that Plaintiffs have standing and the lawsuit is ripe, because Defendants' actions will harm Latinos and non-U.S. citizens, and that harm is the part of the chain of causation created by Defendants. Further,

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Plaintiffs successfully pleaded Administrative Procedure Act ("APA") and race discrimination claims. The decision to create a redistricting citizenship dataset and provide that data to states for use in redistricting is a final agency action, and this final agency action purposefully discriminates against Latinos and non-citizens. Finally, Plaintiffs adequately pleaded a 42 U.S.C. § 1985(3) claim that is not barred under the doctrine of sovereign immunity, and empowers Plaintiffs to seek injunctive relief.

LEGAL STANDARD

A complaint is sufficient when it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). A plaintiff must allege facts sufficient to "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* General factual allegations suffice to satisfy Rule 12(b)(1), and courts must "presume that the general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation and alternations omitted). When considering a motion to dismiss, courts must view the plaintiffs' allegations through a "forgiving lens," accepting the facts alleged as true and construing the pleadings in a light most favorable to the party opposing the motion. *Wright v. North Carolina*, 787 F.3d 256, 265 (4th Cir. 2015).

ARGUMENT

I. Plaintiffs Have Standing to Bring this Action

Plaintiffs' First Amended Complaint adequately pleaded their standing with allegations showing: "(1) injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision." *See Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207 (4th Cir. 2017) (citing *Lujan*, 504 U.S. at 560). "[P]laintiffs are required only to state a plausible claim that each of the

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standing elements is present" in order to defeat a motion to dismiss for lack of standing, *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017), and courts must "presume[e] that general allegations embrace those specific facts that are necessary to support the claim," *Lujan*, 504 U.S. at 561 (1992) (alternations original).

Defendants argue that Plaintiffs have not plausibly alleged facts supporting their standing but fail to engage with Plaintiffs' specific allegations. *See generally* MTD at 10-23. In particular, Plaintiffs allege that:

- For discriminatory reasons, Defendants made the decision to use administrative records to create and provide to states a citizenship dataset for use in redistricting. *See, e.g.*, Plaintiffs' "FAC" ¶ 112. As a result of Defendants' decision, Plaintiffs will lose political representation because: 1) the use of Citizen Voting Age Population ("CVAP") by states and localities for apportionment will result in vote dilution, FAC ¶¶ 86-87, and 2) the Census Bureau's ("Bureau") citizenship dataset will contain inaccuracies that will misclassify, and therefore undercount, naturalized U.S. citizens, *see* FAC ¶¶ 66-72, which will further cause vote dilution where states and localities use CVAP as a population base, *see* FAC ¶¶ 86-87.

- Defendants made the decision to create and provide a redistricting citizenship dataset to states so that this data will be used for redistricting. *See, e.g.*, FAC ¶ 65. Defendants plan to release their redistricting citizenship dataset to states with the dataset that the Census Bureau provides to states for redistricting. FAC ¶ 91. Plaintiffs live in jurisdictions that have expressed an interest in redistricting using CVAP as a population base for apportionment. FAC ¶¶ 61, 87. Defendants plan to create and provide a redistricting citizenship dataset to states, and these jurisdictions will use the dataset for its intended purpose: to redistrict using CVAP as a population base. *See id.*

- Plaintiffs' harms will be redressed if the Court enjoins Defendants from creating the redistricting citizenship dataset. If the Bureau does not create and provide the redistricting citizenship dataset, states will continue their established practice of using the Census Bureau's traditional redistricting dataset to redistrict. *See* FAC ¶¶ 36-38, 53.

As discussed in more detail below, Plaintiffs' allegations are more than sufficient to establish standing at the pleading stage.

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A. Plaintiffs Plausibly Allege Injury in Fact

Plaintiffs have adequately alleged "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Plaintiffs have further alleged facts showing that "the threatened injury is certainly impending, [and] there is a substantial risk that the harm will occur." *Susan B. Anthony List. v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted).

Plaintiffs allege that they face a concrete injury from the exclusion of non-U.S. citizens from redistricting in their jurisdictions as a result of Defendants' decision to create and provide to states a redistricting citizenship database. FAC ¶ 87. Plaintiffs allege that because Plaintiffs and members of Plaintiffs La Unión del Pueblo Entero ("LUPE") and Promise Arizona ("PAZ") (collectively, "Organizational Plaintiffs") live in jurisdictions with higher populations of immigrants, the exclusion from apportionment of non-U.S. citizens (and naturalized U.S. citizens improperly classified as non-U.S. citizens) will result in a loss of political representation. FAC ¶¶ 66-71, 85-87. In particular, excluding non-U.S. citizens and misclassified naturalized U.S. citizens will result in Plaintiffs' districts being overpopulated and result in fewer districts in which Plaintiffs and their members have the opportunity to elect their preferred candidates. FAC ¶¶ 86-87.

Plaintiffs possess standing in census cases where, as here, they face an expected loss of representation; this injury "undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Dep't of Commerce v. House of Representatives*, 525 U.S. 316, 331-32 (1999); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1125 (2016) (adjudicating claim "that basing apportionment on total population dilutes [plaintiffs'] votes in relation to voters in other Senate districts"); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (holding that vote dilution is a "concrete harm" sufficient to confer standing). Here, Plaintiffs have alleged that vote dilution

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and the loss of representation is imminent, concrete and particularized. *Lujan*, 504 U.S. at 560. Thus, assuming all facts in the First Amended Complaint to be true, Plaintiffs have plausibly alleged that they will lose representation as a result of Defendants' decision to create and provide a redistricting citizenship dataset to states.

Defendants erroneously argue that Plaintiffs' allegations are speculative, and that vote dilution as a result of redistricting based on CVAP is not a cognizable legal injury. MTD at 15-21. First, ignoring years of Supreme Court jurisprudence, Defendants argue that Plaintiffs' injuries do not satisfy standing requirements because a series of "speculative events" must first occur before Plaintiffs suffer injury. MTD at 15-18. But the series of "speculative events" Defendants point to are not speculative at all. For example, notwithstanding the fact that Defendants have already committed to create and provide a redistricting citizenship dataset to states, Defendants argue that maybe they won't, after all, follow through with their commitment if they are unable collect a requisite amount of administrative records, ensure the quality of the data, and come up with a methodology to create and provide the data. MTD at 16 -18. However, nothing in either EO 13880 or Sectary Ross's directive indicates that Defendants will not create and provide states with a redistricting citizenship dataset if the citizenship data is spotty or unreliable according to Census Bureau standards. *See* FAC ¶ 58-61, 65. Defendants have already ignored evidence that administrative records will not yield accurate citizenship data. FAC ¶¶ 66-72. Contrary to Defendants' assertion, Secretary Ross's directive, as reflected in the July 3 Office Management and Budget ("OMB") request ("July 3 OMB Request"), is unequivocal, FAC ¶ 65, and EO 13880 orders federal agencies to do everything in their power to facilitate the collection of this data, FAC ¶¶ 58-61.

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"It would be inequitable in the extreme" to permit Defendants "to create a significantly increased risk of harm to [Plaintiffs], and then avoid [Plaintiffs] from trying to prevent the potential harm because the party that created the risk promises that it will ensure that the harm is avoided." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002). Ultimately, Defendants' claims that the dataset they have already decided to create and give states may ultimately be incomplete and inaccurate at most provides factual support for Plaintiffs' allegations regarding vote dilution resulting from inaccuracies in the Bureau's dataset and support for their APA and equal protection claims.

Furthermore, as in other cases challenging the conduct of the decennial census, it is "certainly not necessary" for the Court to wait until the Bureau creates and provides a redistricting citizenship dataset to states "to consider the issues presented here, because such a pause [from judicial action] would result in extreme—possibly irremediable—hardship." *Dep't of Commerce*, 525 U.S. at 332.

Finally, Defendants improperly collapse a standing argument into a merits argument, conflating the question of whether Plaintiffs plausibly alleged an injury with the question of whether redistricting using CVAP as a population base is unconstitutional. MTD at 19-20. As explained above, Plaintiffs' allegations regarding their vote dilution injuries more than satisfy the pleading standard under Rule 12; Defendants can try to justify their actions under the Constitution at the merits stage of the case.

B. Plaintiffs' Harms are Traceable to Defendants' Actions and Redressable by a Favorable Decision from this Court

Plaintiffs sufficiently alleged that their alleged injuries are fairly traceable to the challenged conduct of the Defendants. *See Lujan*, 504 U.S. at 560. Defendants' argument regarding traceability and redressability rests entirely on the erroneous premise that lawsuits are

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precluded where injury depends at least in part on the actions of third parties. MTD at 11-15. But Defendants wrongly "equate[ ] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step of the chain of causation." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC (Lansdowne)*, 713 F.3d 187, 196-97 (4th Cir. 2013) (finding traceability where challenged action was not the last in the series of injurious acts). Even where standing "depends on the unfettered choices made by independent actors not before the court," plaintiffs can "adduce facts showing that those choices . . . will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (internal quotations and citations omitted).

Traceability exists where, for example, "third parties will likely react in predictable ways to the" challenged conduct. *See Dep't of Commerce*, 139 S. Ct. at 2566; *Block v. Meese*, 793 F.2d 1303, 1307, 1309 (D.C. Cir. 1986) (Scalia, J.) (holding plaintiff had standing to challenge classification of film as "political propaganda" based on anticipated, albeit irrational, public reaction to the classification).

Here, Plaintiffs have satisfied the "relatively modest" burden of alleging traceability and redressability at the pleading stage. *See Bennett v. Spear*, 520 U.S. 154, 171 (1997). Plaintiffs allege that the sole purpose of Defendants' decision to create and provide a redistricting citizenship dataset to states is so that they will use these data in redistricting. *See, e.g.*, FAC ¶ 65 (quoting July 3 OMB Request noting that Secretary Ross "directed the Census Bureau to . . . produce [CVAP] information prior to April 1, 2021 that states may use in redistricting."); *see also Lansdowne*, 713 F.3d at 196-97 (rejecting argument that plaintiffs' injury was not traceable to defendant cable provider's exclusivity agreements because it was up to third party providers to refuse to provide service to plaintiffs, and instead finding traceability because the "whole

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purpose" of the exclusivity agreements was for third party providers to decline service); *Mayor and City Council of Baltimore v. Trump*, No. ELH-19-3636, 2019 WL 4598011, at *17 (D. Md. Sept. 20, 2019) (where plaintiff's injuries rested on third party immigrants declining to use public benefits, finding traceability because challenged provision was designed to discourage immigrants from using public benefits).

Plaintiffs allege that, in the absence of the Bureau's redistricting citizenship dataset, jurisdictions have redistricted using total population in the "overwhelming majority of cases." FAC ¶ 53 (quoting *Evenwel*, 136 S. Ct. at 1124).[2] Plaintiffs further allege (and Defendants admit) that, given the tools by Defendants, jurisdictions in which Plaintiffs reside will redistrict using CVAP data as a population base, and Plaintiffs will suffer vote dilution as a result. FAC ¶ 87; MTD at 12 n.8 (noting Texas argued in favor of excluding non-U.S. citizens from redistricting in 2015). Plaintiffs thus plausibly allege that states and local jurisdictions in which they reside will make a choice "in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (citation omitted).

Defendants also make disingenuous arguments that jurisdictions attempting to use CVAP to redistrict might not use the Bureau's redistricting citizenship dataset, but instead would turn to voter registration data or Census sample data currently available from the American Community Survey ("ACS"). MTD at 12-13.[3] However, jurisdictions currently redistrict using total

[2] A rare exception is *Burns v. Richardson*, 384 U.S. 73, 94 (1966), in which the Supreme Court upheld redistricting that was not based on total population. However, *Burns* is limited to its facts which showed that Hawaii acted to correct population distortions created by a large number of *non-residents*, including military personnel and tourists largely concentrated in Oahu. *Id.*

[3] Defendants' citation to *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), in support of their argument that Plaintiffs' claims are not redressable because they purportedly rely on hypothetical facts is inapposite. As discussed in Section II below, the instant case is ripe for review, and Plaintiffs' lawsuit challenging Defendants' *decision* to create and provide a citizenship dataset to states does not rest on hypothetical, future facts, but on a directive that has already been issued.

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population tabulations prepared by the Bureau in the Redistricting Data File,[4] not Census datasets on voter registration or sample data, although both have existed for decades. FAC ¶¶ 36-40, 42. *See also* FAC ¶ 54 (quoting *Evenwel*, 136 S. Ct. at 11240); FAC ¶¶ 52-53, 81 (although ACS data was available, Dr. Thomas Hofeller, a redistricting expert for the Republican Party, opined that a citizenship question was necessary to generate CVAP data for use in redistricting). Plaintiffs need not "negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate" traceability and the likely effectiveness of judicial relief. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978).

Plaintiffs have plausibly alleged that the sole purpose of Defendants' decision to create and provide a redistricting citizenship dataset to states is for states *to use that dataset* in redistricting. The Court should reject Defendants' attempts to disclaim the very result they seek to achieve.

C. Organizational Plaintiffs Have Standing to Sue on Behalf of their Members

Organizational Plaintiffs have more than adequately pleaded that they have standing because "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they seek] to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State of Apple Advertising Com'n*, 432 U.S. 333, 343 (1977).

Organizational Plaintiffs pleaded that: (1) at least one of their respective members would otherwise have standing to sue in their own right, FAC ¶¶ 7, 9-10, 85, 87 and (2) the interests LUPE and PAZ seek to protect are germane to their purpose, FAC ¶¶ 6, 8. The First Amended

[4] "A [Redistricting] dataset is the assembled result of one data collection operation (for example, the 2010 Census) as a whole or in major subsets (2010 Census Summary File 1)." *Redistricting Data Datasets*, United States Census Bureau, (2017) *available at* https://www.census.gov/programs-surveys/decennial-census/data/datasets/rdo.html.

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Complaint demonstrates on its face that neither the claims asserted, nor the relief requested, requires the participation of the individual members in this lawsuit. *Hunt*, 432 U.S. at 343.

Defendants do not dispute that Organizational Plaintiffs adequately alleged the last two *Hunt* requirements, but instead argue that because Plaintiffs did not name a PAZ member with standing, Plaintiffs have failed to meet first *Hunt* requirement. MTD at 21-22. Even if Defendants were correct that Plaintiffs must name a member with standing (they are not), Plaintiffs identify Juanita Valdez-Cox as a LUPE member who has standing, and the case may proceed if at least one plaintiff has standing to sue. *Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

Defendants cite to no Fourth Circuit case that stands for the proposition that organizational plaintiffs must name a member with standing at the pleading stage. *See* MTD at 21. Instead, an organization need only "allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury." *LUPE*, 353 F. Supp. 3d at 391 n.6 (rejecting defendants' argument that an organizational plaintiff must identify a particular member by name at pleading stage) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 545 U.S. 464, 487 n.23 (1982)).

None of the cases on which Defendants rely support their position. In *Valley Forge Christian College*, for example, the Court granted summary judgment in favor of defendants on standing grounds where plaintiffs alleged only that the Constitution had been violated and failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error." 454 U.S. at 485-87. The Court did not enter summary judgment based on a failure by plaintiffs to name a particular member who was harmed. Similarly, *American Chemistry Council v. Department of Transportation*, does not stand for the proposition that Organizational

Plaintiffs must name a member with standing at the pleading stage. 468 F.3d 810 (2006). Instead, the Court noted that despite having had at least two opportunities to show standing for one of their members during the administrative appeal stage, plaintiffs had not shown that anyone had suffered an injury-in-fact. *Id.* at 819.

II. Plaintiffs' Claims are Ripe

In support of their argument that Plaintiffs' claims are unripe, Defendants again misstate Plaintiffs' allegations. MTD at 22-23. Plaintiffs challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, *see, e.g.*, FAC ¶¶ 96, 103, 108, 112, 115, not, as Defendants disingenuously claim, redistricting based on CVAP. MTD at 22. All of Defendants' arguments regarding ripeness rest on this mischaracterization, and many of the cases they cite in support of their arguments are inapposite because the cases involved challenges to decisions or events that had not yet occurred.[5] In this case, Plaintiffs plausibly allege that Defendants have already made their decision and are implementing that decision in order to create and release a redistricting citizenship dataset for use in the 2021 redistricting cycle. FAC ¶¶ 1, 58, 62, 65.

[5] *See, e.g.*, *Trustguard Ins. Co. v. Collins*, 942 F.3d 195, 200 (2019) (holding claim unripe where plaintiff requested a declaratory judgment that it did not have to indemnify insured should court in another proceeding find the insured liable for car accident); *South Carolina v. United States*, 912 F.3d 720, 726-27, 728-31 (4th Cir. 2019) (holding claims unripe where state alleged it would become a permanent repository of nuclear waste but this was uncertain because defendants planned to remove waste and were statutorily required to remove waste by 2021); *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 751, 758-59 (4th Cir. 2013) (holding claim unripe where plaintiff, a registered sex offender, sought to challenge a law that excluded her from school premises unless she petitioned a state court or school board, but plaintiff had not yet filed a petition); *Johnston v. Lamone*, 401 F. Supp. 3d 598 (D. Md. 2019) (holding claims unripe where political party alleged state standards for verifying petition signatures were needlessly stringent in violation of First and Fourteenth Amendment, but political party had not yet collected signatures or submitted them to state, and plaintiff included no allegations regarding how state standards would result in needless invalidations).

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Plaintiffs allege that the case is ripe because: 1) the issues are fit for judicial decision, and 2) Plaintiffs would suffer great hardship if the Court withheld consideration of Plaintiffs' claims. *See Mayor and City Council of Baltimore*, 2019 WL 4598011, at *20 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)) (laying out standard for ripeness). A case is fit for decision "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Lansdowne*, 713 F.3d at 198. "The hardship prong is measured by the immediacy of the threat and burden imposed on the plaintiff." *Id.* (internal quotation marks and brackets omitted). Plaintiffs meet both prongs to establish ripeness.

Plaintiffs' APA claims—that Defendants' decision is contrary to law, arbitrary and capricious, in excess of authority, and without observance to proper procedure—challenge actions already taken by Defendants and present purely legal questions. *Compare Mayor and City Council of Baltimore*, 2019 WL 4598011, at *199 (holding APA review of amendments to policy was a purely legal question); *with Johnston v. Lamone*, 401 F. Supp. 3d 598 (D. Md. 2019) (holding claims unripe where political party alleged state standards for verifying petition signatures were needlessly stringent in violation of First and Fourteenth Amendment, but additional facts regarding standards were necessary to identify the legal question). Similarly, Plaintiffs' equal protection claim challenges the decision already made by Defendants to create and provide a redistricting citizenship dataset to states. *See, e.g.*, *Mayor and City Council of Baltimore*, 2019 WL 4598011, at *199 (holding plaintiff's equal protection claim based on prior statements by President Donald J. Trump was ripe for review).

Plaintiffs also meet the hardship prong. Here, as in other cases where plaintiffs challenge decisions made before the census and before census data is produced, courts routinely hold that

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"it is certainly not necessary . . . to wait until the census [has taken place] to consider the issues presented." *Dep't of Commerce*, 525 U.S. at 332 (allowing case to go forward where challenged statistical adjustments would not take place until after the census); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 547 (1998) (same). Here, Plaintiffs challenge Defendants' discriminatory decision to compile a "census . . . of how many citizens, non-citizens, and illegal aliens are in the United States" FAC ¶ 62 (quoting President Trump), and although the Bureau will not provide the redistricting citizenship dataset to states until 2021, it is not necessary for the Court to wait until the dataset has been created and provided to states for the Court to review Defendants' final discriminatory decision. *See Glavin*, 19 F. Supp. 2d at 547 ("Given the finality of the Department's decision to utilize statistical sampling as a means to determine the population for purposes of congressional apportionment in the 2020 Census, it is clear that ripeness concerns have no application in the instant case."); *Public Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 244 (1952) (challenged action ripe for review where it has "taken on a fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them).

Defendants' reliance on *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) is misplaced. MTD at 22-23. *Miller* involved a challenge to an election law that required open primaries, and identified one way to show a case is ripe for review: where plaintiffs would be "compelled to act under threat of enforcement of the challenged law." 462 F.3d at 316, 319. But, as demonstrated above, *Miller* and other cases cited by Defendants in which the challenged decision obligates or prohibits action are by no means the only ripe cases. For example, the decision to use statistical sampling during the 2000 Census challenged in *Department of Commerce* and *Glavin* did not

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force plaintiffs to act. Nonetheless, both of these cases were ripe for review. *Dep't of Commerce*, 525 U.S. at 332; *Glavin*, 19 F. Supp. 2d at 547.

III. Defendants' Decision to Create and Provide Redistricting Citizenship Data Is Reviewable Under The APA

Defendants contend that Plaintiffs' APA claims are not reviewable agency action, arguing that: (1) the executive order was a managerial tool, and (2) Plaintiffs do not challenge a cognizable agency action. *See* MTD at 34-41. Defendants are wrong on both fronts. Plaintiffs have adequately alleged that Defendants' decision to create and provide to states citizenship data with the Redistricting Data File is agency action that is reviewable under the APA. *See* FAC ¶¶ 88-109.

A. Defendants' Decision to Create and Provide Citizenship Data for Redistricting Is Not A Managerial Action and is Thus Reviewable

To avoid APA review, Defendants attempt to characterize Plaintiffs' APA claims as merely challenging EO 13880. *See* MTD at 34. But as Plaintiffs allege consistently throughout the First Amended Complaint, the APA claims are not focused on EO 13880, but challenge Defendants' decision to create and provide citizenship data for states to use in redistricting as evidenced by the July OMB Request. *See, e.g.*, FAC ¶¶ 1-4, 88-109.[6] One day after President Trump issued EO 13880, the Bureau released the OMB request stating that the Secretary "directed the Census Bureau to . . . produce [CVAP] information prior to April 1, 2021 that states may use in redistricting." *Id.* at ¶ 65 (quoting July 3 OMB Request). Plaintiffs challenge Defendants' decision, made in connection with EO 13880, to create and provide states with

[6] Subsequent statements by Defendants, such as the official Bureau policy presented by Dr. John Abowd, Chief Scientist and Associate Director for Research and Methodology at the Bureau, on September 6, 2019, further demonstrate that a final agency action has been taken and that Defendants are executing their plan as set forth in the decision. *See* John Abowd, Census Bureau Citizenship Data Research and Product Development, Census Bureau, Sept. 6, 2019, http://www.copafs.org/UserFiles/file/2019%20Documents/2019-09-06-Abowd-COPAFS%20(Approved).pdf.

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redistricting citizenship data. *See e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1246-47 (9th Cir. 2018) (holding that an agency rule that incorporated a presidential proclamation constituted an "operative rule of decision for asylum eligibility" that courts may review under the APA); *see also, Int'l Refugee Assistance Project v. Trump (IRAP)*, 373 F. Supp. 3d 650, 663 (D. Md. 2019) ("declin[ing] to find that APA review of the implementation of the Proclamation is foreclosed because the agency action was taken in response to presidential action."). Accordingly, Plaintiffs' challenge to Defendants' decision—made in connection with a presidential directive—is reviewable under the APA.

Defendants' reliance on *Chai v. Caroll*, 48 F.3d 1331 (4th Cir. 1995), and *Orbital ATK, Inc. v. Walker*, No. 1:17-cv-163(LMB/IDD), 2017 WL 2982010 (E.D. Va. July 12, 2017), is unavailing, as these cases concern whether third parties can compel executive agencies to comply with presidential orders. In *Chai,* the Fourth Circuit held that an asylum seeker could not sue to require an agency to follow an executive order or previously-withdrawn interim rules. *Chai*, 48 F.3d at 1339. Similarly, in *Orbital ATK*, the court held that a presidential policy directive (akin to an executive order) did not have the force of law against which to measure agency action. 2017 WL 2982010, at *9.

B. Defendants' Decision to Create and Provide Citizenship Data for Redistricting Is Reviewable Agency Action

Defendants further contend that "Plaintiffs do not challenge an 'agency action.'" MTD at 35. On the contrary, the challenged action in this case is both "circumscribed and discrete" and it "determines rights and obligations." MTD at 35 (internal citation and quotation omitted).

1. Defendants' Actions are Discrete and Circumscribed

An agency action that is "discrete" is reviewable under the APA. "Accordingly, courts that have conducted APA review of agency actions implementing a presidential directive are

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typically presented with a discrete agency rule or decision to review." *IRAP*, 373 F.Supp.3d at 665 (citation omitted). *See also East Bay Sanctuary Covenant,* 909 F.3d at 1246-47 (finding that an interim final rule, incorporating a presidential proclamation issued on the same day as the interim final rule, created an "operative rule of decision for asylum eligibility" that is reviewable under the APA)*; City of Carmel-by-the-Sea v. U.S. Dep't. of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (reviewing whether the Federal Highway Administration's findings in a final environmental impact statement/report complied with two separate executive orders and were thus lawful under the APA); *Zhang v. Slattery,* 55 F.3d 732, 743-45, 748-49 (2d Cir. 1995) (reviewing whether a rule issued in connection with an executive order requiring the attorney general to overrule a previous Board of Immigration Appeals decision was lawfully promulgated under the APA).

Indeed, "[c]ourts are well-suited to reviewing specific agency decisions[.]" *City of New York v. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2013). Here, Plaintiffs allege that Defendants' discrete decision to create, and provide citizenship data for use along with the Redistricting Data File violates the APA, and Defendants do not dispute the discrete nature of that agency action. *See* MTD at 34-41.

2. Defendants' Actions Determine Plaintiffs' Rights and Obligations

Plaintiffs' allegations "demonstrate that the challenged act had an immediate and practical impact or altered the legal regime in which it operates." *City of New York*, 913 F.3d at 431 (internal citations omitted); *see also Frozen Food Express v. U.S.*, 351 U.S. 40, 44 (1956) (finding that a commission's order that categorized certain commodities as nonexempt from the agricultural exception had an "immediate and practical impact" on carriers transporting the commodities). Defendants argue that EO 13880 "has no impact whatsoever on private parties,

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let alone an 'immediate and practical' one." MTD at 36. Defendants again mischaracterize Plaintiffs' claims as merely challenging EO 13880. Plaintiffs allege that Defendants' decision to create and provide a redistricting citizenship dataset in accordance with EO 13880 will harm Plaintiffs by reducing their political representation and violating their right to equal protection under the law. *See* FAC ¶¶ 73-87. Moreover, this injury is imminent, as the Bureau already confirmed in the July 3 OMB Request that it is carrying out the Secretary's directive. *Supra* Part I (A); *see City of New York*, 913 F.3d at 43; *Frozen Food Express*, 351 U.S. at 40, 44.

Here, the rights of Plaintiffs are impaired by the vote dilution and reduction in Plaintiffs' political representation that flow from the challenged agency action. *See* FAC ¶¶ 85-87, 96. Plaintiffs further will be injured by the unreliable and faulty citizenship data created and provided by Defendants for use in redistricting. FAC at ¶¶ 3, 7, 9, 10-14, 67-72, 81, 85-87. This discrimination certainly "directly affect[s] the parties," *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *see also Frozen Food Express,* 351 U.S. at 44 (finding an agency action reviewable when that action had "immediate and practical impact" on the plaintiff, as well as other similarly-situated entities).[7]

Defendants further err in arguing that Plaintiffs' APA claim fails because EO 13880 does not alter the "legal regime in which it operates." *See* MTD at 37 (relying on *City of New York*, 913 F.3d at 431).[8] First, Plaintiffs have alleged an "immediate and practical impact" and thus are not required to show that the decision also altered the "legal regime in which it operated." *City of*

[7] Having established that Defendants' actions affect Plaintiffs' rights, Plaintiffs need not demonstrate that an agency action must "obligate private parties to do [some]thing" to be reviewable under the APA. *See* Defs.' Mot. at 36-37.

[8] Because Defendants mischaracterize Plaintiffs' APA claims as only challenging EO 13880, Defendants' argument that EO 13880 does not "dictate how the Census Bureau must use the administrative records once they are collected," MTD at 37-38, is irrelevant. Defendants' decision, as outlined in the July 3 OMB Request, directs the Bureau to collect, create, and provide the citizenship data file to states for use in redistricting. *See* FAC ¶ 65.

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New York, 913 F.3d at 431; *Bennett*, 520 U.S. at 178. ("[T]he action must be one by which 'rights or obligations have been determined,' *or* from which 'legal consequences will flow[.]'") (emphasis added). Second, *City of New York* did not address whether there were alterations in the "legal regime." 520 U.S. at 432-34 (finding instead that the municipalities' requested relief that the court "supervise an agency's compliance with the broad statutory mandate" was not a challenge to a discrete agency action, and that the challenged action did not determine rights and obligations).[9] Third, Defendants' decision to create and provide citizenship data for the purpose of redistricting, as alleged, changes the legal regime related to redistricting and political representation.

Defendants are also wrong in suggesting that civil or criminal liability must follow for an agency action to alter the legal regime in which it operates. MTD at 28-29 (relying on *Bennett*, 520 U.S. at 154 and *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 841 (4th Cir. 2002)).[10] Agency actions that do not trigger civil or criminal penalties are reviewable

[9] Defendants' reliance on *Vill. of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186 (4th Cir. 2013) to support their contention that Defendants' decision does not determine rights and obligations is misplaced. In *Bald Head Island*, the plaintiff challenged the implementation of an ongoing project to deposit sand on a beach. *Id.* at 193-94. The court found that the Corps had already taken a final agency action when it announced formal approval of the project, and any subsequent "project implementation" was not reviewable under the APA. *Id.* at 195. That is not the case here, where Plaintiffs challenge Defendants' decision to create and provide a redistricting citizenship data file for states to use in redistricting.

[10] Defendants' reliance on cases in which agency action has no direct effect on the plaintiff are misplaced. *Flue-Cured* "is readily distinguished . . . because when the Fourth Circuit 'first look[ed] for direction to the Radon Act,' it noted that 'section 404 of the Radon Act prohibits the EPA (and the courts) from giving the Report 'any regulatory' effect.'" *Am. Acad. of Pediatrics v. Food & Drug Admin.*, 379 F. Supp. 3d 461, 488 (D. Md. 2019) (citing *Flue-Cured*, 313 F.3d at 858-59). *Flue-Cured* turned on this statutory language, but Defendants point to no equivalent statutory provision that prohibits the challenged action from having a regulatory effect—likely because they cannot do so. Similarly, in *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004), the Patent and Trademark Office's advertisement campaign warning the public of promotional scams that did not directly affect the plaintiff, also did not mention the plaintiff or target the plaintiff in any way. *Id.* at 460. It was the actions of a journalist who read

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under the APA. *See, e.g.*, *Mayor & City Council of Balt.*, No. ELH-18-3636, 2019 WL 4598011 at *27-28 (revisions to the Foreign Affairs Manual's criteria for determining "public charge" for purposes of an immigrant visa application were reviewable agency action because legal consequences flowed from the challenged action). Moreover, discrimination determines rights and renders agency action reviewable under the APA. *See Jersey Heights Neighborhood Association v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (noting that a demonstration of discrimination alone is a sufficient enough injury to be considered an action determining rights).

Defendants' reliance on *Golden & Zimmerman v. Domenech*, 599 F.3d 426, 432-33 (4th Cir. 2010) is also incorrect. In that case, the court held agency action was not reviewable because the challenged Reference Guide restated an established interpretation of the Gun Control Act and simply served to inform licensees about compliance with the Gun Control Act and implementing regulations. *Id.* Here, Defendants' decision does not merely "inform" agencies, stakeholders, and individuals, but directs the preparation and distribution to states of a new redistricting citizenship dataset and determines the rights of Latinos and non-U.S. citizens. Defendants' decision is more akin to the FDA Guidance in *American Academy of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 490 (D. Md. 2019), that removed a regularity requirement for new products to undergo premarket review and "immediately brought a number of new tobacco

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the report, and linked the plaintiff to the report, that had a deleterious effect on the plaintiff. *See Id.* at 459-60 ("[B]y looking at the campaign material, the public would see only that a consumer complained about an invention promoter and that invention promotion scams are causing the public $200 million in losses every year. Surely Invention Submission would not suggest that the attribution in the advertisements of $200 million in losses to patent scams was in any respect focusing the public's eye on it."). The journalist's conduct was too attenuated to be connected to the agency action. *Id.* Here, however, Defendants' decision itself harms plaintiffs by discriminating against them. Moreover, the effects are hardly the "independent" actions of third parties, but instead, actions both concerted and traceable to illegal conduct of Defendants. *See Supra* Sec. I (discussing traceability of the injury).

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products into compliance." The court held that the FDA Guidance was a final agency action that directly affected the parties and was therefore subject to judicial review. *Id.*[11]

Furthermore, Defendants' reliance on *Franklin* to argue that "the mere gathering of administrative records parallel to the census cannot constitute 'final agency action,'" MTD at 38, is inapposite. Although both *Franklin* and the instant case concern the census, the similarities end there. In *Franklin*, the Supreme Court held that the Secretary's report to the President was unreviewable because "the final action complained of is that of the President, and the President is not an agency within the meaning of the Act." 505 U.S. at 796-97. Thus, *Franklin* is limited to "those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (quoting *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993)). Here, Plaintiffs challenge Defendants' directive that issued in tandem with EO 13880. Unlike *Franklin*, where the final action rested with the President and not an agency, here Defendants have made the final decision, pursuant to EO 13880, to create and provide states a redistricting citizenship dataset, as evidenced by the July 3 OMB Request. Finally, Defendants' conduct at issue here is not the "mere gathering" of records, but the creation and distribution of citizenship dataset for states to use in redistricting. *See* FAC ¶¶ 65, 84.

[11] Defendants also appear to argue that EO 13880 has little effect because the Bureau has already collected 90 percent of citizenship data from administrative records, which collection is authorized by the Census Act. *See* MTD at 40-41. As discussed *supra* Section I., Plaintiffs challenge the creation and distribution of a dataset to be used to specifically to discriminate against Latinos and noncitizens by removing some of them from the population base used for redistricting. The Census Act does not authorize such discrimination. *See generally* United States Code Title 13.

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For the foregoing reasons, Plaintiffs have sufficiently alleged that Defendants' decision to create and provide a citizenship dataset along with the Redistricting Data File was a discrete decision that imminently and directly affects Plaintiffs' rights. *See City of New York*, 913 F.3d at 431. Thus, Defendants' decision is a final agency action that this Court is "well-suited" to review pursuant to the APA. *Id.*

IV. Plaintiffs Have Stated an Equal Protection Claim

A. Plaintiffs Plausibly Allege Intentional Discrimination

Defendants offer a hodge podge of arguments in support of their contention that Plaintiffs failed to properly plead an equal protection claim. All are unavailing. The First Amended Complaint meticulously sets out allegations supporting the equal protection claim.

Plaintiffs plausibly alleged that the challenged decision was motivated by intentional discrimination and adversely affects a protected group. *See La Unión del Pueblo Entero v. Ross ("LUPE I")*, 353 F. Supp. 3d 381, 393-95 (D. Md. 2018) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. ("Arlington Heights")*, 429 U.S. 252, 264-65 (1977)). Plaintiffs' allegations bear directly on the Court's required "sensitive inquiry into such circumstantial evidence of intent as may be available[,]" including:

- the impact of the official action, *i.e.* whether it "bears more heavily on one race than another" and whether "a clear pattern, unexplainable on grounds other than race emerges from the effect of the state action even when the governing legislation appears neutral on its face";
- the historical background of the decision;
- the specific sequence of events leading up to the challenged decision;
- departures from the normal procedural sequence;
- substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and
- the legislative or administrative history, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

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Arlington Heights, 429 U.S. at 264-68. A plaintiff can survive a motion to dismiss without independently establishing that each factor weights in the plaintiff's favor. *LUPE I*, 353 F. Supp. 2d at 394.

Plaintiffs more than adequately allege that Defendants are motivated by a desire to reduce the electoral strength of Latinos and other racial minorities by inviting and equipping states to exclude non-U.S. citizens from apportionment. FAC ¶¶ 2, 54-84; *see also LUPE I*, 353 F. Supp. 2d at 394-95 (holding plaintiffs stated an equal protection claim where they alleged facts touching on the *Arlington Heights* factors); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 325 (D. Md. 2018) (same); *North Carolina State Conference of NAACP v. McCrory ("NAACP")*, 831 F.3d 204, 233 (4th Cir. 2016) (finding intentional discrimination where totality of the circumstances showed that defendants adopted a voting law to politically entrench themselves to the detriment of African Americans who were unlikely to vote for them). In particular, Plaintiffs allege that the decision to create and provide states with a redistricting citizenship dataset was motivated by a discriminatory purpose to increase the political representation of "Non-Hispanic Whites" to the detriment of Latinos and other racial minorities, in violation of the Fifth Amendment. FAC ¶ 80.

1. Historical Background of the Decision

Plaintiffs adequately pleaded that the historical background of the decision to create and provide a redistricting citizenship dataset evidences discriminatory animus. The Fourth Circuit requires courts to engage in a broad inquiry into historical discrimination and look at the historical origins of the challenged decision, particularly where matters of political representation are at issue. *NAACP*, 831 F.3d at 226-27.

Although earlier in its history the United States excluded certain racial minorities from

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congressional apportionment, with the attendant reduction of representation and political power (*see Evenwel*, 136 S. Ct. at 1127-29), the origins of the challenged action in this case are found in more recent history. Plaintiffs allege that the decision to have the Bureau prepare and release a redistricting citizenship dataset to the states—first by adding a citizenship question to the 2020 Census, and now by using administrative records—goes at least as far back as the Hofeller Study. *See* FAC ¶ 73. Dr. Hofeller, a leading Republican redistricting strategist and map-drawing expert for the Republican National Committee, FAC ¶ 79, prepared a memo explaining how using CVAP instead of total population to apportion population to election districts in redistricting would "be advantageous for Republicans and Non-Hispanic Whites." FAC ¶¶ 73, 79-81. He acknowledged that CVAP apportionment was a "radical departure" from prior practice, FAC ¶ 81, and concluded that it was necessary to add a citizenship question to the 2020 Census to acquire the data necessary to use CVAP as a population base for redistricting. FAC ¶ 81. This information was then promulgated among major players in the Administration. *See* FAC ¶ 73.

Plaintiffs allege that after Dr. Hofeller explained the political advantages of using CVAP as a population base for redistricting to suppress the representation of Latinos and others, Dr. Hofeller, Secretary Ross, White House officials, A. Mark Neuman (a Presidential transition team member), then-Kansas Secretary of State Kris Kobach, and U.S. Department of Justice (DOJ) attorneys, including then-Attorney General Jeff Sessions ("AG Sessions") and the head of the DOJ's Civil Rights Division John Gore, conspired to reduce the political power of people of color by using CVAP as a population base for redistricting. FAC ¶ 73.

Secretary Ross first consulted with Mr. Kobach, a proponent of excluding non-U.S. citizens from apportionment, and Steve Bannon, then a White House official, about adding a

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citizenship question to the 2020 Census. *See* FAC ¶ 74. Secretary Ross then directed U.S. Department of Commerce ("Commerce") staff to research the exclusion of non-U.S. citizens from apportionment and solicit and secure the help of DOJ. *Id.* Secretary Ross, through Commerce, coordinated with DOJ, Mr. Neuman, Dr. Hofeller, and the White House to fabricate a "need" for a Census citizenship question to better enforce the VRA, FAC ¶ 73, resulting in a letter from DOJ to the Bureau requesting the addition of the question to the 2020 Census (the "DOJ letter"), FAC ¶ 75. Dr. Hofeller provided Mr. Neuman and Mr. Gore with the substantive content of the DOJ Letter. FAC ¶ 82.[12]

Ultimately, three federal courts in six cases enjoined Defendants from adding a citizenship question on the 2020 Census, and the Supreme Court affirmed the New York district court's injunction. FAC ¶¶ 55-56, n.24. After reviewing evidence of the failed attempt to add a citizenship question to the Census, the U.S. District Court for the District of Maryland concluded: "it is becoming difficult to avoid seeing what is increasingly clear. As more puzzle pieces are placed on the mat, a disturbing picture of the decisionmakers' motives take shape." *Kravitz v. Dep't of Commerce*, 382 F. Supp. 3d 393, 402 (D. Md. 2019). *See also La Union del Pueblo Entero v. Ross*, 771 F. App'x. 323, 324-25 (4th Cir. 2019) (Wynn, J., concurring) (emphasizing that discriminatory intent can be inferred from the totality of the circumstances, including where the decisionmaker provides a pretextual rationale); *LUPE v. Ross*, Case No. 19-

[12] The Supreme Court later determined that Secretary Ross's initial "VRA enforcement rationale—the sole stated reason [for adding a citizenship question]—seems to have been contrived." FAC ¶ 56 (quoting *Dep't of Commerce*, 139 S. Ct. at 2575). Such "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000).

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1425 (4th Cir. Aug. 19, 2019), ECF No. 52 (instructing the district court to vacate its judgment on the equal protection claim).[13]

These well pleaded facts are relevant, because the historical background of the decision to accomplish CVAP redistricting was rooted in a study that advocated for the creation of a redistricting citizenship dataset and the failed attempt to add a citizenship question to the Census. This history sparked a highly specific and suspect series of events that further evidenced the discriminatory intent of the Defendants.

2. Specific Sequence of Events

Plaintiffs adequately pleaded that the specific series of events surrounding the challenged action in this case further support their claim of racial discrimination. *See NAACP*, 831 F.3d at 227 (recognizing that sequences of events leading to official action can provide further evidence of racial animus).

In the immediate aftermath of the Supreme Court's decision blocking the addition of the citizenship question to the Census, Secretary Ross directed the Bureau "to proceed with the 2020 Census without a citizenship question on the questionnaire, and [instead] produce [CVAP] information . . . that states may use in redistricting." FAC ¶ 65 (quoting July 3 OMB Request). Thus, Secretary Ross directly tied his decision to create and provide to states a redistricting citizenship dataset to the citizenship question, describing it as an alternative to the citizenship question to achieve Defendants' discriminatory purpose. *See Id.*

President Trump issued EO 13880 only a few days later. FAC ¶ 1; *see also* MTD at 1.

[13] In fact, Defendants continue to maintain that they sought to include a citizenship question on the Census to "enhance Voting Rights Act enforcement by allowing the Census Bureau to calculate citizenship data at the census-block level." MTD at 5. This is despite the fact that this rationale was found to be "contrived" by the U.S. Supreme Court. *Dep't of Commerce*, 139 S. Ct. at 2575.

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The purpose of issuing EO 13880 was to speed up the process of collecting and producing a redistricting citizenship dataset. FAC ¶ 58. That same day President Trump explained during a press conference that the purpose of the order was to make sure that the census could generate an accurate dataset of non-U.S. citizens, in part, for the purpose of "administering our elections." FAC ¶ 63. Attorney General William Bar further elaborated that they were studying "whether illegal aliens could be counted for [legislative] apportionment purposes." FAC ¶ 64 (quoting Attorney General Barr). The next day, the Census Bureau published the July 3 OMB Request, a revision of the February 2019 OMB Request, that reflects Secretary Ross's directive that the bureau continue collecting citizenship data for the purposes of creating the redistricting citizenship dataset. FAC ¶ 65.

The decision to redirect Bureau and other federal government resources to create and give to states a redistricting citizenship dataset occurred "in the immediate aftermath" of the Supreme Court's June 27, 2019 decision blocking the Census citizenship question. FAC ¶¶ 56-58, 65; *see NAACP*, 831 F.3d at 226-27 (noting that the timing of the adoption of a restrictive voting law was evidence of discriminatory intent). Plaintiffs adequately pleaded that the discriminatory purpose that infected the decision to add a citizenship question to the 2020 Census also provides evidence that the agency action at issue in this case is similarly motivated. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 222-33 (1985) (looking at the original enactment of state constitutional provision to support finding that, even 80 years later and after several changes, the provision was still discriminatory); *NAACP*, 831 F.3d at 225 ("[T]hat a legislature impermissibly relied on race" in enacting a prior election law "certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature."); *Jean v. Nelson*, 711 F.2d 1455, 1490-92 (11th Cir. 1983) (finding evidence of prior

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discriminatory policies to be probative of whether the challenged policy was motivated by discriminatory intent).

3. Departures from the Normal Procedural Sequence

Plaintiffs plausibly allege that Defendants' decision to create and provide to states a redistricting citizenship dataset significantly departs from the Bureau's normal procedural sequence. *See LUPE*, 353 F. Supp. 3d at 394 (holding plaintiffs stated a claim for an equal protection violation where plaintiffs provided, among other things, detailed allegations regarding procedural departures). In *NAACP*, for example, the voting bill at issue was rushed through the legislative process to avoid in-depth scrutiny, was afforded far less debate than normally offered to other bills, and targeted African American voters. 831 F.3d at 227-28. Finding error in the district court's "accepting the State's efforts to cast this suspicious narrative in an innocuous light," the Fourth Circuit held that such departures, even as other procedural rules were adhered to, provided "another compelling piece of the [motivation] puzzle." *Id.* at 228-29.

Plaintiffs allege that Defendants made the challenged decision *before* fully studying the issue, affording less in-depth scrutiny to this data collection than normally afforded to other data collections, and departing from other normal procedures along the way. *See, e.g.*, FAC ¶¶ 3, 91, 108. For example, Plaintiffs allege that Secretary Ross added a citizenship question to the 2020 Census and directed the Bureau collect administrative citizenship data to validate question responses just two years before the 2020 Census. FAC ¶¶ 54, 76. This was contrary to the normal procedure of informing Congress about subjects on the decennial census three years before the Census, or by April 2017, *see* FAC ¶ 23 (citing 13 U.S.C. § 141(f)).

Plaintiffs further allege that, following its normal procedures, the Bureau began to plan the contents of the Redistricting Data File at least as early as 2014. FAC ¶¶ 41-42. It was not

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until December 2018, however, that the Bureau first mentioned including citizenship data in this file in connection with the citizenship question. FAC ¶¶ 46-47. And it was not until July 3, 2019, less than a year before the 2020 Census, that Defendants first made the affirmative decision to redirect Bureau resources to collect administrative records from federal agencies and states and use these records to compile a completely new dataset to accompany the Redistricting Data File. *See* FAC ¶¶ 58, 60-61, 65. Such a hurried pace "strongly suggests an attempt to avoid in-depth scrutiny." *NAACP*, 831 F.3d at 227-28 (comparing the robust deliberations afforded to other bills to the minimal deliberations afforded to the bill at issue); *Veasey v. Abbot*, 830 F.3d, 216, 236-39 (5th Cir. 2016) (highlighting departures from normal procedural sequence, including intervention by the governor and extreme prioritization of a bill that did not present a problem of great magnitude).

Defendants emphasize that the Bureau has collected administrative data regarding citizenship in the past. MTD at 3-4. But Plaintiffs do not challenge past well-planned, measured collection of citizenship data for other purposes (e.g., validating ACS responses). Plaintiffs adequately pleaded that Defendants' unstudied and rushed decision to redirect federal resources to create a redistricting citizenship dataset, specifically for the purpose of using this data as a population base for redistricting and apportionment, departed from procedural norms and these allegations support a claim of discriminatory intent.

4. Substantive Departures

Plaintiffs also allege a number of substantive departures where "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 564-65. For example, Plaintiffs allege that Secretary Ross ignored the known shortcomings of citizenship data derived from administrative sources,

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including those explained in the Bureau's March 1, 2018 memorandum concluding that citizenship data from administrative records does not produce 100 percent accurate data on citizenship, and that the Bureau "will most likely never possess a fully adequate truth deck to benchmark [citizenship] to." FAC ¶¶ 65, 66-72. Departing from these important substantive considerations, Secretary Ross directed the Bureau to produce a redistricting citizenship dataset using this flawed and incomplete data. FAC ¶ 65;[14] *see also* FAC ¶ 76 (alleging that Secretary Ross ignored the recommendation of the Bureau not to add a citizenship question to the 2020 Census).

Plaintiffs also allege that federal laws, regulations, and guidelines require that data created and provided by the Bureau have integrity, objectivity, and impartiality, that the Bureau be independent from political influence in the development, production, and dissemination of statistics, and that Defendants departed from substantive considerations when they violated many of these provisions. FAC ¶¶ 3, 27-31, 37, 108.

5. Contemporaneous Statements

The Fourth Circuit recognizes that officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982). Plaintiffs nonetheless allege statements made by Defendants and their conspirators which support their allegation that Defendants were motivated by discriminatory intent.

[14] Defendants' contention that as of July 11, 2019 they had 90 percent of citizenship data necessary for the purpose of validating citizenship question responses to better enforce the federal voting rights act says nothing about the quality of this data for the purposes of apportionment, and says nothing about the sufficiency of Plaintiffs' discriminatory intent allegations. *See* FAC ¶ 3.

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For example, contemporaneous statements reflect that Defendants first "contrived" a reason for gathering citizenship information from the total U.S. population. FAC ¶ 54. After the U.S. Supreme Court held that Secretary Ross's rationale was pretextual, Defendants and the President publicly revealed their real reason to create and provide citizenship data—to conduct redistricting and apportionment based on CVAP instead of total population. FAC ¶¶ 56, 58-65. Statements made by President Trump and Attorney General William Bar regarding EO 13880 also support Plaintiffs' allegations that Defendants seek to reduce the political power of racial minorities and non-U.S. citizens. *See, e.g.*, FAC ¶¶ 63-64 (noting that some jurisdictions "may want to draw state and local legislative districts based upon the voter-eligible population, and that there is "a dispute over whether illegal aliens can be included for apportionment purposes") (internal quotation omitted). Plaintiffs' general allegations of racial animus, FAC ¶¶ 112, 115, further support their claim of discriminatory intent, s*ee Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 829 F.3d 613, 620 (4th Cir. 2018) (on a motion to dismiss, courts "presume that general allegations embrace those specific facts that are necessary to support the claim.").

Defendants concede that their purpose in preparing and distributing a redistricting citizenship dataset is to enable states to "design State and local legislative districts based upon the voter-eligible citizens." MTD at 36 (quoting EO 13880 at 33823).[15] Plaintiffs plainly allege that removing non-U.S. citizens from the apportionment base used for redistricting would, as described by the expert who drafted Defendants' plan, be "advantageous to . . . Non-Hispanic Whites" FAC ¶ 81. Defendants' admission that their purpose is to provide the tool to states

[15] Plaintiffs note that equating CVAP, which is what the redistricting citizenship dataset contains, and voter eligibility is incorrect. The redistricting citizenship dataset does not contain information related to criminal conviction history or mental competency—voter eligibility requirements found in most states.

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needed to subtract primarily Latinos and Asian Americans from the apportionment base demonstrates the adequacy of Plaintiffs' allegations, and does not undermine it.

6. Disparate Impact

Finally, Plaintiffs allege that Defendants' creation and provision to states of a redistricting citizenship dataset will have a disparate impact on the basis of race and national origin. *Arlington Heights*, 429 U.S. at 266 ("The impact of the official action whether it 'bears more heavily on one race than another,' . . . may provide an important starting point.") (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Plaintiffs allege that they live in areas with relatively larger Latino and non-U.S. citizen populations when compared to the population of the U.S. and their states. FAC at ¶¶7, 9, 10-14, 85, 87. Furthermore, citizenship data based on administrative records will be inaccurate, and the Bureau's own research confirms that inaccuracies will be greater for naturalized citizens, those in mixed-immigration status households, certain U.S. citizens, and certain types of immigrants. FAC ¶¶ 66-72. Given that Latinos and Asian Americans are overrepresented among immigrants, naturalized citizens and those in mixed-immigration status households, Plaintiffs adequately pleaded disparate impact. Furthermore, although not necessary to set forth an equal protection claim, Plaintiffs adequately pleaded that Defendants relied on Dr. Hofeller's explanation that, for example in Texas, redistricting based on CVAP would benefit "Non-Hispanic Whites," FAC ¶ 81, and that Defendants intended this disparate impact to occur, FAC ¶¶ 81-83. Redistricting based on CVAP as a population base will result in a disproportionate harm to Latinos and non-U.S. citizens, because they will live in "unconstitutionally overpopulated districts." FAC ¶ 87.

Plaintiffs further allege that the decision to provide states with citizenship data for use in redistricting bears more heavily on Latino, Asian-American, and non-U.S. citizen populations

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because it will result in less political representation for these communities. *See* FAC ¶¶ 2, 4, 7, 9-14, 80-81, 85-87. In particular, Plaintiffs allege that jurisdictions' use of CVAP data to apportion population for redistricting will result in: 1) less majority-minority CVAP districts; and 2) malapportionment. *Id.* Plaintiffs allege that Defendants made the decision to create and provide citizenship data because of, not in spite of, this disparate impact. FAC ¶¶ 60, 63-65, 73, 80-84.

i. Disparate Impact is Not a Necessary Element of an Equal Protection Claim

Defendants' argument that Plaintiffs failed to allege disparate impact as a necessary element of an equal protection claim is factually incorrect and legally unfounded. First, Defendants cite no case to support their argument that Plaintiffs asserting an equal protection claim must allege discriminatory effects. *See* MTD at 32; *see also Arlington Heights*, 429 U.S. at 265 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.") (quoting *Washington*, 426 U.S. at 242). Second, even if pleading discriminatory effects was a requirement, Plaintiffs have more than satisfied it. *See supra* Sec. IV.A.6; *see also* FAC ¶¶ 67-72, 86, 87 (alleging that administrative data regarding citizenship is inaccurate and misclassifies some naturalized U.S. citizens as non-U.S. citizens, and that Plaintiffs live in states where there is a higher population of non-U.S. citizens). Plaintiffs allege facts related to discriminatory effects in satisfaction of one of the *Arlington Heights* factors, not because equal protection plaintiffs are required to plead disparate effects.

B. Defendants' Other Arguments Are Unavailing

Defendants misstate equal protection law when they assert that "Plaintiffs cannot maintain an equal protection claim based on 'animus towards non-U.S. citizens and foreign-born persons,' FAC ¶ 112, because they are not suspect classifications." MTD at 33 n.16. It is well-

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established that individuals treated differently because they are non-U.S. citizens can prevail on an equal protection claim. *See, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 226 (1984) (strict scrutiny applied to law that prevented non-U.S. citizen from becoming a notary public); *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977) (applying strict scrutiny to law that prevented non-U.S. citizens from receiving state financial aid, and finding that the law was unconstitutional); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."); *Traux v. Raisch*, 239 U.S. 33, 37 (1915) (striking down an anti-non-U.S. citizen labor law as unconstitutional under Equal Protection Clause of the Fourteenth Amendment).

Furthermore, even if the Court found that the Plaintiffs are not entitled to strict scrutiny, the level of scrutiny that a court applies to analyze an equal protection claim (e.g. strict scrutiny, intermediate scrutiny or rational basis review) has nothing to do with whether a plaintiff can assert an equal protection claim. *See, e.g.*, *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366 (2001) (reflecting that constitutional protections still exist under the equal protection clause, even though challenged law did not target a suspect classification).

Defendants' argument that this case involves "the mere collection of administrative records" and thus there cannot be an equal protection challenge rests on a mischaracterization of Plaintiffs' complaint and ignores the facts surrounding the challenged action. *See* MTD at 32. Plaintiffs do not challenge the "mere" collection of administrative records. *See e.g.*, FAC ¶ 61, 65, 112) ("Defendant Ross 'directed the Census Bureau to proceed with the 2020 Census without a citizenship question on the questionnaire, and rather to produce Citizen Voting Age Population

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(CVAP) information prior to April 1, 2021 that states may use in redistricting.'"). Even if Defendants hope to prove that Plaintiffs' challenge involves mere record collection, that is a dispute of fact. Disputes of fact are properly resolved at the merits, not the pleading, stage of litigation. Defendants will have an opportunity later in the case to present their competing version of the facts; at this point, Plaintiffs well-pleaded facts are taken as true and Defendants' fact disputes cannot sustain their motion to dismiss. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) ("[I]n evaluating a Rule 12(b)(6) motion to dismiss, a court accepts all well-pleaded facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint.").

The same is true for Defendants' unsuccessful attempt to re-litigate the facts that led one court to conclude, "it is becoming difficult to avoid seeing that which is increasingly clear. As more puzzle pieces are placed on the mat, a disturbing picture of the decionsmakers' motives take shape." *Kravitz*, GJH-18-1041, Opinion, Dkt. No. 175 at 13. The question before the Court is whether Plaintiffs adequately pleaded that Defendants are motivated by discriminatory intent—not whether Defendants deny those allegations.

Finally, Plaintiffs also sufficiently allege that Latinos, other racial minority individuals, and non-U.S. citizens will be harmed if Defendants are not enjoined from continuing their discriminatory conduct. *See supra* Sec. I (standing); *see supra* Sec. IV.A.6 (disparate impact).

V. Plaintiffs Have Stated a Cause of Action under 42 U.S.C. § 1985(3)

Plaintiffs more than adequately pleaded a claim under 42 U.S.C. § 1985(3) that Defendants and others are engaged in a conspiracy to create and provide to states a redistricting citizenship dataset in order to increase the political power of non-Hispanic whites and reduce the power of Latinos, other racial minority individuals, and non-U.S. citizens. Further, creating and providing a redistricting citizenship dataset from administrative sources is an overt act that is part

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of the same conspiracy Defendants initiated when they attempted to add a citizenship question to the 2020 Census. *See, e.g.*, FAC ¶¶ 54-56, 58, 60-65. Accordingly, plaintiffs adequately pleaded that such a conspiracy exists.

A. Injunctive Relief is Available as a Remedy for § 1985(3) Violations

Defendants erroneously argue that § 1985(3) provides no basis for injunctive relief. MTD at 37-38. It is well-established, however, that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *see also Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010) (same); *LUPE I*, 353 F. Supp. 3d at 398 n.7 (noting that argument that § 1985(3) prohibits injunctive relief is "not persuasive"); *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 608 (1966) (holding that courts retain authority under All Writs Act "[i]n the absence of explicit direction from Congress"); *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 539 (7th Cir. 2012) (holding that "when all that a plaintiff seeks is to enjoin an unlawful act, there is no need for express statutory authorization" from Congress).

Congress did not divest federal courts of their equitable powers when it enacted § 1985(3), and this Court thus retains the power to enjoin Defendants from violating § 1985(3).[16]

[16] Defendants erroneously argue that the Court must dismiss Plaintiffs' APA claims if their conspiracy claim survives. MTD at 44-45. In support of this argument, Defendants cite 5 U.S.C. § 704, which provides that the APA allows review of "final agency actions for which there is no other adequate remedy in a court[.]" Defendants interpret this language to mean that if a plaintiff brings an APA claim for injunctive relief, they cannot add additional claims that provide for the same relief. This is incorrect. Instead, the Supreme Court in *Bowen v. Massachusetts* held that the "no other adequate remedy" language is "merely a restatement of the proposition that one need not exhaust administrative remedies that are inadequate," and is meant to make clear that Congress did not intend for the APA "to duplicate the previously established special statutory procedures relating to specific agencies." 487 U.S. 879, 901-03 (1988) (alteration and internal quotation omitted). Section 704 does not speak to what other claims, in addition to an APA claim a plaintiff, may bring in federal court, and the Court should reject this meritless attempt to dismiss Plaintiffs' APA claims.

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See, e.g., *Mizell v. N. Broward Hospital Dist.*, 427 F.2d 468, 473 (5th Cir. 1970) (holding that the power to issue an injunction "is available to a trial court in an action brought under Section 1985, even though that section refers in precise terms only to a suit for damages"); *Action v. Gannon*, 450 F.2d 1227, 1237-38 (8th Cir. 1971) (en banc) (in holding that injunctive relief is available under § 1985(3), reasoning that "[f]ederal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available").

B. Sovereign Immunity Does not Bar Plaintiffs' § 1985(3) claim.

The Supreme Court has long held that federal officials may be sued for injunctive relief to prevent future infringement of federal laws. *See, e.g.*, *Larson v. Domestic Foreign Com. Corp.*, 337 U.S. 682, 689-691 (1949) (federal officers may be enjoined from acting unconstitutionally); *Unimex, Inc. v. Dep't of Hous. and Urban Dev.*, 594 F.2d 1060, 1062 (5th Cir. 1979) (same). Here, Plaintiffs allege that Defendants acted unconstitutionally when they conspired to violate Plaintiffs' rights to equal protection of the law, in violation of the Fifth Amendment of the Constitution. Because Plaintiffs seek only injunctive relief, not damages, Plaintiffs' § 1985(3) claim is not barred on sovereign immunity grounds.[17] *See Ziglar v. Abassi*,

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[17] The cases cited by Defendants are either inapposite or not persuasive for the proposition for which Defendants cite them. *United States v. Testan,* 424 U.S. 392, 392 (1976), *Davis v. Dep't of Justice*, 204 F.3d 723, 725 (7th Cir. 2000), and *Unimex*, 594 F.2d at 1061 all involved claims for damages, not injunctive relief. Further, in *Unimex*, the Fifth Circuit acknowledged that had plaintiffs alleged that defendant federal officials acted *ultra vires*, plaintiffs could have brought an action for injunctive relief. 594 F.2d at 1062 (citing *Larson*, 337 U.S. at 691, and 5 U.S.C. § 702). *Larson* supports Plaintiffs' argument that their § 1985(3) claim is not barred by sovereign immunity. 337 U.S. at 689-691. There, the Supreme Court acknowledged that federal employees may be sued for injunctive relief in their official capacities where, like Defendants here, they violate the Constitution. *Id.* Finally, although the plaintiffs in *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999), sought both monetary

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137 S. Ct. 1843, 1853 (2017) (entertaining § 1985(3) claim against federal administration officials acting in their official capacity).

C. Plaintiffs' Allegations Support a Claim Under 42 U.S.C. § 1985(3)

Plaintiffs have sufficiently stated a claim under § 1985(3) because they plausibly allege: "(1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995). Plaintiffs allege that Defendants, including Secretary Ross and Commerce and Census Bureau officials, worked with individuals in the White House, including President Trump, and others outside of the administration to create and provide a citizenship redistricting dataset to the states because it would negatively affect the representation of Latinos, Asian Americans and non-U.S. citizens. FAC ¶¶ 1-2, 46-47, 49, 73-74, 80-83. Defendants carried out overt acts in furtherance of this conspiracy, from the collection of citizenship and immigration administrative records, to the effort to add a citizenship question to the decennial census, to the most recent executive order and implementing actions. FAC ¶¶ 54-56, 58-65, 73-78, 85.

Contrary to Defendants' claim, MTD at 40-41, Plaintiffs allege more than the existence of the Hofeller Study. Plaintiffs' First Amended Complaint also includes allegations regarding: 1) Mr. Kobach's involvement early in 2017 in persuading the Commerce Department to add a Census citizenship question to 2020 Census, FAC ¶ 74; 2) Secretary Ross's request that Commerce research excluding immigrants from apportionment, *id.*; 3) The involvement of Dr.

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damages and injunctive relief, the Fifth Circuit did not address the plaintiffs' request for injunctive relief.

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Hofeller and Mr. Neuman in drafting the DOJ Letter requesting a citizenship question for pretextual reasons, FAC ¶ 82; 4) Secretary Ross's decision to add a citizenship question to the 2020 Census notwithstanding the Bureau's recommendations to the contrary, FAC ¶ 76; and 5) statements by Defendants, President Trump, and Attorney General William Bar in July 2019 admitting that, after more than a year of hiding their true purpose and consistent with the Hofeller Study, that found that using CVAP would diminish the political power of minority groups, Defendants were in fact moving forward to create and give states citizenship data for use in redistricting and apportionment, FAC ¶¶ 60-65.[18,19]

Plaintiffs' allegations are nothing like the allegations in the cases cited by Defendants. In *Simmons*, the Fourth Circuit provided examples of conclusory allegations of conspiracy, including cases where the "§ 1985(3) claim was essentially an afterthought with little more to support it than the respective racial identities of the individuals involved." 47 F.3d at 1377 (quoting *Gooden v. Howard Cnty.*, 954 F.2d 960, 969-70 (4th Cir. 1992)) (alteration omitted).[20] Here, Plaintiffs allege with specificity that Defendants conspired to create and provide citizenship data for use in redistricting and with the purpose of discriminating against Latinos, Asian Americans and others.

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[18] In *LUPE I*, the U.S. District Court for the District of Maryland held that plaintiffs pleaded sufficient facts to state a claim for conspiracy by defendants to violate plaintiffs' constitutional rights. *LUPE I*, 353 F. Supp. 3d at 397-98. Notably, this was before Dr. Hofeller's study became public, and before Defendants and President Trump admitted their true purpose for collecting and reporting citizenship data in July 2019.

[19] Defendants argue that some of the conspirators were only involved with the citizenship question. MTD at 42. But there is no requirement that all conspirators be involved at every step of the conspiracy. Instead, *Simmons* requires only that conspirators have a meeting of the minds (here, to use citizenship data in redistricting to reduce the political power of Latinos and other groups), and that they commit an overt act in furtherance of the conspiracy. 47 F.3d at 1376. Plaintiffs allege that Dr. Hofeller, Mr. Kobach, Mr. Neuman, AG Sessions, Secretary Ross, among others, committed such overt acts.

[20] It was also uncontested in *Simmons* that one of the alleged conspirators had acted on his own. *Simmons*, 47 F.3d at 1377-78.

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Hinkle v. City of Clarksburg, West Virginia, also cited by Defendants, involved not a motion to dismiss, but a summary judgment motion where defendants had proffered evidence that contradicted plaintiffs' allegations. 81 F.3d 416, 241-43 (1996). And, unlike the claims in *Hinkle*, Plaintiffs' allegations here are not "rank speculation and conjecture," MTD at 44, but are instead supported by allegations related to documents released in connection with the citizenship question cases, FAC ¶¶ 55-56. Plaintiffs further alleged facts connected to the Hofeller Study and other documents evidencing the important roles played by Dr. Hofeller and Mr. Neuman in the conspiracy. *See* FAC ¶¶ 79-83.

D. The Intracorporate-Conspiracy Doctrine Does Not Apply in this Case

Defendants erroneously argue that the intracorporate-conspiracy doctrine, an antitrust principle that provides that "there is no unlawful conspiracy where officers within a single corporate entity consult among themselves and then adopt a policy for the entity." *Ziglar*, 137 S. Ct. at 1867, applies in this case, MTD at 43-44. Plaintiffs here allege a conspiracy between private parties and individuals working for different state and federal governments. *See* FAC ¶¶ 73-84; *see also Ziglar*, 137 S. Ct. at 1867 (in discussing whether intracorporate-conspiracy doctrine applies to civil rights suits, focusing on whether officers were members of the same department, not members of the same branch of government).[21] Further, "[i]ndividuals are not immune from liability under [§] 1985(3) merely because the same corporation employs them," and they remain liable for their "unauthorized acts in furtherance of [the] conspiracy[.]" *Hodgin v. Jefferson*, 446 F. Supp. 804, 807 (D. Md. 1978); *see also Buschi v. Kirven*, 775 F.2d 1240,

[21] To the extent there is a question of fact as to whether Commerce and DOJ officials are part of the same governmental body, this does not defeat Plaintiffs' claim at the motion to dismiss stage. *Kronberg v. LaRouche*, No. 1:09-CV-947-AJT/TRJ, 2010 WL 1443898, at *8 (E.D. Va. Apr. 9, 2010) (denying defendants' motion to dismiss where there was a question of fact as to whether the intracorporate-conspiracy doctrine applied).

1251-53 (4th Cir. 1985) (same). Plaintiffs alleged that the conspirators took steps to disadvantage Latinos, Asian Americans, and non-U.S. Citizens individuals in violation of their right to equal protection, and Defendants' acts were therefore unauthorized.[22]

Even though the Supreme Court did not decide the issue, it acknowledged in *Ziglar* that it "has not given its approval to [the intracorporate-conspiracy] doctrine in the specific context of § 1985(3)," and that "[t]here is a division in the courts of appeals . . . respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies." 137 S. Ct. at 1868. The Court should thus further decline to dismiss Plaintiffs' § 1985(3) claim on the basis of unsettled law. *Wright*, 787 F.3d at 263 (holding that the fact that a plaintiff's claim does "not fall within the four corners of . . . prior case law . . . does not justify dismissal under Rule 12(b)(6)," and that dismissal in these circumstances is "especially disfavored") (internal quotation marks omitted). Indeed, Plaintiffs here "should be given an opportunity to develop evidence before the merits are resolved." *Id.* (internal quotation marks omitted).

[22] Moreover, to the extent there is a question as to whether an exception to the intracorporate-conspiracy doctrine applies under the facts of this case, such a question requires denial of Defendants' Motion to Dismiss. *Bell v. City of Roanoke Sheriff's Office*, No. 7:09-cv-214, 2009 WL 5083459, at *4 (W.D. Va. Dec. 23, 2009) ("Because the applicability of the exceptions to intracorporate immunity entail a factual inquiry, the court will deny the defendants' motion to dismiss").

Dated: January 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 9th day of January, 2020, I caused a copy of Plaintiffs' Response to Defendants' Motion to Dismiss to be sent to all parties receiving CM/ECT notices in this case.

/s/ Terry Ao Minnis
Terry Ao Minnis

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*, Defendants.	No. 8:19-cv-02710-PX

MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants Wilbur L. Ross, in his official capacity as Secretary of Commerce; Steven Dillingham, in his official capacity as Director of the U.S. Census Bureau; U.S. Department of Commerce; and U.S. Census Bureau (collectively, "Defendants"), by and through their undersigned counsel, move the Court to dismiss the claims against them under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants' arguments in support of this motion are fully explained in the attached Memorandum of Law.

DATED: December 18, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*, Defendants.	No. 8:19-cv-02710-GJH

MEMORANDUM OF LAW IN SUPPORT OF
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INTRODUCTION

Secretaries of Commerce have long exercised their statutory authority to gather administrative records—files from other federal and state agencies—in aid of their mission to provide vital statistics to the nation. After the Secretary's unsuccessful attempt to obtain citizenship data using a citizenship question on the 2020 Census, the President issued Executive Order 13880 in July 2019 with the "goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." Exec. Order No. 13880, 84 Fed. Reg. 33821 (July 11, 2019). While the Secretary had collected enough administrative records for the Census Bureau (the primary statistical agency in the Department of Commerce) to "determine citizenship status for approximately 90 percent of the population," he "remain[ed] in negotiations to" access "several additional important sets of [administrative] records with critical information on citizenship." *Id.* The President therefore directed "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible" in order "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department." *Id.*

Plaintiffs—individuals and organizations concerned about their *States and localities'* potential use of citizenship data—now take issue with a process decades in the making: the Secretary's collection of administrative records, facilitated by the President's

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internal guidance to federal agencies, to obtain comprehensive citizenship data on the U.S. population. In seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380," Plaintiffs' First Amended Complaint (FAC) alleges violations of the Administrative Procedure Act (APA), the Fifth Amendment's equal protection component, and 42 U.S.C. § 1985(3) (civil conspiracy). FAC ¶¶ 88–117, ECF No. 41; *Id.* at 31. But the FAC is fatally flawed from beginning to end.

The Secretary's administrative-record collection does not affect any private parties, let alone Plaintiffs. It is only when Plaintiffs' *States and localities* "discriminatorily" choose to use citizenship data that Plaintiffs could possibly be injured. *See* FAC ¶ 87. So they lack standing, and their suit is unripe, because their injuries can only result from a highly attenuated chain of possibilities, including the independent decisions of States and localities to use (or not use) citizenship data. This also torpedoes Plaintiffs' APA and equal protection claims, as the Secretary's administrative-record collection is neither "agency action" for APA purposes, nor does it cause a "disparate impact" for equal protection purposes.

If that were not enough, Plaintiffs' § 1985(3) is barred on several threshold grounds, including sovereign immunity and a lack of statutory authorization for injunctive relief. And Plaintiffs do not plausibly allege any facts supporting their equal protection and § 1985(3) claims, instead relying almost exclusively on the events leading

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up to *a citizenship question*, not the collection of administrative records. Plaintiffs' FAC is meritless and should be dismissed.

BACKGROUND

I. The Secretary's Collection of Administrative Records and Citizenship Data

The use of administrative records is not new. In the 1890 Census, for example, "special enumerators visited real estate recorders' office[s] [ ] to obtain data on individual and corporate debt."[1] And after the Department of Commerce was formed, Congress specifically empowered the Secretary of Commerce, "whenever he considers it advisable," to "call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work" of the Census Bureau. 13 U.S.C. § 6(a).[2] Secretaries have routinely exercised this power to collect and use administrative records. As just two of many examples, administrative records have been used since the 1940s to help produce population estimates between censuses,[3] and in 1954 the Census

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[1] U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, https://www.census.gov/history/pdf/1997econhistory.pdf.

[2] The Secretary may also acquire similar information from "States, counties, cities, or other units of government," or "from private persons and agencies." 13 U.S.C. § 6(b).

[3] U.S. Census Bureau, *Current Population Reports, Population Estimates* (Aug. 13, 1948), at 2, https://www2.census.gov/library/publications/1948/demographics/P25-13.pdf.

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Bureau implemented "large-scale use of administrative records" from the Internal Revenue Service as part of the Economic Census.[4]

The Secretary has collected administrative records containing citizenship data since at least 2002.[5] But the Census Bureau has never had a full set of administrative records to determine citizenship for every person in the country. To inform immigration policy, support research, plan investments, design programs, and aid Voting Rights Act enforcement—which requires citizenship estimates to determine the number of eligible voters in a given geographic area—the Census Bureau has used sample-based surveys. From 1970 to 2000, the Census Bureau used the long-form census, a set of over thirty questions (including citizenship) sent to one in six households during each decennial census. *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 693 (D. Md. 2019). The long form was discontinued after the 2000 Census and replaced by the American Community Survey (ACS) in 2005, a similarly lengthy survey (also including a citizenship question) that is sent to one in 38 households annually. *Id.*

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[4] U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, https://www.census.gov/history/pdf/1997econhistory.pdf.

[5] J. David Brown, et al., Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census (June 2019), at Table A8, https://www2.census.gov/ces/wp/2018/CES-WP-18-38R.pdf (noting the use of Social Security records after the 2000 Census).

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These surveys did not, and do not, provide perfect citizenship data. For example, because the ACS is based on a sample of the population, its citizenship data is not available at the lowest geographic level, called a "census block" and roughly equivalent to a city block. *See id.* (discussing census blocks). Instead, ACS-based citizenship data is only reported at a higher geographic level (called a "census block group"), containing about 600 to 3,000 people. *See id.* (discussing census block groups). While the Census Bureau is statutorily obligated to produce *population* data for States and localities to use in redistricting (so-called Public Law 94-171 data), it also provides citizen voting age population by race and ethnicity (CVAP) data tabulated from the ACS.[6] 13 U.S.C. § 141(c); FAC ¶ 39. Population totals are reported at the census-block level; CVAP data is not. *Kravitz*, 366 F. Supp. 3d at 692–93.

In December 2017, the Department of Justice sent a letter to the Census Bureau requesting a citizenship question on the 2020 Census, which would enhance Voting Rights Act enforcement by allowing the Census Bureau to calculate citizenship data at the census-block level. *Id.* at 698. In March 2018, the Secretary of Commerce issued a memorandum directing the Census Bureau to include a citizenship question on the 2020 Census. *Id.* at 693.

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[6] *See* U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity (CVAP)*, https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html.

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Various parties—including two organizations and one individual in this case—challenged the Secretary's decision. *Id.* at 691. Throughout the year-long litigation, the plaintiffs consistently and forcefully argued that the Secretary's so-called Alternative C—collecting citizenship data using administrative records—was "objectively superior" to employing a citizenship question on the 2020 Census.[7] The issue eventually reached the Supreme Court, which vacated and remanded the Secretary's decision on other grounds. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570–75 (2019).

II. The Executive Order to Continue Gathering Citizenship Data Using Administrative Records

Several weeks after the Supreme Court's decision, the President issued Executive Order 13880. While noting the Supreme Court's holding that "the Department of Commerce [ ] may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census," the President explained that "[t]he Court's

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[7] *See, e.g.*, Pls.' Corrected Conclusions of Law, *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. Feb. 18, 2019), ECF No. 151-2 at ¶ 129 ("The uncontroverted evidence before the Secretary demonstrated that the use of [administrative records] alone without a decennial Census citizenship question—Alternative C—was superior to [including a citizenship question] by every relevant metric, including those that the Secretary purported [ ] to value."); *id.* ¶ 178 ("[T]he only reasonable conclusion to be drawn from the [administrative record] is that Alternative C would yield more accurate citizenship data than [including a citizenship question], with no compromise of timeliness, scope, or other criteria of quality relevant to DOJ's stated use."); Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J., *LUPE v. Ross*, No. 18-cv-1570 (D. Md. Nov. 27, 2018), ECF No. 85 at 34–41, 44 (arguing that "all evidence from the Census Bureau points out that [including the citizenship question] is less accurate and more costly" than Alternative C).

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ruling . . . has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire." E.O. 13880, 84 Fed. Reg. at 33821. Nonetheless, the President sought to "ensure that accurate citizenship data is compiled," with the "goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." *Id.* at 33822.

This is important, the President explained, to "help us understand the effects of immigration on our country," to "implement specific [public-benefits] programs and to evaluate policy proposals for changes in those programs," and to "generate a more reliable count of the unauthorized alien population in the country." *Id.* The President also noted that "the Supreme Court left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population,'" but "because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." *Id.* at 33823 (citing *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)). Among other helpful aspects, "a more accurate and complete count of the citizen population" derived from administrative records would enable the Census Bureau to produce a CVAP tabulation at the lowest geographic level (the census block), unlike recently available CVAP tabulations derived solely from the ACS. *See id.* at 33824.

By the time of the Executive Order, the Census Bureau had enough administrative records to "determine citizenship status for approximately 90 percent of the population,"

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but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies." *Id.* at 33821. "[T]o eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department," the President directed "all executive departments and agencies" to "provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country," including "by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective." *Id.* The President also established an "interagency working group to improve access to administrative records," and directed "the [Commerce] Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship." *Id.* at 33822.

III. Plaintiffs' Challenge

Plaintiffs now take issue with the exact decision some of them previously desired—the use of administrative records to gather citizenship data. Their lawsuit stems from a purported concern that if the Census Bureau "provides [Plaintiffs'] states with citizenship data to be used along with the total population tabulations in the P.L. 94-171 Redistricting Data File," these States may "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021." FAC ¶ 87.

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On the merits, Plaintiffs overlook the Secretary's decades of gathering administrative records to allege that the mere collection of citizenship data from federal and state agencies is now part of a conspiracy "motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶¶ 110–17. For that reason, and alleged violations of the APA, Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31. This motion follows.

LEGAL STANDARDS

In evaluating a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Court must "accept as true the allegations for which there is sufficient factual matter to render them plausible on their face." *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2018) (alterations and citations omitted). But the Court need not do the same for "legal conclusion[s] couched as [ ] factual allegation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). So, to survive a Rule 12(b)(1) motion to dismiss, Plaintiffs must establish this Court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, to survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

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face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6)." *K.M. by & Through C.M. v. Bd. of Educ. of Montgomery*, 2019 WL 330194, at *3 (D. Md. Jan. 25, 2019) (Xinis, J.) (quoting *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012)).

ARGUMENT

I. Plaintiffs Lack Standing

Article III of the Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "[R]ooted in the traditional understanding of a case or controversy," standing doctrine developed to implement this Article III command. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," thus preventing "the judicial process from being used to usurp the powers of the political branches" and "confin[ing] the federal courts to a properly judicial role." *Id.*

Standing "requires an injury in fact that is caused by the challenged conduct and is likely to be redressed by a favorable decision." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 405 (4th Cir. 2019). As the parties invoking this Court's jurisdiction, Plaintiffs bear the burden of establishing these requirements. *Spokeo*, 136 S. Ct. at 1547. They cannot. Plaintiffs claim that they "live in states where lawmakers have expressed an interest and desire to use CVAP as a population base for drawing congressional and

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state legislative redistricting plans in 2021." FAC ¶ 87. If the Census Bureau "provides those states with citizenship data," the state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally overpopulated districts." *Id.* This theory fails every prong of standing.

A. Plaintiffs' purported harm is not traceable any action of Defendants and not redressable by the Court.

Most obviously, Plaintiffs fail to demonstrate traceability and redressability. Standing requires Plaintiffs to show that their purported injury is "fairly traceable to the challenged action of the defendant[s], and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations and citations omitted). This is important because "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation marks and citations omitted). Here, it is only "independent action of some third party not before the court"—States and localities using redistricting data—that could possibly cause Plaintiffs' alleged redistricting injury, and no court order is likely to redress that injury.

For starters, Plaintiffs' claimed injury could only occur if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But that redistricting choice is, quite obviously, an independent decision by state and local officials. The Supreme Court has

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explained in no uncertain terms that "[r]edistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "[t]he decision to include or exclude" noncitizens and other non-voting persons "involves *choices* about the nature of representation with which we have been shown no constitutionally founded reason to interfere," *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (emphasis added). The possibility that "*States* may draw districts to equalize voter-eligible population rather than total population" was explicitly left open in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (emphasis added). And "because eligibility to vote depends in part on citizenship, *States* could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 18880, 84 Fed. Reg. at 33824 (emphasis added). Nothing in either law or Plaintiffs' factual allegations supports the idea that States' redistricting methodologies are anything but their own independent decisions.[8]

[8] It is true that traceability may be found "where the plaintiff suffers an injury that is produced by the determinative or coercive effect of the defendant's conduct upon the action of someone else." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne*, LLC, 713 F.3d 187, 197 (4th Cir. 2013) (alterations omitted). But Plaintiffs do not (and cannot) advance any allegations that Defendants' mere collection of citizenship data somehow coerces States into using that data for CVAP redistricting, or somehow makes CVAP redistricting a foregone conclusion. As Plaintiffs themselves acknowledge, States and localities expressed a desire for CVAP redistricting long before the Executive Order. *See, e.g.*, FAC ¶ 87 n.42; Brief for Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (State of Texas arguing for voter-eligible redistricting in 2015); Brief Amicus Curiae of Tennessee State Legislators and the Judicial Education Project in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (Tennessee legislators arguing for voter-eligible redistricting in 2015).

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This alone is fatal to Plaintiffs' standing. *See Doe v. Obama*, 631 F.3d 157, 162 (4th Cir. 2011) (stating that "a fundamental tenet of standing doctrine" is that where a third party "makes the independent decision that causes an injury, that injury is not fairly traceable" to the defendant). But even if States make the independent choice to use CVAP for redistricting, they must also make the independent choice to use citizenship data *provided by the Census Bureau*, as opposed to other statistics like voter-registration data. *See Burns*, 384 U.S. at 92–93 (permitting a State to draw districts based on voter-registration data).[9] So before Plaintiffs could possibly suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts," States must make two independent decisions: (i) whether to "exclu[de] [ ] non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," and (ii) whether to use "citizenship data" provided by the Census Bureau "along with the total population tabulations in the P.L. 94-171 Redistricting Data File." FAC ¶ 87.

That is also why a favorable decision in this case would do nothing to relieve Plaintiffs' theoretical "injury." *Lujan*, 504 U.S. at 560. Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31.

[9] More broadly, States make the independent choice to use any Census Bureau data, even total population figures, for redistricting. *See Burns*, 384 U.S. at 91 ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.").

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But even if they are granted this relief, States may nonetheless choose to use CVAP for redistricting based on either voter-registration data or the Census Bureau's ACS-based citizenship data.[10] The reverse is also true. Even if this Court declines Plaintiffs' requested injunction, it is entirely possible that States—or at least Arizona, Texas, and Washington, where Plaintiffs reside—may choose *not* to use CVAP for redistricting. In either case, Plaintiffs lack standing because "[f]ederal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (alterations and citations omitted).

Plaintiffs' quarrel lies with their respective States, not the President, the Secretary of Commerce, or the Census Bureau. Merely collecting citizenship data and potentially providing it to the States cannot have the challenged effect on redistricting unless *States* decide to use CVAP for redistricting. And if they do so for discriminatory purposes, Plaintiffs could sue their respective States (or the relevant State officials). *See Davidson v. City of Cranston*, 837 F.3d 135, 142–43 (1st Cir. 2016); *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015); *Terrebonne Par. NAACP v. Jindal*, 154 F. Supp. 3d 354, 363 (M.D. La. 2015); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 267 (D.D.C. 2002); *Common Cause S. Christian*

[10] As experienced demographers told the Supreme Court in 2015, "ACS data more than suffices as the raw material for building districts of 'substantially equal' numbers of eligible voters." Brief of Demographers Peter A. Morrison, et al. as Amici Curiae in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

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Leadership Conference of Greater L.A. v. Jones, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001). In the meantime, Plaintiffs may seek relief through the political process—not the courts—if they dislike the collection of citizenship data through administrative records.

B. Plaintiffs' purported harm is far from certainly impending.

Plaintiffs also fail the injury-in-fact inquiry because no one is injured by the Defendants' mere collection of citizenship data; Plaintiffs' hypothetical injury could only occur, if ever, after a series of speculative events. "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). So the "threatened injury must be *certainly impending* to constitute injury in fact, and allegations of *possible* future injury are not sufficient." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207–08 (4th Cir. 2017) (alterations omitted) (quoting *Clapper*, 568 U.S. at 409). Plaintiffs have alleged just such a "possible future injury" here.

Plaintiffs claim that if the Census Bureau "provides th[eir] states with citizenship data," state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally

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overpopulated districts." FAC ¶ 87. So Plaintiffs will not suffer any harm unless (1) Defendants collect more administrative records under the Executive Order, *id.* ¶¶ 59–62; (2) the Census Bureau is able to "produce citizenship population tabulations" using these additional administrative records, *id.* ¶¶ 96, 101, 103, 108, 112; (3) the Census Bureau provides "[S]tates with citizenship data" based on administrative records, *id.* ¶ 87; (4) States choose to "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021," *id.*; and (5) States choose to use the Census Bureau's administrative-record data to do so. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

First, until the Census Bureau is able to obtain administrative records under the Executive Order, the precise effect of additional records remains unknown. As the Executive Order itself notes, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population," but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies. E.O. 13880, 84 Fed. Reg. at 33821–22. The acquisition of administrative records from federal agencies is a complicated process. It requires extensive negotiation of a lengthy agreement, including how the data will be transferred, how the data may be used, how the data must be protected, how long the Census Bureau may retain the data, and how much the data will

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cost. And this says nothing about Defendants' acquisition of *state* administrative records, which are comparably more difficult to obtain because they not only require the same extensive negotiation as federal agreements, but require these negotiations with each separate State (and sometimes multiple state agencies with the same State). Plaintiffs seek to enjoin only the speculative acquisition of administrative records obtained under the Executive Order, not any preexisting administrative records. *See* FAC at 31 (seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380").[11]

Second, even if additional administrative records are acquired, they may be too unreliable to aid production of "citizenship population tabulations" by April 2021. *See id.* ¶¶ 87, 96, 101, 103, 108, 112. The Census Bureau can only produce these tabulations—including the number and location of citizens and noncitizens—when administrative records and their connections to census data are both of "high quality." *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 587–88 (S.D.N.Y.) (noting that administrative

[11] Although Plaintiffs seemingly seek a declaratory judgment "that production of citizenship data for use along with the P.L. 94-171 Redistricting Data File and population tabulations, or including citizenship data in the File, violates the Equal Protection guarantee of the Fifth Amendment," FAC at 31, they nowhere allege facts supporting the unprecedented relief of declaring that all citizenship data—not just citizenship data collected under the Executive Order—is invalid on equal protection grounds. In fact, the only allegations of discriminatory intent (necessary for an equal protection violation) focus on the Secretary's previous attempt to include a citizenship question on the census and the subsequent Executive Order, not any preexisting animus somehow infecting administrative records collected years ago. *See id.* ¶¶ 73–84. In any event, Plaintiffs claims are both unreviewable and meritless, as discussed above and below.

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records "will be used to enumerate only a limited number of those households for which there is high quality administrative data about the household," and that "[n]oncitizen and Hispanic households are less likely to be accurately represented in quality administrative records than other groups"), *aff'd in part, rev'd in part* 139 S. Ct. 2551 (2019). Plaintiffs themselves fully acknowledge the possibility of gaps in administrative records. *See* FAC ¶¶ 66–72 (cataloguing shortcomings of administrative records and noting that the Census Bureau "will most likely never possess a fully adequate truth deck" for citizenship). So the usability of any administrative records collected under the Executive Order is still unknown.[12]

Third, even if the Census Bureau is able to gather administrative records under the Executive Order, and even if they prove reliable enough to "produce citizenship population tabulations," the methodology used to produce any citizenship data provided to States is still undetermined.[13]

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[12] The usability and completeness of citizenship data in Defendants' administrative records is currently being litigated. *See* Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 42–51 (contesting the use of "data collected under EO 13880" for congressional apportionment because it "is not an enumeration of individuals, and specifically is not an enumeration of undocumented immigrants, in the U.S.").

[13] U.S. Census Bureau, *Update on Disclosure Avoidance and Administrative Data* (Sept. 13, 2019), at 13, https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf? ("No final decisions have been made regarding the methodology and format of the block-level CVAP data.").

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Fourth and fifth, it is anyone's guess as to whether state and local officials will make the independent decisions to both use CVAP for redistricting and use the Census Bureau's (as-yet-unknown) data in the process. As explained above, it is entirely possible that Plaintiffs' States and localities may choose to redistrict using total population, or to use voter-registration data for CVAP redistricting.

Plaintiffs build speculation on top of speculation in a feeble attempt to manufacture a redistricting injury from Defendants' mere collection of administrative records. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. No redistricting harm may ever befall Plaintiffs, let alone redistricting harm traceable to Defendants' conduct and redressable by the Court.

C. Plaintiffs will suffer no injury to a legally protected interest.

Plaintiffs' sole alleged redistricting injury is that they will suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts" if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But standing requires Plaintiffs to show that they will suffer "an invasion of a *legally protected* interest." *Wikimedia*, 857 F.3d at 207–08 (emphasis added) (quoting *Spokeo*, 136 S.Ct. at 1548). And despite Plaintiffs' cursory assertion that CVAP redistricting is itself "unconstitutional[]," that is simply not true under current law. FAC ¶ 87.

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The Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population," and it has suggested that States may constitutionally redistrict on either basis. *Evenwel*, 136 S. Ct. at 1126–32 (total population); *Burns*, 384 U.S. at 90 (registered-voter population). Indeed, "[i]t has long been constitutionally acceptable, but by no means required, to exclude non-voting persons . . . from the apportionment base, so long as the apportionment scheme does not involve invidious discrimination." *Davidson*, 837 F.3d at 143 (quoting *Burns*, 384 U.S. at 92); *Kaplan v. Cty. of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (same). So the mere use of CVAP in redistricting does not cause "vote dilution and loss of representation in unconstitutionally overpopulated districts." FAC ¶ 87.[14] It is only when Plaintiffs' state and local officials choose to use CVAP *with discriminatory intent* that Plaintiffs will suffer

[14] Plaintiffs also point out that "[e]xclusion of non-citizens from the population count used for [congressional] apportionment creates a significant risk that states in which large numbers of non-citizens reside, including Texas and Arizona, will suffer a reduction in the number of congressional seats that would otherwise be apportioned to them." FAC ¶ 86. But Defendants do not understand Plaintiffs to be asserting an injury on this basis because they advance no allegation, nor could they, that Defendants will use citizenship data collected under the Executive Order to exclude noncitizens in congressional apportionment. If Plaintiffs were to rely on that theory for standing, however, Defendants would likely seek to transfer venue to the Northern District of Alabama where that issue is currently being litigated. *See* First Am. Compl., *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Sept. 10, 2019), ECF No. 112 at ¶¶ 1–4 (alleging that *inclusion* of noncitizens in congressional apportionment is unconstitutional); Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 50—56 (alleging that *exclusion* of noncitizens in congressional apportionment based on administrative records is unconstitutional).

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a legally cognizable injury. *Davidson*, 837 F.3d at 143; *Kaplan*, 74 F.3d at 401. And, as explained above, Plaintiffs may attempt to enjoin such conduct by suing their state and local officials, not Defendants who merely tabulated citizenship data.

D. Organizational Plaintiffs lack standing.

In addition the infirmities identified above, the Organizational Plaintiffs have other standing problems: suing on behalf of their members or on their own behalves.

An organization does not have Article III standing to sue on behalf of its members unless "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). A general reference to unidentified members is insufficient for organizational standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982); *see also Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). Here, Promise Arizona (PAZ) does not identify a single member who may suffer an injury. *See* FAC ¶¶ 6–14. And although La Unión del Pueblo Entero (LUPE) identifies one member (Plaintiff Juanita Valdez-Cox) who may hypothetically suffer an injury, she—and therefore LUPE—still lack standing for the reasons explained above. *Id.*

When an organization sues on its own behalf (rather than on behalf of its members), it must satisfy the same Article III standing requirements that apply to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). But Organizational Plaintiffs do not even attempt to allege any injuries distinct from their

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members, like a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* at 379.

II. Plaintiffs' Claims Are Not Ripe

Ripeness "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 199 (4th Cir. 2019) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In that sense, "[a]nalyzing ripeness is similar to determining whether a party has standing." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006)). Just as Plaintiffs "cannot assert standing based on an alleged injury that lies at the end of a highly attenuated chain of possibilities," Plaintiffs' "claim is not ripe for judicial review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (citations omitted).

"The question of whether a claim is ripe turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citations omitted). Neither factor favors Plaintiffs. "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319; *Johnston v. Lamone*, 401 F. Supp. 3d 598, 607 (D. Md. 2019). Here, as explained above, the action in controversy—redistricting based on CVAP—is far from final and entirely dependent on unknown facts underlying a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, including

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States' independent redistricting decisions. *See Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("Where an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court.").

"The hardship prong [of ripeness] is measured by the immediacy of the threat and the burden imposed on" Plaintiffs. *Miller*, 462 F.3d at 319. By Plaintiffs' own admission, the Census Bureau would not provide citizenship data to the States—whether based on administrative records or the ACS—until April 2021. *See* FAC ¶¶ 1, 15, 65, 87. And as explained above, it is far from certain that Plaintiffs would suffer any redistricting harm whatsoever. But perhaps more importantly, there is no burden on Plaintiffs at all. Cases have been deemed ripe where, for example, a "challenged statute imposed a continuing injury on [plaintiffs'] associational rights," *Miller*, 462 F.3d at 319–20, or a challenged "policy impose[d] the heavy burden of requiring a pit bull owner to either vacate his or her home or abandon a family pet," *Weigel v. Maryland*, 950 F. Supp. 2d 811, 830 (D. Md. 2013), or a challenged policy forced "harmful consequences [for plaintiffs] such as the cancellation and postponements of surgeries" and "the prospect of discharge [from the military] and inability to commission as an officer," *Stone v. Trump*, 280 F. Supp. 3d 747, 767 (D. Md. 2017). In stark contrast, Defendants' collection of administrative records, facilitated by the Executive Order, neither obligates Plaintiffs to, nor prohibits Plaintiffs from, any action. This case is not ripe and it should be dismissed.

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III. Plaintiffs' APA Claims Should be Dismissed

Plaintiffs seem to target their APA claims at the Executive Order, and they challenge the Secretary's compliance with this presidential directive. FAC ¶¶ 88–109; *see, e.g., id.* ¶ 103 ("Defendant Ross's decision to follow EO 13380 and direct the Census Bureau to, among other things, collect citizenship data . . . violates the APA and must be set aside."). But "[i]t is firmly established that presidential action is not subject to APA review." *Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 662 (D. Md. 2019) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

It is true that, in certain circumstances, courts may apply the APA to an *agency's implementation* of an executive order. *See U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("Appellants could not possibly have relied on the APA for a cause of action prior to the Secretary's issuance of regulations implementing the Executive Order."); *Serv. Emps. Int'l Union Local 200 v. Trump*, 2019 WL 4877273, at *7 (W.D.N.Y. Oct. 3, 2019) (collecting cases for the proposition that "an APA challenge to an agency's implementation of an executive order (or other presidential directive) is not permissible prior to some independent, concrete action by the agency"). For at least two reasons, however, that gets Plaintiffs no closer to an actionable APA claim.

First, the Executive Order was merely a managerial tool designed "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department." E.O. 13880, 84 Fed. Reg. at 33822. It was

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not "issued pursuant to statutory mandate" or "a delegation from Congress of lawmaking authority." *U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1096 (4th Cir. 1988). To the contrary, it was "intended for the internal management of the President's cabinet," so neither the Executive Order nor its implementation are reviewable by courts. *Chai v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995); *see U.S. Dep't of Health & Human Servs.*, 844 F.2d at 1095; *Orbital ATK, Inc. v. Walker*, 2017 WL 2982010, at *9 (E.D. Va. July 12, 2017) (rejecting an APA challenge where the presidential directive at issue was "intended primarily as a managerial tool for implementing the President's personal [ ] policies" (quoting *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235–36 (8th Cir. 1975))).

Second, given that the Executive Order is simply managerial, it is unsurprising that Plaintiffs do not challenge a cognizable "agency action." The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "The term 'action' as used in the APA is a term of art that does not include all conduct on the part of the government." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013)). Cognizable "agency action" under the APA must satisfy two key criteria: it must be "circumscribed and discrete," and it must "determine rights and obligations." *Id.* at 431 (citations and alterations omitted).

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The latter requirement "ensures that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties." *Id.* "To meet this requirement, a party must demonstrate that the challenged act had an immediate and practical impact, or altered the legal regime in which it operates." *Id.* (citations and alterations omitted). "It is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the 'independent responses and choices of third parties,' or mere 'coercive pressures.'" *Id.* (citation omitted). The collection of administrative records fails this test.

Indeed, Plaintiffs' APA claims are the paradigmatic example of improperly "reach[ing] into the internal workings of the government." *Id.* The Executive Order simply seeks to "ensure that accurate citizenship data is compiled" from administrative records already held by federal and state agencies. *See* E.O. 13880, 84 Fed. Reg. at 33821 (ordering "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country"). It has no impact whatsoever on private parties, let alone an "immediate and practical" one. *See City of New York*, 913 F.3d at 431.

The Court need look no further than the recent challenges to the 2020 Census to understand this point. In those cases, plaintiffs challenged the Secretary's decision to include a citizenship question on the 2020 Census, arguing that it violated the

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Constitution and the APA. *See, e.g., La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018). Moving to dismiss plaintiffs' APA claims, the government acknowledged that the Secretary's decision was "final agency action." *See, e.g., New York*, 351 F. Supp. 3d at 627 ("There is no dispute th[at] Secretary Ross's decision constitutes 'final agency action' reviewable under the APA."). That was because the Secretary's decision imposed an obligation on private parties—*i.e.*, U.S. residents—to truthfully answer the citizenship question in 2020. *See* 13 U.S.C. § 221. Here, in contrast, Defendants' collection of administrative records from other federal and state agencies do not obligate private parties to do anything. *See NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 425 (D. Md. 2019) (rejecting APA challenges to the Census Bureau's plans to conduct the 2020 Census because they did not determine rights and obligations of private parties).

It also cannot be said that the Executive Order "alter[s] the legal regime in which it operates." *City of New York*, 913 F.3d at 431 (citations omitted). It neither dictates how the Census Bureau must use the administrative records once they are collected, nor is anyone exposed to civil or criminal penalties for failing to follow it. *Cf. Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that the legal regime is altered by one agency's determination when the action agency would expose itself to civil and criminal penalties if it disregarded that determination); *see Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (holding that an EPA Report did not alter the legal regime because "no statutory scheme triggers potential civil or criminal penalties for

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failing to adhere to the Report's recommendations"). Beyond ordering "*all executive departments and agencies*"—not private parties—to "provide the [Commerce] Department the maximum assistance permissible," *see* E.O. 13880, 84 Fed. Reg. at 33821 (emphasis added), the Executive Order in no way "determine[s] rights and obligations" for the Department of Commerce, the Census Bureau, other federal agencies, Plaintiffs, or anyone else.

The Supreme Court's decision in *Franklin v. Massachusetts* alone resolves this case. 505 U.S. 788 (1992). There, plaintiffs challenged the Secretary's *use of administrative records* to count federal employees serving overseas, arguing that the Secretary's tabulation of census results violated the APA. *Id.* at 794–96 (explaining that the Census Bureau used the "home of record" in the Department of Defense's personnel files to allocate individuals). Strikingly, the Supreme Court held that the Secretary's final report to the President conveying the census results did not constitute "final agency action" because "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." *Id.* at 797. So if the Secretary's tabulation of final census results—*including* administrative records—is not "final agency action" under the APA, then the mere gathering of administrative records parallel to the census cannot constitute "final agency action" either.

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Fourth Circuit law reinforces this point, consistently rejecting APA claims like those at issue here. *City of New York*, 913 F.3d at 434–35 (holding that the Department of Defense's compliance with statutory requirements was not "agency action" under the APA because it did not "in any way determine [the plaintiffs'] rights and obligations"); *Bald Head Island*, 714 F.3d at 188–93 (finding no "agency action" where plaintiffs "commenced [the] action to challenge the adequacy of [a project's] performance and to require the [Army Corps of Engineers] to do what it had undertaken to do when approving the project," which was not a "determination of rights and obligations"); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 427–28 (4th Cir. 2010) (discussed below); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (holding that the Patent and Trademark Office's advertising campaign was not "final agency action" because it "was not the consummation of any decisionmaking process that determined rights or obligations or from which legal consequences flowed"); *Flue-Cured Tobacco*, 313 F.3d at 861 (holding that publication of an EPA report that classified environmental tobacco smoke as a potentially harmful human carcinogen was not an "agency action" reviewable under the APA).

In *Golden & Zimmerman, LLC v. Domenech*, for example, the plaintiffs challenged the "Federal Firearms Regulations Reference Guide 2005,' which [was] published by the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF') to provide information designed to help licensees comply with all of the laws and regulations governing the

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manufacture, importation, and distribution of firearms and ammunition." 599 F.3d at 427–28 (alterations omitted). The court rejected this challenge because, although the Reference Guide "inform[ed] the regulated community of what violates the law," it did "not itself *determine* the law or the consequences of not following it." *Id.* at 432–33. Notably, the court explained, "if the ATF had never published the Reference Guide . . . the ATF would still have had the authority to prosecute licensees for engaging in the conduct described in [it] because legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations." *Id.* at 433.

The Executive Order here is even further removed from "determin[ing] the law" than the Reference Guide in *Golden & Zimmerman*: it provides no information to "the regulated community of what violates the law," *id.* at 432–33, but merely functions as an internal guide for "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country." *See* E.O. 13880, 84 Fed. Reg. at 33821. Surely, if a Reference Guide explaining the law to regulated parties does not "determine rights and obligations," then neither does the President's managerial decision. And, like the Reference Guide in *Golden & Zimmerman*, Defendants can, and have, gathered administrative records *without* the President's recent directive. *See id.* 33821–22 (noting that the Census Bureau already had administrative records to "determine citizenship status for approximately 90 percent of the population"). Their

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authority to do so derives from the Census Act, not a recent directive "to eliminate delays and uncertainty" in the process. *See* 13 U.S.C. § 6(a) ("The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work provided for in this title."); E.O. 13880, 84 Fed. Reg. at 33821–22 ("[T]o to eliminate delays and uncertainty . . . I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.").

Plaintiffs are clearly concerned about the conduct of States and localities when they receive citizenship data from the Census Bureau in 2021. *See* FAC ¶¶ 1, 15, 65, 87. But the APA "does not provide judicial review for everything done by an administrative agency," *Invention Submission Corp.*, 357 F.3d at 459 (citation omitted), and "[i]t is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the independent responses and choices of third parties," *City of New York*, 913 F.3d at 431 (citations omitted). Managerial "policy statements," like the Executive Order, "are properly challenged through the political process and not the courts." *Invention Submission Corp.*, 357 F.3d at 459.

IV. Plaintiffs' Equal Protection Claim Should be Dismissed

Plaintiffs' equal protection claim alleges that "[t]he collection of citizenship data and the production of citizenship population tabulations for use along with the P.L. 94-171 Redistricting Data File violates the equal protection guarantee of the Fifth

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Amendment because it is motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶ 112. To state an equal protection claim,[15] Plaintiffs must plausibly allege that the decision at issue has an adverse effect on a protected group and was motivated by discriminatory animus. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *La Union del Pueblo Entero*, 353 F. Supp. 3d at 393. They fail both prongs.

As explained above, the mere collection of administrative records does not impact anyone, let alone disparately impact Plaintiffs. *See* Argument Section I., *supra*. The Executive Order is even explicit that its goal is to "mak[e] available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population," citizens and noncitizens alike. E.O. 13880, 84 Fed. Reg. at 33822. It is only when States and localities use citizenship data produced by the Census Bureau (sometime after April 2021, if ever) that Plaintiffs would be impacted. That alone resolves their equal protection claim. *See Feeney*, 442 U.S. at 272.

But even if Plaintiffs somehow alleged an adverse effect from the collection of administrative records, they fail to allege facts plausibly suggesting discriminatory intent for this collection. *Id.* at 274. Put simply, Plaintiffs have not met their burden of plausibly

[15] "Although the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause contains an equal protection component." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 233 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 374 (2016).

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alleging that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

The Supreme Court and the Fourth Circuit have identified various factors that may be probative of whether a decisionmaker was motivated by discriminatory intent:

> (1) evidence of a "consistent pattern" of actions by the [decisionmaker] disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the [decisionmaker] . . . ; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by [the decisionmaker] on the record or in minutes of [ ] meetings.

Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 635 (4th Cir. 2016) (quoting *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995)). None of these factors favor Plaintiffs.

First, Plaintiffs have not plausibly alleged a "consistent pattern" of actions by *anyone* that disparately impacted Latinos, noncitizens, and foreign-born persons.[16] They

[16] Plaintiffs cannot maintain an equal protection claim based on "animus towards non-U.S. citizens and foreign-born persons," FAC ¶ 112, because they are not suspect classifications. The federal government makes many distinctions between citizens and noncitizens, both for privileges (such as voting, jury service, and eligibility for benefits) and for immigration laws. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001); *Moving Phones P'ship L.P. v. FCC*, 998 F.2d 1051, 1055-56 (D.C. Cir. 1993). In any event, Plaintiffs have not set forth plausible allegations of discriminatory animus toward any of their named groups.

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name only one incident, Defendants' failed inclusion of a citizenship question on the 2020 Census, as the touchstone of discriminatory motivation here. *See* FAC ¶¶ 73–84. But one event can hardly be called a "consistent pattern," especially because the attempt to include a citizenship question was enjoined and could not possibly have "disparately impact[ed] members of a particular class of persons." *Cent. Radio*, 811 F.3d at 635.

Regardless, even their allegations of that one incident are lacking. The proverbial smoking gun cited for discriminatory intent is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from redistricting based on total population to CVAP." FAC ¶ 81 ("To generate the necessary CVAP data and achieve this goal of diluting Latino representation while increasing over-representation of non-Latino Whites, Dr. Hofeller concluded that a citizenship question must be added to the 2020 census."). But there are no allegations that the sole decisionmaker with statutory authority to add a citizenship question—*i.e.*, the Secretary, *see* 13 U.S.C. § 141(f)(2)—ever read, received, or was even aware of Dr. Hofeller or his supposedly incendiary documents.[17] And those deficient allegations are still significantly

[17] At most, Plaintiffs allege that Dr. Hofeller "drafted and gave to Commerce and DOJ officials . . . the substantive content of the December 2017 DOJ letter requesting the addition of the citizenship question." FAC ¶ 82. Their allegations say nothing about the "substantive content of the December 2017 DOJ letter" including his idea to "shift from redistricting based on total population to CVAP," *id.* ¶ 81, or whether the "Commerce and DOJ officials," *id.* ¶ 82, were even aware of Dr. Hofeller's findings, let alone that they shared Dr. Hofeller's supposed motive to use CVAP redistricting for *discriminatory* purposes.

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removed from any action at issue in this case: the Secretary's collection of administrative records, and the President's facilitation of that process. So none of Plaintiffs' allegations, FAC ¶¶ 73–84, shed any light on "the decisionmaker's purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

Second and relatedly, the FAC says nothing about a discriminatory historical background surrounding any action at issue in this case. Again, the FAC's equal protection claim rests solely on insufficient allegations related to a census citizenship question, not the collection of administrative records. Plaintiffs identify no "history of discrimination by the [decisionmaker]" relevant to determining "the decisionmaker's purposes" in collecting administrative records or expediting that process. *Id.* at 267; *Cent. Radio*, 811 F.3d at 635.

Third, Plaintiffs fail to plausibly allege any departures from normal procedures such that discriminatory intent could be inferred. As explained above, the Secretary of Commerce has the statutory authority to collect data from other agencies. *See* 13 U.S.C. § 6(a). Secretaries of Commerce have long exercised this statutory authority to gather administrative records, including those on citizenship. And by the time of the Executive Order, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population." E.O. 13880, 84 Fed. Reg. at 33821–22. While Plaintiffs make oblique references to generally applicable standards of Office of Management and Budget Policy Directives, the Paperwork Reduction Act, and the

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Information Quality Act, *see* FAC ¶¶ 26–31, they nowehere explain how those guidelines apply to the collection of administrative records, how this collection violated any of those guidelines, or how the Secretary's current collection of administrative data differs from the procedures used for the last century.

Fourth, Plaintiffs do not advance any plausible allegations of "contemporary statements by [the decisionmaker]" from which discriminatory intent could be inferred. *Cent. Radio*, 811 F.3d at 635. For example, Plaintiffs cite the President's statements that the Executive Order will help "generate[] an accurate count of how many citizens, non-citizens, and illegal aliens are in the United States of America," and that citizenship data may be used by some States who "may want to draw state and local legislative districts based upon the voter-eligible population." FAC ¶¶ 62–63. Both of those sentiments were clearly expressed in the text of the Executive Order. *See* E.O. 13880, 84 Fed. Reg. at 33821–22 (noting the goal of "making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population"); *id.* at 33823 (noting that citizenship data may allow "States to design State and local legislative districts based on the population of voter-eligible citizens"). And a discriminatory purpose cannot be inferred from either. Again, Secretaries of Commerce have long collected administrative records, including those on citizenship. And the Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population." *Evenwel*, 136 S. Ct. at 1133. As the Executive Order explains, "because

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eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 13880, 84 Fed. Reg. at 33823. So, again, none of Plaintiffs' allegations raise a plausible inference of discriminatory motive to collect administrative records—a collection that some of these Plaintiffs previously advocated.

Whether examined individually or collectively, through the lens of the Fourth Circuit's factors or not, the FAC contains no facts plausibly suggesting that discriminatory intent motivated any action at issue. Plaintiffs' equal protection claim should be summarily rejected.

V. Plaintiffs' 42 U.S.C. § 1985(3) Claim Should be Dismissed

Plaintiffs also advance a claim under 42 U.S.C. § 1985(3), alleging that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to collect citizenship data and produce citizenship data for use along with the P.L. 94-171 Redistricting Data File so that states can use CVAP data to apportion state and local districts." FAC ¶ 115. This official-capacity claim fails on multiple threshold grounds and, in any event, fails to state a claim.

A. Section 1985 does not authorize courts to award injunctive relief.

Plaintiffs' conspiracy claim fails at the outset because § 1985 only authorizes courts to award damages, not the injunctive relief Plaintiffs seek here. *See id.* at 31–32 (prayer for relief). By its terms, § 1985(3) provides only that a plaintiff "may have an action *for*

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the recovery of damages . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). The statute says nothing about injunctive relief. In stark contrast, § 1985(3)'s companion provision, also enacted as part of the Ku Klux Klan Act of 1871, authorizes "action[s] at law, *suit[s] in equity*, or other proper proceeding[s] for redress." 42 U.S.C. § 1983 (emphasis added). As this comparison reveals, Congress both considered and authorized differing remedies under two statutory provisions of the same act: a violation of § 1983 may incur damages or injunction relief, while a violation of § 1985(3) can incur only damages. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Court should therefore conclude that "the statutory relief available under § 1985 'is limited to the recovery of damages'" and that, in requesting only injunctive relief, Plaintiffs' claim fails. *Tufano v. One Toms Point Lane Corp.*, 64 F. Supp. 2d 119, 133 (E.D.N.Y. 1999) (quoting *Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986), *aff'd*, 229 F.3d 1136 (2d Cir. 2000).[18]

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[18] Neither the Supreme Court nor the Fourth Circuit have decided whether § 1985(3) authorizes injunctive relief. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 n.16 (1993). Two other circuits have indicated that injunctive relief is available under § 1985(3). *See Action v. Gannon*, 450 F.2d 1227, 1237–38 (8th Cir. 1971) (en banc); *Mizell v. N. Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970). Neither case is persuasive. *Action* simply relied on *Mizell*. And *Mizell* relied on dicta in *Jones v. Alfred H.*

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B. Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

Plaintiffs' § 1985(3) claim also fails because it is barred by sovereign immunity. Sovereign immunity prohibits cases against the federal government unless Congress has unequivocally consented to suit. *United States v. Testan*, 424 U.S. 392, 399 (1976). Sovereign immunity is not limited to cases naming the United States as a defendant; it also bars cases against federal officials in their official capacities because the relief requested would run against the federal government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). Civil rights statutes like 42 U.S.C. § 1985(3) do not waive the federal government's sovereign immunity. *Unimex, Inc. v. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979). Sovereign immunity thus "bars []§ 1985(3) . . . suits brought against the United States and its officers acting in their official capacity." *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *accord Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

While a § 1985(3) suit against federal officers in their *individual capacities* might be permissible if Plaintiffs alleged that the officers acted beyond their statutory powers and that the powers themselves, or their exercise, were constitutionally void, *see Dugan v.*

Mayer Co., 392 U.S. 409, 414 (1968), and on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238–40 (1969), both of which interpreted a statute (42 U.S.C. § 1982) that—unlike § 1985(3)—confers substantive rights without specifying a remedy. By contrast, § 1985(3) is solely remedial, *see United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983), and that remedy is limited to damages.

Rank, 372 U.S. 609, 621 (1963), Plaintiffs have sued Defendants only in their official capacities, FAC ¶¶ 15–16. So their § 1985(3) claim is barred by sovereign immunity.

C. Plaintiffs fail to state a claim under § 1985(3).

Even if Plaintiffs' § 1985(3) claim were viable, their allegations are entirely conclusory and fail to state a claim. To state an actionable conspiracy under § 1985(3), Plaintiffs must allege non-conclusory facts plausibly showing:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citation omitted). Plaintiffs also must adequately allege "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights"—that is, a "joint plan[] to deprive [the plaintiff] of his constitutional rights." *Id.* at 1377. In applying these "very high" standards, *Brissett v. Paul*, 141 F.3d 1157 (4th Cir. 1998) (unpublished), the Fourth Circuit "has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy," *Simmons*, 47 F.3d at 1377. No such "sufficient facts" can be found in the FAC.

As noted above, Plaintiffs' theory seems to be, in essence, that various individuals with discriminatory animus conspired to include a citizenship question on the 2020 Census. FAC ¶¶ 73–84. The purported proof of this conspiracy is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from

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redistricting based on total population to CVAP." *Id.* ¶¶ 81, 83. Plaintiffs simply state that "[t]he same discriminatory motivation behind adding the citizenship question motivated Defendants" to seek citizenship information through administrative records. *Id.* ¶ 84. This does not come close to plausibly alleging a civil conspiracy under § 1985(3).

To begin, Plaintiffs have not alleged "an overt act committed by the defendants in connection with the conspiracy" that "results in injury to" them. *Simmons*, 47 F.3d at 1376. The only overt act Plaintiffs arguably allege is the Executive Order's facilitation of collecting citizenship data through administrative records. *Cf.* FAC ¶¶ 58, 84. But, as explained above, the mere collection of administrative records causes no harm to anyone, let alone Plaintiffs. *See* Argument Section I., *supra*.

Plaintiffs also do not attempt to allege any facts from which to infer "a specific class-based, invidiously discriminatory animus to" gather administrative records. *Simmons*, 47 F.3d at 1376. Instead, their allegations of discriminatory motive focus exclusively on the 2020 Census citizenship question; they say nothing about the motives for collecting administrative records. *See* Argument Section IV., *supra*; FAC ¶¶ 73–84.

That is fatal to not only § 1985's discriminatory-animus element, but also its meeting-of-the-minds element. *Simmons*, 47 F.3d at 1376. Plaintiffs explicitly note the purported conspirators of a discriminatory plot to include a citizenship question on the census. *See* FAC ¶ 73 ("Defendant Ross, members of the Trump Administration, A. Mark Neuman, then-Kansas Secretary of State Kris Kobach, members of the DOJ . . . and

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Republican strategist Dr. Thomas Hofeller conspired to add a citizenship question to the 2020 census."). And they piece together disparate actions of these individuals in a convoluted attempt to demonstrate this plot and its underlying motivations. *See id.* ¶¶ 73–83 (alleging, for example, that "Defendant Ross . . . coordinated with AG Sessions, other members of the DOJ, and the White House to fabricate a 'need' for the citizenship question"). But setting aside the sufficiency of those allegations on their own terms, the FAC is utterly devoid of facts demonstrating that purported conspirators reached "an agreement" or a "meeting of the minds" on a "joint plan" to gather administrative records in order to deprive Plaintiffs of their constitutional rights. *Simmons*, 47 F.3d at 1376–77.

Plaintiffs do not even plausibly allege the *members* of the purported conspiracy. They claim that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to . . . produce citizenship data for use along with the P.L. 94-171 Redistricting Data File." FAC ¶ 115. But Plaintiffs own allegations make clear that then-Attorney General Sessions, then-Assistant Attorney General Gore, then-Kansas Secretary of State Kris Kobach, and then-White House adviser Stephen Bannon were only involved, if at all, with the inclusion of a citizenship question. *See, e.g., id.* ¶¶ 74–75. None of these individuals are alleged to have been involved in the decision to collect citizenship information through administrative records. That makes sense because three of the four—Messrs. Sessions, Kobach, and Bannon—left their respective positions long before the President issued his

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Executive Order, while Mr. Gore left his position shortly thereafter.[19] And Dr. Hofeller—the author of documents at the heart of the "conspiracy" that allegedly evinced discriminatory animus—had been deceased for almost a year when the President issued his Executive Order.[20]

Plaintiffs' allegations about the remaining "conspirators"—President Trump, Defendant Ross, and Defendant Dillingham—are perfunctory, at best. Dr. Dillingham, for example, appears only in the FAC's caption, its description of parties and venue, and its conclusory causes of action. *See id.* ¶¶ 16, 20, 115–16. But no matter. As Executive Branch officials, the President, the Secretary of Commerce, and the Director of the Census Bureau are legally incapable of a § 1985(3) conspiracy. The intracorporate-conspiracy doctrine applies to § 1985(3) claims, *Buschi v. Kirven*, 775 F.2d 1240, 1251–52 (4th Cir. 1985),

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[19] Devlin Barrett, et al., *Jeff Sessions forced out as attorney general*, Washington Post (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html; Associated Press, *Kobach says he's seriously considering US Senate bid in 2020* (Jan. 19, 2019), https://apnews.com/9de85ad8578243e3aa7fbbcab28e5de0; Sam Levine, *DOJ Official Who Played Big Role In Push For Citizenship Question To Leave Trump Admin*, Huffington Post (Aug. 9, 2019), https://www.huffpost.com/entry/john-gore-leaving-doj_n_5d4d8fa0e4b09e7297459561; Andrew Rafferty, et al., *Steve Bannon Out as White House Chief Strategist*, NBC News (Aug. 18, 2017), https://www.nbcnews.com/politics/politics-news/steve-bannon-out-white-house-chief-strategist-n793921.

[20] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, New York Times (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

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and dictates that "there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). The rationale for this doctrine is that "[c]onspiracy requires an agreement . . . between or among two or more separate persons," but "[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . their acts are attributed to [the] principal," so "there has not been an agreement between two or more separate people." *Id.* Because the President, the Secretary of Commerce, and the Census Bureau's Director are all Executive Branch officers, they cannot conspire for purposes of § 1985(3). *See Ziglar*, 137 S. Ct. at 1867; *Buschi*, 775 F.2d at 1251–52.

At bottom, Plaintiffs' § 1985(3) claim "amounts to nothing more than rank speculation and conjecture." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 422 (4th Cir. 1996). Their allegations, to the extent there are any, are implausible, incomplete, and insufficient to satisfy their "weighty burden" of "establish[ing] a civil rights conspiracy." *Id.* at 421.

D. If Plaintiffs' § 1985(3) claim is viable, their APA claims should be dismissed.

If Plaintiffs may pursue an official-capacity § 1985(3) claim, then their claims under the APA must be dismissed because they have an adequate alternative remedy. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704; *see Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). Here, Plaintiffs seek nearly the same relief under the APA and § 1985(3): an order declaring illegal "Secretary

Ross's decision to follow EO 13380" and "[e]njoin[ing] Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31; *see id.* ¶¶ 88–117. If the Court allows Plaintiffs' § 1985(3) claim to proceed, and the Court has not already dismissed Plaintiffs' APA claims for the reasons explained above, then the Court should dismiss Plaintiffs' APA claims because Plaintiffs would have an "other adequate remedy in a court." 5 U.S.C. § 704.

CONCLUSION

The Court should dismiss Plaintiffs' FAC for the reasons explained above.

DATED: December 18, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DIANE KELLEHER
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
STEPHEN EHRLICH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch

b(6)

Counsel for Defendants

BC-DOC-0000028001

To: Wilbur Ross[b(6)]
Cc: Barranca, Steven (Federal)[SBarranca1@doc.gov]
From: Walsh, Michael [b(6)]
b(6)
Sent: Wed 7/22/2020 4:10:14 PM (UTC-04:00)
Subject: FW: Letter for The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce
2020-07-22.CBM to Ross re Witness Invite.pdf

From: "Foti, Anthony (Federal)" <AFoti@doc.gov>
Date: Wednesday, July 22, 2020 at 4:06 PM
To: "Brebbia, Sean (Federal)" <SBrebbia@doc.gov>, Mike Walsh <MWalsh@doc.gov>, "Kumar, Harry (Federal)" <HKumar@doc.gov>, "Olson, Stephanie (Federal)" <SOlson@doc.gov>
Subject: Fwd: Letter for The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce

See attached.

Anthony Foti
Performing the delegated duties of the
Assistant Secretary for Legislative and Intergovernmental Affairs
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230
202-482-1148
Begin forwarded message:

> **From:** "Foti, Anthony (Federal)" <AFoti@doc.gov>
> **Date:** July 22, 2020 at 4:05:40 PM EDT
> **To:** "Goss, Trinity" <Trinity.Goss@mail.house.gov>
> **Cc:** "Kim, Janet" <Janet.Kim@mail.house.gov>, "Anderson, Tori" <Tori.Anderson@mail.house.gov>, "Whitcomb, Max" <Max.Whitcomb@mail.house.gov>, "LaNier, Elisa" <Elisa.LaNier@mail.house.gov>, "MacPherson, Cameron" <Cameron.MacPherson@mail.house.gov>, "Jones, Taylor" <Taylor.Jones@mail.house.gov>, "Bush, Anthony" <Anthony.Bush@mail.house.gov>
> **Subject: Re: Letter for The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce**
>
> Thanks, Trinity. Acknowledging receipt.
>
> Anthony Foti
> Performing the delegated duties of the
> Assistant Secretary for Legislative and Intergovernmental Affairs
> U.S. Department of Commerce
> 1401 Constitution Ave, NW
> Washington, DC 20230
> 202-482-1148
>
> > On Jul 22, 2020, at 4:03 PM, Goss, Trinity <Trinity.Goss@mail.house.gov> wrote:
> >
> > Hello—
> >
> > Please see the letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to The Honorable Wilbur L. Ross, Jr., Secretary, Department of Commerce.
> >
> > Please acknowledge receipt of letter.
> >
> > Thank you,
> >
> > Trinity Goss

Trinity M. E. Goss | Executive Team Coordinator
Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform
Trinity.Goss@mail.house.gov | (202) 225-5051

CAROLYN B. MALONEY
CHAIRWOMAN

ONE HUNDRED SIXTEENTH CONGRESS

JAMES COMER
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5051
MINORITY (202) 225–5074
https://oversight.house.gov

July 22, 2020

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Secretary Ross:

Yesterday, President Trump issued a memorandum directing you to exclude undocumented immigrants from the 2020 Census apportionment calculations for the House of Representatives.[1] This action directly violates the Constitution and the laws passed by Congress, and it appears to be a blatant attempt to politicize the 2020 Census, depress participation, and undermine its accuracy. Because the Administration is taking this step in the middle of the ongoing Census, the Committee on Oversight and Reform requests that you appear for an emergency hearing on Wednesday, July 29, 2020.

Background

The President's unconstitutional memorandum comes after the Trump Administration failed in its last attempt to politicize the Census. Beginning in 2017, the Administration attempted to add an unlawful citizenship question to the 2020 Census—a decision that was struck down by the Supreme Court last year. The Administration argued repeatedly—including before this Committee—that the attempt to add the citizenship question was not for the purposes of excluding undocumented immigrants from the 2020 Census apportionment calculations.

Despite these assertions, a study written by a Republican gerrymandering expert who provided input on the Administration's effort to add the citizenship question stated that excluding undocumented immigrants from the redistricting counts "would be advantageous to Republicans and Non-Hispanic Whites."[2] After this document was made public, the Supreme Court ruled that the Administration's rationale for adding the question was "contrived" and that

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[1] The White House, *Memorandum on Excluding Illegal Aliens from the Apportionment Based Following the 2020 Census* (July 21, 2020) (online at www.documentcloud.org/documents/6999106-July-21-2020-Memorandum-On-Excluding-Illegal.html).

[2] Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting* (2015) (online at https://assets.documentcloud.org/documents/6111284/May31-2019-Unredacted-Exhibits.pdf).

the effort to add it was illegal.[3] Now, the Administration has dropped all pretense of upholding the Constitution and ensuring a fair, full, nonpartisan, and accurate census and ordered you to exclude undocumented immigrants from the 2020 Census apportionment calculations.

Even prior to the coronavirus pandemic, experts testified to the Committee that the Census Bureau was at risk of failing in critical aspects of Census preparations, which could impact the ability to conduct a complete and accurate count.[4] Since the outbreak of the pandemic, the Census Bureau has faced serious new challenges. For example, the pandemic has led to repeated delays in Census operations, leading the Bureau to push back its timeline from August 1, 2020, to October 31, 2020.[5]

Request for Hearing Testimony

The decennial census is a cornerstone of our democracy. Article I of the Constitution requires the federal government to conduct a Census every ten years and to count every person in the United States. Article I, Section 2 of the Constitution specifically assigns Congress the authority to direct the census in "in such manner as they shall by law direct."[6] Our nation's laws require that "the President shall transmit to the Congress a statement showing the whole number of persons."[7] The Supreme Court has reaffirmed the principle of counting every person.[8]

The President's memorandum violates these constitutional and statutory mandates and appears to be an attempt to sow confusion, reduce participation, and distort the count in the ongoing 2020 Census. For all these reasons, the Committee on Oversight and Reform requests your testimony at a hearing on July 29, 2020, at 10:00 a.m., in room 2154 of the Rayburn House Office Building.

The enclosed Witness Instruction Sheet provides information for witnesses appearing before the Committee. Please note the procedures for submitting written testimony at least two business days prior to the hearing. Please contact the Committee by July 24, 2020, to confirm your attendance. If you have any questions, please contact Committee staff at (202) 225-5051.

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[3] *Dept. of Commerce., v. New York*, 139 S. Ct. 2551 (2019).

[4] Committee on Oversight and Reform, *Hearing on Reaching Hard-to-Count Communities in the 2020 Census* (Jan. 9, 2020) (online at https://oversight.house.gov/legislation/hearings/reaching-hard-to-count-communities-in-the-2020-census).

[5] Census Bureau, *2020 Census Operational Adjustments Due to COVID-19* (last viewed July 21, 2020) (online at https://2020census.gov/en/news-events/operational-adjustments-covid-19.html).

[6] U.S. Const., Art. 1, sec. 2.

[7] 2 U.S.C. 2(a).

[8] *Knox v. Lee*, 79 U.S. 457 (1871); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

Sincerely,

Carolyn B. Maloney
Chairwoman

Enclosure

cc: The Honorable James R. Comer, Ranking Member

Committee on Oversight & Reform
Witness Instruction Sheet

1. Witnesses should provide their testimony, biography, and "Truth in Testimony" disclosure and certification form via email to Oversight_Clerks@mail.house.gov no later than 10:00 a.m. two business days prior to the hearing.

2. Witnesses should also provide a short biographical summary and include it with the electronic copy of testimony provided to the Clerk.

3. At the hearing, each witness will be asked to summarize his or her written testimony in five minutes or less in order to maximize the time available for discussion and questions. Written testimony will be entered into the hearing record and may extend to any reasonable length.

4. Written testimony will be made publicly available and will be posted on the Committee's website and the U.S. House of Representatives Document Repository. It is therefore recommended that personally identifiable information, such as addresses and phone numbers, not be included in the biographical information.

5. The Committee does not provide financial reimbursement for witness travel or accommodations. Witnesses with extenuating circumstances, however, may submit a written request for such reimbursements to Robin Butler, Financial Administrator, 2157 Rayburn House Office Building, at least one week prior to the hearing. Reimbursements will not be made without prior approval.

6. Witnesses with disabilities should contact Committee staff to arrange any necessary accommodations.

7. Please note that Committee Rule 16(b) requires counsel representing an individual or entity before the Committee or any of its subcommittees, whether in connection with a request, subpoena, or testimony, promptly submit a notice of appearance to the Committee. If this applies to you, please email the address above to acquire this form.

For inquiries regarding these rules and procedures, please contact the Committee on Oversight and Reform at (202) 225-5051.

Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: _____

Subcommittee: _____

Hearing Date: _____

Hearing Subject:

Witness Name: _____

Position/Title: _____

Witness Type: ○ Governmental ○ Non-governmental

Are you representing yourself or an organization? ○ Self ○ Organization

If you are representing an organization, please list what entity or entities you are representing:

If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.*

If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.*

False Statements Certification

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

_____ _____

Witness signature Date

If you are a <u>non-governmental witness</u>, please ensure that you attach the following documents to this disclosure. Check both boxes to acknowledge that you have done so.

☐ Written statement of proposed testimony

☐ Curriculum vitae

*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

From: Walsh, Michael (Federal) [MWalsh@doc.gov]
Sent: 7/21/2020 1:39:02 PM
To: Olson, Stephanie (Federal) [SOlson@doc.gov]
Subject: FW: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

From: Mike Walsh <MWalsh@doc.gov>
Date: Tuesday, July 21, 2020 at 1:20 PM
To: Karen Kelley <KKelley@doc.gov>, Dan Risko <DRisko@doc.gov>
Subject: FW: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

From: "Burris, Meghan (Federal)" <MBurris@doc.gov>
Date: Tuesday, July 21, 2020 at 1:17 PM
To:
Cc: Mike Walsh <MWalsh@doc.gov>
Subject: FW: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census



Office of the Press Secretary

FOR IMMEDIATE RELEASE

July 21, 2020

July 21, 2020

MEMORANDUM FOR THE SECRETARY OF COMMERCE

SUBJECT: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

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 Fed. Reg. 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.

DONALD J. TRUMP

###

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From: Walsh, Michael (Federal) [MWalsh@doc.gov]
Sent: 7/21/2020 1:38:44 PM
To: Kelley, Karen (Federal) [KKelley@doc.gov]; Risko, Daniel (Federal) [DRisko@doc.gov]; Olson, Stephanie (Federal) [SOlson@doc.gov]
Subject: FW: Statement from the President Regarding Apportionment

From: "Burris, Meghan (Federal)" <MBurris@doc.gov>
Date: Tuesday, July 21, 2020 at 1:38 PM
To:
Cc: Mike Walsh <MWalsh@doc.gov>
Subject: Statement from the President Regarding Apportionment



Office of the Press Secretary

FOR IMMEDIATE RELEASE

July 21, 2020

Statement from the President Regarding Apportionment

Last summer in the Rose Garden, I told the American people that I would not back down in my effort to determine the citizenship status of the United States population. Today, I am following through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census.

There used to be a time when you could proudly declare, "I am a citizen of the United States." But now, the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country. This is all part of a broader left-wing effort to erode the rights of Americans citizens, and I will not stand for it.

Today's action to exclude illegal aliens from the apportionment base reflects a better understanding of the Constitution and is consistent with the principles of our representative democracy. My Administration will not support giving congressional representation to aliens who enter or remain in the country unlawfully, because doing so would create perverse incentives and undermine our system of government. Just as we do not give political power to people who are here temporarily, we should not give political power to people who should not be here at all.

Under an Executive Order I signed last year, Federal departments and agencies have been collecting the information needed to conduct an accurate census and inform responsible decisions about public policy, voting rights, and representation in Congress. Today's action further advances this effort and is another example of my Administration's commitment to faithfully representing the citizens of the United States and putting their interests first.

###

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To: Kelley, Karen (Federal) [KKelley@doc.gov]; Risko, Daniel (Federal) [DRisko@doc.gov]
Subject: FW: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

From: "Burris, Meghan (Federal)" <MBurris@doc.gov>
Date: Tuesday, July 21, 2020 at 1:17 PM
To:
Cc: Mike Walsh <MWalsh@doc.gov>
Subject: FW: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census



Office of the Press Secretary

FOR IMMEDIATE RELEASE

July 21, 2020

July 21, 2020

MEMORANDUM FOR THE SECRETARY OF COMMERCE

SUBJECT: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

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 Fed. Reg. 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.

DONALD J. TRUMP

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From: Walsh, Michael (Federal) [MWalsh@doc.gov]
Sent: 9/19/2020 1:27:18 PM
To: b(6)
Subject: <no subject>
Attachments: OIG-20-050-M.pdf

The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census

FINAL MANAGEMENT ALERT NO. OIG-20-050-M

SEPTEMBER 18, 2020



U.S. Department of Commerce

Office of Inspector General

BC-DOC-0000028039

UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

September 18, 2020

INFORMATION MEMORANDUM FOR SECRETARY ROSS

FROM: Peggy E. Gustafson
Inspector General

SUBJECT: *The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census*
Final Management Alert No. OIG-20-050-M

On August 3, 2020, the U.S. Census Bureau (the Bureau) issued a press release announcing a decision "to accelerate" the 2020 Census.[1] Following the announced schedule acceleration, our office received several Congressional inquiries expressing concern about the expedited schedule. News articles also highlighted these changes, as did former Directors of the U.S. Census Bureau in a joint statement.

In response, beginning on August 12, 2020, we issued requests for information and notices of interviews. This is our management alert on these pressing and emerging issues that we continue to monitor.

In our review of the circumstances surrounding the accelerated 2020 Census schedule, we found the following:

I. The decision to accelerate the Census schedule was not made by the Census Bureau.

II. The accelerated schedule increases the risks to obtaining a complete and accurate 2020 Census.

We are providing a copy of the report for your review. The final report will be publicly posted on OIG's website on Monday, September 21, 2020.

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[1] U.S. Department of Commerce, U.S. Census Bureau, August 3, 2020. *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, Release Number CB20-RTQ.23. Suitland, MD: DOC Census.

If you have any questions concerning this report, please contact me at (202) 482-4661.

Attachment

cc: Karen Dunn Kelley, Deputy Secretary of Commerce
Dr. Steven Dillingham, Director, U.S. Census Bureau

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Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.

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Introduction

The U.S. Census Bureau (the Bureau) spent more than a decade planning how it would count the U.S. population in the 2020 Census. In early August 2020, those plans were significantly condensed in a matter of days, despite serious operational interruptions from the coronavirus disease 2019 (COVID-19) pandemic and warnings from senior Bureau personnel that an accelerated schedule would exacerbate risks. Ultimately, the decision to accelerate the Census schedule was not made by the Bureau.

Following the August 3, 2020, announced schedule acceleration,[1] our office received several Congressional inquiries expressing concern about the expedited schedule.[2] Specifically, we were asked "to closely monitor and assess the implications of operational 'streamlining' and changes to the [original post-COVID-19] operational plan for data quality and accuracy."[3] Our office was also asked to "examine the Bureau's efforts to uphold the highest standards for data quality and analyze whether a compressed schedule interferes with the Bureau's ability to ensure data quality."[4]

Numerous news outlets also highlighted the changes and threats to accuracy from the accelerated schedule. Further, four former Directors of the U.S. Census Bureau issued a joint statement expressing concern over the announced accelerated plan and stating that an end result will be the under-representation of certain populations.[5]

In response, we issued requests for information and notices of interviews beginning on August 12, 2020. This is our management alert on these pressing and emerging issues that we continue to monitor.

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[1] U.S. Department of Commerce, U.S. Census Bureau, August 3, 2020. *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, Release Number CB20-RTQ.23. Suitland, MD: DOC Census. Available online at https://2020census.gov/en/news-events/press-releases/delivering-complete-accurate-count.html (accessed September 15, 2020).

[2] Attached as appendix A.

[3] Vice Chair Jeanne Shaheen to Peggy E. Gustafson, August 10, 2020. *Letter from the Vice Chair of the Senate Subcommittee on Commerce, Justice, Science and Related Agencies to the Inspector General of the U.S. Department of Commerce*, p. 2. See appendix A for the complete letter.

[4] Chairman José E. Serrano to Peggy E. Gustafson, August 21, 2020. *Letter from the Chairman of the House Subcommittee on Commerce, Justice, Science, and Related Agencies to the Inspector General of the U.S. Department of Commerce*, p. 2. See appendix A for the complete letter.

[5] Vincent Barabba, Kenneth Prewitt, Robert Groves, and John Thompson, August 4, 2020. *Statement by Former U.S. Census Bureau Directors, August 4, 2020, On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve A Fair and Accurate Enumeration of the United States*. Available online at https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html (accessed September 15, 2020).

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Background

I. The Office of Inspector General

The Office of Inspector General (OIG) is an independent and objective unit which provides oversight of the programs and operations of the U.S. Department of Commerce (Department), including those of the Bureau.[6] OIG is statutorily entitled to timely access to all records of the Department,[7] and Department employees are obligated to cooperate with OIG.[8] For this management alert, which is part of our ongoing work on the 2020 Census, we reviewed documents from both the Department and the Bureau. We also interviewed senior career Bureau officials working on the 2020 Census, as well as the Director of the Bureau, Dr. Steven Dillingham. We prepared this management alert in alignment with OIG's quality control standards and the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Federal Offices of Inspector General*,[9] which require that we conduct our work with integrity, objectivity, and independence.

II. Overview of the 2020 Census

The decennial census is mandated by the Constitution of the United States. The Constitution requires the "actual Enumeration" of the "whole number of persons" every 10 years, to provide a basis to apportion representatives in the U.S. House of Representatives among the states.[10] Not only does the decennial census fulfill this critical constitutional role, but census data is used for redistricting Congressional districts, state legislative districts, and school districts.[11] Census data is also used to enforce voting rights and civil rights legislation.[12] Furthermore, the data shapes communities across the country for the next 10 years because the data is key to the appropriation of hundreds of billions of dollars in federal funds every year to local communities, as well as to the decision-making of local governments, businesses, and non-profits who need accurate data to carry out their activities.[13]

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[6] Inspector General Act of 1978, as amended (IG Act), 5 U.S.C. App. § 2.

[7] IG Act, § 6(a)(1)(A).

[8] DOC Office of the Secretary, April 26, 2013. *Inspector General*, DOO 10-13. Washington, DC: DOC OS, § 4.01.

[9] Council of the Inspectors General on Integrity and Efficiency, August 2012. *Quality Standards for Federal Offices of Inspector General*. Washington, DC: CIGIE.

[10] U.S. Const. art 1, § 2 & amend. XIV, § 2.

[11] DOC Census Bureau, December 2018. *2020 Census Operational Plan: A New Design for the 21st Century*, Version 4.0. Suitland, MD: DOC Census, p. 5. Available online at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf (accessed September 15, 2020).

[12] *Id.* at 5

[13] Census Bureau. *Importance of the Data* [online]. https://2020census.gov/en/census-data.html (accessed September 15, 2020); *2020 Census Operational Plan*, p. 5.

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Congress set by statute the deadline of December 31, 2020, for the 2020 Census tabulation of total population by states, as required for the apportionment of House representatives.[14]

To fulfill these duties, Congress delegated responsibility to conduct the decennial census to the Secretary of Commerce (Secretary), who ultimately oversees the Bureau.[15] The Bureau is headed by a Director, who is appointed by the President with the advice and consent of the U.S. Senate.[16] The Bureau's *2020 Census Operational Plan* was developed over more than a decade, with the stated goal "to count everyone once, only once, and in the right place."[17]

The 2020 Census is conducted in two phases. The first phase is *data collection*—how the Bureau counts persons and acquires characteristic information about those persons. An example of data collection is self-response, during which people respond to the 2020 Census online, by phone, or by mail.[18] An additional component of data collection is nonresponse followup (NRFU), where Bureau representatives visit households that have not already responded to the 2020 Census.[19] The second phase is *data processing*—how the Bureau takes the data it collected and converts it into accurate and usable information. This phase is sometimes referred to as "post-processing"[20] and must occur after data collection ends. As one senior Bureau official stated, if the data is not collected, "there's nothing to process." A few examples of data processing include

- resolving duplicate data,
- repairing missing or conflicting data,
- applying data codes to write-in responses to facilitate data tabulation,
- identifying and resolving potential fraudulent returns,
- identifying the return of record for housing units with multiple returns,[21]
- ensuring all addresses are reflected in the correct geography, and
- using subject matter reviews to identify errors.

One senior official described the processing stage as "vitally important to the census" and used the following illustration: "the census is a bit like sausage making. A lot of bits and pieces go into it, and they've got to be sorted and cleaned and fixed. … [T]hat's the part of

[14] See 13 U.S.C. § 141(b).

[15] 13 U.S.C. §§ 2, 4, & 141(a).

[16] *Id.* § 21(a)(1).

[17] *2020 Census Operational Plan*, sec. 2.1, p. 5.

[18] *Id.* at 208.

[19] Census Bureau. *Nonresponse Followup Completion Rates* [online]. https://2020census.gov/en/response-rates/nrfu-completion.html#:~:text=SHARE%3A,by%20returning%20their%20completed%20questionnaire (accessed September 15, 2020).

[20] *2020 Census Operational Plan*, p. 12.

[21] *Id. at* 132.

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the census that … people don't see." In sum, to produce a quality 2020 Census, both the data collection and data processing components are critical.

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Findings and Conclusion

I. The Decision to Accelerate the Census Schedule Was Not Made by the Census Bureau

On August 3, 2020, the Bureau issued a press release announcing the decision "to accelerate" the 2020 Census.[22] The schedule change was not the Bureau's decision, nor was it the first time the 2020 Census schedule had been changed. Senior officials at the Bureau, including the Director, did not know who ultimately made the decision to accelerate the Census schedule. As a consequence, this management alert does not identify the decision maker. Some Bureau officials speculated the decision came from the Department, while others thought the decision likely came from the White House. However, Bureau officials confirmed that the decision was not the Bureau's.

A. The Bureau extended the Census schedule in April 2020 to account for the COVID-19 pandemic

In response to the COVID-19 pandemic, the Bureau temporarily suspended certain 2020 Census operations in March 2020. Then, on April 13, 2020, the Department and the Bureau issued a joint statement adjusting the 2020 Census operations.[23] The statement said in part:

> In order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.
>
> Under this plan, the Census Bureau would extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021, and redistricting data to be delivered to the states no later than July 31, 2021.[24]

The language in the statement appeared to condition the extension of the data collection phase to October 31, 2020, on obtaining a statutory extension to the apportionment deadline. It noted that the Bureau "would extend the window" for data collection while seeking a 120-day statutory extension to deliver final apportionment counts.

Multiple Bureau officials confirmed that the feasibility of extending the data collection phase to October 31, 2020, was dependent on receiving statutory relief from the apportionment deadline. This is because the data collection and data processing phases

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[22] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

[23] DOC Census Bureau, April 13, 2020. *U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19*, Release Number CB20-RTQ.16. Suitland, MD: DOC Census. Available online at https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html (accessed September 15, 2020).

[24] *Id.*

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of the 2020 Census are sequential. As previously described in the Background section of this management alert, data collection must end before the data can be processed. And the time allotted for data processing cannot be truncated beyond a certain point. If the data collection phase were to extend to October 31, 2020, the time needed for the subsequent data processing phase would extend beyond the December 31, 2020, apportionment deadline, thus requiring an extension of the statutory deadline.

After the April 13, 2020, press release, Bureau officials planned to conduct data collection through October 31, 2020. They did so under the belief that a statutory extension to the apportionment date would be forthcoming because there was no resistance to the extension. One senior Bureau official stated, "we got feedback that both sides of both houses of [C]ongress were supportive." Bureau personnel also believed that the Department, and specifically the Secretary, were supportive of this approach. In fact, before the April 13 extension, the Bureau planned to request a 90-day extension, but the Secretary said they should ask for a 120-day extension to account for possible unknowns, like natural disasters.

The announced October 31, 2020, deadline for data collection shifted the Bureau's planned duration for field data collection activities to account for the COVID-19 shutdown. This shift would allow the Bureau to follow the planned operations it had spent a decade developing.

B. *It was not the Bureau's decision to accelerate the 2020 Census schedule*

From the publicized schedule extension in April through mid-July of 2020, Bureau officials continued to believe that a statutory extension to the apportionment deadline was forthcoming. Indeed, both the House of Representatives and Senate introduced legislation that would extend the apportionment deadline for the 2020 Census,[25] though only the House of Representatives passed a bill extending this deadline.[26]

By mid-July 2020, several events occurred that led Bureau officials to believe that executive and legislative branch support for a statutory extension may be in doubt. First, the Department began asking Bureau personnel questions about speeding up field operations, although it was not clear to the Bureau if the Department was motivated by accelerating the 2020 Census schedule to satisfy current statutory deadlines or simply completing necessary fieldwork before any further COVID-19 interruptions. Several Bureau officials felt this pressure from the Department. Second, the Bureau did not see continued movement in Congress to extend the statutory deadline. Third, the Office of Management and Budget (OMB) informed the Bureau that OMB was requesting supplemental appropriations from Congress for the Bureau, in part to "maintain timely delivery." The OMB request did not address the schedule extension issue, and OMB's motivation was unclear to Bureau officials. Fourth, the President issued "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census"

[25] See, e.g., Fair and Accurate Census Act, H.R. 7034, 116th Cong., § 2; Fair and Accurate Census Act, H.R. 7974, 116th Cong., § 2; Fair and Accurate Census Act, S. 4048, 116th Cong., § 2.

[26] See The Heroes Act, H.R. 6800, 116th Cong., § 70201.

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on July 21, 2020.[27] This Presidential Memorandum set forth the Administration's policy to exclude "illegal aliens" from the 2020 Census calculations that allocate Congressional representatives, and directed the Secretary to take all actions that would allow the President to carry out this policy.[28] As one senior Bureau official told our office, "I think that the Presidential Memorandum had to have played some role in -- in changing … what I would say the [A]dministration's policy is … on the deadline." Another official shared that perspective.

Despite these events in mid-July 2020, the Bureau was not told by Department personnel or external stakeholders that the statutory extension was no longer supported. Nor did the Bureau have an operational plan to meet the December 31, 2020, statutory deadline. According to a senior Bureau official, "[W]e had no plan for … accelerating the schedule at that time." As of mid-July 2020, the Bureau still viewed the statutory extension as necessary in order to conduct the 2020 Census completely and accurately. This view is consistent with previous public statements made by senior Bureau officials that the Bureau would no longer be able to meet the December 31, 2020, statutory deadline.[29]

Then, in the late afternoon of Wednesday, July 29, 2020, a senior Department official told the Bureau to put together options for meeting the apportionment deadline of December 31, 2020, and brief the Secretary on those options on Monday morning, August 3, 2020. Our office heard testimony and reviewed documents demonstrating that the Bureau worked tirelessly over the weekend to analyze its options and devise a plan for meeting the December 31, 2020, apportionment deadline. The Bureau determined that to complete both the data collection and data processing phases by the statutory deadline, it must end field data collection by September 30 instead of October 31, 2020. According to one senior Bureau official:

> [I]f you can't complete the data collection – the input to the census until the end of October, you can't deliver those apportionment counts by the legislative requirement of December 31st. You – you can't do it. There's not enough time in … November and December to put out a quality product with all of the backend processing that has to happen.

The Bureau's analysis, termed the "replan," removed some scheduled operations altogether and streamlined others, creating risks to a complete and accurate count as described below. The Bureau briefed the replan to the Secretary on August 3, 2020, as

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[27] White House, July 21, 2020. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*. Washington, DC: White House. Available online at https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (accessed September 15, 2020).

[28] *Id.* at §§ 2–3.

[29] (1) National Congress of American Indians, May 26, 2020. *2020 Census Webinar: Census Bureau Roundtable Discussion* [online]. https://www.youtube.com/watch?v=F6lyJMtDDgY (accessed September 17, 2020); and (2) U.S. Census Bureau, July 8, 2020. *Operational Press Briefing – 2020 Census Update*. Available online at https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf (accessed September 17, 2020).

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requested. It was the impression of a senior Bureau official that if the plan was feasible, it would be adopted. According to Bureau officials at the meeting, the Secretary reacted favorably to the replan and gave the impression that it should be executed. Later that day, the Bureau issued the press release announcing the acceleration of the 2020 Census schedule.[30]

The decision to accelerate the 2020 Census schedule was not made by the Bureau. Senior career officials at the Bureau perceived that this decision resulted from the Administration no longer supporting the schedule extension, but ultimately they lacked visibility into this decision process. Bureau leaders continued to believe that the statutory extension was preferable, and would give the Bureau the best chance to create a high-quality, usable census. A statutory extension would permit the Bureau to adhere, as closely as practicable, to the 2020 Census plan it developed over a decade instead of the replan it developed over a weekend. However, a senior official acknowledged, "we at the Census Bureau … were bound by the statute … in developing and executing the best possible plan to deliver the results according to the schedule set up by the [C]ongress."

A statutory extension would permit the Bureau to adhere, as closely as practicable, to the 2020 Census plan it developed over a decade instead of the replan it developed over a weekend.

II. The Accelerated Schedule Increases the Risks to Obtaining a Complete and Accurate 2020 Census

Based on our review of Bureau and Department documents, as well as interviews with senior Bureau officials, we found that the accelerated schedule increases the risks to the accuracy of the 2020 Census. This was the consensus view of the senior Bureau officials we interviewed. The accelerated replan increases risks to both phases of the 2020 Census—i.e., data collection and data processing.

A. The accelerated timeline for data collection increases risk that the Bureau may not collect sufficient data for an accurate and complete count

Under the accelerated replan, the time set aside for NRFU went from approximately 80 days to approximately 56 days.[31] Other changes to data collection included reducing certain contact attempts from six to one, such as contact attempts to housing units with conflicting information.

We found that senior Bureau officials believed that the largest risk to data collection posed by the accelerated plan was the decreased time to recover from possible external contingencies affecting local areas or regions. As one senior official put it, there is no "time to spare in the operations anymore." This risk exists despite efforts to mitigate

[30] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

[31] These numbers are approximate because some NRFU operations were started earlier under the accelerated replan. It should also be noted that the self-response option stays open until the end of data collection.

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the condensed schedule, such as awards to enumerators for increased productivity and maximizing the in-use time for devices in the field.[32] One of the biggest threats mentioned was weather—including hurricanes—and the possibility of shutdowns from COVID-19. As one senior official stated, "One of the big concerns right now obviously is whether we can get out of the field by September 30th because, you know, we don't usually do field work for the census during hurricane season. And … you do that for a reason." The senior official continued that "there's no time in the schedule to recover from a really major storm that affects a large number of … housing units." Multiple officials expressed concern about natural disasters that could prevent the completion of data collection by September 30, 2020—i.e., shutdowns in operations or in communities due to COVID-19; wildfires out West; or an earthquake.

The accelerated schedule raises risk besides the potential for natural disasters. As one official explained, the Bureau "no longer [has] the runway" of time to correct discovered errors through re-enumeration, as was necessary in the field portion of the 2010 and 2000 Censuses.

The Bureau "no longer [has] the runway" of time to correct discovered errors through re-enumeration.

As described by one **senior Bureau official**

Given this accelerated schedule, the Bureau views "resolving" or "completing" at least 99 percent of housing units in every state, at the end of data collection, to be an acceptable level of accuracy and completeness.[33] "Resolving" or "completing" a housing unit means determining: (1) whether it is in-fact a housing unit; (2) whether it is occupied or vacant; and (3) how many people live there and their basic census characteristics. The 99 percent resolution rate is based on the resolution rates achieved in the fieldwork of the 2010 and 2000 Censuses. Bureau officials expressed confidence that the Bureau could reach the 99 percent figure by the end of data collection.

[32] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

[33] DOC Census Bureau, August 17, 2020. *Review of 2020 Operational Plan Schedule*. Suitland, MD: DOC Census, p. 9. Available online at https://2020census.gov/content/dam/2020census/materials/news/2020-operational-plan-schedule-review.pdf (accessed September 15, 2020).

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Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way. If data collection ends before 99 percent completeness is met in every state, the Bureau will not achieve what it views as an acceptable level of accuracy and completeness. But, if data collection extends beyond September 30, 2020, that will either further condense an already compressed schedule for data processing—which carries its own risks—or the Bureau will miss the December 31, 2020, statutory deadline. According to several senior Bureau officials, the Bureau will miss the December 31, 2020, deadline if data collection goes beyond September 30, 2020.

Senior Bureau officials do not know what will occur if the 99 percent target is not met by September 30, 2020. If the goal is not reached by that date, a decision must be made to either continue data collection to meet 99 percent completeness in every state (and achieve an acceptable level of accuracy and completeness) or cease data collection. There are risks either way.

B. *The streamlined data processing under the accelerated plan poses a myriad of risks to accuracy and completeness*

The accelerated replan announced on August 3, 2020, "streamlined"[34] the data processing component of the 2020 Census. The Bureau determined that to meet the December 31, 2020, deadline, as the Department asked, data processing must begin October 1, 2020. That, in turn, shortened the time that the Bureau had to process the data from 150 days to 90 days. One official described the accelerated processing this way: the Bureau now has "a plan in place that would enable us to get the processing done by December 31st. The plan has taken out some operations and streamlined others. It has an element of increased risk over the plan that we've spent the decade designing." Several senior Bureau officials thought the streamlined data processing portion of the replan posed the greatest risk to the 2020 Census, with one official calling it the Bureau's "biggest concern" and "the most vulnerable to risk." One official represented that it was the consensus view of the Bureau's career staff that the accelerated processing schedule will negatively impact the accuracy of the 2020 Census. The official continued that "[o]nce you start to cut quality assurance programs … you assume that will have a negative impact on accuracy."

Senior Bureau officials identified several risks in the data processing phase. One risk is that the processing time has been so compressed that if an error is found, and a program needs to be started again, the Bureau may not be able to do so and still meet the December 31, 2020, statutory deadline. As one official explained, "all these changes squeeze out all of the … slack that was in the schedule that is there for a reason

[34] Release Number CB20-RTQ.23 (August 3, 2020, Census Bureau press release).

BC-DOC-0000028052

because we often encounter, you know, oddities … problems that need to be solved." This official gave the following overview, given that the census is only conducted once a decade:

> it's not like a lot of [the Bureau's] other processes or the data processing where [the Bureau is] doing it all the time …. So the kinks are worked out … we typically have some … instances in … processing a census where some oddities show up in the data or some errors … in coding or something like that, that … requires someone to investigate the problem, diagnose the problem, fix the thing, and then rerun, … to correct the errors … those often are not known beforehand. And so, typically when … we're done in the field in July and, you know, at worst, early August … that gives us enough time … if there are those problems, to make sure they get fixed … but what we have now for the backend schedule is staff are working weekends, holidays … the schedule is completely crashed. And if you have one of these things … it may be difficult to recover from and keep us on the critical path to getting done by 12/31.

"[T]he schedule is completely crashed."
As described by one **senior Bureau official**

In addition, certain planned data processing reviews have been shortened or removed entirely. One official described the risks from the streamlined processing this way: "the processes … that were … abbreviated or eliminated were things that the Census Bureau had developed and put into plan … because it in fact … makes the census more accurate." The official continued that those reviewers are people who are "very intimately … knowledgeable of the data, … and not just the data in the sort of a general processing sense, but many of those reviews take place with people who are very close … to the small area data." Such reviews have in the past helped the Bureau gain geographic accuracy. The senior official warned that while the Bureau does not expect one of the eliminated reviews to find many errors, that review did find errors in the 2000 and 2010 Censuses.

III. Conclusion

The COVID-19 pandemic prevented the Bureau from implementing its decade of planning for the 2020 Census. The April 2020 extension to the 2020 Census schedule acknowledged these realities and attempted to mitigate for lost time. However, we found that when that schedule was subsequently accelerated in August 2020, the decision came from outside the Bureau and further increased the risks to the accuracy and completeness of the 2020 Census.

BC-DOC-0000028053

Appendix A: Related Congressional Correspondence

RICHARD C. SHELBY, ALABAMA, CHAIRMAN
MITCH MCCONNELL, KENTUCKY
LAMAR ALEXANDER, TENNESSEE
SUSAN M. COLLINS, MAINE
LISA MURKOWSKI, ALASKA
LINDSEY GRAHAM, SOUTH CAROLINA
ROY BLUNT, MISSOURI
JERRY MORAN, KANSAS
JOHN HOEVEN, NORTH DAKOTA
JOHN BOOZMAN, ARKANSAS
SHELLEY MOORE CAPITO, WEST VIRGINIA
JOHN KENNEDY, LOUISIANA
CINDY HYDE-SMITH, MISSISSIPPI
STEVE DAINES, MONTANA
MARCO RUBIO, FLORIDA
JAMES LANKFORD, OKLAHOMA
PATRICK J. LEAHY, VERMONT
PATTY MURRAY, WASHINGTON
DIANNE FEINSTEIN, CALIFORNIA
RICHARD J. DURBIN, ILLINOIS
JACK REED, RHODE ISLAND
JON TESTER, MONTANA
TOM UDALL, NEW MEXICO
JEANNE SHAHEEN, NEW HAMPSHIRE
JEFF MERKLEY, OREGON
CHRISTOPHER A. COONS, DELAWARE
BRIAN SCHATZ, HAWAII
TAMMY BALDWIN, WISCONSIN
CHRIS MURPHY, CONNECTICUT
JOE MANCHIN, WEST VIRGINIA
CHRIS VAN HOLLEN, MARYLAND
SHANNON HUTCHERSON HINES, STAFF DIRECTOR
CHARLES E. KIEFFER, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025
http://appropriations.senate.gov

August 10, 2020

Inspector General Peggy E. Gustafson
U.S. Department of Commerce
Office of the Inspector General
1401 Constitution Ave. NW
Washington, DC 20230

Dear Inspector General Gustafson:

I write to express my concerns about the U.S. Census Bureau's expedited schedule for 2020 Decennial Census data collection and processing operations announced in an August 3, 2020, statement.[1] I am very worried that the rushed schedule will lead to a significant undercount in hard-to-count communities, which puts the accuracy and quality of the Constitutionally-mandated count at risk. Further, I believe that this deviation in schedule is driven not by expert opinions of career Census Bureau employees but by external pressure from the White House and the Department of Commerce for perceived political gain. I request that you investigate whether the decision to expedite operations comports with the statutory requirements under title 13, U.S. Code. I also ask that as the data collection and processing operations unfold, you continue to monitor and assess changes from both the original and April 2020 pandemic-adjusted Decennial Census operational plans and schedules that might impact data quality and, ultimately, the accuracy of the results.

The COVID-19 pandemic has understandably necessitated modification of the original 2020 Decennial Census schedule. The largest and most important field data collection operation, nonresponse followup, was originally scheduled to take place from May 13 to July 31, 2020. However, due to the pandemic, Census Bureau Director Steven Dillingham and Secretary of Commerce Wilbur Ross released a joint statement on April 13, 2020, announcing that the Census Bureau would delay field operations, including nonresponse followup, by three months to protect public health. The release states: "The Census Bureau would extend the window for field data collection and self-response to October 31, 2020."[2] As part of the statement, Secretary Ross and Director Dillingham also requested a four-month delay in the statutory deadlines for reporting apportionment and redistricting counts to no later than April 30, 2021, and July 31, 2021, respectively.

[1] "Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count," U.S. Census Bureau, 3 August 2020, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html.
[2] "U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19," U.S. Census Bureau, 13 April 2020, https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020.

BC-DOC-0000028054

However, over the past several weeks it was widely reported in the press that the Trump Administration was looking to rush 2020 Decennial Census operations in order to allow the Secretary of Commerce to transmit the apportionment counts to the president by December 31, 2020.[3] Then, on August 3, 2020, Director Dillingham announced that field data collection and self-response operations will be shortened by a month, ending on September 30, 2020. I fear that compressing these critical operations will force the Census Bureau to reduce the number of attempts to enumerate households and significantly increase the use of administrative records, proxy interviews and whole household imputations. The greater use of enumeration methods that are known to produce less reliable data could lead to a substantial undercount, especially in historically hard-to-count communities.

Director Dillingham also announced that data processing operations will be "streamlined." This clearly suggests that quality check, data processing and external review operations, which were originally expected to take about five months, will have to be compressed by several months and curtailed to meet the December 31, 2020, deadline. Given that most data collection operations will occur long after the April 1, 2020, Census Day due to pandemic-related disruptions and delay, careful quality check and data processing activities will be particularly important to ensure that individuals are counted in the correct location and duplicates are removed.

Previous statements from career Census Bureau leadership lead me to believe that this new, rushed schedule is not based on the need to execute a complete and accurate count, but instead on external pressure. For the past several months, Census Bureau experts consistently have made clear that additional time provided by delaying the statutory deadlines is needed for a successful count. In May, Tim Olson, director of field operations for the 2020 Decennial, stated, "We have passed the point where we could even meet the current legislative requirement of Dec. 31…We can't do that anymore."[4] In July, Albert Fontenot, Jr., associate director for Decennial Census Programs, said in reference to the statutory deadlines, "We are past the window of being able to get those counts by those dates at this point."[5] Further, Bureau experts believe that the results of accelerating the data collection operations under current conditions could be disastrous. An unnamed career official stated, "I'm very fearful we're going to have a massive undercount."[6]

It is critical that the Census Bureau execute a complete and accurate 2020 Decennial Census for the purposes of apportionment of the House of Representatives, as well as distribution of $1.5 trillion annually in Federal funding to States, localities, individuals and businesses. I request that the Department of Commerce (DOC) Office of Inspector General

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[3] Wines, M. (2020, July 28). New Census Worry: A Rushed Count Could Mean a Botched One. *New York Times*, https://www.nytimes.com/2020/07/28/us/trump-census.html

[4] Lo Wang, H. (2020, May 27). 'We're Running Out Of Time': Census Turns To Congress To Push Deadlines. *National Public Radio*, https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/863290458/we-re-running-out-of-time-census-turns-to-congress-to-push-deadlines

[5] Lo Wang, H. (2020, July 28) Republicans Signal They're Willing To Cut Census Counting Short, *National Public Radio*, https://www.npr.org/2020/07/28/895744449/republicans-signal-theyre-willing-to-cut-short-census-counting

[6] Lo Wang, H. (2020, July 30). Census Door Knocking Cut A Month Short Amid Pressure To Finish Count. *National Public Radio*, https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals

BC-DOC-0000028055

(OIG) investigate whether compressing data collection and processing operations comports with the relevant statutory requirements, as well as traditional lines of authority for making relevant decisions governing the execution of the Decennial Census. Further, I request that the OIG continue to closely monitor and assess the implications of operational "streamlining" and changes to the April 13, 2020, Decennial Census operational plan for data quality and accuracy. I ask that you report periodically on your findings to the Senate and House Committees on Appropriations, the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs.

The OIG plays a crucial role in informing Congress and the public of Census Bureau operations. The OIG has received $3,556,000 in each of fiscal years 2019 and 2020 by transfer from the Census Bureau to carry out investigations and audits related to the 2020 Decennial Census. I appreciate the work of the OIG thus far to help improve the planning, execution and outcome of the Census. I expect DOC employees to fully cooperate and assist the OIG, in this, and all other investigative matters. I request that you keep me and my staff informed of any attempts to prevent you from completing your work in direct contravention of the Inspector General Act of 1978. I look forward to the results of your investigation.

Sincerely,

Jeanne Shaheen
Vice Chair
Subcommittee on Commerce,
Justice, Science and Related Agencies

BC-DOC-0000028056

NITA M. LOWEY, NEW YORK, Chairwoman
MARCY KAPTUR, OHIO
PETER J. VISCLOSKY, INDIANA
JOSE E. SERRANO, NEW YORK
ROSA L. DELAURO, CONNECTICUT
DAVID E. PRICE, NORTH CAROLINA
LUCILLE ROYBAL-ALLARD, CALIFORNIA
SANFORD D. BISHOP, JR., GEORGIA
BARBARA LEE, CALIFORNIA
BETTY MCCOLLUM, MINNESOTA
TIM RYAN, OHIO
C. A. DUTCH RUPPERSBERGER, MARYLAND
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HENRY CUELLAR, TEXAS
CHELLIE PINGREE, MAINE
MIKE QUIGLEY, ILLINOIS
DEREK KILMER, WASHINGTON
MATT CARTWRIGHT, PENNSYLVANIA
GRACE MENG, NEW YORK
MARK POCAN, WISCONSIN
KATHERINE M. CLARK, MASSACHUSETTS
PETE AGUILAR, CALIFORNIA
LOIS FRANKEL, FLORIDA
CHERI BUSTOS, ILLINOIS
BONNIE WATSON COLEMAN, NEW JERSEY
BRENDA L. LAWRENCE, MICHIGAN
NORMA J. TORRES, CALIFORNIA
CHARLIE CRIST, FLORIDA
ANN KIRKPATRICK, ARIZONA
ED CASE, HAWAII

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

KAY GRANGER, TEXAS
HAROLD ROGERS, KENTUCKY
ROBERT B. ADERHOLT, ALABAMA
MICHAEL K. SIMPSON, IDAHO
JOHN R. CARTER, TEXAS
KEN CALVERT, CALIFORNIA
TOM COLE, OKLAHOMA
MARIO DIAZ-BALART, FLORIDA
TOM GRAVES, GEORGIA
STEVE WOMACK, ARKANSAS
JEFF FORTENBERRY, NEBRASKA
CHUCK FLEISCHMANN, TENNESSEE
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ANDY HARRIS, MARYLAND
MARTHA ROBY, ALABAMA
MARK E. AMODEI, NEVADA
CHRIS STEWART, UTAH
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DAN NEWHOUSE, WASHINGTON
JOHN R. MOOLENAAR, MICHIGAN
JOHN H. RUTHERFORD, FLORIDA
WILL HURD, TEXAS

SHALANDA YOUNG
CLERK AND STAFF DIRECTOR
(202) 225-2771

August 21, 2020

Inspector General Peggy E. Gustafson
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, D.C. 20230

Dear Inspector General Gustafson:

I write to express my deep concerns regarding the Department of Commerce's conduct around the 2020 Decennial Census operation and potential external pressures to expedite the U.S. Census Bureau's ("the Bureau") schedule outside of the recommendations of senior career professional staff. I request the Office of Inspector General (OIG) examine the timing and justification for decisions around the various schedules consistent with your authorities under the Office of Inspector General Act of 1978.

Several actions taken by the Department in the past several weeks raise serious concerns about the integrity and accuracy of the 2020 Census. For example, due to the challenges resulting from the novel coronavirus pandemic in early 2020, the Associate Director of Decennial Census Programs and the Associate Director of Field Operations repeatedly informed congressional staff on weekly phone calls that the Bureau would need to continue its field operations, specifically Non-Response Follow-up, until October 31, 2020 to ensure an accurate count and to ensure the health and safety of those conducting the enumeration as well as the public. Further, these career staff communicated that it was simply no longer possible for the Bureau to finish its operations and report initial results by the December 31, 2020 statutory deadline. However, despite the rising number of coronavirus cases this summer and passage by the House of Representatives of a measure that would allow for statutory deadline extensions[1], as initially requested by the Department, it is my understanding that the Secretary subsequently requested that the Bureau develop a new plan to comply with statutory deadlines. This request was made only after the

[1] The House of Representatives took immediate action and included this request to shift the decennial statutory deadlines as part of the HEROES Act (H.R. 6800, Sec. 70201). Additionally, the HEROES Act included an additional $400 million to allow the Bureau to address any additional issues that may arise through the remainder of the 2020 Decennial Census operation.

BC-DOC-0000028057

arrival of two new political appointees in mid-July and the issuance of the Presidential Memorandum on July 21, 2020. The revised plan abandons the Department's prior proposal for legislative relief that would result in a four-month delay in the completion of the 2020 Decennial Census[2]. Additionally, as part of this new effort, the Administration communicated a $1 billion supplemental funding request to support this expedited schedule. However, this communication was sent only to Majority staff of the Senate Appropriations Committee, rather than to all relevant House and Senate Appropriations staff.

It appears that in the three months after the House passage of a statutory extension and the arrival of now three[3] new political appointees, rather than working with the Senate to support the legislative action taken by the House, the Administration opted to work on a plan to unnecessarily expedite the Bureau's revised schedule, against the recommendations of senior career staff.

I would like to further note that the compressed schedule will also force a shortened timeframe for data processing, ultimately cutting that time in half, compared to both the Bureau's original and initial revised plans. I am gravely concerned that a compressed timeline will greatly impact the quality of data used to ensure an accurate and complete count which will inform congressional apportionments, legislative redistricting, and future Federal spending. It is deeply troubling that this Administration appears to be politicizing the Bureau's operation – one that was a decade in the making. These actions jeopardize our ability to ensure an accurate count, especially for hard-to-count communities.

I request that the Office of Inspector General review: the process used to arrive at the revised schedule announced on August 3rd, 2020 to ensure the proposed changes were and are absent political considerations, whether these changes were made after intervention from political appointees at the Department or from individuals employed at the White House, and if partisan influence impacted communications with Congress about these proposed changes and associated funding needs. Additionally, I request that the OIG examine the Bureau's efforts to uphold the highest standards for data quality and analyze whether a compressed schedule interferes with the Bureau's ability to ensure data quality. Lastly, I request that the OIG determine whether any violations of law, regulation, or policy occurred as a result of actions taken at the Department concerning the 2020 Census since July 1, 2020.

Thank you for your attention to this important matter. I appreciate the work the OIG has done toward ensuring transparency in the 2020 Decennial operation and trust that DOC employees will assist you in your investigation. However, I would ask that you swiftly notify us if there are any attempts to contravene your efforts. I further ask that you periodically update the House and

[2] Under 13 USC 141(b), the Secretary of Commerce is required to complete and report to the President within 9 months after the decennial census date (defined as the first day of April) the tabulation of the total population by State as required for apportionment of the Representatives in Congress among the several States. The legislation requested by the Administration in early April 2020 extended that deadline for the 2020 Census to 13 months after the census date of April 1, 2020.

[3] Lo Wang, H. (2020, August 17). Amid Partisan Concerns Another Trump Appointee Joins Census Bureau Top Ranks. *National Public Radio*, https://www.npr.org/2020/08/17/903229947/amid-partisan-concerns-another-trump-appointee-joins-census-bureaus-top-ranks.

BC-DOC-0000028058

Senate Committees on Appropriations, as well as the House Oversight and Reform and Senate Homeland Security and Governmental Affairs Committees on your findings.

Sincerely,

José E. Serrano
Chairman
Subcommittee on Commerce, Justice, Science, and Related Agencies

BC-DOC-0000028059

From: Walsh, Michael (Federal) [MWalsh@doc.gov]
Sent: 4/19/2020 4:21:49 PM
To: Wilbur Ross b(6) b(6)
Subject: DRAFT - first two slides
Attachments: Cover Page 4-19.docx

DELIBERATIVE AND PREDECISIONAL

Attached is a draft of the first two pages. We have the backup material and are compiling it now.

Please note that Cabinet Affairs says the meeting may move to **Tuesday**. I will let you know when I hear for sure.

To: Walsh, Michael (Federal) b(6)
Cc: Keller, Catherine (Federal) b(6)
From: Kourkoumelis, Aristidis (Federal) b(6)
b(6)
Sent: Wed 9/16/2020 2:33:41 PM (UTC-04:00)
Subject: Edits to MOU AWP/PRIV
DRAFT MOU Mod Example - MW + AK.docx
DRAFT MOU Mod Example - MW + AK.pdf

CUI/PRIV/AWP/DRAFT

Mike - Converted the doc to word for easier editing. Attached please find a draft with the proposed edits in tracked changes. Additionally, I converted the tracked changes into a PDF in case you needed to view them on your phone.

Thank you,
Aris

Aristidis (Aris) Kourkoumelis | Senior Counsel
Office of the General Counsel
U.S. Department of Commerce
M: b(6)

-----Original Message-----
From: Walsh, Michael (Federal) <MWalsh@doc.gov>
Sent: Wednesday, September 16, 2020 12:54 PM
To: Kourkoumelis, Aristidis (Federal) <AKourkoumelis@doc.gov>
Cc: Keller, Catherine (Federal) <CKeller@doc.gov>
Subject: FW: Scan from b(6)

From: Tucker, Caroline (Federal) [CTucker@doc.gov]
Sent: 4/13/2020 7:07:47 PM
To: Ahmad, Ali M [ali.m.ahmad@census.gov]
CC: Gorey, Lauren (Federal) [LGorey@doc.gov]; Davis, Caitlin (Federal) [CDavis4@doc.gov]; Paranzino, Anthony (Federal) [AParanzino@doc.gov]; Risko, Daniel (Federal) [DRisko@doc.gov]; Walsh, Michael (Federal) [MWalsh@doc.gov]; Cook, Michael C [michael.c.cook@census.gov]; Quinley, Kevin [kevin.quinley@census.gov]; Stanley, Christopher J [christopher.j.stanley@census.gov]
Subject: NPR: Trump Officials Ask To Delay Census Data For Voting Districts, House Seats

Trump Officials Ask To Delay Census Data For Voting Districts, House Seats

By Hansi Lo Wang | April 13, 2020 6:57 PM

--

With the coronavirus pandemic disrupting plans for the ongoing 2020 census, the Trump administration is asking Congress to pass a new law that would change major deadlines that determine the distribution of political representation and federal funding for the next decade.

The Census Bureau is requesting that lawmakers extend the legal deadline for the bureau to deliver to the president new state population counts used to redistribute congressional seats and Electoral College votes among the states — by four months to April 30, 2021 from Dec. 31, according to a statement released Monday by Census Bureau Director Steven Dillingham and Commerce Secretary Wilbur Ross, who oversees the bureau.

The bureau is also asking Congress to give it four more months to provide census data to state redistricting officials in order to redraw voting districts around the country. That deadline would move from March 31, 2021 to July 31, 2021.

If approved, the request could throw a wrench into redistricting plans in many states. New Jersey and Virginia are set to redraw legislative districts next year before their filing deadline for elections in 2021, according to the National Conference of State Legislatures.

More than 70 million households across the U.S. have already participated in the constitutionally mandated head count, but that's only about half of those expected to respond on their own.

Others still may need to be counted by a census worker in person, but the bureau announced on Monday it's planning to further postpone census field operations until June 1 and to extend counting to Oct. 31, according to an updated schedule.

Michael Cook, the chief spokesperson for the bureau, tells NPR in an email that it is the agency's "assessment" that continuing to count the country's population through the end of October means it cannot meet the current legal deadlines for delivering the apportionment count to the president and redistricting data to the states.

The bureau's plans were first made public Monday by Rep. Carolyn Maloney (D-N.Y.), who chairs the House Oversight and Reform Committee.

In a press release describing a phone call Ross held with some members of Congress about the plans, Maloney says the committee "will carefully examine" the request to change the census deadlines, while also criticizing the administration for not providing more information and not allowing Dillingham, the bureau's director, to brief the committee about its plans in response to the pandemic.

"If the Administration is trying to avoid the perception of politicizing the Census, preventing the Census Director from briefing the Committee and then excluding him from a call organized by the White House are not encouraging moves," Maloney said in the written statement. "The Constitution charges Congress with determining how the Census is conducted, so we need the Administration to cooperate with our requests so we can make informed decisions on behalf of the American people."

According to the House oversight committee's press release, Ross "acknowledged that the Administration had not sought input from Congress about this request in advance of this call because of concerns about leaks to the press."

Asked by NPR why no Census Bureau officials participated in the call, Cook responded in an email that Dillingham now plans to speak with members of Congress "as soon as possible," noting: "The Secretary of Commerce is statutorily delegated responsibility to conduct the decennial census and took the role of calling key congressional leaders to continue the consultation process."

The bureau's changes for the 2020 census were supported by Vanita Gupta, president and CEO of The Leadership Conference on Civil and Human Rights, one of the main groups advocating for participation in the count.

"If it's not safe to have census takers visiting people's homes by June, then Congress has an obligation to consider other options to protect census workers and the communities they serve, and to ensure an equitable count," Gupta said in a statement. "We cannot afford to compromise the health of our communities or the fairness and accuracy of the census."

From: Tucker, Caroline (Federal)
Sent: Monday, April 13, 2020 6:55 PM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Cc: Gorey, Lauren (Federal) <LGorey@doc.gov>; Davis, Caitlin (Federal) <CDavis4@doc.gov>; Paranzino, Anthony (Federal) <AParanzino@doc.gov>; Risko, Daniel (Federal) <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: RE: WSJ: Census Extends 2020 Count

Thank you! FYSA, AP story is on Drudge

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Monday, April 13, 2020 6:54 PM
To: Tucker, Caroline (Federal) <CTucker@doc.gov>
Cc: Gorey, Lauren (Federal) <LGorey@doc.gov>; Davis, Caitlin (Federal) <CDavis4@doc.gov>; Paranzino, Anthony (Federal) <AParanzino@doc.gov>; Risko, Daniel (Federal) <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: Re: WSJ: Census Extends 2020 Count

Remarks from President Trump about the 2020 Census during the administration's daily coronavirus briefing:

During this difficult time, we are also working to ensure that the 2020 Census is completed as safely and accurately. We may be asking for an extension because obviously they can't be doing very much right now. They wouldn't even be allowed to do it, so the census – we're going to be asking for a delay – a major delay, I think, how can you possibly be knocking on doors for a long period of time.

The Census Bureau recently made the decision to temporary suspend its field operation data collection activities to help stop the spread. In addition, while millions of Americans continue to complete their questionnaire online, the Census Bureau is asking Congress for a 120-day extension – I don't even know if 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 it. I think 120 days isn't nearly enough.

Link: https://twitter.com/QuickTake/status/1249830218220613632

On Apr 13, 2020, at 6:39 PM, Tucker, Caroline (Federal) <CTucker@doc.gov> wrote:

Thanks, Ali! The president touched on this during his briefing just now so I will pass along any further mentions that spawn from that as well.

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Monday, April 13, 2020 6:36 PM
To: Tucker, Caroline (Federal) <CTucker@doc.gov>
Cc: Gorey, Lauren (Federal) <LGorey@doc.gov>; Davis, Caitlin (Federal) <CDavis4@doc.gov>; Paranzino, Anthony (Federal) <AParanzino@doc.gov>; Risko, Daniel (Federal) <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: Re: WSJ: Census Extends 2020 Count

b(5) - DP

And just wanted to make sure you all had these-

Statements are posted at the links below. Operational timeline page is also updated at the link below.

https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020.html

https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html

https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (May Need To Refresh yourCache)

On Apr 13, 2020, at 6:33 PM, Tucker, Caroline (Federal) <CTucker@doc.gov> wrote:

Census Extends 2020 Count
U.S. Census Bureau to ask Congress for extra 120 days to deliver apportionment figures
By Janet Adamy & Paul Overberg | April 13, 2020 5:57 PM
--
The U.S. Census Bureau said Monday it will further delay this year's decennial count and ask Congress for an extra 120 days to deliver final apportionment figures as the coronavirus pandemic impedes its field work.

The count that got under way in the middle of March was originally scheduled to end July 31. By law the bureau has to send state population totals to the president by Dec. 31.

Social-distancing restrictions forced the bureau to delay field operations, such as hand delivery of millions of invitations and hiring of certain temporary workers, starting in late March. The bureau had already stretched its completion date into the middle of August.

On Monday, it took those delays a step further. The bureau said it plans to extend the window for Americans to respond until Oct. 31, and will seek congressional approval to deliver the population totals to the president by April 30, 2021. Redistricting data would be delivered to the states no later than July 31, 2021.

Rep. Carolyn B. Maloney, the New York Democrat who chairs the House Committee on Oversight and Reform, said the committee will carefully examine the administration's request but that it needs information the administration has been unwilling to provide. She said the administration was preventing Census Bureau Director Steven Dillingham from briefing members of her committee.

The Commerce Department didn't immediately comment on her assertion.

Census results will determine which states gain and lose congressional seats and electoral votes after fall elections, and are used to distribute at least $675 billion annually in government funding. Experts said the delay puts the 2020 census in uncharted territory.

"Congress should do the deep dive necessary to determine whether the proposed extension of all major counting operations puts historically undercounted populations at even greater risk of inaccurate results," said Terri Ann Lowenthal, a private consultant on census issues in Stamford, Conn. "Then it can decide if delaying the reporting deadlines for the transfer of political power is the best option."

As of Sunday, 48.1% of more than 140 million households that had been invited to self-respond had done so. The bureau expected 60.5% would do so by the end of July.

Most Americans received their invitation to respond in mid-March, but some are still waiting for theirs. Census workers were pulled off the streets just as they began delivering census forms in person to more than 9 million homes. Many of the homes are in rural or tribal areas and don't receive mail at home.

The bureau also had just begun training hundreds of thousands of workers who will be needed this summer to visit tens of millions of households that haven't responded to the census.

The bureau said it hoped to restart field operations by June 1.

From: Tucker, Caroline (Federal)
Sent: Monday, April 13, 2020 6:31 PM
To: Gorey, Lauren <LGorey@doc.gov>; Davis, Caitlin <CDavis4@doc.gov>; Paranzino, Anthony <AParanzino@doc.gov>; Risko, Daniel <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Ahmad, Ali M <ali.m.ahmad@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: New York Times: Knocked Off Track by Coronavirus, Census Announces Delay in 2020 Count

Knocked Off Track by Coronavirus, Census Announces Delay in 2020 Count
The Census Bureau said it would extend the deadlines for collecting census data and would ask Congress for a delay in providing final counts used for congressional redistricting.
By Michael Wines | April 13, 2020 5:59 PM
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WASHINGTON — Conceding that its effort to count the nation's population has been hamstrung by the coronavirus pandemic, the Census Bureau said on Monday it would ask Congress for a four-month delay in delivering the census data used to reapportion the House of Representatives and political districts nationwide.

In a news release, the bureau said the new April deadline would mean that state legislatures would get final population figures for drawing new maps as late as July 31, 2021. Delivery of that data normally is completed by the end of March.

The bureau also said it would extend the deadline for collecting census data, now Aug. 15, to Oct. 31, and would begin reopening its field offices — which have been shuttered since mid-March — sometime after June 1.

Democrats who oversee census operations in the House Oversight and Reform Committee reacted cautiously to the news, which they said was relayed early Monday to a handful of members of Congress in a telephone call with officials from the White House and the Commerce Department. The director of the census, Steven Dillingham, apparently did not participate in the call.

"The oversight committee will carefully examine the administration's request, but we need more information than the administration has been willing to provide," the committee's chairwoman, Representative Carolyn B. Maloney of New York, said in a statement.

"If the administration is trying to avoid the perception of politicizing the census, preventing the census director from briefing the committee and then excluding him from a call organized by the White House are not encouraging moves."

The 2020 head count has been mired in controversy since 2017, when the administration tried to amend the census questionnaire to count the number of noncitizens, which was widely seen as an effort to give Republicans a political edge in next year's redistricting. Many experts also have expressed fears that the administration's harsh anti-immigrant policies and rhetoric would deter minorities from filling out census forms, leading to an undercount that also would work to Republicans' benefit.

Census officials have said that response to the census — the first to be conducted largely over the internet — had been meeting expectations. But the bureau already had been forced once to extend the shutdown of field operations that it first announced in March. Efforts to count millions of households in specialized segments of the population — homeless people and those without fixed addresses, such as Native Americans on reservations — have been in limbo, awaiting the bureau's decision when it would be safe to begin or resume them.

From: Tucker, Caroline (Federal)
Sent: Monday, April 13, 2020 6:27 PM
To: Gorey, Lauren <LGorey@doc.gov>; Davis, Caitlin <CDavis4@doc.gov>; Paranzino, Anthony <AParanzino@doc.gov>; Risko, Daniel <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Ahmad, Ali M <ali.m.ahmad@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: Bloomberg: Census Count Delayed by Three Months Because of Coronavirus

Census Count Delayed by Three Months Because of Coronavirus
By Erik Wasson | April 13, 2020 5:21 PM
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The once-per-decade U.S. census will be delayed by at least three months, the Commerce Department told Congress on Monday, as the coronavirus pandemic hinders in-person data collection from households.

Commerce Secretary Wilbur Ross announced field operations will be delayed until June 1, and that in turn would delay completion of the count until Oct. 31. He asked Congress Monday to grant his department a 120-day extension of statutory deadlines as a result of the outbreak. A leading House Democrat said Congress will consider the request.

The 2020 Census will be used to determine the apportionment of seats in the U.S. House of Representatives and the distribution of federal tax revenue to the states. The Census said in a statement that under its plan, apportionment counts would be finished by April 30, 2021, instead of Dec. 31 and redistricting data would be delivered to the states by July 31, 2021, instead of March 31, 2021.

"The Oversight Committee will carefully examine the administration's request, but we need more information that the administration has been unwilling to provide," House Oversight Chairwoman Carolyn Maloney, a New York Democrat, said in a statement. "The Constitution charges Congress with determining how the Census is conducted, so we need the administration to cooperate with our requests so we can make informed decisions on behalf of the American people."

The Census Bureau temporarily suspended field data collection activities in March because of the outbreak and said Monday that 70 million households, some 48% of the total, have already responded to the questionnaire.

This year's count was already the subject of a pitched battle over Ross's attempt to add a citizenship question to the form. Democrats said the Trump administration was attempting to intimidate undocumented immigrants into failing to respond to the census, which could lead to an undercount. The attempt was abandoned in the wake of court challenges.

From: Tucker, Caroline (Federal)
Sent: Monday, April 13, 2020 6:25 PM
To: Gorey, Lauren <LGorey@doc.gov>; Davis, Caitlin <CDavis4@doc.gov>; Paranzino, Anthony <AParanzino@doc.gov>; Risko, Daniel <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Ahmad, Ali M <ali.m.ahmad@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: Reuters: U.S. Census will ramp up count June 1, results delayed four months due to coronavirus

U.S. Census will ramp up count June 1, results delayed four months due to coronavirus
By Diane Bartz | April 13, 2020 6:02 PM
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The Census Bureau, which stopped some of its work last month because of the new coronavirus, said on Monday that it planned to ramp up again beginning on June 1 but would need more time to complete the count.

The Census Bureau, which is under the Commerce Department and counts all Americans every 10 years, suspended field collection in March but is planning to re-start on June 1, according to a statement from Commerce Secretary Wilbur Ross and Bureau Director Steven Dillingham.

The bureau also said that it would ask Congress for permission to delay its work by 120 days. This would mean that it would complete data collection by Oct. 31 and release state populations by April 30, 2021. Redistricting data would be given to states by July 31, 2021. The survey determines how the state legislatures draw voting districts during the next round of redistricting and guides the federal government in allocating $1.5 trillion a year in aid.

"In-person activities, including all interaction with the public, enumeration, office work and processing activities, will incorporate the most current guidance to promote the health and safety of staff and the public," the statement said.

The bureau also said that 70 million households have responded, or about 48%.

From: Tucker, Caroline (Federal)
Sent: Monday, April 13, 2020 6:22 PM
To: Gorey, Lauren <LGorey@doc.gov>; Davis, Caitlin <CDavis4@doc.gov>; Paranzino, Anthony <AParanzino@doc.gov>; Risko, Daniel <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; 'Ali Mohammad Ahmad (CENSUS/ADCOM FED)' <ali.m.ahmad@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: The Hill: Trump wants Congress to delay Census deadlines amid pandemic

Trump wants Congress to delay Census deadlines amid pandemic
By Olivia Beavers | April 13, 2020 5:52 PM
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The Trump administration is asking Congress to push back statutory deadlines for the 2020 Census amid the coronavirus outbreak.

Rep. Carolyn Maloney (D-N.Y.), chairwoman of the House Oversight and Reform Committee, said Commerce Secretary Wilbur Ross told her in a phone call Monday that he wants Congress to pass legislation to delay by four months the deadline for providing the decennial count to the president, pushing it from Dec. 31 to April 30.

"In order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts," the Commerce Department said in an announcement Monday.

The agency, which oversees the Census Bureau, is also asking Congress to delay the March 31 deadline for providing redistricting data to the states, with a new deadline of July 31.

If Congress agrees, Ross would need to notify states that may require their own legislation for postponement, according to Maloney's office.

The Census attempts to count every person living in the U.S. and its territories through questionnaires in order to provide key data to lawmakers, school districts and others about how many people live in certain areas. The count is mandated under the Constitution and helps to determine where federal funding for roads, schools, fire departments and more. It also determines the number of seats each state will have in the House.

The announcement comes after the Commerce Department said it has received responses from more than 70 million households, or 48 percent of all U.S. households.

Maloney, who emphasized that she is committed to a complete and accurate Census count, said her committee "will carefully" consider the deadline request. But she added that lawmakers "need more information that the Administration has been unwilling to provide."

In particular, she took issue with the White House arranging the Ross call without participation from any Census officials, including the director. She added that the Trump administration has declined repeated requests for him to brief members of the panel since they first asked for one on March 23.

"If the Administration is trying to avoid the perception of politicizing the Census, preventing the Census Director from briefing the Committee and then excluding him from a call organized by the White House are not encouraging moves," Maloney said in a statement. "The Constitution charges Congress with determining how the Census is conducted, so we need the Administration to cooperate with our requests so we can make informed decisions on behalf of the American people."

She said Monday's call included administration officials like Ross, Director of the White House Office of Legislative Affairs Eric Ueland, Deputy Director of the Office of Management and Budget Russ Vought and senior adviser to the White House Chief of Staff John Fleming.

From: Tucker, Caroline (Federal)
Sent: Monday, April 13, 2020 6:19 PM
To: Gorey, Lauren <LGorey@doc.gov>; Davis, Caitlin <CDavis4@doc.gov>; Paranzino, Anthony <AParanzino@doc.gov>; Risko, Daniel <DRisko@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; Cook, Michael C <michael.c.cook@census.gov>; Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>; Quinley, Kevin <kevin.quinley@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>
Subject: Politico: Trump admin requests delays in census deadlines

Trump admin requests delays in census deadlines
The coronavirus has made it difficult to conduct the decennial count.
By Matthew Choi | April 13, 2020 5:29 PM
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The Trump administration is moving to delay some deadlines for the 2020 census due to coronavirus, including delivering data to states for congressional redistricting.

The Census Bureau is requesting Congress allow a 120-day delay on some data-reporting deadlines, according to a joint statement Monday by Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham. The delay would accommodate social distancing guidelines for workers to prevent the spread of the disease.

The bureau had already canceled field work in March as numerous states across the country ordered people to stay in their homes.

The lag in counting could lead to a delay in data necessary for forming congressional districts, the bureau argued. In response, the Trump administration requested to delay the deadline to deliver apportionment counts to President Donald Trump from December to April of next year.

Rep. Carolyn B. Maloney, chairwoman of the House Oversight Committee, said Monday that the committee would consider the request, but that the Trump administration was stonewalling in providing information vital in assessing the move.

Dillingham was not on the call to the committee requesting the deadline changes, Maloney (D-N.Y.) said in a statement. The committee has repeatedly requested a briefing with Dillingham but has not been able to secure one, Maloney said.

"If the Administration is trying to avoid the perception of politicizing the Census, preventing the Census Director from briefing the Committee and then excluding him from a call organized by the White House are not encouraging moves," Maloney said in the release.

This year's census has already been fraught with partisan drama after Ross pushed for a question asking respondents' citizenship. Critics argued that doing could discourage undocumented immigrants from responding, leading to under-representation in Congress. The Supreme Court deemed the citizenship question illegal last summer.

Over 70 million people, or 48 percent of American households, have already responded to the census, according to Ross' and Dillingham's statement.

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b(6)

Federal Register
Vol. 84, No. 136
Tuesday, July 16, 2019

Presidential Documents

Title 3—

The President

Executive Order 13880 of July 11, 2019

Collecting Information About Citizenship Status in Connection With the Decennial Census

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. *Purpose.* In *Department of Commerce* v. *New York,* No. 18–966 (June 27, 2019), the Supreme Court held that the Department of Commerce (Department) may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census and, more specifically, declined to hold that the Secretary of Commerce's decision to include such a question on the 2020 decennial census was ''substantively invalid.'' That ruling was not surprising, given that every decennial census from 1820 to 2000 (with the single exception of 1840) asked at least some respondents about their citizenship status or place of birth. In addition, the Census Bureau has inquired since 2005 about citizenship on the American Community Survey—a separate questionnaire sent annually to about 2.5 percent of households.

The Court determined, however, that the explanation the Department had provided for including such a question on the census was, in the circumstances of that case, insufficient to support the Department's decision. I disagree with the Court's ruling, because I believe that the Department's decision was fully supported by the rationale presented on the record before the Supreme Court.

The Court's ruling, however, has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire. After examining every possible alternative, the Attorney General and the Secretary of Commerce have informed me that the logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the question on the 2020 decennial census.

Nevertheless, we shall ensure that accurate citizenship data is compiled in connection with the census by other means. To achieve that goal, I have determined that it is imperative that all executive departments and agencies (agencies) provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective. When the Secretary of Commerce decided to include the citizenship question on the census, he determined that such a question, in combination with administrative records, would provide the most accurate and complete data. At that 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. At that point, the benefits of using administrative records were limited because the Department had not yet been able to access several additional important sets of records with critical information on citizenship. Under the Secretary of Commerce's decision memorandum directing the Census Bureau ''to further enhance its administrative record data sets'' and ''to obtain as many additional Federal and state administrative records as possible,'' the Department has sought access to several such sets of records maintained by other agencies, but it remains in negotiations to secure access.

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The executive action I am taking today will ensure that the Department will have access to all available records in time for use in conjunction with the census.

Therefore, to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department, I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.

Access to the additional data identified in section 3 of this order will ensure that administrative records provide more accurate and complete citizenship data than was previously available.

I am also ordering the establishment of an interagency working group to improve access to administrative records, with a goal of making available to the Department administrative records showing citizenship data for 100 percent of the population. And I am ordering the Secretary of Commerce to consider mechanisms for ensuring that the Department's existing data-gathering efforts expand the collection of citizenship data in the future.

Finally, I am directing the Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship.

Ensuring that the Department has available the best data on citizenship that administrative records can provide, consistent with law, is important for multiple reasons, including the following.

First, data on the number of citizens and aliens in the country is needed to help us understand the effects of immigration on our country and to inform policymakers considering basic decisions about immigration policy. The Census Bureau has long maintained that citizenship data is one of the statistics that is ''essential for agencies and policy makers setting and evaluating immigration policies and laws.''

Today, an accurate understanding of the number of citizens and the number of aliens in the country is central to any effort to reevaluate immigration policy. The United States has not fundamentally restructured its immigration system since 1965. I have explained many times that our outdated immigration laws no longer meet contemporary needs. My Administration is committed to modernizing immigration laws and policies, but the effort to undertake any fundamental reevaluation of immigration policy is hampered when we do not have the most complete data about the number of citizens and non-citizens in the country. If we are to undertake a genuine overhaul of our immigration laws and evaluate policies for encouraging the assimilation of immigrants, one of the basic informational building blocks we should know is how many non-citizens there are in the country.

Second, the lack of complete data on numbers of citizens and aliens hinders the Federal Government's ability to implement specific programs and to evaluate policy proposals for changes in those programs. For example, the lack of such data limits our ability to evaluate policies concerning certain public benefits programs. It remains the immigration policy of the United States, as embodied in statutes passed by the Congress, that ''aliens within the Nation's borders [should] not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations'' and that ''the availability of public benefits [should] not constitute an incentive for immigration to the United States'' (8 U.S.C. 1601(2)). The Congress has identified compelling Government interests in restricting public benefits ''in order to assure that aliens be self-reliant in accordance with national immigration policy'' and ''to remove the incentive for illegal immigration provided by the availability of public benefits'' (8 U.S.C. 1601(5), (6)).

Accordingly, aliens are restricted from eligibility for many public benefits. With limited exceptions, aliens are ineligible to receive supplemental security income or food stamps (8 U.S.C. 1612(a)). Aliens who are ''qualified aliens''—that is, lawful permanent residents, persons granted asylum, and certain

other legal immigrants—are, with limited exceptions, ineligible to receive benefits through Temporary Assistance for Needy Families, Medicaid, and State Children's Health Insurance Program for 5 years after entry into the United States (8 U.S.C. 1613(a)). Aliens who are not ''qualified aliens,'' such as those unlawfully present, are generally ineligible for Federal benefits and for State and local benefits (8 U.S.C. 1611(a), 1621(a)).

The lack of accurate information about the total citizen population makes it difficult to plan for annual expenditures on certain benefits programs. And the lack of accurate and complete data concerning the alien population makes it extremely difficult to evaluate the potential effects of proposals to alter the eligibility rules for public benefits.

Third, data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country. Data tabulating both the overall population and the citizen population could be combined with records of aliens lawfully present in the country to generate an estimate of the aggregate number of aliens unlawfully present in each State. Currently, the Department of Homeland Security generates an annual estimate of the number of illegal aliens residing in the United States, but its usefulness is limited by the deficiencies of the citizenship data collected through the American Community Survey alone, which includes substantial margins of error because it is distributed to such a small percentage of the population.

Academic researchers have also been unable to develop useful and reliable numbers of our illegal alien population using currently available data. A 2018 study by researchers at Yale University estimated that the illegal alien population totaled between 16.2 million and 29.5 million. Its modeling put the likely number at about double the conventional estimate. The fact is that we simply do not know how many citizens, non-citizens, and illegal aliens are living in the United States.

Accurate and complete data on the illegal alien population would be useful for the Federal Government in evaluating many policy proposals. When Members of Congress propose various forms of protected status for classes of unauthorized immigrants, for example, the full implications of such proposals can be properly evaluated only with accurate information about the overall number of unauthorized aliens potentially at issue. Similarly, such information is needed to inform debate about legislative proposals to enhance enforcement of immigration laws and effectuate duly issued removal orders.

The Federal Government's need for a more accurate count of illegal aliens in the country is only made more acute by the recent massive influx of illegal immigrants at our southern border. In Proclamation 9822 of November 9, 2018 (Addressing Mass Migration Through the Southern Border of the United States), I explained that our immigration and asylum system remains in crisis as a consequence of the mass migration of aliens across our southern border. As a result of our broken asylum laws, hundreds of thousands of aliens who entered the country illegally have been released into the interior of the United States pending the outcome of their removal proceedings. But because of the massive backlog of cases, hearing dates are sometimes set years in the future and the adjudication process often takes years to complete. Aliens not in custody routinely fail to appear in court and, even if they do appear, fail to comply with removal orders. There are more than 1 million illegal aliens who have been issued final removal orders from immigration judges and yet remain at-large in the United States.

Efforts to find solutions that address the immense number of unauthorized aliens living in our country should start with accurate information that allows us to understand the true scope of the problem.

Fourth, it may be open to States to design State and local legislative districts based on the population of voter-eligible citizens. In *Evenwel* v. *Abbott,* 136 S. Ct. 1120 (2016), the Supreme Court left open the question whether ''States may draw districts to equalize voter-eligible population rather than

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total population.'' Some States, such as Texas, have argued that ''jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline—including total population and voter-eligible population—so long as the choice is rational and not invidiously discriminatory''. Some courts, based on Supreme Court precedent, have agreed that State districting plans may exclude individuals who are ineligible to vote. Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population. But because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population.

The Department has said that if the officers or public bodies having initial responsibility for the legislative districting in each State indicate a need for tabulations of citizenship data, the Census Bureau will make a design change to make such information available. I understand that some State officials are interested in such data for districting purposes. This order will assist the Department in securing the most accurate and complete citizenship data so that it can respond to such requests from the States.

To be clear, generating accurate data concerning the total number of citizens, non-citizens, and illegal aliens in the country has nothing to do with enforcing immigration laws against particular individuals. It is important, instead, for making broad policy determinations. Information obtained by the Department in connection with the census through requests for administrative records under 13 U.S.C. 6 shall be used solely to produce statistics and is subject to confidentiality protections under Title 13 of the United States Code. Information subject to confidentiality protections under Title 13 may not, and shall not, be used to bring immigration enforcement actions against particular individuals. Under my Administration, the data confidentiality protections in Title 13 shall be fully respected.

Sec. 2. *Policy*. It is the policy of the United States to develop complete and accurate data on the number of citizens, non-citizens, and illegal aliens in the country. Such data is necessary to understand the effects of immigration on the country, and to inform policymakers in setting and evaluating immigration policies and laws, including evaluating proposals to address the current crisis in illegal immigration.

Sec. 3. *Assistance to the Department of Commerce and Maximizing Citizenship Data*. (a) All agencies shall promptly provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens, non-citizens, and illegal aliens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective. In particular, the following agencies shall examine relevant legal authorities and, to the maximum extent consistent with law, provide access to the following records:

(i) Department of Homeland Security, United States Citizenship and Immigration Services—National-level file of Lawful Permanent Residents, Naturalizations;

(ii) Department of Homeland Security, Immigration and Customs Enforcement—F1 & M1 Nonimmigrant Visas;

(iii) Department of Homeland Security—National-level file of Customs and Border Arrival/Departure transaction data;

(iv) Department of Homeland Security and Department of State, Worldwide Refugee and Asylum Processing System—Refugee and Asylum visas;

(v) Department of State—National-level passport application data;

(vi) Social Security Administration—Master Beneficiary Records; and

(vii) Department of Health and Human Services—CMS Medicaid and CHIP Information System.

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(b) The Secretary of Commerce shall instruct the Director of the Census Bureau to establish an interagency working group to coordinate efforts, consistent with law, to maximize the availability of administrative records in connection with the census, with the goal of obtaining administrative records that can help establish citizenship status for 100 percent of the population. The Director of the Census Bureau shall chair the working group, and the head of each agency shall designate a representative to the working group upon request from the working group chair.

(c) To ensure that the Federal Government continues to collect the most accurate information available concerning citizenship going forward, the Secretary of Commerce shall consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census and to consider any regulatory changes necessary to ensure that citizenship data is collected in any other surveys and data-gathering efforts conducted by the Census Bureau, including the American Community Survey. The Secretary of Commerce shall also consider expanding the distribution of the American Community Survey, which currently reaches approximately 2.5 percent of households, to secure better citizenship data.

(d) The Department shall strengthen its efforts, consistent with law, to gain access to relevant State administrative records.

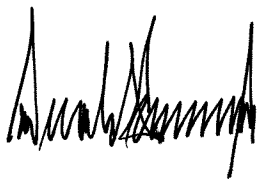
Sec. 4. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(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 order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order 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,
July 11, 2019.

[FR Doc. 2019–15222
Filed 7–15–19; 8:45 am]
Billing code 3295–F9–P

BC-DOC-0000028080

PRESIDENTIAL MEMORANDA

Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

IMMIGRATION

Issued on: **July 21, 2020**

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MEMORANDUM FOR THE SECRETARY OF COMMERCE

SUBJECT: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

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

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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. A ording 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

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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 e orts 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 Fed. Reg. 5525 (Feb. 8, 2018).

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise a ect:

(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 O ice 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.

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(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 o icers, employees, or agents, or any other person.

DONALD J. TRUMP

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From: Olson, Stephanie (Federal) [SOlson@doc.gov]
Sent: 3/31/2020 1:34:16 PM
To: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: CUI//PRIV FW: Def-Int Expert Report
Attachments: Expert Report of D. Sunshine Hillygus dated March 13, 2020.pdf; 2020-03-13 - AL v. Commerce - Rule 26(a)(2) Disclosure - Kimball W. Brace.pdf; Martinez Intervenors - Expert Report of Douglas Massey 3-13-2020.pdf;

b(5) - WP

CUI//PRIV

Hi Mike,

FYSA, please see the Defendant-Intervenor's expert reports in the AL case. I've also attached Brian's b(5) - AC/WP/DP

b(5) - AC/WP/DP

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

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, and DIANA MARTINEZ, et al., Defendant-Intervenors, COUNTY OF SANTA CLARA, CALIFORNIA, et al., Defendant-Intervenors, and STATE OF NEW YORK, et al., Defendant-Intervenors.	Civil Action No. 2:18-cv-00772-RDP

SWORN DECLARATION AND EXPERT REPORT OF D. SUNSHINE HILLYGUS

Sworn Declaration and Expert Report of D. Sunshine Hillygus

I. Qualifications

I am a Professor of Political Science and Public Policy at Duke University. I earned a Ph.D. in political science from Stanford University in 2003. From 2003-2009, I was a faculty member at Harvard University in the Department of Government. In 2009, I joined the faculty at Duke University as an associate professor and was promoted to full professor in 2015.

I have more than 20 years of experience in survey design, implementation, and analysis. Of relevance to this report, I have published research on the topics of census participation, survey methodology, survey non-response, and data quality. This work has been funded by the National Science Foundation and published in respected academic journals including *Public Opinion Quarterly*, *Journal of Survey Statistics and Methodology*, *Statistical Science*, *Political Analysis*, and *Annals of Applied Statistics*. I am co-author of *The Hard Count: The Political and Social Challenges of Census Mobilization*.[1] My other experience of relevance includes serving as associate principal investigator of the American National Election Study, on the editorial boards of several academic journals, and as director of the Initiative on Survey Methodology at Duke University. I was also founding director of the Program on Survey Research at Harvard University. From 2012-2018, I served as a member of the Census Scientific Advisory Committee (the "CSAC"), a committee that advises the director of the U.S. Census Bureau (the "Census Bureau") on the uses of scientific developments in statistical data collection, survey methodology, geospatial and statistical analysis, econometrics, cognitive psychology, business operations, and computer science as they pertain to the full range of Census Bureau programs and activities, including census tests, policies, and operations.

[1] Hillygus, D.S., Nie, N.H., Prewitt, K. & Pals, H. (2006). *The hard count: The political and social challenges of census mobilization*, Russell Sage Foundation, New York.

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I have previously served as an expert witness *in League of Women Voters of North Carolina, et al. v. North Carolina, et al.*, No. 1:13-CV-00660-TDS-JEP (M.D.N.C.); *State of New York, et al., v. United States Department of Commerce, et al.*, No. 18-CV-2921-JMF (S.D.N.Y.); and *NAACP, et al. v. Bureau of the Census*, No. 18-CV-891-PWG (D. Md.). A copy of my curriculum vitae is attached.

II. Retainer Information and Summary of Opinions

Defendant-Intervenors in this action, and Martinez Intervenors in the cross claim brought against the federal government, retained me to evaluate (1) the claims made by Dr. Dudley Poston in his expert report for the State of Alabama ("Alabama" or "Plaintiff") that inclusion of undocumented immigrants[2] in the total population for apportionment after the 2020 decennial count will cause a loss of one congressional seat in the U.S. House of Representatives (the "House") for Alabama, whereas exclusion of undocumented immigrants from the apportionment count will result in Alabama retaining seven seats; and (2) whether exclusion of undocumented immigrants from the 2020 apportionment count is possible. My compensation in this case is $350 per hour.[3]

Based on the knowledge I have amassed over my education, training, and experience, as well as a detailed review of government and academic research, data, and reports, I have reached the following opinions:

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[2] For the purposes of this report, I use the term "undocumented immigrant" to include foreign-born non-citizens that reside in the U.S. but do not have formal legal status. Pew Research Center refers to these individuals as "unauthorized immigrants." I recognize that those with Deferred Action for Childhood Arrivals, or some other form of lawful presence, may or may not be categorized as undocumented immigrants, depending on the context. I offer no opinion as to the legal significance of these various classifications.

[3] To formulate an expert opinion in this case, I reviewed a variety of materials from academic, governmental, legal, and media sources, *see* References, including the Complaint for Declaratory Relief and the exhibits in the Depositions of Karen Battle on January 16, 2020 and March 2, 2020 in *Alabama et al. v. United States Department of Commerce et al.*, No. 2:18-cv-00772-RDP (N.D. Al. 2018). Moreover, I relied on my own experiences and familiarity with survey practices and standards and Census Bureau programs and activities.

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First, Dr. Poston does not demonstrate, to any degree of reasonable certainty, that Alabama will (a) lose a congressional seat because of the inclusion of undocumented immigrants in the 2020 apportionment count, or (b) maintain a congressional seat because of the exclusion of undocumented immigrants in the 2020 apportionment count.

Second, there is no reliable way to exclude undocumented immigrants from the 2020 apportionment count because (a) there is currently no reliable methodology or data product that the Census Bureau may use to do so; (b) no administrative records are of sufficient quality to use to exclude undocumented immigrants from the 2020 apportionment count; and (c) the nature, scope, and methodology of the statistical modeling needed to produce estimates of the undocumented population is fundamentally different from the statistical modeling currently used in producing the apportionment population, and would result in a less accurate and reliable enumeration.

In this report, I first provide background with respect to the Census Bureau's relevant responsibilities and standards, as related to the apportionment count. I then explain why Dr. Poston's methodology, data, and key conclusions are unreliable, and cannot be used to demonstrate that Alabama will likely lose a congressional seat because of the inclusion of undocumented immigrants in the 2020 apportionment count, or maintain a congressional seat if undocumented immigrants are excluded from the 2020 apportionment count. Finally, I explain why I conclude that there is currently no feasible way to reliably exclude undocumented immigrants from the apportionment count.[4]

III. Relevant Background

A. The Census Bureau's Relevant Responsibilities

[4] I am not an attorney and my references to constitutional and statutory provisions and court cases are for the purposes of providing factual context.

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Article 1, Section 2 of the U.S. Constitution requires that an "actual enumeration" of the population be taken every 10 years for the purpose of apportioning seats in the House among the states, with the provision that each state must have at least one Representative. The 14th Amendment 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."

The Census Bureau has the responsibility of both counting the population in the decennial census, and using the results to calculate the number of House seats each state is entitled to have based on that population count. The Census Bureau counts all people (citizens and foreign-born immigrants) who are living in the state at the time of the census.[5] This total resident population, along with the overseas federal employees and their dependents, make up the apportionment population count for each state. To count all people, the Census Bureau uses a multi-part process that starts with (1) creating the Master Address File (the "MAF")—a database containing every known housing unit in the country, then (2) asking every household in the MAF to self-respond with information about their household, followed by (3) employing the Non-Response Follow-up (the "NRFU") operation, which attempts to enumerate all non-responding households through an in-person visit,[6] and, finally, (4) applying count imputation to any remaining uncounted households to estimate the number of household members using information from neighboring households. By law, the Census Bureau must submit the apportionment count to the President within nine months of the census date. For the 2020 Census, the census date is April 1, 2020, and the President will receive the counts by December 31, 2020.

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[5] Immigrants, called "foreign-born" by the Census Bureau, include naturalized U.S. citizens, lawful permanent residents, temporary migrants (such as foreign students), refugees and asylees, and undocumented immigrants.

[6] If a household is not enumerated after one visit, administrative records will be used to enumerate the household in those cases in which multiple, high-quality records are available. If administrative records cannot be used, at least two more in-person visits are attempted before the household becomes eligible to be enumerated through a proxy, such as a neighbor or landlord.

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Since 1940, the Census Bureau has used the Equal Proportions Method to allocate the number of Representatives among the states—after each state is assigned the one seat it is entitled to receive, the remaining 385 seats are assigned sequentially, on the basis of a list of descending "priority values" that are calculated based on each state's share of the total U.S. population.[7] Because apportionment is based on population size relative to other states, under- or over- counting the population in one state has implications for the fair distribution of representation among all states.[8]

Within one year of the census date—April 1, 2021 for the 2020 Census—the Census Bureau is also required to make redistricting data available to the states. Whereas the apportionment count is produced using the Census Unedited File (the "CUF"), the redistricting data products are produced using the Census Edited File (the "CEF"), which applies characteristic imputation—statistically imputing missing or conflicting information about the people in the household (i.e., race, ethnicity, age, date of birth, sex, tenure, and relationship).[9] The redistricting data are also altered to meet the confidentiality requirements of Title 13 of the United States Code.[10]

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[7] This method ensures that no additional transfer of a seat (from one state to another) will reduce the ratio between the numbers of persons per representative in any two states. For more detail, *see* https://www.census.gov/population/apportionment/about/faq.html and https://www.census.gov/population/apportionment/about/computing.html.

[8] Prewitt, K. (2010). The US decennial census: Politics and political science. Annual Review of Political Science, 13, 237-254.

[9] The total resident population count in the CUF and CEF has applied count imputation—an estimate of the number of household members—for the limited number of households not enumerated in the decennial count. In 2010, count imputation accounted for only 0.39% of the total population. 2020 Census Operational Plan: A New Design for the 21st Census, v. 4. (December 2018), available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf.

[10] The data are processed through the disclosure avoidance system that injects noise into the estimates, creating uncertainty in the numbers to protect confidentiality. *See* https://www.census.gov/newsroom/blogs/research-matters/2018/08/protecting_the_confi0.html.

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Neither the CUF nor the CEF has information about the citizenship or legal status[11] of the population.

Following President Trump's July 2019 Executive Order 13880,[12] the Census Bureau plans to use administrative records to separately produce data on block-level Citizen Voting-Age Population ("CVAP data" or "CVAP") by race and ethnicity.[13] As of the date of this report, the methodology to produce this data product is still under development.[14]

B. The Census Bureau's Quality Standards

The Census Bureau has formal standards for data quality governing all information products and the processes that generate them.[15] These guidelines require that all information collected and disseminated by the Census Bureau be designed to ensure and maximize the utility, objectivity, and integrity of the information. *Utility* or "fitness of use" refers to the "usefulness of the information for its intended users;" *objectivity* means the information is "accurate, reliable, and unbiased, and is presented in an accurate, clear, complete, and unbiased manner;" and *integrity* refers to the security of the information, including protection of such information from unauthorized access or revision.[16]

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[11] For the purposes of this report, I use the term "legal status" to encompass determinations of whether individuals are immigrants with formal legal status, or immigrants without formal legal status. I offer no opinion as to the legal significance of these various classifications.

[12] *See* 84 Fed. Reg. 33,821 (July 11, 2019).

[13] *See* https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_Post2020_Census_documentation_v5.pdf?. The Census Bureau previously provided CVAP tables annually from each year's most recent 5-year American Community Survey ("ACS") data. The Post-2020 Census CVAP Special Tabulation will replace CVAP tables based on the ACS that would have been released in February 2021. A census block is the smallest geographic unit used by the Census Bureau. Census blocks are defined by geographic features, such as roads, so they vary in the exact number of households they contain—many contain no population. More than 11 million census blocks were enumerated in 2010. *See* https://transition.fcc.gov/form477/Geo/more_about_census_blocks.pdf.

[14] *See* https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap/Post-2020-CVAP.html.

[15] *See* U.S. Census Bureau Statistical Quality Standards (July 2013), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf. These standards were established to incorporate and adhere to Policy Directive No. 1 of the Office of Management and Budget ("OMB"). *See* https://www.govinfo.gov/content/pkg/FR-2014-12-02/pdf/2014-28326.pdf.

[16] *See* U.S. Census Bureau Statistical Quality Standards (July 2013), i-ii.

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These formal standards govern the Census Bureau's mission to "count everyone once, only once, and in the right place" in the decennial census.[17] Critically, objectivity refers not only to the overall accuracy of the information, but also to distributional accuracy—a complete and accurate count across geography and population subgroups so that the proportional distribution of the population is correct.[18] If the Census Bureau misses more people living in one state than another, the census count is not only inaccurate, it is will also be unfair for apportionment in violation of both the utility and objectivity quality standards.

IV. Dr. Poston's Data, Methodology and Key Conclusions Are Not Credible.

Dr. Poston opines that in 2020, Alabama will receive six seats if undocumented persons are included in the apportionment count, compared to seven seats if undocumented persons are excluded from the apportionment count.[19] To reach these opinions, Dr. Poston's analysis hypothetically apportions congressional seats for all states using a projected 2020 total population count, and then compares the results to a hypothetical apportionment of congressional seats using a 2020 projected population count that excludes undocumented persons.[20] Dr. Poston's conclusions depend on: (1) projections of total population numbers of each state (including the overseas population) in 2020 based on 2010 Census Bureau apportionment counts, and 2018 and 2019 Census Bureau population estimates; and (2) projections of the population of undocumented immigrants in each state in 2020 based on estimates in 2016 of the undocumented immigrant population from Pew Research Center ("Pew"), an independent American think tank founded in 2004 by pollster Andrew Kohut.

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[17] *See* https://www.census.gov/programs-surveys/decennial-census/about/why.html.
[18] Prewitt, K. (2010). The US decennial census: Politics and political science. *Annual Review of Political Science*, 13, 237-254.
[19] Sworn Declaration & Expert Report of Dudley L. Poston, Jr., Ph.D. (January 23, 2020) (the "Poston Report"), 3.
[20] Poston Report.

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Dr. Poston's overall conclusions, methodology, and underlying data are unreliable. Dr. Poston fails to acknowledge massive uncertainty in his estimates, and he relies on flawed assumptions that are likely to bias his results. Statisticians and demographers readily acknowledge that projections of future populations figures can be unreliable.[21] Projection outside of known data requires assumptions that should be validated. Dr. Poston, however, fails to assess the reasonableness of the modeling and data assumptions that he makes.[22]

Moreover, Dr. Poston ignores the uncertainty in his estimates, in violation of basic statistical principles. All modeled estimates, like the projections Dr. Poston advances in his report, have uncertainty, which is a quantification of accuracy and precision, placing confidence limits, or bounds, on modeled estimates. Such uncertainty is especially critical to acknowledge in the context of apportionment because apportionment outcomes are sensitive to small changes in population counts. Statisticians have called this issue "the apportionment problem"— that very small inaccuracies in a state population can change the number of representatives received—and have shown this to be an "inescapable property of any method of apportionment that is a function of population."[23] This means that predictions about apportionment outcomes are often wrong given the difficulty of precisely projecting population. For example, prior to the 1990 Census, the Census Bureau correctly predicted only three of the five eventual seat

[21] Skerry, P. (2000). Counting on the census? Race, group identity, and the evasion of politics (Vol. 56). Brookings Institution Press, 131.
[22] For review of various approaches, *see* Hyndman, R. J., & Athanasopoulos, G. (2018). Forecasting: principles and practice. OTexts. A key assumption is the time frame that informs the forward projection, e.g., 2010-2018 versus 2017 to 2018. The other key assumption is the modeling of the trend, whether linear or exponential, for example.
[23] Keyfitz, N. (1979). Information and allocation: two uses of the 1980 census. *The American Statistician*, 33, 45-50. It is highly unlikely, but theoretically possible, that the omission of a single person from a state population could result in the loss of a representative. On the other hand, an omission of 100,000 persons would have a one in five chance of depriving that state of a representative.

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changes.[24] The Census Bureau 2009 population estimates similarly did not predict all of the 12 seats gained and 12 seats lost.[25]

Below, I discuss in more detail the significant flaws in each of Dr. Poston's projections, and then explain how these errors contribute to massive uncertainty in his estimates, and result in unreliable and unconvincing conclusions.

A. Dr. Poston's Data and Methodology for Projecting Total Population Counts Are Flawed.

In projecting total population numbers for each state in 2020, Dr. Poston starts with Census Bureau population estimates for each state from July 2018, and, in his supplemental report, from July 2019.[26] In contrast to the actual enumeration that the Census Bureau conducts in each decennial census, these yearly population estimates from the Census Bureau are statistically modeled—i.e., they are adjustments to the decennial count made to attempt to account for births, deaths, and migration.[27] These population estimates can differ significantly from census counts, most notably because of the difficulty of estimating net international migration.[28]

Dr. Poston then assumes, without evidence, that each state's population will grow or decline in population at the same average annual rate between 2018 (or 2019 in the supplemental report) and 2020 as it did between 2010 to 2018 (or 2019 in the supplemental report).[29]

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[24] According to Skerry (2000), 131.
[25] *See* https://www.psc.isr.umich.edu/dis/census/Features/apportionment/apportion_estimates.html.
[26] *See* Poston Report, 14; Supplement to Sworn Declaration & Expert Report of Dudley L. Poston, Jr., Ph.D. (Jan. 28, 2020) ("Poston Supplementary Report"), 3.
[27] *See* https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2010-2018/2018-natstcopr-meth.pdf?#.
[28] In 1980 and 2000, for example, the population estimated underestimated relative to the census count by more than 2 percentage points. Tiffany Yowell and Jason Devine. (July 2013, Revised May 2014). Evaluating Current and Alternative Methods to Produce 2010 County Population Estimates, U.S. Census Bureau, https://www.census.gov/population/www/documentation/twps0100/E2%20County%20Totals_FINAL.pdf.
[29] Poston report, 14; Poston Supplementary Report, 3.

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However, documentation of significant geographic and temporal variability in population change by the Census Bureau indicate that this is a flawed assumption. With respect to geography, there has been wide variability in population growth patterns across states within the decade; for example, the Census Bureau reports that, from 2010 to 2019, states have seen changes in total population growth and loss ranging from a 3.3% loss in population (West Virginia) to a 16% growth in population (Utah).[30] With respect to time, the nation's overall population growth rate, for instance, has slowed over the course of the decade.[31] And there is temporal variation in the population growth across states. For example, the state of New York saw population growth from 2010 until 2015, but population loss in the years since; in contrast, the state of Texas has seen population growth.[32] These inconsistent population growth patterns indicate that Dr. Poston's population projections are inaccurate and demonstrate the unreliability in Dr. Poston's estimates, undermining confidence in his conclusions.

Dr. Poston also assumes, without evidence, that a state's overseas population will be the same proportion of the population in 2020 as it was in 2010.[33] This too is inaccurate. In 2016, the number of active-duty U.S. military troops stationed overseas declined to its lowest level in at least 60 years.[34] A change in the residency rules affecting overseas-deployed military personnel also makes it untenable to assume the overseas population will be the same in 2010 as it was in 2020. Specifically, in 2010, deployed military personnel were counted in their "home of record" state (the address provided at the time of enrollment in the military). In 2020, by contrast, military personnel will be counted at their usual residence. This will likely increase the

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[30] *See* https://www.census.gov/quickfacts/geo/chart/US/PST120219.
[31] *See* https://www.census.gov/library/visualizations/2019/comm/slower-growth-nations-pop.html.
[32] *See* https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html.
[33] Poston Report, 14.
[34] Bialik, Kristen. (August 22, 2017). U.S. Active-Duty Military Presence Overseas Is At Its Smallest In Decades. Pew Research Center. https://www.pewresearch.org/fact-tank/2017/08/22/u-s-active-duty-military-presence-overseas-is-at-its-smallest-in-decades/.

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overseas populations of states with major military installations, which further emphasizes the uncertainty, of Dr. Poston's calculations.[35] And finally, as noted above, there has also been wide variability in population growth patterns across states, which means that the overseas population is likely to increase in some states but decrease in others in 2020. Dr. Poston concedes that he has not taken into account any of these issues with respect to the overseas population.[36]

In sum, the assumptions underlying Dr. Poston's total population projections are problematic, undermining the credibility of his calculations and highlighting the difficulty of accurately predicting apportionment outcomes.

B. Dr. Poston's Data and Methodology for Projecting Apportionment Counts Excluding Undocumented Immigrants is Flawed.

Dr. Poston next projects a population count for each state excluding undocumented immigrants by (1) relying on the flawed projection of the total population count, as described above, and (2) subtracting from that count a projected count of the undocumented immigrants in each state.[37] To reach a count of the undocumented immigrants in each state, Dr. Poston relies on 2016 state-level estimates of undocumented immigrants from Pew, and assumes that the proportion of the undocumented immigrant population in a state will be unchanged from the population proportion Pew estimated for a state in 2016.[38] This approach is flawed for a number of reasons, as follows.

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[35] Jarosz, Beth. (October 28, 2019). How Does the U.S. Census Bureau Count People Who Have More Than One Address? PRB. https://www.prb.org/how-does-the-u-s-census-bureau-count-people-who-have-more-than-one-address/.

[36] Deposition of Dudley L. Poston, Jr., Ph.D. (Feb. 27, 2020), at 105-114.

[37] Poston report, 16.

[38] Pew defines unauthorized immigrants as "all foreign-born noncitizens residing in the country who are not `lawful immigrants…The vast majority of unauthorized immigrants entered the country without valid documents or arrived with valid visas but stayed past their visa expiration date or otherwise violated the terms of their admission." Passel et al. (2018), 2. This is the same definition I use throughout this report.

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First, Dr. Poston's assumption that the proportion of the undocumented immigrant population in a state will not change between 2016 and 2020 is simply wrong. Most glaringly, the assumption contradicts Pew's own updated estimates for 2017.[39] Indeed, Pew reports significant variation across states and time in the undocumented population, including a continued decline in the overall numbers of undocumented immigrants in the United States.[40] As one example, Pew reports that California's undocumented immigrant population was 2.2 million in 2016, compared to 2.0 million in 2017—at the same time, the Census Bureau reports an overall growth in total population for the California between 2016 to 2017.[41] Moreover, there are substantial reasons to believe that the changes in immigration policy from 2010 to 2020 have had significant impacts on the undocumented immigrant populations in many states, none of which are taken into account by Dr. Poston's numbers.[42] Given the already mentioned variation in the total population change across states—the denominator for calculating the proportion of the undocumented immigrants in a state—some states will see their proportion of undocumented immigrants increase in 2020 relative to 2016, while others will likely see it decrease.

Second, and more fundamentally, Dr. Poston ignores the massive and undisputed uncertainty in Pew's estimates of undocumented immigrants. Uncertainty is a critical part of *every* statistical estimate, but it is especially remiss to ignore it when estimating the size of the undocumented immigrant population in the United States given that government agencies, scholars, and policy-makers widely acknowledge that this population is difficult to estimate.[43]

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[39] 2017 estimates were released in June 2019 so it's unclear why Dr. Poston did not use the more recent estimates.
[40] *See* https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/.
[41] *See* https://www.census.gov/content/dam/Census/library/visualizations/2017/comm/popest-idaho.pdf.
[42] Warren, Robert. (February 27, 2019). Sharp Multiyear Decline in Undocumented Immigration Suggests Progress at US-Mexico Border, Not a National Emergency. https://cmsny.org/publications/essay-warren-022719/.
[43] For review, *see* Woodrow-Lafield, K. A. (1998). Undocumented immigrants in the United States in 1990: Issues of uncertainty in quantification. International Migration Review, 32(1), 145-173. Demographers acknowledge that many methods fail to account for uncertainty, instead treated "values as if they were true" (Van Hook et al. 2015, 331). However, previous estimates have not be considered for use to determine political representation.

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For example, while Pew estimated an undocumented population of 10.7 million in 2016, researchers at Yale estimated that the 2016 number of undocumented immigrants ranged from a conservative 16.7 million to a high of 27.5 million.[44] While Dr. Poston admits (in a footnote) that "there are inherent difficulties in counting undocumented immigrants," he fails to account for that uncertainty in his conclusions.[45] These massive uncertainties include (1) uncertainties with respect to Pew's overall methodological approach, and (2) uncertainties with respect to the specific data and methodology on which components of Pew's estimates rely, as described below.

1. Pew's Overall Methodology for Projecting Apportionment Counts Excluding Undocumented Immigrants Produces an Unreliable Estimate.

Estimates of the undocumented population vary widely depending on the methodological approach, assumptions, and underlying data used. Broadly, Pew relies on a method called the residual technique for estimating numbers of undocumented immigrants in the United States. The residual technique estimates the number of undocumented immigrants by subtracting the number of lawful immigrants—estimated from government records—from the total number of immigrants in the country, as estimated from self-report responses to government surveys. The residual technique is one that has also been used by the Department of Homeland Security ("DHS"),[46] the Migration Policy Institute, the Center for Migration Studies of New York, and, in previous years, by the Census Bureau.[47]

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[44] Fazel-Zarandi, M. M., Feinstein, J. S., & Kaplan, E. H. (2018). The number of undocumented immigrants in the United States: Estimates based on demographic modeling with data from 1990 to 2016. PloS one, 13(9).
[45] Poston Report, 16 n.2.
[46] Prior to 2018, DHS population estimates referred to foreign-born non-citizens unlawfully present in the United States as "unauthorized immigrants." The 2018 report changes the term to "illegal aliens."
[47] *E.g.*, Baker, B. (2018). Population Estimates: Illegal Alien Population Residing in the United States: January 2015. Washington, DC: Department of Homeland Security. https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

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Although the aggregate numbers of undocumented immigrants resulting from the residual technique can be somewhat similar—recent estimates ranging from 10.5 million to 12 million[48]—there is considerable variability within subgroups and at smaller geographies.[49] In recognition of the limitations of the residual technique, when the Census Bureau released 2001 residual estimates of the undocumented population, they provided the following disclaimer:

> "Although the residual technique . . . is based on the simple idea of subtracting the expected legal population from the counted foreign-born population at the census date, *the approach suffers from a number of limitations.* These limitations stem from anomalies and shortcomings in the data sets used, assumptions made to correct for data deficiencies or to derive intermediate estimates, and the exclusion of components that may prove to be relevant in the changing migration environment."[50]

Similarly, DHS also acknowledges that their estimates of undocumented populations are "subject to sampling error in the ACS and considerable non-sampling error because of uncertainty in some of the assumptions required for estimation . . . Caution is recommended."[51] A March 2019 DHS report explains:

> DHS's ability to describe the illegal alien population depends on its ability to describe the different population groups included in the residual methodology: the total foreign-born population and the subgroups that comprise the legally resident foreign-born population. *Data limitations mean that neither of these populations can be described with precision.*[52]

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[48] Kamarck, Elaine and Christine Stenglein. (November 12, 2019). How many undocumented are in the United States and who are they? Brookings Institute. https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/.

[49] Van Hook, J., Bachmeier, J. D., Coffman, D. L., & Harel, O. (2015). Can we spin straw into gold? An evaluation of immigrant legal status imputation approaches. Demography, 52(1); Baker, B. (2018). Population Estimates: Illegal Alien Population Residing in the United States: Jan. 2015. Washington, DC: Dep. of Homeland Security.

[50] Costanzo et al. Evaluating Components of International Migration: The Residual Foreign Born. June 2002, page 20. https://www.census.gov/content/dam/Census/library/working-papers/2001/demo/POP-twps0061.pdf (emphasis added). The Census Bureau emphasized that "Our assumptions include a great deal of uncertainty, especially for small migration components. Therefore, the residual may be quite different from the actual number of unauthorized migrants" (2).

[51] Office of Immigration Statistics, Homeland Security. (December 2018). Population Estimates: Illegal Aliens Population Residing in the United States: January 2015, 11. Although DHS produces an estimate of the undocumented immigrant population using a residual method similar to Pew, they do not produce population estimates for every state.

[52] Department of Homeland Security, "Potential Improvements to DHS Illegal Alien Population Estimates: Collection and Use of Data," Fiscal Year 2018 Report to Congress, March 5, 2019, page 1.

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In employing the residual method, Pew estimates the number of undocumented immigrants by subtracting the number of immigrants with formal legal status—estimated from government records from DHS—from the total number of immigrants in the country, as estimated from self-report responses to the American Community Survey (the "ACS").[53] Because it is known that immigrants (especially undocumented immigrants) are harder to locate, harder to contact, harder to persuade, and harder to interview,[54] Pew then "augments and adjusts" their estimates in an attempt to account for the fact that surveys are more likely to miss immigrants.[55] To get state-level estimates, the legal status of each foreign-born respondent is imputed based on their survey responses and the total population estimates, aggregated, and then weighted to develop state-level estimates that take into account trends over time.[56] Additionally, Pew often makes revisions to previous estimates and the exact way in which it employs the residual method. For example, Dr. Poston used Pew's 2016 estimate of 55,000 for the undocumented population in Alabama in 2016; yet, their 2017 estimates report the 2016 undocumented population in Alabama to be 60,000.[57]

The accuracy of the residual technique estimates critically depends on the accuracy of the individual data components, and the assumptions used.[58] While Pew is not transparent about all of their data components and assumptions, those that can be scrutinized show that Pew's approach is error-prone and massively uncertain. It is not surprising, then, that demographers

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[53] Passel et al. (2018), 37.
[54] Tourangeau, R., Edwards, B., Johnson, T. P., Wolter, K. M., & Bates, N. (Eds.). (2014). Hard-to-survey populations. Cambridge University Press.
[55] *See* https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/.
[56] Passel et al. (2018), 44.
[57] *See* https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/.
[58] Margo Anderson and Stephen Feinberg (Who Counts?), 59: "The accuracy of the demographic analysis depends on the accuracy of the inputs. Several of the statistical inputs are incomplete.

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call their estimates "difficult to replicate."[59] An evaluation of the approach also found significant biases in the resulting estimates.[60] One recent peer-reviewed academic research article explained that although Pew's estimates "have come to be trusted and widely cited outside of academia," the method has never been evaluated and "[t]he specific details of the Pew[ ] method are not publicly available, thus making it difficult for other researchers to replicate the method."[61] The authors conclude that "it is not possible to spin straw into gold."[62] The specific flaws in each of the components of Pew's estimates that contribute to the unreliability of Dr. Poston's conclusions are discussed in detail below.

2. The Data Components and Specific Method of Pew's Residual Approach Are Not Reliable.

i. Pew and Dr. Poston rely on unreliable and inaccurate ACS estimates of the total foreign-born population.

In estimating the number of undocumented immigrants using the residual technique, Pew starts by estimating the total number of foreign-born residents—anyone who was not a U.S. citizen from birth—from the ACS. The ACS is a nationwide survey designed and conducted by the Census Bureau that collects social, economic, housing, and demographic characteristics from approximately 1.6% of households annually.[63] The ACS asks about the citizenship status—but not the legal status—of each household member. The sampling errors and nonsampling errors in ACS, and Pew's undercount adjustments with respect to this population, undermine confidence in Pew's estimates of the total foreign-born population, on which Dr. Poston relies.

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[59] Van Hook, J., Bachmeier, J. D., Coffman, D. L., & Harel, O. (2015). Can we spin straw into gold? An evaluation of immigrant legal status imputation approaches. Demography, 52(1), 333.
[60] *Ibid.*
[61] *Ibid*, 330.
[62] *Ibid*, 330.
[63] The ACS replaced the Census long form after 2000. The ACS is implemented as a continuous survey, with about 3.5 million household addresses contacted each year. The Census Bureau releases yearly estimates that allow for characteristic estimates for populations of 65,000 or more. The ACS accumulates sample into 5-year estimates for smaller geographic areas, including census tracts and block groups.

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1. Sampling errors in underlying ACS estimates make Pew's numbers unreliable.

Because the ACS is a sample of the population, rather than a census, any resulting population estimates are subject to uncertainty from random sampling error.[64] That sampling error is often reported as a margin-of-error with survey statistics. The greater the margin of error, the less confidence one should have in the resulting statistical estimate.[65] For small population subgroups or geographies—such as state-level estimates of the foreign-born population—the sampling error in the ACS can be quite large.

Although Pew reports its estimates of undocumented immigrants with a sampling error,[66] Dr. Poston fails to acknowledge or account for such sampling error in his calculations. For example, Pew's estimate of the number of undocumented immigrants in Alabama in 2016 was 55,000 +/- 10,000.[67] That is, Pew's estimate has a 90% confidence interval of 45,000 to 65,000 undocumented immigrants in Alabama in 2016—revealing a large degree of uncertainty in the estimate, even before trying to make projections in the future.[68] To put that level of uncertainty into context, consider that in the 2000 Decennial Census, Utah would have needed fewer than 1,000 additional residents to qualify for the 435th and final congressional seat instead of North Carolina.[69] In other words, the margin of error on the number of undocumented immigrants was larger than the population difference between two states determining priority values for

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[64] Groves, R. M., Fowler Jr, F. J., Couper, M. P., Lepkowski, J. M., Singer, E., & Tourangeau, R. (2011). Survey methodology (Vol. 561). John Wiley & Sons.
[65] Error has a statistical meaning—referencing the unknown difference between an estimate and its true value. Sampling error that there will be random sample-to-sample variation if one was to draw multiple samples from the population.
[66] Passel et al. (2018), 45.
[67] Passel et al. (2018) and https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/.
[68] This means that 90% of the time, the true population estimate of undocumented immigrants in Alabama would fall between 45,000 to 65,000.
[69] *See* https://www.pewsocialtrends.org/2011/01/11/census-2010-the-last-seat-in-congress/.

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apportionment.[70] Pew further reports that this margin of error *underestimates* the extent of uncertainty in the estimate because it captures only sampling, but not nonsampling, errors:

> "The ranges reported represent a 90% confidence interval around the estimates. They represent the sampling error associated with the survey-based estimate. Other sources of potential error—including the variability associated with the random assignment of statuses, potential errors in the status assignment process and non-sampling error in the surveys—are not represented in the reported margins of error. For this report, statistical tests rely on a 90% confidence level."[71]

2. Nonsampling errors in underlying ACS estimates make Pew's numbers unreliable and inaccurate.

There are a variety of other sources of error in Pew's estimates in addition to sampling errors that threaten the accuracy and reliability of Pew's estimates. Broadly called nonsampling errors, these include all other sources of error, such as those that arise from misreporting, incomplete coverage, or data processing. Although nonsampling errors can be more difficult to quantify than sampling errors, they still demonstrate the lack of precision in Pew's, and in turn, Dr. Poston's estimates of undocumented immigrants.

First, it is widely recognized that citizenship status is often inaccurately reported in government surveys.[72] One study using the Census Bureau's Current Population Survey estimated that 75 percent of those who reported being naturalized citizens and living in the U.S. fewer than five years were in fact non-citizens at the time of the survey.[73] In a recent comparison of administrative records from the Social Security Administration with individual

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[70] *See* https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/. Similarly, Pew estimates the number of undocumented immigrants in North Carolina in 2010 to be 350,000 +/- 15,000; the number in Minnesota was 90,000 +/- 10,000, so that the uncertainty again exceeds the population difference.

[71] Passel, J. S., & Cohn, D. (2018). US Unauthorized immigrant total dips to lowest level in a decade. Pew Research Center.

[72] Bachmeier, J. D., Van Hook, J., & Bean, F. D. (2014). Can we measure immigrants' legal status? Lessons from two US surveys. International Migration Review, 48(2), 538-566.

[73] Passel JS, Clark RL. How Many Naturalized Citizens Are Thee? An Assessment of Data Quality in the Decennial Census and CPS. Paper presented at the Annual Meeting of the Population Association of America; Washington, DC. March 1997, as reported in Brown et al. (2018).

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responses to the ACS, census researchers found that 37.6 percent of those individuals who were recorded as non-citizens in administrative records had self-reported being U.S. citizens in the ACS.[74] As explained by the researchers, undocumented immigrants "have a strong incentive to provide an incorrect survey answer, if they answer at all, due to concerns about the data being used for enforcement."[75]

Second, and, even more problematic for Dr. Poston's apportionment estimates, misreporting is likely to vary by geography, raising concerns about the way that measurement error might disproportionately affect estimates of undocumented immigrants in some states more than others, and thus threaten the distributional accuracy of the resulting estimates. Census researchers acknowledge that "the extent of intentional misreporting is most likely to vary across geographical areas and over time, depending on the degree of concern about personal security."[76] Indeed, Census Bureau research finds that match rates between the ACS and administrative records is lower in Alabama than any other state—65% compared to a high of 89% in Maine.[77] This both highlights the inherent difficulty of estimating the undocumented immigrant population, and suggests that Pew, and in turn, Dr. Poston, underestimates the number of undocumented immigrants in Alabama compared to other states, which would lead to an overestimate of Alabama's apportionment population if undocumented immigrants are excluded.

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[74] Moreover, this is likely an underestimate because the noncitizens able to be matched to administrative records are more likely to be legal noncitizens. Brown et al. (2018).

[75] J. Brown et. al., Working Paper: Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census, Center for Economic Studies, U.S. Census Bureau, 18–38 (2018), https://www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf.

[76] Brown et al., 21.

[77] Bhaskar, R., Fernandez, L. E., & S. Rastogi. (2018). Assimilation and coverage of the foreign-born population in administrative records. Center for Administrative Records Research and Applications (CARRA) Working Paper Series #2015-02., April 21, 2015. Mulrow et al. (2011) similarly find considerable geographic variation in the ability match administrative records to ACS respondents. Mulrow, Edward, Ali Mushtaq, Santanu Pramanik, and Angela Fontes. 2011. "Final Report: Assessment of the U.S. Census Bureau's Person Identification Validation System," NORC at the University of Chicago, http://www.norc.org/PDFs/May%202011%20Personal%20Validation%20and%20Entity%20Resolution%20Conference/PVS%20Assessment%20Report%20FINAL%20JULY%202011.pdf.

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In other words, in Dr. Poston's analysis, Alabama would inaccurately benefit from higher levels of misreporting in the state.

In sum, there is clear evidence that Pew's estimates are subject to large amounts of measurement error in the ACS estimates of foreign-born residents, jeopardizing the reliability of the resulting estimates. Misreporting of citizenship status is pervasive and appears to vary across states, resulting in biased estimates of an apportionment population with undocumented immigrants excluded.

3. Undercount adjustments in the total foreign-born population make Pew's numbers unreliable.

Another source of imprecision in the Pew estimates involves the statistical adjustment made to try to account for immigrants being disproportionately missed by the ACS. Surveys always miss some people, but immigrants (and especially undocumented immigrants) are especially likely to be undercounted—a source of error called coverage error. Unfortunately, the extent of the undercount is unknown and unknowable, so Pew has to make a guess as to how and how much to adjust their statistical estimates.

Pew reports that their adjustment increases the size of the undocumented immigrant population by 5% to 7% for the years 2010-16.[78] It is not possible to assess the reasonableness of Pew's statistical adjustment because the methodology is not disclosed. Pew simply states that undercount adjustments are based on "comparisons with Mexican data, U.S. mortality data and specialized surveys conducted at the time of the 2000 census."[79] For comparison, DHS assumes

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[78] Passel et al. (2018), 44.

[79] *See* 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, 44. Research shows, for example, that the undercount of young children varies across states and county size—undercounts are large in more populous counties than less populous ones. O'Hare, W. P. (2019). Differential undercounts in the US Census: Who is missed?. Cham: Springer Open.

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that the undercount of undocumented immigrants is 10% based on a study about LA County in California in the 2000 decennial census.[80] It is, of course, also problematic to assume that the undercount hasn't changed since 2000, or that it is the same across the country as it is in Los Angeles,[81] given geographic variation in the size and nature of the immigrant population. In 2014, for example, the estimated share of undocumented immigrants from Mexico was 5% nationwide, but 70 percent in California, variation that is undoubtedly related to the undercount.[82] For their part, DHS acknowledges that "the exact degree of the undercount is unknown."[83]

The adjustments undergirding the Pew data further undermine confidence in Dr. Poston's estimates. Pew statistically adjusts estimates of the undocumented population to try to account for the undercount of this population; in contrast the total population estimates used by Dr. Poston have not been statistically adjusted for the undercount because the Census Bureau does not statistically adjust census numbers. Following the 2000 Census, the Census Bureau spent enormous resources to research whether statistical methods could be used to adjust for the undercount for use in redistricting and other purposes not related to reapportionment (given the Supreme Court's prohibition on its use for reapportionment).[84] In the end, the Census Bureau determined that the research could not conclude, with a high level of certainty, that the adjusted

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[80] Enrico Marcelli, "2000 Census Coverage of Foreign-born Mexicans in Los Angeles County: Implications for Demographic Analysis," presented at 2000 Annual Meeting of the Population Association of American, Atlanta GA.
[81] *See* 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, 44.
[82] *See* https://www.ppic.org/publication/undocumented-immigrants-in-california/.
[83] Department of Homeland Security, "Potential Improvements to DHS Illegal Alien Population Estimates: Collection and Use of Data," Fiscal Year 2018 Report to Congress, March 5, 2019, 3.
[84] Whitford, D. C. (2002) Chronologic Overview of the Census 2000 Adjustment Decision. Joint Statistical Meetings - Section on Survey Research. Methods. New York City. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.380.7478&rep=rep1&type=pdf.

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census results would be more accurate than the unadjusted results.[85] Any requests for the already-produced adjusted data acknowledged:

> [T]he adjusted estimates were determined to be so severely flawed that all potential uses of these data would be inappropriate. Accordingly, the Department of Commerce deems that these estimates should not be used for any purpose that legally require use of data from the decennial census and assumes no responsibility for the accuracy of the data for any purpose whatsoever.[86]

The very fact that the Census Bureau concluded statistical adjustment could reduce the accuracy of the census count undermines Pew's decision to adjust. It also highlights the inherent imprecision in Pew's estimates, and makes the components of Dr. Poston's calculations (total population count and total population count with undocumented immigrants excluded) incomparable, both of which contribute further to the lack of confidence in Dr. Poston's resulting estimates.[87]

ii. Pew and Dr. Poston rely on unreliable estimates of the lawful immigrant population.

From the total foreign-born population estimated from ACS, the residual technique subtracts the estimated population of naturalized citizens and immigrants with formal legal status—lawful naturalized citizens, legal permanent residents, temporary migrants (such as foreign students), and refugees and asylees—based on estimates from administrative records.[88] In the case of immigrants with formal legal status, lawful permanent residents are estimated using data from DHS's Office of Immigration Statistics, and refugees are estimated using data from the Office of Refugee Resettlement.[89]

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[85] *See* U.S. Bureau of the Census (2001) Report: Recommendation Concerning the Methodology to be Used in Producing Tabulations of Population Reported to States and Localities Pursuant to 13 U.S.C. 141(c) (March 1) Washington, DC Department of Commerce https://www.census.gov/dmd/www/pdf/Escap2.pdf.
[86] *See* https://www.icpsr.umich.edu/icpsrweb/ICPSR/themes/census2000/disclaimer.jsp.
[87] *See* https://govinfo.library.unt.edu/cmb/cmbc/articles-archive/031201.asp.
[88] Administrative records refer to micro data records contained in files collected and maintained by administrative agencies, such as the U.S. Postal Service, Internal Revenue Service, or the Social Security Administration.
[89] *See* https://www.pewresearch.org/hispanic/2018/11/27/unauthorized-immigration-estimate-methodology/.

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Scrutiny of Pew's documentation of its reliance on DHS data, and its method with respect to that data, reveals that its estimates are far from an actual count and involve considerable imprecision. Administrative data is incomplete and untimely. As the Census Bureau has recognized, DHS has "incomplete records prior to 2001. These data do not cover naturalizations occurring before 1988, and they miss some between 1988 and 2000."[90] Moreover, available records "do not always cover children under 18 at the time a parent became a naturalized U.S. citizen. These children automatically become U.S. citizens under the Child Citizenship Act of 2000."[91]

Because the administrative records are incomplete and unreliable, Pew estimates the number of legal immigrants by "applying demographic methods . . . with projections to current years, when necessary."[92] Pew makes statistical adjustments to the estimates from administrative records to account for deaths and departures from the country. Once again, the accuracy of the estimates depends on the accuracy of the individual components of the underlying data—yet these components are not known quantities, nor can they assumed to be stable across time or geography. In calculating its own estimates of the undocumented population, DHS admits that the agency "does not know how many lawfully admitted aliens have deceased or departed the United States."[93] Mortality rates are a source of considerable controversy and disagreement among demographers.[94] Departures from the country also vary across time and geography. Pew makes projections, but the exact assumptions underlying those projections are not disclosed and it is clear that precise numbers simply do not exist.

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[90] Brown et al., 18.
[91] Brown et al., 18.
[92] Passel et al. (2018), 36.
[93] Department of Homeland Security, "Potential Improvements to DHS Illegal Alien Population Estimates: Collection and Use of Data," Fiscal Year 2018 Report to Congress, March 5, 2019, 3.
[94] Warren, R., & Warren, J. R. (2013). Unauthorized Immigration to the United States: Annual Estimates and Components of Change, by State, 1990 to 2010. International Migration Review, 47(2), 296–329.

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In sum, the estimation of the population of immigrants with formal legal status from administrative records on which Pew relies is not an actual enumeration. Instead, such population is imprecisely estimated using a combination of incomplete administrative records and contentious assumptions. Taken together with the other sources of error outlined above, it is clear that the Pew estimates, and in turn Dr. Poston's results, are imprecise and error prone.

iii. Pew and Dr. Poston rely on unreliable estimates of undocumented immigrants at the state-level.

The state-level estimates of the undocumented immigrant populations that Dr. Poston uses require many additional steps after computation of the national residual estimate outlined above; although Pew treats these steps as deterministic, scrutiny of the complex and unverified set of modeling and data assumptions reveal the imprecision and uncertainty in such estimates.

Specifically, state-level estimates of undocumented immigrants are produced after assigning a legal status to all foreign-born respondents in the ACS. A variety of approaches are used in that assignment—logical decision rules, statistical imputation, and weighting adjustments. The initial categorization of someone as "potentially unauthorized" relies on decision rules using self-reported information about arrival year, country of origin, occupation, participation in government programs, and family relationships that could be indicators of legality. Here, again, Dr. Poston's estimates rest on strong assumptions that are unsubstantiated. For example, the survey responses can be inaccurate (e.g., there can be high levels of missingness and misreporting in arrival year). And the decision rules are not 100% accurate. Some immigrant veterans are deported[95]; some households have mixed immigration status; and some who should be eligible to adjust to lawful permanent resident status do not apply for such

[95] Zamudio, Maria. (June 21, 2019). Deported U.S. Veterans Feel Abandoned By The Country They Defended. NPR. https://www.npr.org/local/309/2019/06/21/733371297/deported-u-s-veterans-feel-abandoned-by-the-country-they-defended.

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an adjustment, whether due to lack of money, language barriers, or other reasons.[96] Reflecting the imprecision of Pew's assignment process, Pew acknowledges that the resulting "number of potentially unauthorized immigrants typically exceeds the estimated number of unauthorized immigrants from the residual estimates by 20-35% nationally."[97] This mismatch between the assignment process and the national residual estimates demonstrates the inaccuracy of Pew's complex and opaque process, and highlights the extent to which their resulting population estimates are not precise counts.

To adjust the numbers of undocumented immigrants to bring them in line with the national residual estimates, Pew assigns legal status based on an estimated probability of being an undocumented immigrant, which is in turn based on the occupation distribution by age, sex, and state of residents from the 1989 Legalized Population Survey.[98] This survey benchmark is 30 years old, and overrepresents Mexicans and those in the Southwest.[99] To get state estimates, "the final estimated state totals for any given year take into account estimates for surrounding years; however, only a small number of state estimates require significant adjustment based on the trend analysis."[100] Critically for Dr. Poston's state-by-state count of the undocumented population on which his conclusions rely, Pew does not report which states have inaccurate outcomes that must be significantly adjusted.

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[96] Frost, Amanda. (June 19, 2016). The Overlooked Pathways to Legal Status. The Atlantic. As reported, one study found individuals in removal proceedings with legal representation were 15 times more likely to apply for relief than those without lawyers and are 5.5 times more likely to be granted legal status.
[97] Passel and Cohn, 2018, 40.
[98] As reported in Van Hook et al. (2015).
[99] Van Hook, J., Bachmeier, J. D., Coffman, D. L., & Harel, O. (2015). Can we spin straw into gold? An evaluation of immigrant legal status imputation approaches. Demography, 52(1), 332.
[100] Passel and Cohn, 2018, 40.

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3. Dr. Poston's Conclusions Are Not Credible.

As I have shown, the individual population projections underlying Dr. Poston's calculations are imperfect approximations subject to considerable uncertainty and sampling and nonsampling errors. To recap, Dr. Poston's projection of the total state population rests on flawed assumptions about population growth over time, geographic variation in population growth over time, and the overseas population, and fails to acknowledge inherent uncertainty in projecting population trends into the future. Regarding the estimates of the number of undocumented immigrants in each state, it is clear that the numbers are not counts, but rather rough and imprecise estimates calculated from incomplete and outdated data using an opaque methodology criticized by demographers. Although Dr. Poston's calculations give the illusion of precision, the individual data components underlying his analysis are error-prone and unreliable. Pew's estimates are not "fit for use" for apportionment; nor are they sufficiently reliable or accurate to support Dr. Poston's opinions that Alabama will lose a seat if undocumented immigrants are included in the population counts, or maintain a seat if they are included.

Given these outlined problems and the sensitivity of apportionment outcomes to small changes in population counts, as discussed above, Alabama's claim that they will lose a seat from the inclusion of undocumented immigrants in the apportionment count, or maintain a seat if undocumented immigrants are excluded, is only speculative. The lack of precision in the data means that different states could have reasonable claims to "priority" to the available seats depending on the particular assumptions made about the many and varying components that underlie Dr. Poston's estimates. Indeed, a 2015 analysis by the Congressional Research Service in which seats were hypothetically apportioned using the 2013 estimated citizen population

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reported that Alabama received the same number of seats whether estimated numbers of non-citizens were included or excluded in the apportionment population.[101]

To highlight the uncertainty of Dr. Poston's estimates, sampling error alone is enough to undermine Dr. Poston's conclusion that Alabama is likely to lose a congressional seat if undocumented immigrants are included in the apportionment population, or to maintain a seat of undocumented immigrants are excluded. The reported margin of error on the estimate of the undocumented population ranged from 45,000 to 65,000—that confidence interval (spanning 20,000 persons) is in fact wider than the population difference of the approximately 10,000 additional persons that Election Data Services estimates Alabama would need to gain another congressional seat.[102]

In addition to the extensive uncertainty in the estimates, the geographic variation ignored by Dr. Poston means that both the total population projections and the undocumented population projections are likely to be overestimated in some states and underestimated in others (but not necessarily in the same direction for the two quantities).

V. There Is Currently No Feasible Way to Reliably Exclude Undocumented Immigrants From the 2020 Apportionment Count.

I also examined whether there is a feasible way in which undocumented immigrants could be excluded from the 2020 apportionment count. For numerous reasons, I conclude that there is currently no feasible method by which to exclude undocumented immigrants from the 2020 apportionment count. Specifically, I conclude that excluding undocumented immigrants from the apportionment count in 2020 is impossible because (1) there is no current methodology or data product at the time of this writing that the Census Bureau can use to exclude

[101] Congressional Research Service. 7-5700. R41636. https://crsreports.congress.gov/product/pdf/R/R41636.
[102] *See* https://www.electiondataservices.com/wp-content/uploads/2019/12/NR_Appor19wTablesMaps.pdf, Appendix Main, Page 1.

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undocumented immigrants from the 2020 apportionment count; (2) it is not currently feasible for the Census Bureau to produce estimates of undocumented immigrants from administrative records that would be of sufficient quality to use to exclude undocumented immigrants from the 2020 apportionment count; and (3) the nature, scope, and methodology of the statistical modeling needed to produce estimates of the undocumented population is fundamentally different from the statistical modeling currently used in producing the apportionment population, and would result in a less accurate and reliable enumeration.

A. Current Methodologies and Data Products Are Not Sufficient for Excluding Undocumented Immigrants from the Apportionment Count.

It is my opinion that there is no current methodology or data product at the time of this writing that the Census Bureau may use to reliably exclude undocumented immigrants from the 2020 apportionment count. First, as discussed above, the apportionment count is an "actual enumeration" of the population. The Pew methodology on which Dr. Poston relies, and the residual techniques currently used by the federal government to estimate undocumented populations are inadequate for the apportionment count because reliance on estimates from ACS controverts the prohibition on the use of statistical sampling in the production of apportionment population totals.[103] In *Department of Commerce v. U.S. House of Representatives* (1999), the Supreme Court ruled that the Census Act precluded the use of sampling to produce the apportionment count "[w]hether used as a 'supplement' or as a 'substitute.'"[104]

Second, there are no known data products from the 2020 Census that would identify the undocumented immigrant population that Alabama proposes to exclude from the apportionment count. The planned CVAP datafile, described above, is obviously not sufficient for excluding

[103] *Department of Commerce v. U.S. House of Representatives* (1999).
[104] *Department of Commerce v. U.S. House of Representatives* (1999), 24.

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undocumented immigrants from the apportionment count because it only identifies the total number of citizens of voting age population. Subtracting the CVAP numbers from total population numbers does not provide the numbers to apportion excluding undocumented immigrants because CVAP does not distinguish undocumented immigrants from legal non-citizen residents, and it does not provide the citizenship or legal status of those younger than 18 years of age. Even if CVAP had sufficient data—which it does not—it is unlikely to be considered of sufficient quality for use in apportionment. In addition, the other data products, sources, and analysis that the Census Bureau is examining to fulfill the Executive Order are insufficient, as discussed below.

B. Reliance on Administrative Records to Exclude Undocumented Immigrants from the Apportionment Count is Not Sufficient for the 2020 Apportionment Count.

It is my opinion that it is not currently feasible for the Census Bureau to produce estimates of undocumented immigrants from administrative records that would be of sufficient quality to use as a basis to exclude undocumented immigrants from the 2020 apportionment count. To date, administrative record usage for purposes of enumerating households is limited to those nonresponding addresses where the Census Bureau has multiple "high-quality" administrative records available.[105] More importantly, the Census Bureau does not use administrative records *on their own*—administrative records are used only after giving the entire population an opportunity to self-respond and after an attempt to enumerate the household by field staff.[106]

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[105] 2020 Census Operational Plan.
[106] Memorandum from Deborah M. Stempowski to The Record Regarding Use of Administrative Records in the 2018 End-to-End Census Test (Mar. 26, 2018), 7.

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Although administrative records are being used to fulfill President Trump's executive order to produce block-level citizen voting age population estimates,[107] administrative records lack the coverage, accuracy, and reliability needed to produce an actual enumeration of the undocumented population, which would be necessary to exclude undocumented immigrants from the 2020 apportionment count. Specifically, as I explain below, (1) very few administrative records directly identify those individuals with undocumented status, and the few that do so are fundamentally flawed; and (2) administrative records that may theoretically be used to estimate the number of undocumented immigrants lack sufficient coverage, accuracy, and reliability for this purpose.

1. Direct Identification of Undocumented Immigrants from Administrative Records is Not Feasible.

Very few administrative records directly identify those with undocumented status. Indeed, administrative records are "weak in their coverage of undocumented aliens because programs typically require documentation that many undocumented aliens do not have."[108] The limited records available with respect to undocumented immigrants, described below, are woefully deficient because they are incomplete, outdated, and often inaccurate.

i. Administrative records from the Department of Justice

The Census Bureau is unable to attain a precise number of individuals who entered the country undetected, because it is likely to only have records for those individuals who are apprehended.[109] The Census Bureau expects to receive administrative records about

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[107] *See generally* 84 Fed. Reg. at 33,891.

[108] Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias? The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.

[109] Some research has attempted to roughly estimate this number by using annual number of apprehensions and estimating the probability that an undocumented migrant is apprehended along the U.S. Mexico border to produce an estimate of the number undocumented migrants from Mexico (e.g., Massey and Singer 1995). These estimates, however, only speak to migration across the Mexico border.

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incarcerations and apprehensions of undocumented immigrants from the Department of Justice ("DOJ"),[110] but the most recent report (Alien Incarceration Report, Fiscal Year 2018 Q2, April 16, 2019) summarizing those records report only 43,519 individuals.[111] This is surely a far cry from the total number of undocumented immigrants in the country.

Scrutiny of these DOJ records also highlights the difficulty of obtaining complete, accurate, and timely information—even among those in federal custody. The report notes that an additional 16,426 individuals—27.4% of all "known or suspected aliens" in federal custody—were still under investigation by Immigration and Customs Enforcement to determine alienage, and many others are difficult to classify: 1,281 were legally present and undergoing removal proceedings, 1,100 were granted relief or protection from removal, and 4,903 were deemed undocumented but under adjudication.[112] If determination of undocumented status is difficult for Immigration and Customs Enforcement, the Census Bureau cannot be expected to make such determinations with incomplete and deficient administrative records.

Finally, it is worth noting the time lag of about a year from the date of the incarceration data to the report's release. Specifically, the April 16, 2019 report summarizes incarcerations as of the end of fiscal year 2018, Quarter 2. This is just one example of both the time it takes to process and analyze administrative records, and the fact that such records are outdated by the time they can be summarized. This lag in reporting—plus the large number of unresolved statuses—calls into question the ability of the Census Bureau to produce apportionment numbers that exclude undocumented immigrants in the required nine months from the date of the census.

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[110] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data. The Department of Interior is also sharing records on security interactions, although scant information about the coverage or quality of these records is available.
[111] Alien Incarceration Report, Fiscal Year 2018 Q2 (April 16, 2019). https://www.justice.gov/opa/page/file/1154711/download.
[112] Alien Incarceration Report, 2.

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ii. Administrative records from the Department of Homeland Security

The Census Bureau is unable to attain a precise number of individuals who have overstayed their visas because DHS records are similarly unreliable. DHS is providing the Census Bureau with Arrival/Departure Information System and Visa Data, but these data do not completely or accurately identify visa overstays.[113] Record-keeping challenges make it difficult to match arrival and departure records for the same person, which could result in erroneously counting as an overstayer someone who actually left the country.[114] Consider the enormity of the task—more than 47 million people visit the United States from abroad for tourism and business.[115] When departure records are incompletely collected by the airlines and transmitted to DHS, errors result. The land borders are even harder to track, since the ports of entry are primarily focused on screening incoming traffic rather than checking who is departing. More than 254 million people annually pass through the border checkpoints (nearly 700,000 travelers on a given day)—mostly individuals who are legally able to "travel back and forth across the border for commercial trade, tourism, work, school, family visits or a simple trip to the store."[116] As admitted in the DHS Privacy Impact Assessment for the Immigration-Related Information Sharing with the U.S. Census Bureau: "Determining an individual's citizenship based on various DHS data is a challenging task . . . . Due to the decentralized nature of admission and immigration information, as well as the lack of a nationwide departure control system, [U.S.

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[113] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[114] *See* https://thehill.com/opinion/immigration/447607-illegal-immigration-by-the-numbers-visa-violators-and-border-crossers.
[115] Morral, Anrew, Henry Willis, Peter Brownell. (2011). Measuring Illegal Border Crossing Between Ports of Entry: An Assessment of Four Promising Methods. Rand, Homeland Security and Defense Center. https://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP328.pdf.
[116] Davis, Kristina. (April 7, 2019). "The impossible challenge of tracking visa overstays," The San Diego Union-Tribune. https://www.sandiegouniontribune.com/news/immigration/story/2019-04-06/the-impossible-challenge-of-tracking-visa-overstays.

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Customs and Border Protection] collects different data points from different data set."[117] As a result, the classification of an individual as an overstayer is often inaccurate. Indeed, research by the Center for Migration Studies found nearly half the visa overstayers identified by DHS had likely left the U.S. unnoticed.[118] Others have emphasized that the data are quickly out of date because "many overstayers leave or adjust their status within a few months of their visa expiration date."[119] In the Memorandum of Agreement to share this data with the Census Bureau, DHS acknowledges that the shared information "is assumed to be accurate at the time it was collected. However, because DHS is providing information at a point in time, it is reasonable to believe that eventually data accuracy issues may arise."[120]

iii. Additional records with respect to undocumented status

In addition to the records described above, a handful of administrative records may have some information with respect to small groups of undocumented immigrants. One group with administrative records that identify immigrants without formal legal status are those with Deferred Action for Childhood Arrivals ("DACA") status, and who may be considered by some to fall under the category of "undocumented."[121] DACA recipients do not have formal legal status, but they are currently protected from deportation, and retain lawful presence in the U.S. Administrative records also exist for undocumented immigrants with pending asylum cases. The Census Bureau has not, however, requested DACA or records with respect to pending asylum

[117] Department of Homeland Security. (Dec. 20, 2019). Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau, 6.
[118] Warren, Robert (February 27, 2019). Sharp Multiyear Decline in Undocumented Immigration Suggests Progress at US-Mexico Border, Not a National Emergency. https://cmsny.org/publications/essay-warren-022719/
[119] Fazel-Zarandi, Feinstein, Kaplan 2018.
[120] Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 6.
[121] To be eligible, individuals needed to have arrived in the U.S. before turning 16 and must meet education and other related requirements.

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cases.[122] In any event, both of these groups represent a tiny part of the undocumented population.

In sum, the limited number of administrative records that identify undocumented status mean it is impossible to directly enumerate the undocumented population from available administrative records.

2. Indirect Identification of Undocumented Immigrants from Administrative Records is Not Feasible.

The Census Bureau is also unable to produce an accurate and reliable enumeration of the undocumented population by indirectly estimating the undocumented immigrant population through a process of elimination based on information in administrative records. Doing so requires correct identification of citizens and the lawful non-citizen immigrant population—those persons granted lawful permanent residence, persons granted asylum, persons admitted as refugees, and persons admitted as nonimmigrants under classes of admission associated with residence (e.g., students and temporary workers, as opposed to tourists) and with authorized periods of admission in the future of any estimated date.[123]

Here, again, administrative records lack the necessary coverage, accuracy, and reliability to produce high quality estimates. Regarding the estimation of citizenship status, John Abowd, Chief Scientist of the Census Bureau, acknowledges that the Census Bureau "will most likely never possess a fully adequate truth deck to benchmark to."[124] Determining the specific legal

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[122] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[123] Alabama has not clearly explained how to handle so-called quasi-legal cases, such as foreign nationals granted Temporary Protected Status (TPS) because they are from countries in which they cannot return home safely or those with DACA status, who have work authorization and protection against deportation. Pew includes in the authorized immigrant estimates those with temporary protection from deportation under DACA, TPS, and pending asylum cases. This would mean that a resident with 18-month temporary protected status (that could be extended) would be excluded from political representation but a student or temporary worker on a 12-month visa would be included.
[124] Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Sec'y, U.S. Dep't of Commerce (Mar. 1, 2018).

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status (undocumented or otherwise) among immigrants is even more difficult. DHS admits that "immigration status information is challenging, complicated, and dynamic . . . . No one source of citizenship information is complete and up-to-date"[125] In another report, DHS acknowledges, "while Census and DHS data provide a wealth of information on the total foreign-born population broken down by citizenship and on annual migration flows and status changes, national population data on the major subcategories of non-citizens, including lawful permanent residents, students, temporary workers, and unauthorized immigrants, are not readily available from any source and must be estimated."[126]

Below, I will show how the Census Bureau's most complete source of citizenship, the Numident, is inadequate, and then I will demonstrate that the other administrative records that the Bureau could consider using to fill the gaps in data are also insufficient.

i. The Numident

The Census Bureau's most complete source of citizenship data is the Census Numident file, a record of individual applications for Social Security cards and any changes subsequently made (such as change of name).[127] In an effort to evaluate the potential use of administrative records to estimate the citizenship status for the 2020 Census, the Census Bureau undertook extensive research evaluating the strengths and weaknesses of Numident. These results were reported in a 2018 white paper titled, "Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census" (hereinafter, "The Brown Memo"). As the Census Bureau found, there are several sources of error in these records. First, there will be individuals enumerated in the 2020 census who will not have information in the Numident. While this is more likely

[125] *See* Department of Homeland Security. (Dec. 20, 2019). Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau.
[126] *See* https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015.pdf, 2.
[127] See Layne, Wagner, and Rothaas (2014) and NORC (2011). Also Rastogi and Ohara (2012), Bond et al. 2014.

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among undocumented immigrants, citizens and non-citizens with formal legal status can also be missing because of linkage errors, or incomplete identifying information provided by the household.[128] Of those enumerated in the 2010 census, the Brown Memo reports that 89.4% could be matched to the Numident file.[129]

A second issue is that some individuals in Numident have missing information about citizenship status. In 2017, 6.6 million persons born outside the U.S. have blank citizenship among those born in 1920 or later with no year of death.[130] Some of the individuals missing citizenship status could be undocumented immigrants, but a much higher share appear to be U.S. citizens.[131] The Brown Memo outlines the different groups of people who could have missing citizenship status in Numident, as follows:

1. U.S. citizens from birth with no Social Security number or U.S. passport;
2. U.S. citizens from birth born outside the U.S., who do not have a U.S. passport, and either applied for a Social Security number prior to 1974 and were 18 or older or applied before the age of 18 prior to 1978;
3. U.S. citizens who were automatically naturalized if they were under the age of 18 when their parents became naturalized in 2000 or later, and they did not inform USCIS or receive a U.S. passport;

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[128] The internal unique person identifier is called the protected identification key or PIK.
[129] Brown et al, 14 (as reported, 91% can be assigned a PIK; once assigned, 98.2% could be matched to Numident).
[130] *See* https://www.supremecourt.gov/DocketPDF/18/18-966/91016/20190306200155135_18-966%20Commerce%20J.A.pdf, 153. In total, 20.0 percent of 2010 Numident records have missing citizenship status, but some of those will not be in the 2020 Census—either because they no longer reside in the U.S. (e.g., those who had temporary work status), or because they fail to respond.
[131] Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Sec'y, U.S. Dep't of Commerce (Mar. 1, 2018).

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4. U.S. citizens who were naturalized prior to 2001 and did not inform the Social Security Administration of their naturalization and had never applied for a Social Security number; and
5. Lawful permanent residents (LPR) who received that status prior to 2001 and had never applied for a Social Security number.[132]

The reason for the gap in citizenship status information is related to the history of the Social Security number, which was not created to track citizenship status, but rather created for the sole purpose of tracking earnings for use in determining benefit levels. Evidence of citizenship was not added to the Social Security application until 1974. Now, parents typically apply for an infant's Social Security number at the hospital where the infant is born, but there was variation across states in the rollout of this enumeration-at-birth ("EAB") program, which potentially resulted in geographic variation in the accuracy of the data.[133] For example, New Mexico, Indiana, and Iowa were early adopters of EAB in 1987, while California, Rhode Island, and Connecticut did not participate in EAB until 1995.[134] This means that late adopting states could be more likely to have citizens with missing citizenship status in Numident, potentially leading to their exclusion from apportionment numbers.

A third issue is inaccuracies in Numident. There are a number of cases where Numident indicates a person is a non-citizen, but the individual is in fact a citizen. This includes U.S. citizens who were naturalized prior to 2001 and who did not inform the Social Security Administration of their naturalization. Similarly, lawful permanent residents who received that

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[132] Brown et al., 19.
[133] *See* https://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html.
Today, over 90 percent of parents use the EAB process, which is offered in all 50 states plus Puerto Rico and the District of Columbia. The Social Security Administration receives nearly three-quarters of original Social Security number applications through the EAB process and issues over 4 million Social Security numbers via EAB each year (Social Security Administration 2006).
[134] *See* https://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html.

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status prior to 2001 and had applied for a Social Security number prior 1974 would also have inaccurate data. Of course, there can also be inaccuracies in which a non-citizen is listed as a citizen. According to a 2005 GAO report, the Social Security number system had quality control issues for many years.[135] Audits during the 2000s found widespread misuse, with millions of workers showing mismatches.[136]

In sum, Numident lacks coverage of the entire population, and missing citizenship in Numident is not a clear indication of undocumented status. The Census Bureau is receiving other administrative records from federal agencies and state governments to supplement Numident, but they do not completely fill in the gaps, as explained below. Moreover, these administrative records can introduce inconsistencies across data sources that have to be reconciled, as also explained below.

ii. Other administrative records

DHS offers the most complete information about legal non-citizens, but the records it is providing to the Census Bureau are still inadequate for the purpose of apportionment. DHS is providing the Census Bureau with the Lawful Permanent Resident File, Naturalization Data from the Citizen and Immigration Services, and Arrival/Departure Information System and Visa Data.[137] As outlined when discussing Pew's residual method, these records are incomplete and often outdated, and can only partially address Numident's weaknesses.[138] For example, these data "do not cover naturalizations occurring before 1988 . . . and do not always cover children under 18 at the time a parent became a naturalized U.S. citizen."[139] As another example, the

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[135] *See* https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-05-115/html/GAOREPORTS-GAO-05-115.htm.
[136] *See* July 2004 OIG report, 25
[137] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[138] Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Sec'y, U.S. Dep't of Commerce (Mar. 1, 2018).
[139] Brown et al., 18.

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Worldwide Refugee Admission Processing System for the Department of State contains only some of the asylum cases.[140]

Other administrative records that the Census Bureau currently plans to use have considerable variability in availability and coverage across states. For example, Medicaid/Children's Health Insurance Program data from the Department of Health and Human Services ("HHS") has "some citizenship information potentially available."[141] However, Census Bureau research finds that the availability of HHS varies widely across states.[142] A similar issue arises in the use of state Department of Motor Vehicle ("DMV") records. The Census Bureau has requested DMV data, including with respect to citizenship status and eye color, but the citizenship data can be inaccurate.[143] For example, when Florida and Texas attempted to purge registered voters who were identified as having been noncitizens when they applied for the driver licenses from voter rolls, they found that most were naturalized citizens who had outdated information in DMV records.[144]

Finally, any reliance by the Census Bureau on commercial data (i.e. CoreLogic data) cannot fill the gaps.[145] CoreLogic fails to provide full coverage of the population and its availability and accuracy varies across states. Households of higher socioeconomic status are better represented among linked CoreLogic records than are households of lower socioeconomic

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[140] Applicants obtain asylum in one of two ways: affirmatively through a USCIS asylum officer, or defensively in removal proceedings before an immigration judge of DOJ's Executive Office for Immigration Review. The database only contains state of residence information for those receiving affirmative asylum.
[141] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[142] Brown et al. 2018, 14.
[143] Wang, Hansi Lo. (November 20, 2019). Nebraska Is 1st State To Share Driver's License Records With Census Bureau. https://www.npr.org/2019/11/20/781373128/nebraska-1st-to-say-it-will-share-drivers-license-records-with-census-bureau.
[144] Lopez, Ashley. (February 14, 2019). There's No Easy Way For Texas To Vet Its List Of Alleged Noncitizen Voters. Just Ask Florida. National Public Radio Kut 90.5. https://www.kut.org/post/theres-no-easy-way-texas-vet-its-list-alleged-noncitizen-voters-just-ask-florida.
[145] *See* https://www.federalregister.gov/documents/2018/06/08/2018-12365/proposed-information-collection-comment-request-2020-census.

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status.[146] Even more importantly, research finds that the availability and quality of these data vary across states, raising concerns about distributional accuracy.[147] One study evaluating the potential for commercial data in the 2020 census found that "the quality of the CoreLogic data varies between counties and townships around the country, both in the coverage of the CoreLogic data and in the correspondence between ACS and CoreLogic property tax values."[148]

Such variation in data availability and accuracy across states raises concerns about the fairness or distributional accuracy of the resulting population counts. The Census Bureau will have far more information available about the population of some states compared to others. As of this writing, for example, only Nebraska had provided DMV data to the Census Bureau.[149] Asymmetries in information about state populations could make it easier or harder to identify and exclude undocumented persons from apportionment populations. Consider, for instance, that some states, but not others, allow undocumented immigrants to obtain driver's licenses. To the extent those DMV records improve the ability to identify undocumented immigrants in a state, it will increase the chance that those states will be more likely to have undocumented immigrants identified and excluded from their apportionment total, jeopardizing the distributional accuracy of the resulting apportionment count.

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[146] Bond, B., Brown, J. D., Luque, A. & O'Hara, A. (2014). The nature of the bias when studying only linkable person records: Evidence from the American Community Survey. CARRA Working Paper #2014-08. Washington, D.C.: U.S. Census Bureau. https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-08.pdf. Similarly, Brummet (2014) found that 63.4 percent of records could be linked to the Master Address File, but the number varied across structure type—just 14.8 percent of multi-unit structure were linked, compared to 79 percent of single-unit structures. Brummet, Q. O. (2014). Comparison of survey, federal, and commercial address quality. CARRA Working Paper #2014-06. Washington, D.C.: U.S. Census Bureau. https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-06.pdf.

[147] Moore, B. (2015). Preliminary research for replacing or supplementing the year built question on the American Community Survey with administrative records. Washington, D.C.: U.S. Census Bureau. https://www.census.gov/library/working-papers/2015/acs/2015_Moore_02.html.

[148] Seeskin, Z. H. (2016). Evaluating the Use of Commercial Data to Improve Survey Estimates of Property Taxes (No. 2016-06). Center for Economic Studies, US Census Bureau, 5.

[149] The Census Bureau reports that they had reached verbal agreements with about 1/3 of states. *See* Deposition Transcript of Karen Battle. (Mar. 2, 2020), 175, 201-02.

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In sum, it is not possible to conduct an actual enumeration of the undocumented population using administrative records given their incomplete coverage of the population. Very few administrative records provide timely and accurate information about legal status. As a result, administrative records cannot be used to directly enumerate the population, and so any attempt to produce a count of the undocumented population for purposes of exclusion from the 2020 apportionment count would require extensive statistical modeling. In the next section, I explain how this modeling would differ in fundamental ways from that previously used to enumerate the apportionment population, and would result in a less accurate and reliable population enumeration.

C. Statistical Modeling to Exclude Undocumented Immigrants From the 2020 Apportionment Count Would Result in a Less Accurate and Reliable Enumeration.

It is my opinion that the use of statistical modeling to exclude undocumented immigrants would result in a less accurate and reliable enumeration. Below, I (1) explain how current statistical methods used in the enumeration process fundamentally differ from what would be required to estimate an apportionment population that excludes undocumented immigrants; and (2) explain why, in light of the Census Bureau Standards, implementation of any such statistical model would not be feasible for the 2020 apportionment count.

I start by first outlining what the Census Bureau currently plans with respect to estimating citizenship status to produce CVAP because that informs my understanding of the type of statistical modeling that might be considered, although I note that CVAP is not clearly being developed for the purpose of apportionment.[150] Given the shortcomings of available

[150] Trump's executive order calls for identification of citizenship status for states to use for "districting purposes," while acknowledging that it might not be permissible: "Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population." 84 Fed. Reg. at 33,824. To date, no states have actually requested the data.

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administrative records, explained above, the Census Bureau also must use modeling to estimate CVAP. Although the exact methodology for doing so has not been finalized, documents indicate that a model will be estimated for each person in the census "using the most current citizenship status from each available citizenship source for the person, as well as the person's other demographic, household, and location information as explanatory variables."[151] I presume that any model to estimate legal status would rely on a similar model specification.

1. The Extent of Any Planned Statistical Modeling to Exclude Undocumented Immigrants is Fundamentally Different than the Census Bureau's Current Uses of Statistical Modeling in Apportionment.

The current statistical methods used by the Census Bureau to address missing and erroneous values in the census include data editing and imputations. Data editing is the process of identifying missing, invalid, or inconsistent entries, and changing the entries according to checks of logical relationships.[152] For example, an individual who leaves blank the age question on the census form but completes information with respect to her date of birth would have age filled in through the process of editing. Statistical imputation is the process of filling in missing or conflicting values with a substitute. To produce population numbers from the decennial census, deterministic hot-deck count imputation is used in the small number of cases when an individual or a household does not answer a question, or when a household is not enumerated through self-completion or the Census Bureau's NRFU process, as described above.[153] The hot-

[151] *See* Department of Homeland Security (Dec. 20, 2019). Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau.
[152] This is sometimes called logical imputation. Editing can also rely on recontacts with the respondent or reliance on other data sources.
[153] Earlier in the data collection process, modeling on the basis of administrative records is used, for example, in the creation of the MAF and in the determination of a household as occupied or vacant. Count imputation occurs when the Census Bureau is unable to get information about an address in the MAF: (1) when records indicate housing unit is occupied but did not have number of residents; (2) when records say a housing unit exists, but they are unclear whether occupied or vacant, then the Bureau imputes both information with respect to if occupied and household size; (3) status imputation: if unclear if a unit exists, then impute if occupied, vacant, or nonexistent and then

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deck procedure uses contemporaneous data from neighboring housing units to fill in deterministic values for the missing information.[154]

The nature of the statistical modeling that would be required for estimating legal status fundamentally differs from the statistical modeling currently used in producing population numbers for apportionment in several ways. First, excluding undocumented immigrants from the apportionment population requires imputing not just the household count, but also the characteristics (namely, citizenship status and legal status) of the household. As explained above, the Census Bureau currently produces apportionment numbers from the CUF, which only relies on count imputation. Characteristic imputation occurs in the CEF as a separate process, after the final population count is established and for the purposes of redistricting and other data tabulations.[155]

Second, the scope of any statistical modeling required to estimate the number of undocumented immigrants would be unprecedented for use in enumerating the apportionment population. For example, in 2010, 0.39% (less than one half of one percent) of the total population was added via count imputation; in 2000, 0.43% of total population was added using count imputation.[156] In other words, count imputation is used sparingly, and only after giving the entire population an opportunity to self-respond, and attempting to enumerate through NRFU.[157]

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household size. For official statistics beyond apportionment numbers, the Census Bureau also conducts characteristic imputation, in which the characteristics of the household are imputed using hot-deck methods.

[154] In contrast, a cold-deck imputation procedure would use information from outside sources.

[155] Memorandum from Deborah M. Stempowski to The Record Regarding Use of Administrative Records in the 2018 End-to-End Census Test (Mar. 26, 2018), 8.

[156] *See* https://www.pewsocialtrends.org/2011/05/04/imputation-adding-people-to-the-census/.

[157] Relatedly, the Census Bureau acknowledges in the 2020 Operational Plan that "[t]he accuracy and usefulness of the data collected for the 2020 Census are dependent upon the ability to obtain information from the public, which is influenced partly by the public's perception of how well their privacy and confidentiality concerns are being addressed . . . . If a substantial segment of the public is not convinced that the Census Bureau can safeguard their response data against data breaches and unauthorized use, then response rates may be lower than projected, leading to an increase in cases for follow-up and cost increases." For review of research on this topic, *see* U.S. Census Bureau, Privacy Research in Census 2000, Census 2000 Topic Report No. 1 (2003).

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In contrast, estimation of the apportionment population excluding undocumented immigrants requires extensive modeling to account for gaps and inconsistencies in administrative records. With almost no administrative records directly identifying undocumented persons, the Census Bureau would need to impute the vast majority of the population to be excluded. The Census Bureau also acknowledges the inaccuracy of the models for those in the 2020 Census who are unable to be linked to administrative records. These individuals will have their citizenship probability "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."[158]

Third, the shortcomings of the inputs to any model to estimate undocumented status would seriously implicate the accuracy of the outputs to such a model. All of the issues outlined above regarding the accuracy, reliability, and timeliness of administrative records will impact the predictive accuracy of the model results. Census research acknowledges that the modeling of missing information on citizenship will be challenging, with the accuracy of the models "not known."[159] Critically, the concern is not just with the accuracy and reliability of information about citizenship and legal status in administrative records, but also the other information from the administrative records that might be used in building the predictive model—such as race, ethnicity, sex, age, or country of origin.[160] If there are errors in the other explanatory variables, the model results can be biased and unreliable.

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[158] Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 17.
[159] Brown et al, 44.
[160] As explained in Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 17: "A model will be estimated for each person using the most current citizenship status from each available citizenship source for the person, as well as the person's other demographic, household, and location information as explanatory variables."

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Specifically, one key input of concern is the quality of the measures of race and ethnicity in administrative records. The quality of the race and ethnicity data in Numident is poor.[161] The race data included in the Numident file is collected at the time an application is made to obtain a Social Security number. Prior to 1980, the application form only permitted the racial categories of white, black, and other.[162] Individuals added to Numident through state vital records (the EAB program)—roughly one-fourth of the population—are typically missing race entirely because states do not transfer that information.[163] Also problematic is that Hispanic origin data are indirectly estimated through country of birth—a flawed assumption given that Hispanics often select more than one race or "some other race."[164] Given the problems with Hispanic ethnicity in Numident, census research has warned that statistical imputation could result in "bias in the resulting proportion of persons who are Hispanic," which could, in turn, bias estimates of citizenship and legal status.[165]

Finally, there are critical unanswered questions about how unverifiable modeling assumptions will be translated into any model results that would be used to exclude individuals from apportionment counts. The modeling of legal status seems likely to follow the same modeling strategy taken for estimating citizenship status, in which the planned model will result

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[161] The Census Bureau has built an internal Best Race and Hispanic Origin file, a composite from various government and commercial sources that uses a rules-based approach to resolve unique race and Hispanic origin codes for person records where those values vary across different files. Unfortunately, the content and quality of this file "is mysterious to observers." Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias?. The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.
[162] The current OMB race and ethnicity categories were not used until 1997.
[163] Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias?. The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.
[164] Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias?. The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.
[165] Richard A. Griffin. (2014). "Issues Concerning Imputation of Hispanic Origin due to Administrative Record Enumeration for the 2020 Census," Proceedings of the Survey Research Methods Section, American Statistical Association, available at http://ww2.amstat.org/sections/srms/proceedings/y2014/Files/311893_88330.pdf.

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in a probability of best citizenship status.[166] This means that the model output for each individual is a value that ranges from 0 to 1, where 0 would indicate a 0% chance of being a citizen and 1 would indicate a 100% chance of being a citizen, but where most values will fall somewhere in between. It is unclear, however, how the Census Bureau will decide on the threshold that will be used to classify an individual as a citizen or not based on their predicted probability.[167] Any appropriate rate of false positives and false negatives that would be considered acceptable in producing an apportionment population based on such probabilities are unclear. Indeed, a probabilistic model inherently implies error in the underlying data and clearly contravenes an actual enumeration of "whole number of persons in each State." And it is unclear how the uncertainty in the prediction will be accounted for in the enumeration count. What is clear, however, is that the resulting population count from the use of such probabilities will be less reliable than the existing method of counting the population, given that these modeling decisions will introduce uncertainty and bias into the resulting population numbers.

In sum, there are fundamental differences in the statistical modeling that would be necessary to produce apportionment populations excluding undocumented immigrants compared to the current use of statistical modeling in the enumeration process. The nature and scope of the statistical modeling required to produce estimates of undocumented immigrants from incomplete and outdated administrative records requires untested modeling approaches and unverified modeling assumptions that will inherently result in a population count that is less reliable and less accurate than the current enumeration methods.[168]

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[166] Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 17.

[167] For example, it is unclear if, say, a 50%, 70%, or 90% predicted chance of being a legal non-citizen would be considered sufficient for inclusion in the apportionment population.

[168] Additionally, any attempt to exclude the undocumented immigrant population from the apportionment count threatens the accuracy and reliability of the apportionment population by reducing cooperation with the decennial census. The very exercise of asking the Census Bureau to use administrative records beyond their originally

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2. Any Implementation of a Statistical Model to Exclude Undocumented Immigrants from the 2020 Apportionment Count is Not Feasible in the Limited Available Time.

The Census Bureau's Statistical Quality Standards govern the development and implementation of statistical methods in the design, collection, and dissemination of census products. These standards require an explicit plan that addresses (1) requirements for the editing and imputation systems; (2) verification and testing of the editing and imputation systems; and (3) monitoring and evaluation of the quality of the editing and imputation operations.[169] To date, there is no indication that sufficient planning and evaluation of the statistical modeling required to estimate an apportionment population that excludes undocumented immigrants has occurred, and there is likely not time for it to occur prior to December 31, 2020. It is telling to consider the time typically required to produce estimates of undocumented populations. For example, the most recent DHS estimate of the undocumented population—from December 2018—reports on numbers considered current as of July 2015.

With respect to the Census Bureau's timing, consider, as a point of comparison, that the Census Bureau began investigating methods for utilizing administrative records in NRFU operations shortly after the 2010 census. By the time the 2018 Operational Plan was drafted, the

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intended purpose to identify the legal status of the population will stoke fears about confidentiality and will undermine trust in the Census Bureau. As the former director of the Census John Keane explained: "If the Census Bureau were directed to enumerate undocumented aliens separately in order to remove them from the apportionment count, we would run the risk of being perceived as an enforcement agency . . . . The Census Bureau goes to great lengths to avoid misperception that could adversely affect cooperation. We must convince the population that it is safe to be included in the census." John G. Keane. Statement of the Director of the Bureau of the Census Before the Subcommittee on Energy, 5. Research shows that attitudes about privacy and confidentiality are strong predictors of census self-response—those individuals reporting higher levels of concern about the confidentiality of census data are less likely to return their census forms, more likely to skip individual questions, and more likely to provide inaccurate responses. *E.g.*, Singer, E., Mathiowetz, N. A., & Couper, M. P. (1993). The impact of privacy and confidentiality concerns on survey participation: The case of the 1990 U.S. census. Public Opinion Quarterly, 57, 465–482. Lower levels of self-response, in turn, increase the cost and reduce the quality of the census count. Brown, J. D., Heggeness, M. L., Dorinski, S. M., Warren, L., & Yi, M. (2019). Predicting the Effect of Adding a Citizenship Question to the 2020 Census. Demography, 56(4), 1173-1194.

[169] *See* https://www.census.gov/about/policies/quality/standards/standardc2.html.

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use of administrative records had undergone years of research led by a team of census researchers (i.e. the Administrative Records Modeling Team), extensive testing in large-scale tests, engagement with stakeholders (e.g., I served on an administrative records working group for the Census Scientific Advisory Committee), publication and presentation in professional outlets, and significant revisions in light of the results of that research.[170] Such a process is simply not possible before apportionment population numbers are due to the President on December 31, 2020.

VI. Conclusion

To reiterate my opinions:

First, Dr. Poston does not demonstrate, to any degree of reasonable certainty, that Alabama will (a) lose a congressional seat because of the inclusion of undocumented immigrants in the 2020 apportionment count, or (b) maintain a congressional seat because of the exclusion of undocumented immigrants in the 2020 apportionment count.

Second, there is no reliable way to exclude undocumented immigrants from the 2020 apportionment count because (a) there is currently no reliable methodology or data product that the Census Bureau may use to do so; (b) no administrative records are of sufficient quality to use to exclude undocumented immigrants from the 2020 apportionment count; and (c) the nature, scope, and methodology of the statistical modeling needed to produce estimates of the undocumented population is fundamentally different from the statistical modeling currently used in producing the apportionment population, and would result in a less accurate and reliable enumeration.

[170] The final 2020 Census Operational Plan scaled back the plans to use administrative records compared to initial plans in the 2015 version 1.1. Operational Plan.

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Executed on March 13, 2020 at Durham, NC.

I declare under penalty of perjury that the foregoing is true and correct.



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Yowell, Tiffany and Jason Devine. (July 2013, Revised May 2014). Evaluating Current and Alternative Methods to Produce 2010 County Population Estimates, U.S. Census Bureau, Population Division Working Paper.

Zamudio, Maria. (June 21, 2019). Deported U.S. Veterans Feel Abandoned By The Country They Defended. NPR. https://www.npr.org/local/309/2019/06/21/733371297/deported-u-s-veterans-feel-abandoned-by-the-country-they-defended.

D. SUNSHINE HILLYGUS

Department of Political Science
Duke University
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ACADEMIC APPOINTMENT

Duke University
Professor of Political Science, July 2015-
Professor of Public Policy (by courtesy), Nov 2015-
Associate Professor of Political Science, July 2009-2015
Director, Duke Initiative on Survey Methodology, July 2010-

Harvard University
Frederick S. Danziger Associate Professor of Government, July 2007-June 2009
Director, Program on Survey Research, July 2005-June 2009
Assistant Professor of Government, July 2003-June 2007

EDUCATION

Stanford University
Ph.D., Political Science, 2003
M.A., Political Science, 2000
Dissertation: Understanding Receptivity to Political Campaigns: Three Essays on Voter Decision Making in Election 2000.
Committee: Morris Fiorina (chair), Norman Nie, Simon Jackman, David Brady

University of Arkansas
M.A., Political Science, May 1998
B.A., Political Science and B.A., Spanish, *Summa Cum Laude*, May 1996

BOOKS

Holbein, J. and D.S. Hillygus. *Making Young Voters: Converting Civic Attitudes into Civic Action.* Cambridge University Press, 2020.

Hillygus, D.S. and T. Shields. *The Persuadable Voter: Wedge Issues in Presidential Campaigns.* Princeton University Press, 2008. Paperback, 2009.
Winner of the 2009 Robert E. Lane Award.
Excerpt reprinted in *Controversies in Voting Behavior*, 5th edition(2011).

Hillygus, D.S., N. Nie, K. Prewitt, and H. Pals. *The Hard Count: The Political and Social Challenges of Census Mobilization.* Russell Sage Foundation, 2006.

JOURNAL PUBLICATIONS

Bail, C.A., Guay, B., Maloney, E., Combs, A., Hillygus, D.S., Merhout, F., Freelon, D. and Volfovsky, A., 2020. Assessing the Russian Internet Research Agency's impact on the political attitudes and behaviors of American Twitter users in late 2017. *Proceedings of the National Academy of Sciences*, 117(1).

Madson, G. and D.S. Hillygus. 2019. "Who Trusts the Polls? Motivated Reasoning in Evaluations of Polling Results," *Political Behavior.*

Carlson, C., V. Dounoucos, and D.S. Hillygus. 2019. "The Message and the Medium: The Communication Effects of Twitter Commentary," *Journal of Information Technology & Politics*.

Holbein, J., D.S. Hillygus, C. Gibson-Davis, M. Lenard, and D. Hill. 2018. "The Development of Students' Engagement in School, Community, and Democracy," *British Journal of Political Science*.

Hillygus, D.S. 2018. "Navigating Scholarly Exchange in Today's Media Environment," *Journal of Politics* 80(3), 1064-1068(editor-reviewed).

Xing, Z. D.S. Hillygus and L. Carin. 2017. "Evaluating U.S. Electoral Representation with a Joint Statistical Model of Congressional Roll-Calls, Legislative Text, and Voter Registration Data," *Proceedings of the 23nd ACM SIGKDD Conference on Knowledge Discovery and Data Mining (KDD)*, 1205-1214.

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DeYoreo, M., Reiter, J. and D.S. Hillygus. 2017."Nonparametric Bayesian Models With Focused Clustering for Mixed Ordinal and Nominal Data," *Bayesian Analysis*.

Hillygus, D.S., McKee, S., and M. Young. 2017. "Reversal of Fortune: The Political Behavior of White Migrants to the South," *Presidential Studies Quarterly*.

Henderson, M. and D.S. Hillygus. 2016. "Contextual Factors in Time of Decision in the 2008 Presidential Election," *Public Opinion Quarterly*.

Holbein, J. and D.S. Hillygus. 2016. "Making Young Voters: The Impact of Preregistration on Youth Turnout," *American Journal of Political Science*.

Ballard, A., D.S. Hillygus, and T. Konitzer. 2016. "Campaigning Online: Web Display Ads in the 2012 Presidential Campaign," *PS: Political Science & Politics*.

Si, Y., J. Reiter, and D.S. Hillygus. 2016. "Bayesian Latent Pattern Mixture Models For Handling Attrition In Panel Studies With Refreshment Samples," *Annals of Applied Statistics*.

Schifeling, T. C. Cheng, J. Reiter and D.S. Hillygus. 2015. "Accounting for Nonignorable Unit Nonresponse and Attrition in Panel Studies with Refreshment Samples," *Journal of Survey Statistics and Methodology*.

Gerber, A., K. Arceneaux, C. Boudreau, C. Dowling, and D.S. Hillygus. 2015."Reporting Balance Tables, Response Rates and Manipulation Checks in Experimental Research: A Reply from the Committee that Prepared the Reporting Guidelines," *Journal of Experimental Political Science*.

Johnston, C., D.S. Hillygus, and B. Bartels. 2014. "Ideology, The Affordable Care Act Ruling, and Supreme Court Legitimacy," *Public Opinion Quarterly*, 78 (4): 963-973.

Gerber, A., K. Arceneaux, C. Boudreau, C. Dowling, D.S. Hillygus, T. Palfrey, D. Biggers, D. Hendry. 2014. "Reporting Guidelines for Experimental Research: A Report from the Experimental Research Section Standards Committee," *Journal of Experimental Political Science*, 1(1): 81-98.

Si, Y., J. Reiter and D.S. Hillygus. 2014. "Semi-parametric Selection Models for Potentially Non-ignorable Attrition in Panel Studies with Refreshment Samples," *Political Analysis*, 23(1): 92-112.

Frankel, L. and D.S. Hillygus. 2014. "Panel Attrition and the Survey Experience," *Political Analysis*, 22(3): 336-353.

Hillygus, D.S. and S. Treul. 2014. "Assessing Strategic Voting in the 2008 Presidential Primaries," *Public Choice*, 161(3): 517-536.

Aldrich, J., B. Bishop, R. Hatch, D.S. Hillygus, and D. Rohde. 2013. "Blame, Responsibility, and the Tea Party in the 2010 Midterm Elections," *Political Behavior*, 36(3), 471-491.

Deng, Y., D.S. Hillygus, J. Reiter, and Y. Si. 2013. "Handling Attrition in Longitudinal Studies: The Case for Refreshment Samples," *Statistical Science*, 28(2): 238-256.

Hillygus, D.S. 2011. "The Evolution of Election Polling in the United States," *Public Opinion Quarterly*, 75(5): 962-981.

Henderson, M. and D.S. Hillygus. 2011. "The Dynamics of Health Care Opinion, 2008-2010: Partisanship, Self-Interest, and Racial Resentment," *Journal of Health Politics, Policy, and Law*, 36(6): 945-960.

Henderson, M., D.S. Hillygus, and T. Tompson. 2010. "'Sour Grapes' or Rational Voting? Voter Decision Making Among Thwarted Primary Voters in 2008," *Public Opinion Quarterly*, 74(3): 499-529.

Ellis, R., D.S. Hillygus and N. Nie. 2010. "Retrospective and Prospective Candidate Evaluations and the Dynamics of Vote Choice in 2008," *Electoral Studies* 29(4): 582-593.

Hillygus, D.S. and M. Henderson. 2010. "Policy Issues and the Dynamics of Vote Choice in the 2008 Presidential Election," *Journal of Elections, Public Opinion, and Parties*, 20(2): 241-269.

Treier, S. and D.S. Hillygus. 2009. "The Nature of Political Ideology in the Contemporary Electorate," *Public Opinion Quarterly*, 73(4):679-703.

Burden, B. and D.S. Hillygus. 2009. "Opinion Formation, Polarization, and Presidential Reelection." *Presidential Studies Quarterly*, 39: 619-35.

Hillygus, D.S. and T. Shields. 2008. "Southern Discomfort? Regional Differences in Voter Decision Making in the 2000 Presidential Election," *Presidential Studies Quarterly*, 38(3): 506-520.

Hillygus, D.S. 2007. "The Dynamics of Voter Decision Making Among Minor Party Supporters: The 2000 U.S. Presidential Election," *British Journal of Political Science*, 37(2): 225-244.

Hillygus, D.S. 2005. "Campaign Effects and the Dynamics of Turnout Intention in Election 2000," *Journal of Politics*, 66(1): 50-68.

Hillygus, D.S. 2005. "The Missing Link: Exploring the Relationship between Higher Education and Political Behavior," *Political Behavior*, 27(1): 25-47.

Hillygus, D.S. and T. Shields. 2005. "Moral Issues and Voter Decision Making in the 2004 Presidential Election," *PS: Political Science and Politics*, 38(2): 201-10.
Reprinted in *Quantitative Methods in Practice*, D. Rochefort (ed) CQ Press, 2006.

Hillygus, D.S. and S. Jackman. 2003. "Voter Decision Making in Election 2000: Campaign Effects, Partisan Activation, and the Clinton Legacy," *American Journal of Political Science*, 47(4): 583-596.

Nie, N. and D.S. Hillygus. 2002. "Where Does Internet Time Come From?: A Reconnaissance," *IT & Society*, 1(2): 1-20.

Nie, N. and D.S. Hillygus. 2002. "The Impact of Internet Use on Sociability: Time-Diary Findings," *IT & Society*, 1(1): 1-29.

OTHER PUBLICATIONS

Zhou, J., D.S. Hillygus, and J. Aldrich. 2019. "Understanding the Trump Win: Populism, Partisanship, and Polarization in the 2016 Election," *Publications of the Bavarian American Academy*, Heidelberg University Press.

Guay, B. and D.S. Hillygus. 2018. "Online Public Opinion Polling," *Oxford Bibliographies*

Hillygus, D.S. and S. Snell. 2018. "Longitudinal Surveys: Issues and Opportunities," *Oxford Handbook on Polling and Polling Methods*. L. Atkeson and M. Alvarez, eds. New York: Oxford University Press.

Hillygus, D.S. and B. Guay. 2016. "The Virtues and Limitations of Election Polling in the United States," *Seminar Magazine*.

Hillygus, D.S. 2016. "The Practice of Survey Research: Changes and Challenges," *New Directions in Public Opinion*, second edition. Adam Berinsky, ed. Routledge Press.

Hillygus, D.S., N. Jackson, and M. Young. 2014. "Professional Respondents in Online Survey Panels," *Online Panel Research: A Data Quality Perspective*. M.Callegaro, R. Baker, P. Lavrakas, J. Krosnick, J. Bethlehem, and A. Göritz, eds.

Frankel, L. and D.S. Hillygus. 2014. "Niche Communication in Political Campaigns," *Oxford Handbook on Political Communication*. Kathleen Hall Jamieson and Kate Kenski, eds. New York: Oxford University Press.

Hillygus, D.S. and B. Burden. 2013. "Mass Polarization in the Bush Presidency," *The Presidency of George W. Bush: Perspectives on the Forty-Third President of the United States*, D. Kelly and T. Shields, eds. Texas A&M Press.

Hillygus, D.S. 2011. "The Practice of Survey Research: Changes and Challenges" *New Directions in Public Opinion*. Adam Berinsky, ed. Routledge Press.

Bishop, B. and D.S. Hillygus. 2011. "Campaigning, Debating, Advertising," *Oxford Handbook on Public Opinion and Media*. Larry Jacobs and Robert. Shapiro, eds. New York: Oxford University Press.

Hillygus, D.S. 2010. "Campaign Effects on Vote Choice," *Oxford Handbook on Elections and Political Behavior*. Jan Leighly and George C. Edwards III, eds. Oxford University Press.

Bishop, B., A. Cooper, and D.S. Hillygus. 2009. "Innovative Survey Methodologies for the Study of Attitudes Toward Terrorism and Counterterrorism Strategies," Institute for Homeland Security Solutions, Duke University.

Hillygus, D.S. 2009. "Guest Editor Introduction: Understanding the 2008 Presidential Election," *Public Opinion Quarterly* 73: 841-844.

Hillygus, D.S. 2009. "The Need for Survey Reporting Standards in Political Science," *The Future of Political Science: 100 Perspectives*, G. King, N. Nie, and K. Schlozman (eds).

Hillygus, D.S. 2008. "Internet and Politics 2008: Microtargeting," *The Publius Project*, The Berkman Center.

Hillygus, D.S. and T. Shields. 2008. "Moderation or Polarization in Candidates' Campaign Agendas?" *The Polling Report*, 24(15).

Hillygus, D.S. 2007. "Moral Values: Media, Voters, and Candidate Strategy," in *A Matter of Faith? Religion in the 2004 Presidential Election*, Brookings Institution Press.

Hillygus, D.S. 2004. Review of Models of Voting in Presidential Elections: The 2000 Election, H. Weisberg and C. Wilcox (eds), in *Presidential Studies Quarterly*, 34(3).

Brady, D. and D.S. Hillygus. 2004. "Assessing the Clinton Presidency: The Political Constraints of Legislative Policy" in *The Clinton Riddle: Perspectives on the 42nd President*, Shields, Whayne, and Kelley (eds). U of Arkansas Press.

Nie, N., D.S. Hillygus, and L. Erbring. 2003."Internet Use, Interpersonal Relations and Sociability: A Time Diary Study" in *The Internet in Everyday Life*, Wellman and Haythornthwaite (eds). Oxford: Blackwell Publishers.

Nie, N. and D.S. Hillygus. 2001. "Education and Democratic Citizenship," in *Making Good Citizens: Education and Civil Society*, Ravitch and Viteritti (eds). Yale University Press.

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CURRENT PROJECTS

Valentino, N., K. Zhirkov, D.S. Hillygus, B. Guay. "Personality Differences between Face-to-Face and Online Samples," R&R, *Public Opinion Quarterly*.

Olanrewaju A., G. Madson, D.S. Hillygus and J. Reiter. "Leveraging Auxiliary Information on Marginal Distributions in Nonignorable Models for Item and Unit Nonresponse in Surveys," under review.

Lopez, J. and D.S. Hillygus. "Why So Serious?: Survey Trolls and Political Misinformation" available at SSRN.

Endres, K. D.S. Hillygus, and S. Snell, "Big Data, Big Problems: Overcoming Barriers to Consent for Data Linking."

HONORS/AWARDS

Duke University Howard D. Johnson Distinguished Teaching Award, 2019.

National Science Foundation, Political Science Program ($3.9m) "ANES Web: American National Election Study," (Co-PI with PI S. Iyengar), 2018-2021.

Provost "Together Duke" Initiative ($454,000), "Duke Polarization Lab" (Co-PI with K. Heller, J. Moody, G. Sapiro, A. Volfovsky and PI C. Bail), 2018-2019

National Science Foundation, Political Science Program, Grant SES-1657821 ($335,690), "Making Young Voters: Policy Reforms to Increase Youth Turnout" (PI with Co-PI J. Holbein) 2017-2019

National Science Foundation, MMS Program, Grant SES-1733835 ($300,000), "Leveraging Auxiliary Information on Marginal Distributions in Multiple Imputation for Survey Nonresponse" (Co-PI with PI J. Reiter) 2017-2019

Bass Connections, Education and Human Development grant ($23,000), 2017-2019

Facebook Academic Program gift ($25,000), 2016

National Science Foundation, Political Science Program, Grant SES-1416816 ($249,999), "Education, Engagement, and Well-being among Adolescents" (PI with Co-PI C. Gibson-Davis) 2014-2016

National Science Foundation, MMS Program, Grant SES-1131897 supplement ($199,000), "Conducting Research Using the Survey of Income and Program Participation (SIPP) Panel Study," 2013-2015

Information Initiative at Duke, Research Incubator Award ($75,000) "Using Big Data to Understand the American Electorate," (with L. Carin), 2013-2015

National Science Foundation, MMS Program, Grant SES-1131897 ($2,997,591), "Triangle Census Research Network" (Senior Co-Investigator with L. Cox, D. Dunson, J. Hotz, F. Li, and PI J. Reiter and Co-PI A. Karr), 2011-2016

National Science Foundation, MMS Program, Grant SES-1061241 ($160,000), "Multiple Imputation Methods for Handling Missing Data in Longitudinal Studies with Refreshment Samples." (with PI J. Reiter), 2011-2012

National Science Foundation, Political Science Program, SES-1110341"Balancing Innovation and Continuity in Longitudinal Surveys"($38,235), 2011

IHSS Award, Innovative Survey Methodologies($25,081), 2009

Robert E. Lane Award for best book published in political psychology in 2008

CAPS Junior Faculty Seed Grant ($5000), 2008

Shorenstein Center for Press and Politics Fellow, Fall 2005

Program on the Global Demography of Aging Grant ($17,130), 2005-06

Institute for Quantitative Social Science Research Grant ($10,000), 2005-06

Institutional Development Initiative ($10,000), 2005-06

Blair Center for Southern Politics, 2004 Election Survey Funding ($85,000)

CAPS Junior Faculty Seed Grant ($5000), 2004-2005

Milton Fund Grant, Harvard University ($3500), 2004-2005

Harvard University Cooke-Clark Grant ($6000)

Westview Paper Prize, 2003 Midwest Political Science Meeting

Heinz Eulau Political Behavior Fellowship, 2002-2003

Best Graduate Student Poster Award, 2002 Political Methodology Meeting

National Conference of State Legislators Women's Graduate Fellowship, 1998

PROFESSIONAL SERVICE

Associate PI, American National Election Study, 2018-2021
Associate Editor, *Political Analysis*, 2018-
Chair, POQ Advisory Committee, 2011-
Methods, Measurement, and Statistics Advisory Panel, National Science Foundation, 2018-2020
Board Member, American National Election Studies, 2010-2013, 2014-2017
Scientific Advisory Committee, U.S. Census Bureau, 2012-2018
Political Science Advisory Panel, National Science Foundation, 2010-2012
Member, Executive Council, Midwest Political Science Association, 2014-17
Member, Executive Council, Southern Political Science Association, 2014-17
Editorial Board, *American Political Science Review*, 2016-
Editorial Board, *Journal of Politics*, 2010-
Editorial Board, *Public Opinion Quarterly*, 2008-
Editorial Board, *Political Communication*, 2015-

Editorial Board, *Journal of Experimental Political Science*, 2013-
Editorial Board, *Political Behavior*, 2011-
Editorial Board, *Journal of Elections, Public Opinion and Parties*, 2008-
Editorial Board, *Political Science Network*, 2007-
Editorial Board, *The Forum*, 2011-
Editorial Board, *Political Analysis*, 2015-2017
Editorial Board, *American Journal of Political Science*, 2009-2012
Guest Editor, *Public Opinion Quarterly* 2009 Special Issue
AAPOR Journals Committee (2019)
APSA EPOVB Best Article in Political Behavior Award Committee (2019)
APSA Experimental Research Section: Reporting Standards Committee (2011)
APSA Political Meth Section: Nominations Committee (2010-2012), Diversity Committee (2005-08, 2011-12), Miller Prize (2017), Emerging Scholar (2018-2020)
SPSA, VO Key Award Committee, 2013
APSA Gladys M. Kammerer Award Committee, 2012
APSA Philip Converse Book Award Committee, 2009, 2010 and 2012
SPSA Program Committee, 2009 and 2012
JOP Best Paper Award Committee, 2011
AAPOR Book Award Committee, 2011, 2016

CONFERENCES ORGANIZED

International Total Survey Error Workshop (6/18)
Conducting Research Using the Survey of Income and Program Participation (SIPP) Panel Study, Durham, NC (2/14)
Balancing Innovation and Continuity in Longitudinal Surveys, Durham, NC (2/11)
Assessing Survey Quality, Cambridge, MA (4/09)
Surveying Multiethnic America, Cambridge, MA (4/07)
Advances in Questionnaire Design, Cambridge, MA (2/06)

Expert Witness Work

League of Women Voters v. State of North Carolina, Case No. 1:13-CV-660
NAACP et al. v. Bureau of the Census et al., Case No. 8:18-CV-00891
New York Immigration Coalition v. Dept. of Commerce, Case No. 18-CV-5025

INVITED PRESENTATIONS(last 5 years)

Plenary, Pacific Association of Public Opinion Research Meeting (12/19)
Massachusetts Institute of Technology (10/19)
Michigan State University (9/19)
Plenary, American Association of Public Opinion Research Meeting (5/19)
University of North Carolina (2/19)
Emory University (11/18)
Duke Alumni Association of Philadelphia (4/18)
Duke Alumni Association of Los Angeles (6/17)
Duke Alumni Association of Austin (6/17)
Duke Alumni Association of Denver (5/17)
Fordham University (4/17)
Qualtrics Innovation Summit, Salt Lake City (3/17)
Stanford Alumni Association, Durham (2/17)

Duke Alumni Association of San Diego (11/16)
Wake Forest University (11/16)
Reed College (10/16)
UNC-Wilmington (10/16)
Duke Alumni Association of North Texas (9/16)
Duke Alumni Association of Charlotte (5/16)
Dept of Political Science, MIT (4/16)
Center for the Study of Democratic Politics, Princeton (3/16)
Appalachian State University (3/16)
Computers, Privacy, and Data Protection Conference, Brussels (1/16)
Political Persuasion Conference, Laguna Beach, CA (1/16)
Duke Alumni Association of Tampa (1/16)
Keynote, Australian Society for Quantitative Political Science, Melbourne (12/15)
Dept of Communication, U. of Michigan (11/15)
Dept of Political Science, UNC-Greensboro (11/15)
Microsoft Panel on Campaign Technology, D.C. (11/15)
Political Science Dept, U. Texas (12/14)
ElectionsLive!, Duke University (11/14)
American Politics Research Group, UNC (11/14)
American Politics Workshop, UCLA (01/14)
The American Panel Survey Workshop, Wash U (11/13)
Intro to Survey Methods, Shanghai Jiao Tong University (06/13)
Senior Scholar Career Presentation, Visions in Methodology, FSU (04/13)
American Politics Workshop, Yale University (03/13)
Google Political Innovation Summit, New York (01/13)

DEPARTMENTAL AND UNIVERSITY SERVICE

Founding Director, Duke Initiative on Survey Methodology, 2010-
Associate Director, Institutional Review Board, Duke University, 2010-
Social Science Research Institute Steering Committee, 2011-
Duke Advisory Committee on Investment Responsibility, 2017-
EHD-Bass Connections Team Leader, 2017-2020
Standing Committee for Misconduct in Research, 2019-2022
Social Science Research Institute (SSRI) Director Search chair, 2018
Faculty Fellow, Duke Alumni Association, 2015-2018
POLIS steering committee, 2015-2017
Social Science Research Institute Planning Committee, 2012
Behavior and Identity Field Chair, 2011-2012, 2014, 2016-2018
Behavior and Identity Workshop Organizer, 2010-2012, 2016
American Politics Field Organizer, 2010-2012
REP Search Committee, Duke Political Science, 2013, 2017
China Search Committee, Duke Political Science, 2011
Graduate Admissions Committee, Duke Political Science, 2009, 2014
Undergraduate Curriculum Committee, Duke Political Science, 2009
Faculty Organizer, Duke Political Science Graduate Orientation, 2009
Harvard University Faculty Advisory Group for Metrics and Analysis, 2006-2009
Faculty Advisory Board for the Social Sciences, Harvard FAS, 2008-2009

Executive Committee, Center for American Political Studies, 2003-2009
Organizer, Political Psychology and Behavior Workshop, 2003-2008
Standing Committee on Women, Harvard FAS 2004-2005

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, and DIANA MARTINEZ, et al., COUNTY OF SANTA CLARA, CALIFORNIA, et al., STATE OF NEW YORK, et al., Defendant-Intervenors.	Civil Action No. 2:18-cv-00772-RDP

RULE 26(A)(2)(B) EXPERT REPORT AND DECLARATION OF KIMBALL W. BRACE

EXPERT REPORT AND DECLARATION OF KIMBALL W. BRACE
MARCH 13, 2020

I. Introduction

My name is Kimball William Brace. I am the president of Election Data Services, Inc. ("Election Data Services" or "EDS, Inc."), a Manassas, Virginia-based consulting firm whose specialty is reapportionment, redistricting matters, election administration issues, and the census.

I have been retained by all of the Defendant-Intervenors in *Alabama, et al. v. Department of Commerce, et al.*, 2:18-cv-00772-RDP. My understanding of the case is that Alabama seeks to require the federal government to exclude undocumented immigrants from congressional reapportionment calculations, and that Alabama alleges that it will lose a congressional seat that it otherwise would have kept following the 2020 census if undocumented immigrants are not excluded from the apportionment count. I have been asked by Defendant-Intervenors to provide background and history on the congressional reapportionment process, including my continuing involvement with creating EDS, Inc.'s yearly reapportionment reports based on United States Census Bureau ("Census Bureau") population estimates from the Population Estimates Program that are also released yearly. I have also been asked to review and opine on the report and supplemental report submitted by Plaintiff's expert witness, Dr. Dudley Poston, in this case.

All the materials considered in forming the opinions contained herein are identified in this report. I am being compensated at an hourly rate of $275 per hour for my work, and at an hourly rate of $185 for work performed by another Election Data Services staffer.

II. Background and Qualifications

I attended American University in Washington, D.C., from 1969 through 1974 (having taken a year off for the 1972 campaign), where I earned a B.A. degree in Political Science. I started Election Data Services in 1977 and have been with the company since that time. Prior to 1977, I was a journalist and was employed by such companies as NBC News, Congressional Quarterly, and Plus Publications.

As president of Election Data Services I supervise and direct all major projects in which the company is involved. Election Data Services has been viewed by clients, the press, academics, and the general public as a research facility and consulting firm dealing with many aspects of the electoral process. The company and its staff have been hired by state and local governments across the nation to provide software, database development services, and consulting services for the creation of districting plans and the analysis of many aspects of the redistricting process.

Since 1979, I, individually and with Election Data Services, have been actively involved in many aspects of the redistricting process, having gone through four full census and redistricting cycles. I have been a consultant to many state and local governmental organizations around the nation, providing strategic advice and consulting on redistricting matters, coordinating the development of extensive databases used in the redistricting process, creating

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and assisting others with the creation of districting plans, and analyzing many aspects of districts and district configurations. Over the past 41 years, Election Data Services's clients for redistricting services have come from more than half the states in the nation. In addition, over the past four decades I have been called upon to provide reports, expert witness testimony, and assistance to attorneys in more than 75 different court cases.

I frequently give speeches to groups and organizations and participate in numerous conferences and panels on various aspects of apportionment, redistricting, and the census. Since the early 1980s, I have been a regular participant and speaker at annual and bi-annual meetings of the Task Force on Redistricting of the National Conference of State Legislatures ("NCSL"). I have also been on their faculty, as NCSL has conducted five regional "Get Ready for Redistricting" seminars each decade since 1980. I was also appointed by the U.S. Secretary of Commerce to the 2010 Census Advisory Committee, a 20-person advisory board to the Director of the Census Bureau. Just this week I was asked to be NCSL's representative on a series of half-day small-group expert meetings, being arranged by the Committee on National Statistics (CNSTAT), to delve deeply into and provide informal discussion/feedback with Census Bureau staff as they continue to develop the differential privacy-based Disclosure Avoidance System for the 2020 census. I am regularly called upon by members of the press with questions on redistricting, reapportionment, the census, election administration issues, and politics in general.

For the past four decades I and Election Data Services have studied and issued yearly reports on the apportionment process using new population estimates released by the Census Bureau and private demographic firms. All of our reports can be found at our website: www.electiondataservices.com, under the "Research" tab. We have become a staple for the press and others to cite when looking at the shift that is occurring in population between different states.

A copy of my curriculum vitae is attached as **Exhibit A**, which includes a complete list of cases in which, during the previous four years, I have testified as an expert at trial or by deposition.

III. Summary of Conclusions

Based upon my decades of experience with congressional reapportionment, population projections, and the census generally, it is my opinion that Dr. Poston does not show with any level of certainty that Alabama will lose its seventh congressional seat following the 2020 census if undocumented immigrants are not excluded from the population counts. In addition, it is my opinion that Dr. Poston does not show with any level of certainty that Alabama will retain a seventh congressional seat following the 2020 Census as a result of excluding undocumented immigrants from the apportionment count. Finally, it is my opinion that Dr. Poston's argument that all states should have the same average congressional district population size, and that this is better achieved by excluding the undocumented population, is specious. Dr. Poston ignores the constitutional requirement that each state be assigned at least one congressional seat, which results in a wide range of congressional district sizes across states.

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With respect to his apportionment calculations, Dr. Poston makes the following series of mistakes and assumptions that render his ultimate conclusions unreliable:

First, Dr. Poston's projections of the 2020 resident populations of each state are not a reliable projection of the resident population of each state on Census Day, or April 1, 2020. Dr. Poston uses a long-term trend line to project the 2020 resident population of each state, notwithstanding the fact that such a projection incorporates population changes early in the decade which may not apply to more recent conditions. More importantly, Dr. Poston's projections are not a projection of the resident population of each state on April 1, 2020, the count of the population necessary for congressional reapportionment, but instead appear to be a projection of the resident population of each state on July 1, 2020, three months past census day.

Second, Dr. Poston's projections of the overseas population of each state are not reliable projections of the overseas population of each state on April 1, 2020. Dr. Poston assumes, without any basis, that the proportion of the overseas population of each state on April 1, 2020, will be the same proportion of the overseas population of each state on July 1, 2010. Not only did Dr. Poston fail to explore whether this assumption was appropriate, Dr. Poston was unaware that the Census Bureau changed the way that it will count certain portions of the overseas population from the 2010 census to the 2020 census. Dr. Poston then added his unreliable projections of the 2020 overseas population of each state to his unreliable projections of the 2020 resident population of each state to calculate an unreliable 2020 apportionment population.

Third, Dr. Poston's projections of the undocumented population of each state are not reliable projections of the undocumented population of each state on April 1, 2020. Dr. Poston assumes, without any basis, that the proportion of the undocumented population of each state on April 1, 2020, will be the same proportion of the undocumented population of each state in 2016. Dr. Poston then subtracted his unreliable projections of the 2020 undocumented population from his unreliable projections of the 2020 apportionment population and used these numbers to run a flawed apportionment calculation.

Fourth, even if Dr. Poston had developed a way to more reliably project the 2020 apportionment population and his calculations showed Alabama would lose a seat, the issue still remains whether he can reliably claim with any level of certainty that the loss would come about, because the apportionment process is so susceptible to small changes. As explained in more detail below, because Alabama is so close to gaining its seventh seat back under any of the projections in Election Data Service's 2019 Reapportionment Analysis ("2019 EDS, Inc. Report"), Alabama could very possibly keep or lose its seventh seat when the new numbers become available.

Finally, Dr. Poston compares his apportionment results in his first report to the 2019 EDS, Inc. Report results. But these comparisons are not appropriate because the calculations are based on different inputs.

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IV. United States Congressional Reapportionment and the Method of Equal Proportions

As required by the Constitution, each state is provided at least one initial seat in the House of Representatives. The apportionment of the remaining 385 congressional districts or seats to the states is governed by the "method of equal proportions" formula that was adopted by Congress in 1941. The formula works as follows:

> The [remaining 385] seats are handed out based on statistical "priority values" assigned to each additional seat that a state might get. In as close to plain English as the formula will allow, these priority values are calculated in a two-step process that requires dividing a state's population by the square root of the product of the number of seats it's already been assigned and that number plus one. The priority numbers are then rank ordered: "State A" will get an additional seat if its priority value for that seat is greater than any other state's. The seats are disbursed to states based on these rankings until all 435 have been awarded.[1]

Each decade, by December 31, in the year ending in zero, the Census Bureau releases the initial state-level resident total population results, counts of military and other U.S. government employees and their families living abroad, and the resulting apportionment population counts for each state by December 31, in the year ending in zero. At the same time, the Census Bureau performs the administrative task of running the state numbers through an apportionment program that is based on the method of equal proportions to determine the number of representatives to which each state is entitled. They release the results of both the census counts (by state) and the apportionment results that same day.

Some states and many commentators interchange the terms reapportionment and redistricting to describe the process that occurs each decade with the taking of the census. However, they are two different and rather distinct processes. I always say that reapportionment is the process by which seats or districts are assigned **to** an area, such as congressional districts being assigned **to** different states. Redistricting, however, is the process whereby districts are drawn or created **within** that area. Before the Supreme Court's one-person, one-vote rulings in the 1960s relating to state legislative districts, a number of states allocated State Senate districts to their counties, hence they called the process "reapportionment," even though the process was in fact redistricting.

V. EDS, Inc.'s Reapportionment Work

A. EDS, Inc.'s Initial Involvement with Reapportionment

As noted above, EDS, Inc. first developed a computer program to calculate apportionment results according to the method of equal proportions in the early 1990s. We also

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[1] Greg Giroux, *Before Redistricting, That Other 'R' Word*, CQ Weekly (Nov. 30, 2009); *see also* Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

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programmed options so that we could, for example, include the District of Columbia in an apportionment calculation or change the total number of congressional seats. We did this in the event additional states came into existence, or in the event someone inquired about the impact of adding seats to the House of Representatives.

Since the early 1990s we have studied and issued yearly reports on the apportionment process as new population estimates have been released both by the Census Bureau (as part of the Bureau's Population Estimates Program, discussed below), and by private demographic firms. Our annual studies are usually released the same day the Census Bureau releases its population estimates (usually in late December) and can be found on our website: http://www.electiondataservices.com/, under the "Research" tab. All our historical studies (back to when we started them in 1994) and press releases are also kept on our website, available for all to see. The same tables have also been generated from the final official decennial population numbers for each decade from 1940 to 2010. Our website also has a historical table, that we have continued to update, showing the number of seats given to each state each decade back to the nation's founding in 1789.

B. EDS, Inc.'s Reapportionment Reports

When the Census Bureau releases the final state apportionment population counts by December 31 of any year ending in zero, the Census Bureau also reports its apportionment calculations. However, the Census Bureau does not report any calculations for how close or how far away each state was from gaining or losing an additional seat. In addition to reporting its apportionment calculations, the Census Bureau also reports as a separate column of the overseas counts (both military and non-military overseas residents), so EDS, Inc. is able to create a separate apportionment table showing whether the overseas numbers caused a state to gain or lose a seat.

In contrast to the Census Bureau's apportionment counts and calculations, EDS, Inc.'s reapportionment program calculates not only how many seats each state would receive based on the population or other numbers put into the formula, but it also calculates and reports the number of people a state gained its last seat by or lost the next seat by. EDS, Inc.'s program, using the Census Bureau's reporting creates a separate apportionment table showing whether the overseas numbers caused a state to gain or lose a seat. It also reports the last seat number that is given to a state, as well as what number seat the next district would be if the calculations continued past the 435 seat cut-off. The program allows the user to change the maximum number of seats to be calculated. Finally, the program calculates the ideal district size for each state, by taking the state's total population and dividing it by the number of seats that the state has been awarded.

Our current report was generated on December 30, 2019 and is available on the front page of EDS, Inc.'s webpage. A copy of the 2019 EDS, Inc. Report is also attached to this document as **Exhibit B**.

This new study follows our normal practice of taking the census's new state-level total resident population estimates, using a straight line projection to move the estimates forward to be

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as of April 1 in the year ending in zero (to correspond to when the census is taken), and then using the resulting state resident population projections as input to the apportionment program. We have always recognized the importance of showing population estimates to correspond to Census Day (April 1) because this is the population count necessary for apportionment, and have always projected the last year of estimates to be $9/12^{th}$ of a year (i.e., from July 1 to April 1, or nine months). EDS, Inc. has never, however, included any projections in its yearly apportionment studies for the overseas population because there have not been any reliable numbers available for such projections. EDS, Inc. has also never attempted to calculate projections of the undocumented population because available estimates of this population vary widely.

It is important to note that estimates from the Population Estimates Program are based on the premise of a data date of July 1 for each year (i.e., different from Census Day of April 1).[2] While the Census Bureau uses the enumerated resident population from the 2010 census as a starting point for all post-2010 population estimates, they modify the data to produce the "April 1, 2010 Population Estimates base" so that the data reflect the following information:

1) Changes brought about by the Count Question Resolution program, where local jurisdictions can challenge their decennial census results. Successful changes are incorporated into the estimates base.
2) Legal boundary changes. While this does not impact state-level population numbers, it will impact county, city or town boundaries within a state (these jurisdictions also see population estimates being generated over the decade).
3) Revisions to racial categorizations, most significantly the "Some other race" category. Again, this does not impact the state-level total population estimates used in the reapportionment studies.[3]

Each year when the Census Bureau releases their state estimates for the current year, part of the Population Estimates Program also revises all past year's estimates in that decade. As the Census Bureau's documentation notes:

> With each annual release of population estimates, the Population Estimates Program revises and updates the entire time series of estimates from April 1, 2010 to July 1 of the current year, which we refer to as the vintage year. We use the term "vintage" to denote an entire time series created with a consistent population starting point and methodology. The release of a new vintage of estimates supersedes any previous series and incorporates the most up-to-date input data and methodological improvements.[4]

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[2] U.S. Census Bureau, *Methodology for the United States Population Estimates: Vintage 2019, Nation, States, Counties, and Puerto Rico – April 1, 2010 to July 1, 2019* 1 (2019), *available at* https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2010-2019/2019-natstcopr-meth.pdf (hereinafter "Methodology for the U.S. Population Estimates").

[3] *Id.* at 2-3.

[4] *Id.* at 1.

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These revisions to the estimates reflect new information Census Bureau staff may have received from the states on their births, deaths and migration estimates in previous time periods.[5] As a result, EDS, Inc. always completely replaces the entire decade's estimates for each state for each year with the Census Bureau's new tables.

Over the decades, EDS, Inc. has also developed a spreadsheet that automatically calculates both raw number and percentage changes for individual yearly population data, as well as multiple time period changes. This allows us to test multiple time period ranges to see whether different time periods will yield different apportionment results. In each of the past two decades we have observed that different national events have caused changes in population movements. For example, we could see how the 2008 recession significantly changed the nation's growth pattern for not only that year, but for several subsequent years into the next decade.

As a result of these observed changes, for the past several years we have generated different trend line scenarios, and given them easily recognized names (such as "long-term trend," "mid-term trend," and "short-term trend") and then utilized them in our studies. With each new year's estimates, the years covered by these trends may change, but generally the "long-term trend" looks at the entire decade's worth of change to calculate. Usually the "short-term trend" period only covers the immediate one or two years of change, in order to project the population estimates forward.

When we performed the analysis for our 2019 EDS, Inc. Report, we discovered and reported that all the different trend models ultimately produced the same overall outcome results as it relates to reapportionment results. We theorized that this was because of the very short time before April 2020 (basically nine months from the July 1, 2019 date of the 2019 estimates) resulted in the projections not shifting much in the trending forward process. It is unusual for this to happen, but we observed that the different trend models did produce different margins of how much a state gained or lost a seat by, and where states fell at the 435-seat cut-off point. As a result, the EDS, Inc. 2019 Study focused on using the "short-term" trend model to generate 2020 populations for apportionment. A short-term trend projection that focuses on more recent population changes is a better projection of what will happen on April 1, 2020 when compared to a long-term trend projection that incorporates and potentially amplifies population changes earlier in the decade.

i. A Number of States Are Close to Gaining or Losing a Seat in the 2019 EDS, Inc. Report

The apportionment process is very susceptible to small changes in the population. As a result, one of the focuses of our studies is to see which, and how many states are "sitting on the edge" of the 435-seat cut-off for the allocation of seats in Congress, but most importantly by what margin of gain or loss. Each of our studies contains a table that shows which states receive seat numbers 430 through 435, and which states just missed the cut-off by receiving theoretical seats numbers 436 through 440. Each year different states fall into this "watch" category, as population estimates change and different states get seat numbers around the magic 435 cut-off

[5] *See id.*

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each year, particularly if they would have received seat number 436. Any state that falls into seat ranges 429 through 440, particularly if they gained or lost the seat by under 50,000 people, could very possibly change when new numbers become available.

The 2019 EDS, Inc. Report shows the State of Alabama would receive seat number 436, or, in other words, would just miss that last seat (435) by only 10,072 people, assuming all other state populations stay the same.[6] Although our 2019 EDS, Inc. Report shows Alabama losing a seat, in earlier parts of the decade the margin that Alabama would lose their seventh seat by was much larger than it is in our new study. Our 2015 study showed Alabama would lose that seat by 64,891 people.[7] By the time of our 2018 study, Alabama's loss margin dropped to just over 40,000 people,[8] and, as noted above, the margin is now only 10,072.

Other states are also close to the cut-off mark, at least one by a smaller number of people: Montana would gain back their second seat by only 2,402 people to spare.[9] To demonstrate how susceptible the states are to gain or lose a seat, I took away 2,403 people from the Montana estimate, leaving it with 1,072,507 people, and re-ran the apportionment calculator. In this revision Montana lost its second seat and went back to receiving just a single seat. As a result of this small change, and with every other state keeping the same population estimates, the State of Alabama would avoid losing its seventh seat by a margin of only nine (9) people. This is without adding the overseas population to the resident population, subtracting undocumented immigrants from the apportionment population count, or considering any other factors that may ultimately affect the counting process. **Exhibit C** attached to this report are the results of a revised 2019 apportionment table reflecting the above population changes and resulting apportionment.

Because a number of states are "sitting on the edge" and by relatively close margins, it's very likely that the final official population totals released at the end of the year will produce a different shift in where states fall at the 435-seat cut-off mark. Certainly, the addition of the overseas population, which we have no way of reliably projecting, will also shift these final seat assignments.

ii. Factors That Contribute to Uncertainty in Apportionment Projections

There are a wide range of factors that will ultimately impact the final population numbers. As noted in the 2019 EDS, Inc. Report,[10] there are several factors that govern any apportionment study that deals with population estimates, as well as several factors that govern specifically relevant to the 2020 congressional reapportionment. As explained below, these include:

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[6] Exhibit B at 4.
[7] Election Data Services, *2015 Reapportionment Analysis* at Appendix 2020Proj10-15 (Dec. 22, 2015), *available at* https://www.electiondataservices.com/wp-content/uploads/2015/12/NR_Appor15wTables.pdf.
[8] Election Data Services, *2018 Reapportionment Analysis* 3 (Dec. 19, 2018), *available at* https://www.electiondataservices.com/wp-content/uploads/2018/12/NR_Appor18.pdf.
[9] *Id.*
[10] Exhibit B at 3.

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- What is the method used to project estimates forward to Census Day, 2020?
- How well will the census be conducted this year? Will the Internet option for filling out the form work?
- Will people respond to the census? Will the citizenship question debate over the past year cause some people to not respond?
- How will the addition of overseas military populations impact apportionment? What impact will the change in method of counting overseas military impact the additional numbers?
- What will be the impact of the current COVID-19 crisis?

a. What is the method used to project estimates forward to Census Day, 2020?

All firms or entities that create population estimates always pick a specific date in time their estimates reflect. Some are good as of January 1 or December 31. For instance, the Census Bureau Population Estimates Program uses July 1, a date which tends to follow state fiscal year dates and when the states update their own source data. This becomes important when one uses a time series of estimates to project the data forward to something like Census Day (officially April 1). If a researcher uses a whole number of years to project the Census Bureau's estimate data forward to Census Day, then they will either fall nine months short or (as Dr. Poston does in his report and admitted at his deposition)[11] three months longer in time. In the event the estimate includes an extra three months of change, it will include extra births, deaths, and migrations, [12] and the resulting population numbers are likely to be higher than expected. The bottom line, however, is that Dr. Poston's data does not constitute a projection of the population on Census Day, the day relevant for congressional reapportionment.

I have also seen instances where different population time series will create different population projections. This is why EDS, Inc. has its time series calculate not only the individual year population changes, but also population changes for parts of a decade (for example, for 2011 through 2019, and then from 2012 through 2019, followed by 2013 through 2019, etc.). We've particularly seen different population projections being created in the first half of the decade, as projections forward are much more susceptible to slight changes that get magnified at the end of the decade.

b. How well will the census be conducted this year? Will the Internet option for filling out the form work?

There has been a wide-ranging discussion over the past several years about whether enough funds will be, or have been, allocated to conduct this census. This was a problem initially raised in the first part of this decade, as planning and development of programs for the 2020 census were being formulated. Advocacy groups have expressed concerns that not enough funds were allocated to the Bureau early enough in the decade to conduct all the planning steps

[11] Sworn Declaration and Expert Report of Dudley L. Poston, Jr., Ph.D. (Jan. 23, 2020) ("Poston Report") at 14; Supplement to Sworn Declaration and Expert Report of Dudley L. Poston, Jr., Ph.D. ("Poston Supp. Report") at 3; February 27, 2020 Transcript of Deposition of Dudley L. Poston, Jr., Ph.D. ("Poston Dep.") 41:20-42:2, 43:1-6.
[12] *See* Methodology for the U.S. Population Estimates at 1.

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necessary to ensure a good census. Instead of four testing sites, for example, the Census Bureau had to cut back to only one location in order to test out some of their processes.[13] Moreover, if different hard to count groups are not properly enumerated, then population counts could suffer, including final state resident population data for states with larger hard-to-count populations.[14]

There have also been concerns surfacing over the past several weeks on whether the Internet option for filling out the census form will work properly. This is the first time the Census Bureau will implement a primarily online census.[15] The sudden decision to change from the vendor-provided solution to one developed in-house has surfaced immense concerns.[16] While the Census Bureau has touted the Internet option as a new improvement to the whole census experience in this new decade, it remains to be seen if all groups will accept and make use of this process.

These are just a few examples of where things might go wrong as the census is conducted over the next several months. Any or all these problems have a potential of impacting the census and are likely to result in different population counts being generated. As a result, state reapportionment calculations would be impacted and change the likely outcome.

c. Will people respond to the census? Will the citizenship question debate over the past year cause some people not to respond?

There is also the issue of whether people will respond to the census, and the impact of the citizenship question debate on response rates. While this issue could apply to several individuals or groups over the next several months, this is of great concern in the Hispanic community because of last year's attempt by the Trump Administration to add a citizenship question to the 2020 census questionnaire. Although the decision was enjoined by the courts, there is still concern that discussion of the larger citizenship issue will cause large numbers of this group to not answer the census.

d. How will the addition of overseas military populations impact apportionment? What impact will the change in method of counting overseas military impact the additional numbers?

Since at least the 1990 census, the Census Bureau has created the total state population numbers that are used for apportionment by adding each state's overseas population (which primarily includes military personnel, but also includes other civilian employees of the U.S. government and their dependents) to their respective resident population. For 2020, however, and as noted elsewhere in this report, the Census Bureau and the Department of Defense have modified the way the military overseas population will be counted. The new residency rules

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[13] Michelle Wines, *Census Officials Say Rhode Island Rehearsal is Going Well. Not Everyone Agrees*, N.Y. Times (Apr. 28, 2018), https://www.nytimes.com/2018/04/28/us/2020-census-test-rhode-island.html.

[14] Hard-to-count groups are groups that that the Census Bureau identifies as difficult to fully enumerate, including children and certain racial and ethnic minorities.

[15] Nick Brown, *Census Says Switching Software for U.S. Population Count*, Reuters.com (Feb. 13, 2020), https://www.reuters.com/article/us-usa-census-technology/census-says-switching-software-for-u-s-population-count-idUSKBN2072SN.

[16] *Id.*

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released by the Trump Administration in the last several years will take short-term "deployed" military personnel and count them back at the states of their usual residence in the United States. They will be counted as part of their respective states' resident population for both apportionment and redistricting purposes. This means that they will no longer constitute part of the overseas population.

In contrast, in 2010 deployed military personnel were counted at their "home state of record," the address they provided when they entered military service. They were counted only as part a state's overseas population, but not the state's resident population, and were counted only for apportionment purposes. Department of Defense documents seem to indicate the new rules regarding deployed personnel will reduce the military overseas population by about 15% because deployed personnel will instead be counted as part of the resident population of the states of their usual residence in the United States.[17]

The addition of the military overseas population has affected the reapportionment process twice since 1990. In 2000, had the overseas populations not been included in the apportionment calculation, North Carolina's surprise gain of a seat would have instead gone to the state of Utah.[18] Utah would have gained the 435th and final seat, with just 691 persons to spare, while North Carolina would have missed the seat by 2,493 people.[19] North Carolina's gain was directly attributable to the way the overseas population was counted. That decade, individuals were allocated to states using the "home of record" in their personnel files, or the state from which Americans overseas entered government service. Although several military bases are in the state of Utah, the number of North Carolina residents living overseas was almost six times the number of Utah residents overseas.

The inclusion of overseas personnel for congressional apportionment had a similar impact following the 1990 census. In 1990, the state of Washington gained a seat at Massachusetts' expense after the overseas population was included in the apportionment calculations.[20]

e. What will be the impact of the current COVID-19 crisis?

With three weeks to go before Census Day, the rapidly changing coronavirus crisis is bound to impact how the Census is taken and could impact the apportionment results. The fact that many college campuses are closing, and students sent home, raises the question of where they will be counted.[21] For students that go to school out of state, will they still have an

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[17] Hansi Lo Wang, *Restrictions On Deployed U.S. Troop Data Could Put 2020 Census 'At Risk'*, NPR (Feb. 25, 2019), https://www.npr.org/2019/02/25/697315761/restrictions-on-deployed-u-s-troop-data-could-put-2020-census-at-risk.

[18] Election Data Services, *2000 Census Counts Produce Surprises in Congressional Delegations* 2 (Dec. 28, 2000), https://www.electiondataservices.com/wp-content/uploads/2014/12/reap2000_nr.pdf

[19] *Id.*

[20] Margo Anderson and Stephen E. Fienberg, *A Short Story About the Reapportionment of Congress and the 1990 Census*, UWMilwake (accessed Mar.13, 2020), https://sites.uwm.edu/margo/history-myth-making-and-statistics/.

[21] Lily Jackson, *Universities Across the State End Lectures, Go Online*, AL.com (Mar. 13, 20220), https://www.al.com/coronavirus/2020/03/auburn-and-samford-end-lectures-universities-cancel-travel-as-alabama-prepares-for-coronavirus.html.

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attachment to the college campus when the census form arrives in the mail, or will they fill it out based on their parents' address? This could have a significant impact on states with large college populations, like Alabama. More than 100,000 undergraduate students attend public four-year colleges in Alabama.[22] Where will the over 100,000 students be counted, particularly if they are sent home during the census?

VI. ISSUES WITH DR. POSTON'S REPORTS

I reviewed Dr. Poston's initial report and supplemental report. Methodologically, there are a number of issues with Dr. Poston's projections in both reports, which I have outlined below. These issues render Dr. Poston's projections unreliable. Even if Dr. Poston had conducted sound projections, however, because of the closeness of Alabama to the magic 435 cut-off mark, it is impossible to say with any level of certainty that not excluding undocumented immigrants will cause Alabama to lose its seventh congressional seat. Given the unreliability in Dr. Poston's projections and the fact that so many issues are still in flux on the eve of the 2020 census, it is my opinion that Dr. Poston cannot reliably predict that Alabama will lose its seventh congressional district following the 2020 census. In addition, it is my opinion that Dr. Poston cannot reliably predict that Alabama would keep its seventh congressional district following the 2020 census as a result of excluding undocumented immigrants from the apportionment population counts.

A. Projection of the 2020 Resident Population

There are several problems in the method Dr. Poston's uses to project his population numbers forward to correspond to 2020. Dr. Poston uses a long-term trend line to project the 2020 resident population of each state, notwithstanding the fact that such a projection incorporates population changes early in the decade that resulted from factors that do not reflect more recent conditions. More importantly, Dr. Poston's projections are not a projection of the resident population of each state on April 1, 2020, the count of the population necessary for congressional apportionment, but instead it appears Dr. Poston's numbers are a projection of the resident population of each state on July 1, 2020, three months after Census Day.

i. Trend Line Used by Dr. Poston

Dr. Poston has adopted a "long-term" model where he looks at the trend in the overall decade (2010 through 2018, or 2010 to 2019 in his supplemental report) to project his data forward.[23] He attempted to create "annualized" change estimates (average change of the whole decade, reflected as an annual number) that he then added to the 2018 and 2019 Census Bureau estimates.[24]

By taking all ten years into account Dr. Poston is giving too much weight to demographic and population changes that occurred at the beginning of the decade that no longer have an

[22] *Public Four-Year FTE, Fall 2019*, Alabama Commission on Higher Education, *available at* https://ache.edu/ACHE_Reports/Reports/SDB_Reports/FTE/FTE-4YR-Fall-2019.pdf.
[23] Poston Report at 14; Poston Supp. Report at 3.
[24] *Id.*

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impact, such as the 2008 recession. Because of the immediacy of Census Day, a short-term trend projection that focuses on more recent population changes is a better projection of what will happen on April 1, 2020.

ii. Incorrect Starting Point for Projections

The Census Bureau's population estimates series is built around the prospect that the numbers are an estimate of the resident population as of July 1 of each year. As a result, the Census Bureau publishes "adjusted 2010 Census numbers" to correspond to the different July 1 timetable, as opposed to the official 2010 census count numbers from April 1.[25] In addition, the Census Bureau updates the population estimates base to reflect changes brought about by their Count Question Resolution program.[26] This program allows jurisdictions to challenge their population counts, and successful challenge results are incorporated into the estimate program.[27]

I follow the Census Bureau's practice and always use the "adjusted 2010 Census numbers" as the starting point in the EDS, Inc. projection models. [28] Dr. Poston's calculations, however, are anchored to the April 1, 2010 census counts, not the July 1, 2010 starting point for the Census Bureau estimates series.[29] This is problematic not only because it ignores adjustments to the 2010 census count numbers that better reflect the population, but also because Dr. Poston subtracted April 1, 2010 census counts from the July 1, 2018 (or 2019) Census Bureau estimates, and divided this number by nine instead of nine and one third. In other words, Dr. Poston did not correctly annualize the differences that he then added to the 2018 (or 2019) Census Bureau estimates.

iii. Incorrect Ending Point for Projections

Dr. Poston also does not have a correct ending point for his projections. Dr. Poston used a whole number of years to project the Census Bureau estimates forward to 2020.[30] Because Dr. Poston used a whole number of years to project the Census Bureau's July 1 population estimate data, his projections fall three months over in time from Census Day.[31] This means that Dr. Poston's resident population projections include births, deaths, and migrations for a three-month period beyond Census Day. Put another way, Dr. Poston's population projections are not estimates of the apportionment resident population on Census Day, the population needed for congressional reapportionment, but for July 1, 2020, a date that has no significance to congressional reapportionment.

B. Projection of overseas populations and impact of changes to residency rules

Dr. Poston attempted to project the 2020 overseas population for the states by calculating the proportion of each state's 2010 resident population to the 2010 overseas population and

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[25] *Methodology for the U.S. Population Estimates* at 1.
[26] *Id.* at 2-3.
[27] *Id.*
[28] *See id.* at 1.
[29] Poston Report at 14; Poston Supp. Report at 3; Poston Dep. at 97:4-98:14.
[30] Poston Report at 14; Poston Supp. Report at 3; Poston Dep. at 41:20-42:2, 43:1-6, 97:4-98:14.
[31] Poston Report at 14; Poston Supp. Report at 3; Poston Dep. at 41:20-42:2, 43:1-6.

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applying those proportions to his 2020 resident population projections.[32] Those resulting numbers were then added to his 2020 resident population estimates to create his 2020 apportionment counts.[33]

Dr. Poston's overseas population estimates are highly problematic because there is no indication that each state's proportion of the overseas population in 2010 will be the same proportion in 2020. We know the proportions are very likely to be different because of changes, discussed above, to the residency rule dealing with how the overseas population will be counted in 2020. Despite the fact that this information was cited in the 2019 EDS, Inc. Report, Dr. Poston was apparently not aware of these changes when he decided to apply the 2010 proportion of each state's overseas population to his 2020 projections, nor was he aware of the way in which the overseas population was counted in 2010.[34] Changes in foreign policy will also likely impact the overseas population counts for 2020, and no good data is available to determine how much of an impact this will have.

A look at past overseas population state proportions further highlight Dr. Poston's flawed assumption. For the past three censuses the numbers of the overseas population have significantly changed with each decennial census, in both raw numbers and the percentages they represent of the total apportionment count. In 1990, the Census Bureau reported 919,810 individuals living overseas, but in 2000 it dropped to only 574,330. This ballooned to 1,039,648 in 2010. While these represented low percentages of the total apportionment population count (0.37% in 1990, 0.20% in 2000, and 0.34% in 2010), there is a great deal of variation in the individual states' percentages. Further, within states the overseas population numbers see changes in the thousands from decade to decade. For example, in 1990, California's overseas population was 88,033 and constituted 0.24% of its total apportionment population. In 2000, California's overseas population fell to 59,150 and constituted 0.17% of its total apportionment population. Finally, in 2010, California's overseas population jumped back up to 79,229 and constituted 0.27% of California's total apportionment population. Tables for each decade's overseas numbers are attached as **Exhibit D.**

At best, Dr. Poston's projections of the 2020 overseas population are a guessing game, based on an assumption that is not supported by any facts, and should be disregarded.

C. Undocumented Immigrant Population

The central claim in Dr. Poston's report is that it is substantially likely that the continued inclusion of undocumented immigrants in the 2020 census apportionment population will cause the State of Alabama to lose a congressional seat in 2020. In addition, he claims it is likely that the exclusion of undocumented immigrants from the apportionment population will allow Alabama to keep a seventh congressional seat.[35] Because there are no Census Bureau state-by-state estimates of undocumented immigrants, Dr. Poston uses four-year old estimates from the Pew Research Center to generate undocumented immigrant counts that he then removes from his

[32] Poston Report at 14; Poston Supp. Report at 3.
[33] *Id.*
[34] Poston Dep. at 105:10-23.
[35] Poston Report at 2, 3.

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2020 apportionment population projections.[36] He specifically says that his "assumption is that the proportions of undocumented immigrants in the states in 2016 will be the same proportions in 2020."[37]

As with his projections of the 2020 resident and overseas populations, Dr. Poston's projections of the 2020 undocumented population are highly problematic. As an initial matter, there are no official estimates of the undocumented population, and the available estimates of the undocumented population vary widely. For example, a study by professors at the Yale School of Management estimates that in 2016 there were 16.7 million undocumented immigrants in the country,[38] while Pew estimates that in 2016 there were 10.7 undocumented immigrants in the country.[39] Because apportionment calculations are very susceptible to even small population changes, the choice of one estimate over another can have a large impact on the final apportionment results.

Despite the fact that there is variability in the available undocumented population estimates, Dr. Poston decided to use the 2016 Pew estimates[40] and did not to look into whether other estimates were more accurate or reliable.[41] Dr. Poston used the Census Bureau's 2016 population estimates for the resident population totals of each state.[42] There is no indication, however, that the Pew estimates are tied to any particular date in 2016, much less that they are tied to July 1, 2016. Are the Pew estimates for the beginning of the calendar year? The end? How does this correspond to the April 1 Census Day or the July 1 Census estimate date? Dr. Poston does not appear to have grappled with these questions.

Even assuming that the 2016 Pew estimates were reliable, however, there is no indication that each state's proportion of the undocumented population in 2016 will be the same proportion in 2020. Pew's own estimates show that between 2010 and 2016, the undocumented population decreased from 11.4 million to 10.7 million, with varying changes state by state.[43] While total population estimates from different sources vary, other estimates also show that the undocumented population has been decreasing over time. For example, the Center for Migration Studies reports that the undocumented population decreased from 11.7 million in 2010 to 10.7 million in 2017.[44]

Further, data released over the past several years indicates that the number of undocumented immigrants has continued to decrease since 2016 as a result of the Trump Administration's efforts to lower the flow of immigrants into the country. News agencies have

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[36] *Id.* at 15-16.
[37] Poston Supp. Report at 5.
[38] Mohammad M. Fazel Zarandi, Jonathan S. Feinstein, and Edward H. Kaplan, *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS ONE (Sept. 21, 2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0201193.
[39] Jeffrey S. Passel and D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade* 5, Pew Research Center (Nov. 27, 2018) (hereinafter "2016 Pew Estimates").
[40] Poston Report at 15-16; Poston Supp. Report at 4-5.
[41] Poston Dep. at 146:23-147:5.
[42] *Id.*
[43] 2016 Pew Estimates at 5, 14.
[44] State-Level Unauthorized Population and Eligible-to-Naturalize Estimates, Center for Migration Studies, http://data.cmsny.org/.

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recently reported that the "Illegal immigrant population shrinks as Mexicans head back home"[45] and "A Mexican Exodus is Helping Shrink the Undocumented Population."[46] If the Trump Administration's policies have been even moderately successful, then it is likely that Dr. Poston's proportional methodology will overestimate the undocumented population.

D. Dr. Poston's District Size Argument

Dr. Poston argues that it is important that all states have the same average congressional district population size, seeming to argue that this is closer to the one-person, one-vote requirement from the courts and that this is better achieved by excluding undocumented immigrants.[47] This is a specious argument because Dr. Poston fails to take into account the first step of the apportionment process: that every state is guaranteed at least one congressional district, no matter their total population.

Article 1, section 2 of the Constitution specifically states that: "The Number of Representatives shall not exceed one for every thirty thousand, *but each State shall have at least one Representative*." (emphasis added). One can see the results of this tenet in any of the apportionment tables attached to any EDS, Inc. apportionment study, where we calculate the ideal district size (labeled "average size") for each state.[48] The 2019 EDS, Inc. Report shows this column as the second column from the right.[49] At the bottom of each of our tables we report not only the median average district size for the country, but also the minimum and maximum district population for the 50 states. For example, the 2019 EDS, Inc. Report apportionment calculations based on EDS, Inc.'s 2020 resident population projections shows that Rhode Island's single seat is projected to have a population of 1,060,167.[50] This is nearly double the size of a congressional district in the state of Montana (537,455), which would go back to two seats in the 2019 EDS, Inc. Report.[51] The seven "at-large" states that have only a single congressional district demonstrate the largest and smallest extremes of the district population size issue.[52] **Exhibit E** sorts the states by their average district size to further show this dichotomy.

Dr. Poston attempts to obscure these basic facts of apportionment by bringing in a standard deviation calculation, but this is irrelevant to the basic premise of reapportionment when every state gets at least one seat. Whether the ideal district size includes or excludes undocumented immigrants has little bearing on the issue of whether there is disparity in district population sizes when every state gets at least one district, no matter its total population.

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[45] Stephen Dinan, *Illegal Immigrant Population Shrinks as Mexicans Go Home*, Wash. Times (Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/26/illegal-immigrant-population-shrinks-mexicans-go-h/.
[46] Miriam Jordan, *A Mexican Exodus Is Helping Shrink the Undocumented Population*, N.Y. Times (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/undocumented-population-study-mexicans.html.
[47] Poston Report at 17-19.
[48] *E.g.*, Exhibit B at Appendix Main.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

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E. Dr. Poston's Reference to the 2019 EDS, Inc. Report

Dr. Poston compares his apportionment results in his first report to the 2019 EDS, Inc. Report results, presumably in support of his conclusions. But this comparison is not appropriate because the calculations are based on different inputs. Thus, any consistency between the two reports is as much the result of happenstance as anything else.

The 2019 EDS, Inc. Report is based on the Census Bureau's 2019 population estimates and uses only the 2020 resident population projections for the apportionment calculations. That is, the apportionment population does not include a projection of the overseas population. Further, the 2019 EDS, Inc. Report uses a short-term trend line and projects the estimates to April 1, 2020, or Census Day. Importantly, Election Data Services recognizes the report's limitations as a projection of the actual 2020 congressional reapportionment because there is no reliable overseas population projection to use in the calculations.

Dr. Poston's analysis in his main report, on the other hand, relies on the Census Bureau's 2018 population estimates. Dr. Poston conducted the reapportionment calculation using apportionment population counts that include his projected 2020 resident population counts *plus* his projected 2020 overseas population counts. Further, Dr. Poston uses a long-term trend line and projects the estimates to July 1, 2020. His introduction of unreliable projections renders his calculations a wholly different animal than the 2019 EDS, Inc.'s Report's calculations. Importantly, because Dr. Poston used different inputs for his calculations, the different inputs for the 50 states will have an effect on the gain or loss population margins and on the seat positions.

VII. Conclusion

Dr. Poston compounds mistake upon mistake in reaching his conclusions, and does not show with any level of certainty that Alabama will lose its seventh congressional seat following the 2020 census if undocumented immigrants are not excluded from the apportionment count. Neither does he show with any level of certainty that Alabama will retain a seventh congressional seat following the 2020 Census as a result of excluding undocumented immigrants from the apportionment count.

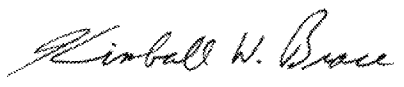

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EXHIBIT A

VITA

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Kimball Brace is the president of Election Data Services Inc., a consulting firm that specializes in redistricting, election administration, and the analysis and presentation of census and political data. Mr. Brace graduated from the American University in Washington, D.C., (B.A., Political Science) in 1974 and founded Election Data Services in 1977.

Redistricting Consulting

Activities include software development; construction of geographic, demographic, or election databases; development and analysis of alternative redistricting plans; general consulting, and onsite technical assistance with redistricting operations.

Congressional and Legislative Redistricting

Arizona Independent Redistricting Commission: Election database, 2001

Arizona Legislature, Legislative Council: Election database, 2001

Colorado General Assembly, Legislative Council: Geographic, demographic, and election databases, 1990–91

Connecticut General Assembly

- Joint Committee on Legislative Management: Election database, 2001; and software, databases, general consulting, and onsite technical assistance, 1990–91
- Senate and House Democratic Caucuses: Demographic database and consulting, 2001

Florida Legislature, House of Rep.: Geographic, demographic, and election databases, 1989–92

Illinois General Assembly

- Speaker of House and Senate Minority Leader: Software, databases, general consulting, and onsite technical assistance, 2000–02,
- Speaker of House and President of Senate: Software, databases, general consulting, and onsite technical assistance, 2018-current, 2009-2012, 1990–92, and 1981-82

Iowa General Assembly, Legislative Service Bureau and Legislative Council: Software, databases, general consulting, and onsite technical assistance, 2000–01 and 1990–91

Kansas Legislature: Databases and plan development (state senate and house districts), 1989

Massachusetts General Court

- Senate Democratic caucus: Election database and general consulting, 2001–02

- Joint Reapportionment Committees: Databases and plan development (cong,, state senate, and state house districts), 1991–93, 2010-2012(Redistricting Consulting, cont.)

Michigan Legislature: Geographic, demographic, and election databases, 1990–92; databases and plan development (cong., state senate, and state house districts), 1981-82

Missouri Redistricting Commission: General consulting, 1991–92

Commonwealth of Pennsylvania: General consulting, 1992

Rhode Island General Assembly and Reapportionment Commissions

- Software, databases, plan development, and onsite assistance (cong., state senate, and state house districts), 2016- current, 2010-2012, 2001–02 and 1991–92
- Databases and plan development (state senate districts), 1982-83

State of South Carolina: Plan development and analysis (senate), U.S. Dept. of Justice, 1983–84

Local Government Redistricting

Orange County, Calif.: Plan development (county board), 1991–92

City of Bridgeport, Conn.: Databases and plan development (city council), 2011-2012 and 2002–03

Cook County, Ill.: Software, databases, and general consulting (county board), 2010-2012, 2001–02, 1992–1993, and 1989

Lake County, Ill.: Databases and plan development (county board), 2011 and 1981

City of Chicago, Ill.: Software, databases, general consulting, and onsite technical assistance (city wards), 2010-2012, 2001–02 and 1991–92

City of North Chicago, Ill.: Databases and plan development (city council), 1991 and 1983

City of Annapolis, Md.: Databases and plan development (city council), 1984

City of Boston, Mass.: Databases and plan development (city council), 2011-2012, 2001-2002, and 1993

City of New Rochelle, N.Y.: Databases and plan development (city council), 1991–92

City of New York, N.Y.: Databases and plan development (city council), 1990–91

Cities of Pawtucket, Providence, East Providence, and Warwick, and town of North Providence, R.I.: Databases and plan development (city wards and voting districts), 2011-2012, 2002

City of Woonsocket and towns of Charlestown, Johnston, Lincoln, Scituate and Westerly, R.I.: Databases and plan development (voting districts), 2011-2012, 2002; also Westerly 1993

City of Houston, Tex.: Databases and plan development (city council), 1979 — recommended by U.S. Department of Justice

City of Norfolk, Va.: Databases and plan development (city council), 1983–84 — for Lawyers' Committee for Civil Rights

Virginia Beach, Va.: Databases and plan development (city council), 2011-2012, 2001–02, 1995, and 1993

Other Activities

International Foundation for Electoral Systems (IFES) and U.S. Department of State: redistricting seminar, Almaty, Kazakhstan, 1995

Library of Congress, Congressional Research Service: Consulting on reapportionment, redistricting, voting behavior and election administration

National Conference of State Legislatures (NCSL): Numerous presentations on variety of redistricting and election administration topics, 1980 - current

Election Administration Consulting

Activities include seminars on election administration topics and studies on voting behavior, voting equipment, and voter registration systems.

Prince William County, VA:
2013 – Appointed by Board of County Supervisors to 15 member Task Force on Long Lines following 2012 election. Asked and appointed by County's Electoral Board to be Acting General Registrar for 5-month period between full-time Registrars.
2008 - current – poll worker and now chief judge for various precincts in county

U.S. Election Assistance Commission (EAC): Served as subcontractor to prime contractors who compiled survey results from 2008 and 2010 Election Administration and Voting Survey.

U.S. Election Assistance Commission (EAC): Compile, analyze, and report the results of a survey distributed to state election directors during FY–2007. Survey results were presented in the following reports of the EAC: *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 2005–2006, A Report to the 110th Congress,* June 30, 2007; *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Survey Report Findings,* September, 2007; and *The 2006 Election Administration and Voting Survey, A Summary of Key Findings,* December, 2007.

U.S. Election Assistance Commission (EAC): Compile, analyze, and report the results of three surveys distributed to state election directors during FY–2005: Election Day, Military and Overseas Absentee Ballot (UOCAVA), and Voter Registration (NVRA) Surveys. Survey results were presented in the following reports: *Final Report of the 2004 Election Day Survey,* by Kimball W. Brace and Dr. Michael P. McDonald, September 27, 2005; and *Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 2003–2004, A Report to the 109th Congress,* June 30, 2005.

Rhode Island Secretary of State: Verification of precinct and district assignment codes in municipal registered voter files and production of street files for a statewide voter registration database, on-going maintenance of street file, 2004-2006, 2008-2014, 2016-2017.

Rhode Island Secretary of State, State Board of Elections & all cities & towns: production of precinct maps statewide, 2012, 2002, 1992

District of Columbia, Board of Elections and Ethics (DCBOEE): Verification of election ward, Advisory Neighborhood Commission (ANC), and Single-Member District (SMD) boundaries and production of a new street locator, 2003. Similar project, 1993.

Harris County, Tex.: Analysis of census demographics to identify precincts with language minority populations requiring bilingual assistance, 2002–03

(Election Administration Consulting, cont.)

Cook County, Ill., Election Department and Chicago Board of Election Commissioners:
- Analysis of census demographics to identify precincts with language minority populations requiring bilingual assistance, 2019, 2010-2013, 2002–03
- Study on voting equipment usage and evaluation of punch card voting system, 1997

Chicago Board of Election Commissioners: Worked with Executive Director & staff in Mapping Dept. to redraw citywide precincts, eliminate over 600 to save costs, 2011-12

Library of Congress, Congressional Research Service: Nationwide, biannual studies on voter registration and turnout rates, 1978–2002

U.S. General Accounting Office (GAO), U.S. Dept. of Justice, and numerous voting equipment vendors and media: Data on voting equipment usage throughout the United States, 1980–present

Needs assessments and systems requirement analyses for the development of statewide voter registration systems:
- Illinois State Board of Elections: 1997
- North Carolina State Board of Elections, 1995
- Secretary of Commonwealth of Pennsylvania, 1996

Federal Election Commission, Office of Election Administration:
- Study on integrating local voter registration databases into statewide systems, 1995
- Nationwide workshops on election administration topics, 1979–80
- Study on use of statistics by local election offices, 1978–79

Cuyahoga County, Ohio, Board of Elections: Feasibility study on voting equipment, 1979

Winograd Commission, Democratic National Committee: Analysis of voting patterns, voter registration and turnout rates, and campaign expenditures from 1976 primary elections

Mapping and GIS

Activities include mapping and GIS software development (geographic information systems) for election administration and updating TIGER/Line files for the decennial census.

2000 Census Transportation Planning Package (CTPP), 1998–99: GIS software for the U.S. Department of Transportation to distribute to 400 metropolitan planning organizations (MPOs) and state transportation departments for mapping traffic analysis zones (TAZs) for the 2000 census; provided technical software support to MPOs

Census 2000, 2010 and 2020 Redistricting Data Program, Block Boundary Suggestion Project (Phase 1) and Voting District Project (Phase 2), 1995–99: GIS software and provided software, databases, and technical software support to the following program participants:
- Alaska Department of Labor
- Connecticut Joint Committee on Legislative Management

- Illinois State Board of Elections
- Indiana Legislative Services Agency
- Iowa Legislative Service Bureau

(Mapping & GIS Support, cont.)

- New Mexico Legislative Council Service
- Rhode Island General Assembly
- Virginia Division of Legislative Services

Developed PRECIS® Precinct Information System—GIS software to delineate voting precinct boundaries—and delivered software, databases, and technical software support to the following state and local election organizations (with date of installation):

- Cook County, Ill., Department of Elections (1993)
- Marion County, Fla., Supervisor of Elections (1995)
- Berks County Clerk, Penn. (1995)
- Hamilton County, Ohio, Board of Elections (1997)
- Brevard County, Fla., Supervisor of Elections (1999)
- Osceola County, Fla., Supervisor of Elections (1999)
- Multnomah County, Ore, Elections Division (1999)
- Chatham County, Ga., Board of Elections (2000)
- City of Chicago, Ill., Board of Election Commissioners (2000)
- Mahoning County, Ohio, Board of Elections (2000)
- Iowa Secretary of State, Election and Voter Registrations Divisions (2001)
- Woodbury County, Iowa, Elections Department (2001)
- Franklin County, Ohio, Board of Elections (2001)
- Cobb County, Ga., Board of Elections and Voter Registration (2002)

Illinois State Board of Elections, Chicago Board of Election Commissioners, and Cook County Election Department: Detailed maps of congressional, legislative, judicial districts, 1992

Associated Press: Development of election night mapping system, 1994

Litigation Support

Activities include data analysis, preparation of court documents and expert witness testimony. Areas of expertise include the census, demographic databases, district compactness and contiguity, racial bloc voting, communities of interest, and voting systems. Redistricting litigation activities also include database construction and the preparation of substitute plans.

State of Alabama vs. US Department of Commerce, et al (2019-2020) apportionment & citizenship data

NAACP vs. Denise Merrill, CT Secretary of State, et al (2019-2020) state legislative redistricting and prisoner populations

Latasha Holloway, et al. v. City of Virginia Beach, VA (2019) city council redistricting

Joseph V. Aguirre vs. City of Placentia, CA (2018-2019), city council redistricting

Davidson, et al & ACLU of Rhode Island vs. City of Cranston, RI (2014-16), city council & school committee redistricting with prisoner populations.

Navaho Nation v. San Juan County, UT (2014-17) county commissioner & school board districts.

Michael Puyana vs. State of Rhode Island (2012) state legislature redistricting

(Litigation Support, cont.)

United States of America v. Osceola County, Florida, (2006), county commissioner districts.

Deeds vs McDonnell (2005), Va. Attorney General Recount

Indiana Democratic Party, et al., v. Todd Rokita, et al. (2005), voter identification.

Linda Shade v. Maryland State Board of Elections (2004), electronic voting systems

Gongaley v. City of Aurora, Ill. (2003), city council districts

State of Indiana v. Sadler (2003), ballot design (city of Indianapolis-Marion County, Ind.)

Peterson v. Borst (2002–03), city-council districts (city of Indianapolis-Marion County, Ind.)

New Rochelle Voter Defense Fund v. City of New Rochelle, City Council of New Rochelle, and Westchester County Board Of Elections (2003), city council districts (New York)

Charles Daniels and Eric Torres v. City of Milwaukee Common Council (2003), council districts (Wisconsin)

The Louisiana House of Representatives v. Ashcroft (2002–03), state house districts

Camacho v. Galvin and *Black Political Caucus v. Galvin* (2002–03), state house districts (Massachusetts)

Latino Voting Rights Committee of Rhode Island, et al., v. Edward S. Inman, III, et al. (2002–03), state senate districts

Metts, v. Harmon, Almond, and Harwood, et al. (2002–03), state senate districts (Rhode Island)

Joseph F. Parella, et al. v. William Irons, et al. (2002–03), state senate districts (Rhode Island)

Jackson v. County of Kankakee (2001–02), county commissioner districts (Illinois)

Corbett, et al., v. Sullivan, et al. (2002), commissioner districts (St Louis County, Missouri)

Harold Frank, et al., v. Forest County, et al. (2001–02), county commissioner districts (Wisc.)

Albert Gore, Jr., et al., v. Katherine Harris as Secretary of State, State of Florida, et al., and The Miami Dade County Canvassing Board, et al., and The Nassau County Canvassing Board, et al., and The Palm Beach County Canvassing Board, et al., and George W. Bush, et al (2000), voting equipment design — Leon County, Fla., Circuit Court hearing, December 2, 2000, on disputed ballots in Broward, Volusia, Miami-Dade, and Palm Beach counties from the November 7, 2000, presidential election.

Barnett v. Daley/PACI v. Daley/Bonilla v. Chicago City Council (1992–98), city wards

Donald Moon, et al. v. M. Bruce Meadows, etc and Curtis W. Harris, et al. (1996–98), congressional districts (Virginia)

Melvin R. Simpson, et al. v. City of Hampton, et al. (1996–97), city council districts (Va.)

Vera vs. Bush (1996), Texas redistricting

In the Matter of the Redistricting of Shawnee County Kansas and Kingman, et al. v. Board of County Commissioners of Shawnee County, Kansas (1996), commissioner districts

Vecinos de Barrio Uno v. City of Holyoke (1992–96), city council districts (Massachusetts)

(Litigation Support, cont.)

Torres v. Cuomo (1992–95), congressional districts (New York)

DeGrandy v. Wetherell (1992–94), congressional, senate, and house districts (Florida)

Johnson v. Miller (1994), congressional districts (Georgia)

Jackson, et al v Nassau County Board of Supervisors (1993), form of government (N.Y.)

Gonzalez v. Monterey County, California (1992), county board districts

LaPaille v. Illinois Legislative Redistricting Commission (1992), senate and house districts

Black Political Task Force v. Connolly (1992), senate and house districts (Massachusetts)

Nash v. Blunt (1992), house districts (Missouri)

Fund for Accurate and Informed Representation v. Weprin (1992), assembly districts (N.Y.)

Mellow v. Mitchell (1992), congressional districts (Pennsylvania)

Phillip Langsdon v. Milsaps (1992), house districts (Tennessee)

Smith v. Board of Supervisors of Brunswick County (1992), supervisor districts (Virginia)

People of the State of Illinois ex. rel. Burris v. Ryan (1991–92), senate and house districts

Good v. Austin (1991–92), congressional districts (Michigan)

Neff v. Austin (1991–92), senate and house districts (Michigan)

Hastert v. Illinois State Board of Elections (1991), congressional districts

Republican Party of Virginia et al. v. Wilder (1991), senate and house districts

Jamerson et al. v. Anderson (1991), senate districts (Virginia)

Ralph Brown v. Iowa Legislative Services Bureau (1991), redistricting database access

Williams, et al. v. State Board of Election (1989), judicial districts (Cook County, Ill.)

Fifth Ward Precinct 1A Coalition and Progressive Association v. Jefferson Parish School Board (1988–89), school board districts (Louisiana)

Michael V. Roberts v. Jerry Wamser (1987–89), St. Louis, Mo., voting equipment

Brown v. Board of Commissioners of the City of Chattanooga, Tenn. (1988), county commissioner districts

Business Records Corporation v. Ransom F. Shoup & Co., Inc. (1988), voting equip. patent

East Jefferson Coalition for Leadership v. The Parish of Jefferson (1987–88), parish council districts (Louisiana)

Buckanaga v. Sisseton School District (1987–88), school board districts (South Dakota)

Griffin v. City of Providence (1986–87), city council districts (Rhode Island)

United States of America v. City of Los Angeles (1986), city council districts

Latino Political Action Committee v. City of Boston (1984–85), city council districts

Ketchum v. Byrne (1982–85), city council districts (Chicago, Ill.)

(Litigation Support, cont.)

State of South Carolina v. United States (1983–84), senate districts — U.S. Dept. of Justice

Collins v. City of Norfolk (1983–84), city council districts (Virginia) — for Lawyers' Committee for Civil Rights

Rybicki v. State Board of Elections (1981–83), senate and house districts (Illinois)

Licht v. State of Rhode Island (1982–83), senate districts (Rhode Island)

Agerstrand v. Austin (1982), congressional districts (Michigan)

Farnum v. State of Rhode Island (1982), senate districts (Rhode Island)

In Re Illinois Congressional District Reapportionment Cases (1981), congressional districts

Publications

"EAC Survey Sheds Light on Election Administration", *Roll Call*, October 27, 2005 (with Michael McDonald)

Developing a Statewide Voter Registration Database: Procedures, Alternatives, and General Models, by Kimball W. Brace and M. Glenn Newkirk, edited by William Kimberling, (Washington, D.C.: Federal Election Commission, Office of Election Administration, Autumn 1997).

The Election Data Book: A Statistical Portrait of Voting in America, 1992, Kimball W. Brace, ed., (Bernan Press, 1993)

"Geographic Compactness and Redistricting: Have We Gone Too Far?", presented to Midwestern Political Science Association, April 1993 (with D. Chapin and R. Niemi)

"Whose Data is it Anyway: Conflicts between Freedom of Information and Trade Secret Protection in Redistricting", *Stetson University Law Review*, Spring 1992 (with D. Chapin and W. Arden)

"Numbers, Colors, and Shapes in Redistricting," *State Government News*, December 1991 (with D. Chapin)

"Redistricting Roulette," *Campaigns and Elections*, March 1991 (with D. Chapin)

"Redistricting Guidelines: A Summary", presented to the Reapportionment Task Force, National Conference on State Legislatures, November 9, 1990 (with D. Chapin and J. Waliszewski)

"The 65 Percent Rule in Legislative Districting for Racial Minorities: The Mathematics of Minority Voting Equality," *Law and Policy*, January 1988 (with B. Grofman, L. Handley, and R. Niemi)

"Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?" *Journal of Politics*, February 1987 (with B. Grofman and L. Handley)

"New Census Tools," *American Demographics*, July/August 1980

Professional Activities

Member, Task Force on Long Lines in 2012 Election, Prince William County, VA

Member, 2010 Census Advisory Committee, a 20-member panel advising the Director of the Census on the planning and administration of the 2010 census.

Delegate, Second Trilateral Conference on Electoral Systems (Canada, Mexico, and United States), Ontario, Canada, 1995; and Third Trilateral Conference on Electoral Systems, Washington, D.C., 1996

Member, American Association of Political Consultants

Member, American Association for Public Opinion Research

Member, American Political Science Association

Member, Association of American Geographers, Census Advisory Committee

Member Board of Directors, Association of Public Data Users

Member, National Center for Policy Alternatives, Voter Participation Advisory Committee

Member, Urban and Regional Information Systems Association

Historical Activities

Member, Manassas Battlefield Trust Board Member, 2018 -- current

Member, Historical Commission, Prince William County, VA., 2015 – current. Elected Chairman in 2017, re-elected 2018

Member of Executive Committee & head of GIS Committee, Bull Run Civil War Round Table, Centerville, VA. 2015 – current

Member, Washington Capitals Fan Club, Executive Board 2017 -- current

February, 2020

EXHIBIT B

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FOR IMMEDIATE RELEASE

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Montana Gains California's Seat With New 2019 Census Estimates; But Alabama & Ohio to also lose by 2020

New Census Bureau population estimates for 2019 released today shows a change of one more seat between two states from last year's study generated by Election Data Services, Inc. on which states would gain or lose congressional seats if the current estimate numbers were used for apportionment in 2019. But projecting these numbers to 2020, using several different methods, leads to more states being impacted by the decennial census scheduled to take place in just four months. These numbers could also be majorly impacted by how well the Commerce Department and Census Bureau conducts the census, how well the American public responds to this decennial exercise, the first where major components will be conducted via the internet, and whether the discussion on citizenship over the past year will cause some groups to avoid participating. A changed practice on how to count the military overseas could also change the final apportionment when it is announced December 31, 2020.

The Bureau's 2019 total population estimates show that now 15 states will be impacted by changes in their congressional delegation if these new numbers were used for apportionment today. The state of **Montana** joins the previously indicated states of **Arizona, Colorado, Florida**, **North Carolina**, and **Oregon** to each gain a single seat while the state of **Texas** is now shown to gain a second seat with the new data. The state of **California** joins the states of **Illinois**, **Michigan**, **Minnesota, New York, Pennsylvania, Rhode Island,** and **West Virginia** to lose a seat in Congress using the new data. A map of the 2019 numbers is attached.

The new numbers, however, reflect subtle changes taking place across the nation in birth and death rates and resulting total population numbers that become magnified when the information is projected forward to coincide with the taking of the Census on April 1, 2020. Election Data Services created a variety of different methodologies to project the 2019 data forward nine months (from the July1, 2019 date of the Census estimates) to April 1, 2020 (several short-term projection methods for the trend occurring in 2018-2019, and 2017-2019, a middle term

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methodology using the 2015-2019 trend, and a long-term projection for 2011-2019). The different methodologies benefit some states and disadvantage others in the "musical-chairs" effort of allocating 435 seats to the 50 states. All the methods would add a second seat for **Florida** and a third seat for **Texas,** to the list of states noted above that will gain one or more seats by 2020. The list of losing states will expand to also include **Alabama** and **Ohio**, by the time the Census is taken in 2020. A map showing the 2020 projected apportionment using the 2018-2019 trend is attached. Because all the projection models produce the same state overall results in seats as the 2018-2019 trend map, only the tables of the calculations for the different projection models are attached so that how close states are to changes can be observed.

The new 2019 data and all projections forward to 2020 now confirms that **California** will lose a congressional district in 2020. Our 2018 study first picked up the possibility that **California** could lose a congressional district for the first time in their nearly 160-year history. The new 2019 numbers from the Bureau indicate the state would lose that seat by 98,709 people but projecting the data forward to 2020 shows the state further away from potentially keeping that seat, losing it by over 300,000 people in 2020.

While the 2019 Census estimate numbers show **Alabama** keeping their seventh seat by a slim margin of just 18,516 people, projecting the data forward to 2020 would find the state losing the seventh seat by only 10,072 to 19,074 people, depending on the projection model utilized. All of the projection models find **Alabama** just missing the last seat to be apportioned, coming in at seat #436 when there are only 435 seats to hand out (a cut-off mark established in 1910).

The state of **Montana** is just barely able to reverse previous decades of population shifts when it went from two seats down to one in 1990. For 2020 the state is projected to go back to having two seats, but that gain of a second seat is because the state occupies the dubious distinction of obtaining seat #435, the last one to be apportioned. Election Data Services calculations show **Montana** getting that additional seat by only between 2,402 and 4,163 people to spare; a very close margin.

Rhode Island is also a state with an extremely close margin. For most of the decade our studies have projected that **Rhode Island** would lose their second seat by the end of the decade and the new numbers confirm that projection. But their margin has gotten tighter with the new data. For the past several years we saw that **Rhode Island** would lose that second seat by more than 25,000 people. But this new data shows the state missing the seat by only 14,539 residents.

Previous Election Data Services studies have hinted that the states of **Illinois** and **New York** might be in a position to each lose a second seat by 2020. However, these new Census numbers seem to indicate this will not be the case, with both states just losing a single seat each.

The state of **Minnesota** is also close to the margin of likely losing a seat in Congress. All of the projections place the state at position #437, having lost their last seat (their 8th) by between 6,740 people (the 2019 estimate) to around 21,000 people. **Minnesota**'s state demographer has indicated that recent influx of people to the state has boosted their numbers and it is likely to have had an impact on reapportionment.

Using any methodology, the population projections points toward a ten (10) seat change over 17 states across the nation by year 2020. States that will gain single seats include **Arizona**, **Colorado**, **Montana**, **North Carolina**, and **Oregon**, while **Florida** is set to gain two congressional districts and **Texas** would gain three seats. Single seat losses will again occur in the Midwest and Northeast sections of the nation, where **Alabama**, **California, Illinois, Michigan**, **Minnesota, New York**, **Ohio**, **Pennsylvania, Rhode Island** and **West Virginia** would each lose a seat. All other states would keep the same number of representatives they were awarded in December 2010 when the official 2010 Census numbers were released.

In table form, the gainers and losers are:

States Gaining Districts (7)	States Losing Districts (10)
Arizona +1 (from 9 to 10)	**Alabama** -1 (from 7 to 6)
Colorado +1 (from 7 to 8)	**California** -1 (from 53 to 52)
Florida +2 (from 27 to 29)	**Illinois** -1 (from 18 to 17)
Montana +1 (from At-large to 2)	**Michigan** -1 (from 14 to 13)
North Carolina +1 (from 13 to 14)	**Minnesota** -1 (from 8 to 7)
Oregon +1 (from 5 to 6)	**New York** -1 (from 27 to 26)
Texas +3 (from 36 to 39)	**Ohio** -1 (from 16 to 15)
	Pennsylvania -1 (from 18 to 17)
	Rhode Island -1 (from 2 to 1)
	West Virginia -1 (from 3 to 2)

With only four months until Census Day, many states have appropriated funds to help send a message to their constituents about the importance of participating in the Census[i]. Many of these states are on the edge of gaining or losing a seat in the apportionment process, but there are some notable exceptions. For example, Texas has not appropriated any funds for Complete Count efforts, and yet whether they stand to gain only two or maybe three additional seats may depend on how good the counting is conducted in the state. This could also be impacted by the reaction to the citizenship issue that has become more of a focus in the past year. Florida has also failed to appropriate any funds for Complete Count efforts in 2020, but they are more firm in the projection of receiving two additional seats in 2020. Thus, the two largest gaining states in number of seats are those that didn't spend their own money to help the counting process.

Since 1941, by law the number of seats in the U.S. House of Representatives has been capped at 435. As a result, there has always been interest in finding which states are close to that magic bubble, either just gaining their last seat, or just missing their next seat. The following table shows the results of the 2019 population estimates, as well as one of the short-term trend methodology calculations (2018-2019) for the seats within five positions of the 435 cut off.

2019 Reapportionment Analysis

2019 Population Estimates			2020 Projections (using 2018-2019 short-term trend)		
Last Five Seats		**Margin of Gain**	**Last Five Seats**		**Margin of Gain**
431	Arizona (10th)	128,294	431	Illinois (17th))	126,052
432	New York (26th)	237,376	432	New York (26th)	61,279
433	Alabama(7th)	18,516	433	Texas (39th)	79,742
434	Montana (2nd)	2,856	434	Montana (2nd)	2,402
435	Ohio (16th)	12,508	435	Florida (29th)	44,285

2019 Reapportionment Analysis

2019 Population Estimates			2020 Projections (using 2018-2019 short-term trend)		
Next Seats		**Margin of Loss**	**Next Seats**		**Margin of Loss**
436	Florida (29th)	23,006	436	Alabama (7th)	10,072
437	Minnesota (8th)	6,740	437	Minnesota (8th))	21,992
438	Texas (39th)	51,004	438	Ohio (16th)	74,135
439	California (53rd)	98,709	439	California (53rd)	344,367
440	Rhode Island (2nd)	7,703	440	Rhode Island (2nd)	14,539

The Census Bureau's yearly release of population estimates also results in a revision of previous year estimates. While Election Data Services has traditionally reflected those revisions in our projection methodology, we have created a new apportionment table that shows the apportionment results for each year in the decade based upon those revised numbers. The table, entitled "2020 Apportionment Calculations based on different trend lines coming from the 2019 Census Bureau Estimates" is attached to this press release. The table shows consistent gains and losses of seats over the entire decade with the new data. The table also includes a chart of where seats # 430 through # 440 would be assigned to states in each projection.

Kimball Brace, President of Election Data Services, Inc. cautioned users that even though there is a very short time before the Census, the population projections are still subject to change. "We are now at a place where the rubber meets the road. How well does the Census Bureau and the Trump administration put on the greatest mobilization of government resources outside of war time? How well will the public respond and answer the Census, given the competing focuses of everyday life and the need to utilize the internet? Will the fear of foreign intervention also impact the census?" Brace noted. "Having worked with Census data and estimates since the 1970s, it is important to remember that major events like Katrina and the 2008 recession each changed population growth patterns and that impacted and changed the next apportionment," he said.

Brace also noted that major changes in the counting process are in the works for 2020 and that reduced budget funding could impact those plans. "History can also be a guide, recalling that the 1920 apportionment was cancelled because the numbers showed for the first time that more people resided in urban areas than rural areas" said Brace. "I have had my share of nightmares that a failed Census process could lead to unreliable numbers and a repeat of 1920."

Because congressional apportionment also impacts the Electoral College and the vote for President, Election Data Services took the 2020 projections for each state and applied the Presidential election results from the past five Presidential contests to determine the Electoral College outcomes in the past 16 years. The study shows that none of the presidential contests would have elected a different presidential candidate using the new apportionment counts but they would have been more Republican in nature. For example, in 2016 President Trump would have gained two additional electoral college votes under the new apportionment projections. In 2012 President Obama would still have won the Electoral College, but with four less votes (328 vs 332) than he won at the time of the voting. The biggest change would have occurred in the 2000 presidential election where George Bush would have gained an additional 20 electoral votes had the new 2020 apportionment projections determined the number of congressional seats in each state.

The 2016 Electoral College was muddled because 7 electors voted for a different candidate than what they had pledged based on the vote totals. As a result, the overall change in candidate votes based on the new apportionment numbers shows just two vote difference in the bottom line results. President elect Trump's ability to carry states that will be losing congressional seats in 2020 also contributed to a reversal of the pattern depicted in previous elections.

It should be noted that the 2020 Presidential election and resulting Electoral College will occur before the results of the 2020 Census are released by December 31, 2020. Therefore, the Electoral College results in 2020 will be governed by the state's apportionment allocation as they exist today, having been first determined in 2011. The first time the new 2020 apportionment results will be utilized will be the 2024 Presidential election. Election Data Services, Inc. has also worked with the website 270ToWin, who has built an interactive map of the these new apportionment results where users can adjust state outcomes to discover Electoral College outcomes for the presidential elections back to 2000.

Major weather events have also affected apportionment. The Census Bureau's estimated populations released for 2005 showed **Louisiana** would keep all their congressional districts that decade. Even the Bureau's own projections for 2010 released that same year showed **Louisiana** staying the same. Then hurricane Katrina hit **Louisiana** at the end of August 2005 (after the date of the population estimates). Devastation and population loss impacted New Orleans in a major way, and when the Bureau's 2006 population estimates were released **Louisiana** was looking at losing a congressional seat. That was ultimately confirmed when the 2010 Census was taken, and state data was released at the end of that year.

As Election Data Services, Inc. noted last year in the 2017 study, the year of 2017 saw 18 hurricanes and tropical storms, three of which had a potential of impact on population movements in the United States. Two of these storms: Irma (impacting Miami and the Florida Gulf Coast), and Maria (which devastated Puerto Rico)) affected **Florida** and the new population estimates reflect that fact. Last years study showed **Florida** was 366,735 people away from gaining a third seat.

The 2019 data shows the state is only 172,169 people away from a third additional seat, an improvement of nearly 200,000 people.

The 2019 population estimates have not been statistically adjusted for any known undercount that may take place when the Census is conducted. In addition, no estimates were provided for U.S. military personnel overseas. This component has in the past been counted by the Census Bureau and allocated to the states based on administrative records retained by the military. Overseas military personnel have been a factor in the apportionment formula for the past several decades, including the switching of the final district in 2000 that went from **Utah** to **North Carolina**.

For 2020 the Census Bureau has changed the "residency rules" for counting the military by creating a distinction between personnel who are *deployed* overseas (usually for short periods of time) compared to those who are *stationed* or *assigned* overseas (frequently for longer periods of time). The Bureau will use DOD's administrative records to count *deployed* personnel at their usual residence in the US for both apportionment and redistricting purposes (they will be embedded within the state's resident population counts). On the other hand, personnel who are *stationed* or *assigned* overseas will be counted to their "home state of record" for apportionment purposes only and will show up as part of a state's total "overseas count" when the Bureau releases the final and official apportionment data by December, 31, 2020. Military sources have told the Census Bureau that of all overseas military, approximately 15% are *deployed* personnel and 85% are *stationed* or *assigned* overseas.

Past apportionment studies by Election Data Services, Inc. can be found at https://www.electiondataservices.com/reapportionment-studies/. A historical chart on the number of districts each state received each decade from 1789 to current is also available at this web address and linkable at https://www.electiondataservices.com/wp-content/uploads/2014/10/CD-apportionment-1789-2010.pdf.

Election Data Services Inc. is a political consulting firm that specializes in redistricting, election administration, and the analysis of census and political data. Election Data Services, Inc. conducts the congressional apportionment analyses with each annual release of the census population estimates. For more information about the reapportionment analysis, contact Kimball Brace (703-580-7267 or 202-789-2004 or kbrace@electiondataservices.com).

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[i] National Conference of State Legislatures reports 26 states have appropriated funds for Census counting. http://www.ncsl.org/research/redistricting/2020-census-resources-and-legislation.aspx

2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,903,185	7	7	0	743,187	18,516	433	502	700,455	43
Alaska	731,545	1	1	0			at large	637	731,545	34
Arizona	7,278,717	9	10	1	634,842	128,294	431	472	727,872	37
Arkansas	3,017,804	4	4	0	356,549	406,839	378	490	754,451	24
California	39,512,223	53	52	-1	98,709	697,431	430	439	759,850	20
Colorado	5,758,736	7	8	1	643,648	118,406	428	487	719,842	39
Connecticut	3,565,287	5	5	0	567,434	194,546	413	507	713,057	40
Delaware	973,764	1	1	0			at large	477	973,764	2
Florida	21,477,737	27	28	1	23,006	753,842	421	436	767,062	15
Georgia	10,617,423	14	14	0	316,729	449,174	419	446	758,387	22
Hawaii	1,415,872	2	2	0	432,337	349,950	330	565	707,936	41
Idaho	1,787,065	2	2	0	61,144	721,143	262	449	893,533	4
Illinois	12,671,821	18	17	-1	527,032	241,139	429	454	745,401	29
Indiana	6,732,219	9	9	0	425,864	336,686	417	465	748,024	28
Iowa	3,155,070	4	4	0	219,283	544,105	362	468	788,768	9
Kansas	2,913,314	4	4	0	461,039	302,349	393	505	728,329	36
Kentucky	4,467,673	6	6	0	422,229	339,375	402	474	744,612	30
Louisiana	4,648,794	6	6	0	241,108	520,496	390	459	774,799	11
Maine	1,344,212	2	2	0	503,997	278,290	344	597	672,106	46
Maryland	6,045,680	8	8	0	356,704	405,350	407	462	755,710	23
Massachusetts	6,892,503	9	9	0	265,580	496,970	405	451	765,834	16
Michigan	9,986,857	14	13	-1	192,285	572,888	411	442	768,220	13
Minnesota	5,639,632	8	7	-1	6,740	754,963	379	437	805,662	6
Mississippi	2,976,149	4	4	0	398,204	365,184	385	493	744,037	31
Missouri	6,137,428	8	8	0	264,956	497,098	399	456	767,179	14
Montana	1,068,778	1	2	1	779,431	2,856	434	734	534,389	50
Nebraska	1,934,408	3	3	0	679,355	88,177	418	586	644,803	47
Nevada	3,080,156	4	4	0	294,197	469,191	371	476	770,039	12
New Hampshire	1,359,711	2	2	0	488,498	293,789	339	589	679,856	45
New Jersey	8,882,190	12	12	0	541,864	222,598	426	464	740,183	32
New Mexico	2,096,829	3	3	0	516,934	250,598	387	542	698,943	44
New York	19,453,561	27	26	-1	537,876	237,376	432	444	748,214	27
North Carolina	10,488,084	13	14	1	446,068	319,835	423	455	749,149	26
North Dakota	762,062	1	1	0			at large	613	762,062	18
Ohio	11,689,100	16	16	0	754,898	12,508	435	466	730,569	35
Oklahoma	3,956,971	5	5	0	175,750	586,230	374	457	791,394	8
Oregon	4,217,737	5	6	1	672,165	89,439	427	508	702,956	42
Pennsylvania	12,801,989	18	17	-1	396,864	371,307	424	447	753,058	25
Rhode Island	1,059,361	2	1	-1			at large	440	1,059,361	1
South Carolina	5,148,714	7	7	0	497,658	264,045	415	478	735,531	33
South Dakota	884,659	1	1	0			at large	524	884,659	5
Tennessee	6,829,174	9	9	0	328,909	433,641	409	458	758,797	21
Texas	28,995,881	36	38	2	51,004	733,864	425	438	763,050	17
Utah	3,205,958	4	4	0	168,395	594,993	355	460	801,490	7
Vermont	623,989	1	1	0			at large	729	623,989	48
Virginia	8,535,519	11	11	0	133,350	630,429	404	441	775,956	10
Washington	7,614,893	10	10	0	298,666	464,470	410	452	761,489	19
West Virginia	1,792,147	3	2	-1	56,062	726,225	261	448	896,074	3
Wisconsin	5,822,434	8	8	0	579,950	182,104	422	480	727,804	38
Wyoming	578,759	1	1	0			at large	781	578,759	49
Washington DC	705,749	*0*								
	328,239,523		435					Median =	751,104	
Other Inputs:	Seats to Apportion							Min =	534,389	
435	Max Seats to Calculate							Max =	1,059,361	
75	States									
50										
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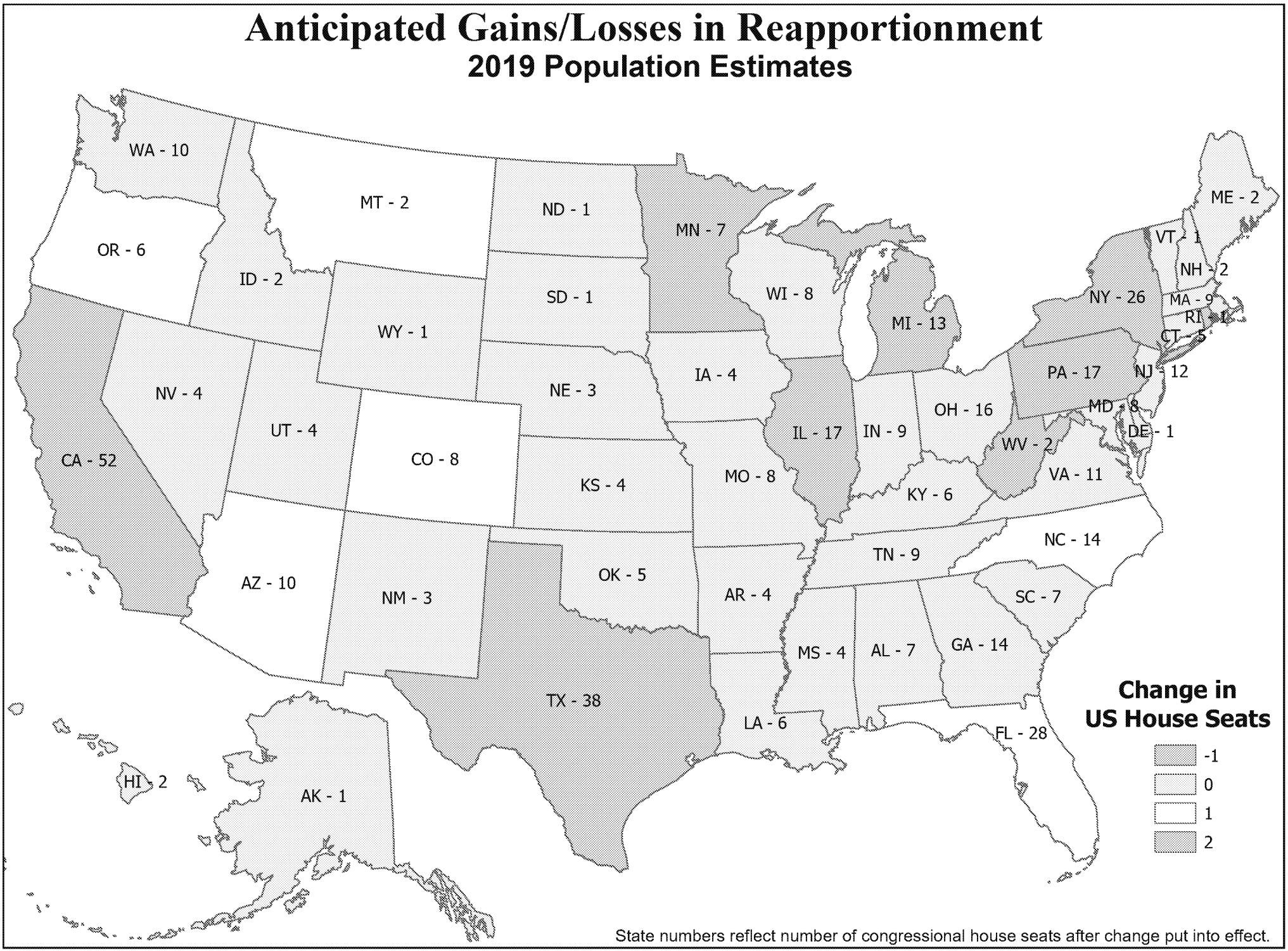
Anticipated Gains/Losses in Reapportionment

2019 Population Estimates



State numbers reflect number of congressional house seats after change put into effect.

Election Data Services

Based on Census Bureau estimates released 12/30/2019

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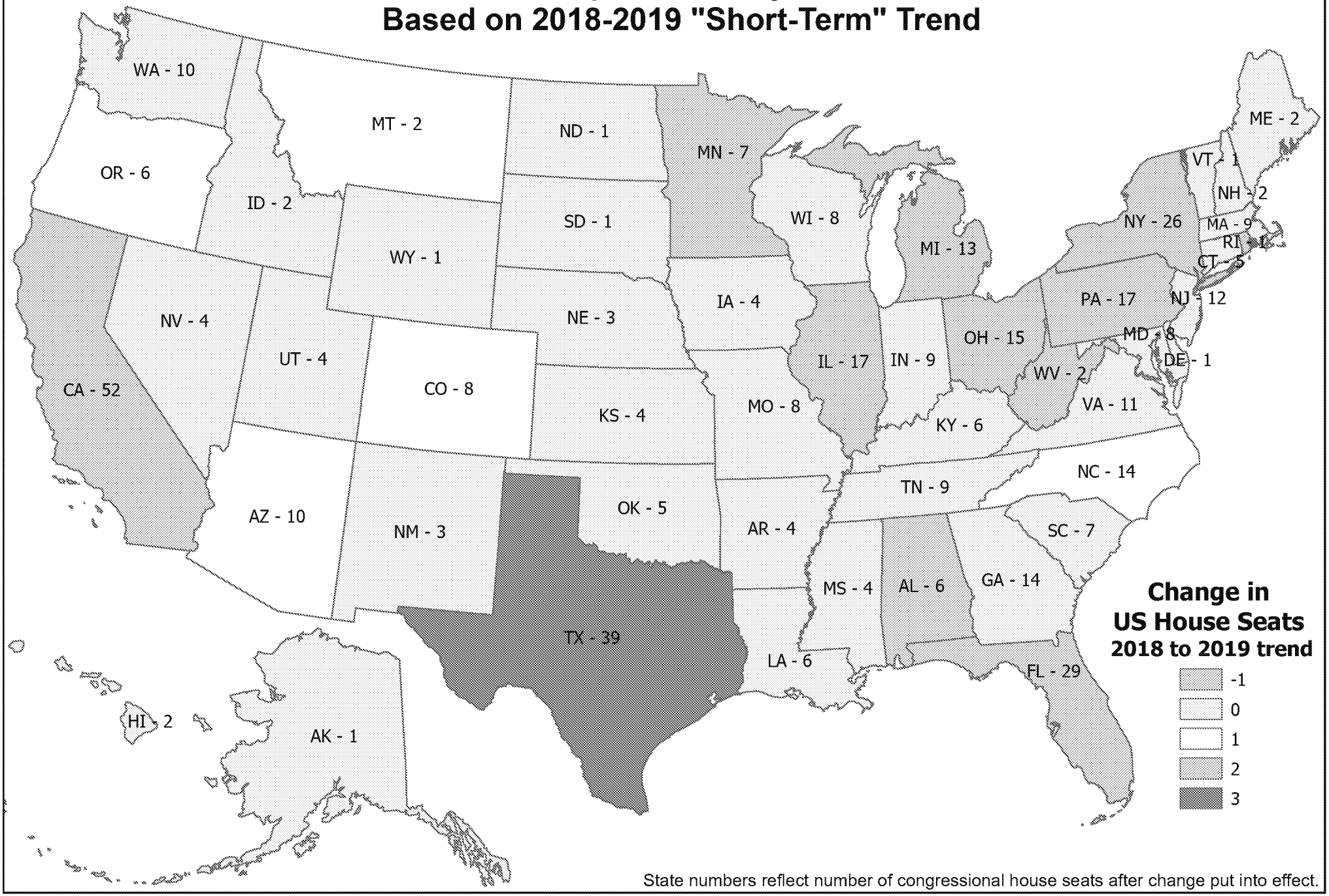
2020 Projections (short term 2018-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,914,850	7	6	-1	10,072	761,044	371	436	819,142	6
Alaska	728,863	1	1	0			at large	640	728,863	38
Arizona	7,370,763	9	10	1	599,470	176,160	425	471	737,076	36
Arkansas	3,023,873	4	4	0	374,646	396,776	379	489	755,968	24
California	39,550,248	53	52	-1	344,367	495,632	430	439	760,582	22
Colorado	5,809,922	7	8	1	638,314	134,743	426	485	726,240	40
Connecticut	3,560,620	5	5	0	601,698	169,052	416	508	712,124	41
Delaware	980,031	1	1	0			at large	475	980,031	2
Florida	21,654,726	27	29	2	760,045	44,285	435	447	746,715	29
Georgia	10,697,948	14	14	0	314,512	466,873	417	446	764,139	20
Hawaii	1,412,343	2	2	0	449,103	339,835	334	572	706,172	43
Idaho	1,815,033	2	2	0	46,412	742,526	261	443	907,517	3
Illinois	12,633,538	18	17	-1	659,841	126,052	431	460	743,149	32
Indiana	6,759,912	9	9	0	449,436	324,863	415	464	751,101	27
Iowa	3,159,919	4	4	0	238,600	532,822	362	468	789,980	10
Kansas	2,914,781	4	4	0	483,738	287,684	395	507	728,695	39
Kentucky	4,472,570	6	6	0	452,352	318,764	402	478	745,428	31
Louisiana	4,640,641	6	6	0	284,281	486,835	392	461	773,440	14
Maine	1,348,093	2	2	0	513,353	275,585	342	596	674,047	46
Maryland	6,053,101	8	8	0	395,136	377,921	409	462	756,638	23
Massachusetts	6,899,915	9	9	0	309,433	464,866	406	453	766,657	18
Michigan	9,988,946	14	13	-1	263,096	516,811	413	444	768,380	17
Minnesota	5,664,818	8	7	-1	21,992	749,969	377	437	809,260	8
Mississippi	2,972,502	4	4	0	426,017	345,404	386	497	743,125	33
Missouri	6,149,312	8	8	0	298,924	474,133	400	457	768,664	15
Montana	1,074,909	1	2	1	786,537	2,402	434	735	537,455	50
Nebraska	1,941,034	3	3	0	691,448	83,395	418	587	647,011	47
Nevada	3,120,458	4	4	0	278,061	493,361	369	473	780,115	11
New Hampshire	1,364,417	2	2	0	497,029	291,909	339	589	682,209	45
New Jersey	8,879,315	12	12	0	612,232	166,218	429	465	739,943	35
New Mexico	2,099,901	3	3	0	532,581	242,263	387	542	699,967	44
New York	19,396,195	27	26	-1	738,416	61,279	432	449	746,007	30
North Carolina	10,568,755	13	14	1	443,705	337,679	421	451	754,911	25
North Dakota	765,064	1	1	0			at large	612	765,064	19
Ohio	11,698,680	16	15	-1	74,135	708,742	410	438	779,912	12
Oklahoma	3,969,576	5	5	0	192,743	578,008	374	456	793,915	9
Oregon	4,244,856	5	6	1	680,066	91,050	428	505	707,476	42
Pennsylvania	12,802,789	18	17	-1	490,590	295,303	427	450	753,105	26
Rhode Island	1,060,167	2	1	-1			at large	440	1,060,167	1
South Carolina	5,197,747	7	7	0	489,063	282,898	412	474	742,535	34
South Dakota	889,160	1	1	0			at large	525	889,160	5
Tennessee	6,872,698	9	9	0	336,649	437,649	408	458	763,633	21
Texas	29,274,825	36	39	3	740,080	79,742	433	442	750,637	28
Utah	3,245,917	4	4	0	152,602	618,820	350	454	811,479	7
Vermont	623,712	1	1	0			at large	731	623,712	48
Virginia	8,561,297	11	11	0	169,656	607,364	403	441	778,300	13
Washington	7,683,987	10	10	0	286,246	489,384	407	448	768,399	16
West Virginia	1,783,100	3	2	-1	78,346	710,593	264	452	891,550	4
Wisconsin	5,833,734	8	8	0	614,502	158,555	424	483	729,217	37
Wyoming	579,629	1	1	0			at large	782	579,629	49
Washington DC	708,919	*0*								
	329,418,113		435					Median =	754,008	
Other Inputs:	Seats to Apportion							Min =	537,455	
435	Max Seats to Calculate							Max =	1,060,167	
75	States									
50										
☐ Include										

Anticipated Gains/Losses in Reapportionment

2020 Population Projections

Based on 2018-2019 "Short-Term" Trend



State numbers reflect number of congressional house seats after change put into effect.

Election Data Services

Based on Census Bureau estimates released 12/30/2019

BC-DOC-0000028196

2020 Projections (short term 2017-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,914,010	7	6	-1	12,184	760,914	372	436	819,002	6
Alaska	728,521	1	1	0			at large	640	728,521	39
Arizona	7,369,666	9	10	1	602,627	176,291	426	471	736,967	36
Arkansas	3,024,010	4	4	0	375,387	397,361	379	490	756,002	24
California	39,570,095	53	52	-1	334,826	522,150	430	439	760,963	22
Colorado	5,815,246	7	8	1	634,656	141,036	425	485	726,906	40
Connecticut	3,562,290	5	5	0	601,104	171,301	416	508	712,458	41
Delaware	980,229	1	1	0			at large	475	980,229	2
Florida	21,675,262	27	29	2	745,300	68,512	433	447	747,423	29
Georgia	10,696,628	14	14	0	318,677	467,300	417	446	764,045	20
Hawaii	1,412,696	2	2	0	449,231	340,371	334	572	706,348	43
Idaho	1,814,121	2	2	0	47,806	741,797	261	444	907,061	3
Illinois	12,632,029	18	17	-1	664,784	126,679	431	460	743,061	32
Indiana	6,760,331	9	9	0	450,878	326,382	415	464	751,148	27
Iowa	3,160,162	4	4	0	239,235	533,513	362	468	790,040	10
Kansas	2,915,040	4	4	0	484,357	288,392	395	507	728,760	38
Kentucky	4,473,470	6	6	0	452,724	320,373	402	478	745,578	31
Louisiana	4,640,670	6	6	0	285,525	487,573	392	461	773,445	14
Maine	1,347,838	2	2	0	514,089	275,513	343	597	673,919	46
Maryland	6,053,889	8	8	0	396,013	379,679	409	462	756,736	23
Massachusetts	6,904,829	9	9	0	306,381	470,880	406	453	767,203	18
Michigan	9,992,018	14	13	-1	262,673	521,500	413	443	768,617	17
Minnesota	5,667,521	8	7	-1	20,758	753,511	377	437	809,646	8
Mississippi	2,971,533	4	4	0	427,864	344,884	386	497	742,883	33
Missouri	6,149,020	8	8	0	300,882	474,810	400	457	768,628	16
Montana	1,074,984	1	2	1	786,943	2,659	435	735	537,492	50
Nebraska	1,941,398	3	3	0	691,764	84,077	418	587	647,133	47
Nevada	3,123,035	4	4	0	276,362	496,386	368	473	780,759	11
New Hampshire	1,363,841	2	2	0	498,086	291,516	339	589	681,920	45
New Jersey	8,880,940	12	12	0	613,059	169,331	429	465	740,078	35
New Mexico	2,098,725	3	3	0	534,436	241,405	387	543	699,575	44
New York	19,402,911	27	26	-1	736,901	71,298	432	449	746,266	30
North Carolina	10,572,293	13	14	1	443,011	342,965	421	451	755,164	25
North Dakota	764,757	1	1	0			at large	612	764,757	19
Ohio	11,700,172	16	15	-1	75,684	712,111	410	438	780,011	12
Oklahoma	3,966,654	5	5	0	196,740	575,666	374	458	793,331	9
Oregon	4,246,026	5	6	1	680,168	92,930	428	505	707,671	42
Pennsylvania	12,807,376	18	17	-1	489,438	302,025	427	450	753,375	26
Rhode Island	1,060,749	2	1	-1			at large	440	1,060,749	1
South Carolina	5,197,719	7	7	0	490,560	283,709	411	474	742,531	34
South Dakota	889,140	1	1	0			at large	525	889,140	5
Tennessee	6,875,125	9	9	0	336,085	441,175	408	456	763,903	21
Texas	29,265,114	36	39	3	757,545	75,018	434	442	750,388	28
Utah	3,246,633	4	4	0	152,765	619,984	350	455	811,658	7
Vermont	623,856	1	1	0			at large	731	623,856	48
Virginia	8,562,723	11	11	0	170,486	610,148	403	441	778,429	13
Washington	7,688,570	10	10	0	283,722	495,196	407	448	768,857	15
West Virginia	1,782,953	3	2	-1	78,974	710,629	264	452	891,477	4
Wisconsin	5,834,594	8	8	0	615,308	160,384	424	483	729,324	37
Wyoming	578,695	1	1	0			at large	783	578,695	49
Washington DC	709,879	*0*								
	329,489,985		435					Median =	754,269	
Other Inputs:	Seats to Apportion							Min =	537,492	
435	Max Seats to Calculate							Max =	1,060,749	
75	States									
50										
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2020 Projections (mid- term 2015-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,912,817	7	6	-1	19,074	760,729	372	436	818,803	6
Alaska	730,438	1	1	0			at large	638	730,438	37
Arizona	7,368,448	9	10	1	613,064	176,821	427	471	736,845	36
Arkansas	3,025,358	4	4	0	377,971	399,347	379	490	756,339	24
California	39,625,332	53	52	-1	325,736	586,871	430	439	762,026	22
Colorado	5,819,773	7	8	1	637,588	146,941	425	485	727,472	40
Connecticut	3,561,218	5	5	0	606,991	171,053	415	508	712,244	41
Delaware	980,071	1	1	0			at large	475	980,071	2
Florida	21,730,551	27	29	2	715,938	129,049	432	447	749,329	29
Georgia	10,703,281	14	14	0	324,762	476,437	417	446	764,520	19
Hawaii	1,414,718	2	2	0	449,362	342,654	334	570	707,359	43
Idaho	1,814,667	2	2	0	49,413	742,603	261	444	907,333	3
Illinois	12,637,252	18	17	-1	674,939	134,938	431	460	743,368	33
Indiana	6,755,866	9	9	0	463,683	323,479	416	465	750,652	28
Iowa	3,161,536	4	4	0	241,793	535,525	362	468	790,384	10
Kansas	2,914,122	4	4	0	489,206	288,111	395	507	728,531	39
Kentucky	4,475,565	6	6	0	456,326	323,477	402	478	745,927	31
Louisiana	4,645,835	6	6	0	286,056	493,748	392	461	774,306	14
Maine	1,347,239	2	2	0	516,841	275,174	344	598	673,619	46
Maryland	6,057,065	8	8	0	400,296	384,233	409	463	757,133	23
Massachusetts	6,911,196	9	9	0	308,353	478,809	406	452	767,911	18
Michigan	9,997,254	14	13	-1	269,296	529,036	414	443	769,020	16
Minnesota	5,670,032	8	7	-1	24,826	757,215	377	437	810,005	8
Mississippi	2,973,848	4	4	0	429,480	347,838	386	497	743,462	32
Missouri	6,149,879	8	8	0	307,482	477,047	400	456	768,735	17
Montana	1,076,227	1	2	1	787,853	4,163	435	735	538,113	50
Nebraska	1,942,679	3	3	0	693,527	85,810	418	587	647,560	47
Nevada	3,123,107	4	4	0	280,221	497,097	369	473	780,777	11
New Hampshire	1,364,168	2	2	0	499,912	292,104	340	589	682,084	45
New Jersey	8,884,864	12	12	0	620,113	175,371	429	466	740,405	35
New Mexico	2,098,247	3	3	0	537,959	241,378	388	543	699,416	44
New York	19,416,240	27	26	-1	746,863	89,321	433	449	746,778	30
North Carolina	10,577,560	13	14	1	450,483	350,716	422	451	755,540	25
North Dakota	763,577	1	1	0			at large	614	763,577	21
Ohio	11,702,603	16	15	-1	86,871	717,210	410	438	780,174	12
Oklahoma	3,965,980	5	5	0	202,229	575,815	375	458	793,196	9
Oregon	4,257,506	5	6	1	674,385	105,418	426	502	709,584	42
Pennsylvania	12,805,211	18	17	-1	506,979	302,898	428	450	753,248	26
Rhode Island	1,059,981	2	1	-1			at large	440	1,059,981	1
South Carolina	5,199,387	7	7	0	495,471	286,570	412	474	742,770	34
South Dakota	890,616	1	1	0			at large	526	890,616	5
Tennessee	6,875,411	9	9	0	344,138	443,024	408	457	763,935	20
Texas	29,297,864	36	39	3	759,514	114,857	434	442	751,227	27
Utah	3,251,140	4	4	0	152,189	625,129	350	455	812,785	7
Vermont	623,759	1	1	0			at large	731	623,759	48
Virginia	8,568,766	11	11	0	174,542	618,123	404	441	778,979	13
Washington	7,704,829	10	10	0	276,683	513,202	407	448	770,483	15
West Virginia	1,783,044	3	2	-1	81,036	710,980	266	453	891,522	4
Wisconsin	5,834,087	8	8	0	623,274	161,255	424	483	729,261	38
Wyoming	577,489	1	1	0			at large	785	577,489	49
Washington DC	711,695	*0*								
	329,739,397		435					Median =	754,394	
Other Inputs:	Seats to Apportion							Min =	538,113	
435	Max Seats to Calculate							Max =	1,059,981	
75	States									
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2020 Projections (long- term 2011-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,913,158	7	6	-1	17,500	760,782	372	436	818,860	6
Alaska	732,439	1	1	0			at large	637	732,439	37
Arizona	7,363,698	9	10	1	615,818	171,572	428	472	736,370	36
Arkansas	3,025,225	4	4	0	377,252	399,033	379	490	756,306	24
California	39,696,643	53	52	-1	244,435	655,474	430	438	763,397	22
Colorado	5,825,957	7	8	1	629,790	152,731	425	485	728,245	40
Connecticut	3,563,145	5	5	0	604,021	172,745	415	508	712,629	41
Delaware	980,443	1	1	0			at large	475	980,443	2
Florida	21,733,957	27	29	2	706,919	130,957	433	447	749,447	29
Georgia	10,700,181	14	14	0	325,104	472,628	419	445	764,299	20
Hawaii	1,419,389	2	2	0	444,225	347,250	333	568	709,694	42
Idaho	1,808,554	2	2	0	55,060	736,415	261	446	904,277	3
Illinois	12,653,759	18	17	-1	655,102	150,579	431	460	744,339	32
Indiana	6,753,109	9	9	0	464,634	320,276	416	465	750,345	28
Iowa	3,163,630	4	4	0	238,848	537,437	362	468	790,907	10
Kansas	2,917,511	4	4	0	484,966	291,318	395	507	729,378	38
Kentucky	4,477,052	6	6	0	453,606	324,676	404	477	746,175	31
Louisiana	4,655,763	6	6	0	274,894	503,388	392	461	775,961	14
Maine	1,345,723	2	2	0	517,891	273,585	344	599	672,862	46
Maryland	6,065,700	8	8	0	390,046	392,475	408	463	758,212	23
Massachusetts	6,919,755	9	9	0	297,989	486,922	406	452	768,862	18
Michigan	9,996,752	14	13	-1	267,230	527,878	414	444	768,981	17
Minnesota	5,668,657	8	7	-1	24,776	755,500	378	437	809,808	8
Mississippi	2,975,907	4	4	0	426,570	349,714	386	497	743,977	33
Missouri	6,149,601	8	8	0	306,145	476,376	400	458	768,700	19
Montana	1,075,958	1	2	1	787,656	3,819	435	735	537,979	50
Nebraska	1,943,643	3	3	0	691,904	86,645	418	587	647,881	47
Nevada	3,119,268	4	4	0	283,209	493,075	369	473	779,817	13
New Hampshire	1,363,526	2	2	0	500,088	291,387	340	589	681,763	45
New Jersey	8,887,290	12	12	0	615,310	177,193	429	466	740,608	35
New Mexico	2,098,377	3	3	0	537,171	241,378	388	544	699,459	44
New York	19,449,289	27	26	-1	708,771	121,030	432	448	748,050	30
North Carolina	10,572,638	13	14	1	452,647	345,085	422	451	755,188	25
North Dakota	770,073	1	1	0			at large	608	770,073	15
Ohio	11,702,810	16	15	-1	83,715	716,656	410	439	780,187	11
Oklahoma	3,973,480	5	5	0	193,687	583,080	374	456	794,696	9
Oregon	4,253,040	5	6	1	677,618	100,664	427	504	708,840	43
Pennsylvania	12,807,279	18	17	-1	501,583	304,098	426	450	753,369	26
Rhode Island	1,059,899	2	1	-1			at large	440	1,059,899	1
South Carolina	5,197,967	7	7	0	495,466	284,810	412	474	742,567	34
South Dakota	890,810	1	1	0			at large	526	890,810	5
Tennessee	6,872,183	9	9	0	345,561	439,350	409	459	763,576	21
Texas	29,350,998	36	39	3	698,863	165,968	434	442	752,590	27
Utah	3,247,776	4	4	0	154,702	621,583	351	455	811,944	7
Vermont	623,704	1	1	0			at large	732	623,704	48
Virginia	8,578,424	11	11	0	162,697	627,230	403	441	779,857	12
Washington	7,697,326	10	10	0	282,190	505,200	407	449	769,733	16
West Virginia	1,786,340	3	2	-1	77,273	714,202	265	453	893,170	4
Wisconsin	5,833,642	8	8	0	622,104	160,417	424	483	729,205	39
Wyoming	579,855	1	1	0			at large	782	579,855	49
Washington DC	714,924	*0*								
	329,956,225		435					Median =	754,279	
Other Inputs:	Seats to Apportion							Min =	537,979	
435	Max Seats to Calculate							Max =	1,059,899	
75	States									
50										
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		2020 Apportionment Calculations based on different trend lines coming from the 2019 Census Bureau Estimates																	
		2010-2019 Trend		2011-2019 Trend		2012-2019 Trend		2013-2019 Trend		2014-2019 Trend		2015-2019 Trend		2016-2019 Trend		2017-2019 Trend		2018-2019 Trend	
State	Compare To	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change
Alabama	7	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1
Alaska	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Arizona	9	10	1	10	1	10	1	10	1	10	1	10	1	10	1	10	1	10	1
Arkansas	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
California	53	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1
Colorado	7	8	1	8	1	8	1	8	1	8	1	8	1	8	1	8	1	8	1
Connecticut	5	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0
Delaware	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Florida	27	29	2	29	2	29	2	29	2	29	2	29	2	29	2	29	2	29	2
Georgia	14	14	0	14	0	14	0	14	0	14	0	14	0	14	0	14	0	14	0
Hawaii	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
Idaho	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
Illinois	18	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1
Indiana	9	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0
Iowa	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Kansas	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Kentucky	6	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0
Louisiana	6	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0
Maine	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
Maryland	8	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0
Massachusetts	9	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0
Michigan	14	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1
Minnesota	8	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1
Mississippi	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Missouri	8	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0
Montana	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1
Nebraska	3	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0
Nevada	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
New Hampshire	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
New Jersey	12	12	0	12	0	12	0	12	0	12	0	12	0	12	0	12	0	12	0
New Mexico	3	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0
New York	27	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1
North Carolina	13	14	1	14	1	14	1	14	1	14	1	14	1	14	1	14	1	14	1
North Dakota	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Ohio	16	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1
Oklahoma	5	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0
Oregon	5	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6	1
Pennsylvania	18	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1
Rhode Island	2	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1
South Carolina	7	7	0	7	0	7	0	7	0	7	0	7	0	7	0	7	0	7	0
South Dakota	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Tennessee	9	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0
Texas	36	39	3	39	3	39	3	39	3	39	3	39	3	39	3	39	3	39	3
Utah	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Vermont	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Virginia	11	11	0	11	0	11	0	11	0	11	0	11	0	11	0	11	0	11	0
Washington	10	10	0	10	0	10	0	10	0	10	0	10	0	10	0	10	0	10	0
West Virginia	3	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1
Wisconsin	8	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0
Wyoming	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Washington DC	*0*																		
		435		435		435		435		435		435		435		435		435	
		State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat
	430	California	52	California	52	California	52	California	52	California	52	California	52	California	52	California	52	California	52
	431	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17
	432	New York	26	New York	26	Florida	29	Florida	29	Florida	29	Florida	29	Florida	29	New York	26	New York	26
	433	Texas	39	Florida	29	New York	26	New York	26	New York	26	New York	26	New York	26	Florida	29	Texas	39
	434	Florida	29	Texas	39	Texas	39	Texas	39	Texas	39	Texas	39	Montana	2	Texas	39	Montana	2
	435	Montana	2	Montana	2	Montana	2	Montana	2	Montana	2	Montana	2	Texas	39	Montana	2	Florida	29
	436	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7
	437	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8
	438	California	53	California	53	California	53	California	53	Ohio	16	Ohio	16	Ohio	16	Ohio	16	Ohio	16
	439	Ohio	16	Ohio	16	Ohio	16	Ohio	16	California	53	California	53	California	53	California	53	California	53
	440	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2

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					2016 Presidential Election				
State	New Apportionment Count (2018-2019 Trend)	New Electoral College Count	2010s Electoral College Count	2000s Electoral College Count	2016 Presidential Victor	Electoral Votes For Clinton (D)	Electorial Votes For Trump (Rep)	Revised Electoral Votes For Clinton (D)	Revised Electorial Votes For Trump (Rep)
Alabama	6	8	9	9	Trump	0	9	0	8
Alaska	1	3	3	3	Trump	0	3	0	3
Arizona	10	12	11	10	Trump	0	11	0	12
Arkansas	4	6	6	6	Trump	0	6	0	6
California	52	54	55	55	Clinton	55	0	54	0
Colorado	8	10	9	9	Clinton	9	0	10	0
Connecticut	5	7	7	7	Clinton	7	0	7	0
Delaware	1	3	3	3	Clinton	3	0	3	0
Florida	29	31	29	27	Trump	0	29	0	31
Georgia	14	16	16	15	Trump	0	16	0	16
Hawaii	2	4	4	4	Clinton*	3	0	3	0
Idaho	2	4	4	4	Trump	0	4	0	4
Illinois	17	19	20	21	Clinton	20	0	19	0
Indiana	9	11	11	11	Trump	0	11	0	11
Iowa	4	6	6	7	Trump	0	6	0	6
Kansas	4	6	6	6	Trump	0	6	0	6
Kentucky	6	8	8	8	Trump	0	8	0	8
Louisiana	6	8	8	9	Trump	0	8	0	8
Maine	2	4	4	4	*Clinton*	3	1	4	0
Maryland	8	10	10	10	Clinton	10	0	10	0
Massachusetts	9	11	11	12	Clinton	11	0	11	0
Michigan	13	15	16	17	Trump	0	16	0	15
Minnesota	7	9	10	10	Clinton	10	0	9	0
Mississippi	4	6	6	6	Trump	0	6	0	6
Missouri	8	10	10	11	Trump	0	10	0	10
Montana	2	4	3	3	Trump	0	3	0	4
Nebraska	3	5	5	5	Trump	0	5	0	5
Nevada	4	6	6	5	Clinton	6	0	6	0
New Hampshire	2	4	4	4	Clinton	4	0	4	0
New Jersey	12	14	14	15	Clinton	14	0	14	0
New Mexico	3	5	5	5	Clinton	5	0	5	0
New York	26	28	29	31	Clinton	29	0	28	0
North Carolina	14	16	15	15	Trump	0	15	0	16
North Dakota	1	3	3	3	Trump	0	3	0	3
Ohio	15	17	18	20	Trump	0	18	0	17
Oklahoma	5	7	7	7	Trump	0	7	0	7
Oregon	6	8	7	7	Clinton	7	0	8	0
Pennsylvania	17	19	20	21	Trump	0	20	0	19
Rhode Island	1	3	4	4	Clinton	4	0	3	0
South Carolina	7	9	9	8	Trump	0	9	0	9
South Dakota	1	3	3	3	Trump	0	3	0	3
Tennessee	9	11	11	11	Trump	0	11	0	11
Texas	39	41	38	34	Trump#	0	36	0	39
Utah	4	6	6	5	Trump	0	6	0	6
Vermont	1	3	3	3	Clinton	3	0	3	0
Virginia	11	13	13	13	Clinton	13	0	13	0
Washington	10	12	12	11	Clinton&	8	0	8	0
West Virginia	2	4	5	5	Trump	0	5	0	4
Wisconsin	8	10	10	10	Trump	0	10	0	10
Wyoming	1	3	3	3	Trump	0	3	0	3
Washington DC	*1*	3	*3*	3	Clinton	3	0	3	0
						227	304	225	306
								-2	2
					#One elector voted for John Kasich for President				
					#One elector voted for Ron Paul for President				
					&Three electors voted for Colin Powell for President				
					&One elector voted for Faith Spotted Eagle				
					*One elector voted for Bernie Sanders				

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2012 Presidential Election					2008 Presidential Election				
2012 Presidential Victor	Electoral Votes For Obama (D)	Electoral Votes For Romney (Rep)	Revised Electoral Votes For Obama (D)	Revised Electorial Votes For Romney (Rep)	2008 Presidential Victor	Electoral Votes For Obama (D)	Electorial Votes For McCain (Rep)	Revised Electoral Votes For Obama (D)	Revised Electorial Votes For McCain (Rep)
Romney	0	9	0	8	McCain	0	9	0	8
Romney	0	3	0	3	McCain	0	3	0	3
Romney	0	11	0	12	McCain	0	10	0	12
Romney	0	6	0	6	McCain	0	6	0	6
Obama	55	0	54	0	Obama	55	0	54	0
Obama	9	0	10	0	Obama	9	0	10	0
Obama	7	0	7	0	Obama	7	0	7	0
Obama	3	0	3	0	Obama	3	0	3	0
Obama	29	0	31	0	Obama	27	0	31	0
Romney	0	16	0	16	McCain	0	15	0	16
Obama	4	0	4	0	Obama	4	0	4	0
Romney	0	4	0	4	McCain	0	4	0	4
Obama	20	0	19	0	Obama	21	0	19	0
Romney	0	11	0	11	Obama	11	0	11	0
Obama	6	0	6	0	Obama	7	0	6	0
Romney	0	6	0	6	McCain	0	6	0	6
Romney	0	8	0	8	McCain	0	8	0	8
Romney	0	8	0	8	McCain	0	9	0	8
Obama	4	0	4	0	Obama	4	0	4	0
Obama	10	0	10	0	Obama	10	0	10	0
Obama	11	0	11	0	Obama	12	0	11	0
Obama	16	0	15	0	Obama	17	0	15	0
Obama	10	0	9	0	Obama	10	0	9	0
Romney	0	6	0	6	McCain	0	6	0	6
Romney	0	10	0	10	McCain	0	11	0	10
Romney	0	3	0	4	McCain	0	3	0	4
Romney	0	5	0	5	McCain	1	4	1	4
Obama	6	0	6	0	Obama	5	0	6	0
Obama	4	0	4	0	Obama	4	0	4	0
Obama	14	0	14	0	Obama	15	0	14	0
Obama	5	0	5	0	Obama	5	0	5	0
Obama	29	0	28	0	Obama	31	0	28	0
Romney	0	15	0	16	Obama	15	0	16	0
Romney	0	3	0	3	McCain	0	3	0	3
Obama	18	0	17	0	Obama	20	0	17	0
Romney	0	7	0	7	McCain	0	7	0	7
Obama	7	0	8	0	Obama	7	0	8	0
Obama	20	0	19	0	Obama	21	0	19	0
Obama	4	0	3	0	Obama	4	0	3	0
Romney	0	9	0	9	McCain	0	8	0	9
Romney	0	3	0	3	McCain	0	3	0	3
Romney	0	11	0	11	McCain	0	11	0	11
Romney	0	38	0	41	McCain	0	34	0	41
Romney	0	6	0	6	McCain	0	5	0	6
Obama	3	0	3	0	Obama	3	0	3	0
Obama	13	0	13	0	Obama	13	0	13	0
Obama	12	0	12	0	Obama	11	0	12	0
Romney	0	5	0	4	McCain	0	5	0	4
Obama	10	0	10	0	Obama	10	0	10	0
Romney	0	3	0	3	McCain	0	3	0	3
Obama	3	0	3	0	Obama	3	0	3	0
	332	206	328	210		365	173	356	182
			-4	4				-9	9

2004 Presidential Election					2000 Presidential Election				
2004 Presidential Victor	Electoral Votes For Kerry (D)	Electorial Votes For Bush (Rep)	Revised Electoral Votes For Kerry (D)	Revised Electorial Votes For Bush (Rep)	2000 Presidential Victor	Electoral Votes For Gore (D)	Electorial Votes For Bush (Rep)	Revised Electoral Votes For Gore (D)	Revised Electorial Votes For Bush (Rep)
Bush	0	9	0	8	Bush	0	9	0	8
Bush	0	3	0	3	Bush	0	3	0	3
Bush	0	10	0	12	Bush	0	8	0	12
Bush	0	6	0	6	Bush	0	6	0	6
Kerry	55	0	54	0	Gore	54	0	54	0
Bush	0	9	0	10	Bush	0	8	0	10
Kerry	7	0	7	0	Gore	8	0	7	0
Kerry	3	0	3	0	Gore	3	0	3	0
Bush	0	27	0	31	Bush	0	25	0	31
Bush	0	15	0	16	Bush	0	13	0	16
Kerry	4	0	4	0	Gore	4	0	4	0
Bush	0	4	0	4	Bush	0	4	0	4
Kerry	21	0	19	0	Gore	22	0	19	0
Bush	0	11	0	11	Bush	0	12	0	11
Bush	0	7	0	6	Gore	7	0	6	0
Bush	0	6	0	6	Bush	0	6	0	6
Bush	0	8	0	8	Bush	0	8	0	8
Bush	0	9	0	8	Bush	0	9	0	8
Kerry	4	0	4	0	Gore	4	0	4	0
Kerry	10	0	10	0	Gore	10	0	10	0
Kerry	12	0	11	0	Gore	12	0	11	0
Kerry	17	0	15	0	Gore	18	0	15	0
Kerry	9	0	8	0	Gore	10	0	9	0
Bush	0	6	0	6	Bush	0	7	0	6
Bush	0	11	0	10	Bush	0	11	0	10
Bush	0	3	0	4	Bush	0	3	0	4
Bush	0	5	0	5	Bush	0	5	0	5
Bush	0	5	0	6	Bush	0	4	0	6
Kerry	4	0	4	0	Bush	0	4	0	4
Kerry	15	0	14	0	Gore	15	0	14	0
Bush	0	5	0	5	Gore	5	0	5	0
Kerry	31	0	28	0	Gore	33	0	28	0
Bush	0	15	0	16	Bush	0	14	0	16
Bush	0	3	0	3	Bush	0	3	0	3
Bush	0	20	0	17	Bush	0	21	0	17
Bush	0	7	0	7	Bush	0	8	0	7
Kerry	7	0	8	0	Gore	7	0	8	0
Kerry	21	0	19	0	Gore	23	0	19	0
Kerry	4	0	3	0	Gore	4	0	3	0
Bush	0	8	0	9	Bush	0	8	0	9
Bush	0	3	0	3	Bush	0	3	0	3
Bush	0	11	0	11	Bush	0	11	0	11
Bush	0	34	0	41	Bush	0	32	0	41
Bush	0	5	0	6	Bush	0	5	0	6
Kerry	3	0	3	0	Gore	3	0	3	0
Bush	0	13	0	13	Bush	0	13	0	13
Kerry	11	0	12	0	Gore	11	0	12	0
Bush	0	5	0	4	Bush	0	5	0	4
Kerry	10	0	10	0	Gore	11	0	10	0
Bush	0	3	0	3	Bush	0	3	0	3
Kerry	3	0	3	0	Gore	2	0	2	0
	251	286	239	298		266	271	246	291
			-12	12				-20	20

EXHIBIT C

2020 Population Projections and Apportionment

2020 Projections wMTchange (short term 2018-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019

State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,914,850	7	7	0	760,330	9	435	502	702,121	44
Alaska	728,863	1	1	0			at large	640	728,863	38
Arizona	7,370,763	9	10	1	583,171	176,173	425	471	737,076	36
Arkansas	3,023,873	4	4	0	367,696	396,781	379	489	755,968	24
California	39,550,248	53	52	-1	262,781	495,701	430	439	760,582	22
Colorado	5,809,922	7	8	1	625,127	134,753	426	485	726,240	40
Connecticut	3,560,620	5	5	0	593,186	169,058	416	508	712,124	41
Delaware	980,031	1	1	0			at large	475	980,031	3
Florida	21,654,726	27	29	2	714,206	44,323	434	447	746,715	29
Georgia	10,697,948	14	14	0	291,991	466,891	417	446	764,139	20
Hawaii	1,412,343	2	2	0	445,296	339,837	334	572	706,172	43
Idaho	1,815,033	2	2	0	42,606	742,528	261	443	907,517	4
Illinois	12,633,538	18	17	-1	632,656	126,074	431	460	743,149	32
Indiana	6,759,912	9	9	0	434,692	324,874	415	464	751,101	27
Iowa	3,159,919	4	4	0	231,650	532,826	362	468	789,980	10
Kansas	2,914,781	4	4	0	476,788	287,689	395	507	728,695	39
Kentucky	4,472,570	6	6	0	442,280	318,772	402	478	745,428	31
Louisiana	4,640,641	6	6	0	274,209	486,843	392	461	773,440	14
Maine	1,348,093	2	2	0	509,546	275,587	342	596	674,047	47
Maryland	6,053,101	8	8	0	381,949	377,931	409	462	756,638	23
Massachusetts	6,899,915	9	9	0	294,689	464,877	406	453	766,657	18
Michigan	9,988,946	14	13	-1	242,130	516,828	413	444	768,380	17
Minnesota	5,664,818	8	7	-1	10,362	749,978	377	437	809,260	8
Mississippi	2,972,502	4	4	0	419,067	345,409	386	497	743,125	33
Missouri	6,149,312	8	8	0	285,737	474,143	400	457	768,664	15
Montana	1,072,506	1	1	0			at large	436	1,072,506	1
Nebraska	1,941,034	3	3	0	686,065	83,399	418	587	647,011	48
Nevada	3,120,458	4	4	0	271,111	493,366	369	473	780,115	11
New Hampshire	1,364,417	2	2	0	493,222	291,911	339	589	682,209	46
New Jersey	8,879,315	12	12	0	592,821	166,233	429	465	739,943	35
New Mexico	2,099,901	3	3	0	527,197	242,266	387	542	699,967	45
New York	19,396,195	27	26	-1	697,240	61,313	432	449	746,007	30
North Carolina	10,568,755	13	14	1	421,184	337,697	421	451	754,911	25
North Dakota	765,064	1	1	0			at large	612	765,064	19
Ohio	11,698,680	16	15	-1	50,059	708,761	410	438	779,912	12
Oklahoma	3,969,576	5	5	0	184,230	578,014	374	456	793,915	9
Oregon	4,244,856	5	6	1	669,995	91,057	428	505	707,476	42
Pennsylvania	12,802,789	18	17	-1	463,405	295,325	427	450	753,105	26
Rhode Island	1,060,167	2	1	-1			at large	440	1,060,167	2
South Carolina	5,197,747	7	7	0	477,433	282,907	412	474	742,535	34
South Dakota	889,160	1	1	0			at large	525	889,160	6
Tennessee	6,872,698	9	9	0	321,906	437,661	408	458	763,633	21
Texas	29,274,825	36	39	3	678,699	79,794	433	442	750,637	28
Utah	3,245,917	4	4	0	145,652	618,825	350	454	811,479	7
Vermont	623,712	1	1	0			at large	731	623,712	49
Virginia	8,561,297	11	11	0	151,801	607,378	403	441	778,300	13
Washington	7,683,987	10	10	0	269,947	489,396	407	448	768,399	16
West Virginia	1,783,100	3	2	-1	74,539	710,595	264	452	891,550	5
Wisconsin	5,833,734	8	8	0	601,315	158,565	424	483	729,217	37
Wyoming	579,629	1	1	0			at large	782	579,629	50
Washington DC	708,919	*0*								
	329,415,710		435					Median =	754,008	
Other Inputs:	Seats to Apportion							Min =	579,629	
435	Max Seats to Calculate							Max =	1,072,506	
75	States									
50										
Include										

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EXHIBIT D

Table 1. Apportionment Population and Number of Representatives, by State: Census 2010

State	Apportionment Population	Resident	Overseas	Number of Apportioned Representatives Based on Census 2010	Change From 2000 Census Apportionment	Percent Overseas ot Apportionment Population
Alabama	4,779,736	4,756,490	23,246	7	0	0.49%
Alaska	710,231	698,939	11,292	1	0	1.59%
Arizona	6,392,017	6,371,334	20,683	9	1	0.32%
Arkansas	2,915,918	2,905,607	10,311	4	0	0.35%
California	37,253,956	37,165,923	88,033	53	0	0.24%
Colorado	5,029,196	5,013,462	15,734	7	0	0.31%
Connecticut	3,574,097	3,566,566	7,531	5	0	0.21%
Delaware	897,934	894,991	2,943	1	0	0.33%
Florida	18,801,310	18,701,847	99,463	27	2	0.53%
Georgia	9,687,653	9,647,740	39,913	14	1	0.41%
Hawaii	1,360,301	1,353,740	6,561	2	0	0.48%
Idaho	1,567,582	1,561,665	5,917	2	0	0.38%
Illinois	12,830,632	12,796,884	33,748	18	-1	0.26%
Indiana	6,483,802	6,466,022	17,780	9	0	0.27%
Iowa	3,046,355	3,038,923	7,432	4	-1	0.24%
Kansas	2,853,118	2,842,423	10,695	4	0	0.37%
Kentucky	4,339,367	4,328,128	11,239	6	0	0.26%
Louisiana	4,533,372	4,512,782	20,590	6	-1	0.45%
Maine	1,328,361	1,323,648	4,713	2	0	0.35%
Maryland	5,773,552	5,757,175	16,377	8	0	0.28%
Massachusetts	6,547,629	6,535,614	12,015	9	-1	0.18%
Michigan	9,883,640	9,855,654	27,986	14	-1	0.28%
Minnesota	5,303,925	5,292,971	10,954	8	0	0.21%
Mississippi	2,967,297	2,956,354	10,943	4	0	0.37%
Missouri	5,988,927	5,966,376	22,551	8	-1	0.38%
Montana	989,415	984,414	5,001	1	0	0.51%
Nebraska	1,826,341	1,820,857	5,484	3	0	0.30%
Nevada	2,700,551	2,691,670	8,881	4	1	0.33%
New Hampshire	1,316,470	1,311,495	4,975	2	0	0.38%
New Jersey	8,791,894	8,776,287	15,607	12	-1	0.18%
New Mexico	2,059,179	2,051,085	8,094	3	0	0.39%
New York	19,378,102	19,335,149	42,953	27	-2	0.22%
North Carolina	9,535,483	9,505,185	30,298	13	0	0.32%
North Dakota	672,591	669,277	3,314	1	0	0.49%
Ohio	11,536,504	11,504,513	31,991	16	-2	0.28%
Oklahoma	3,751,351	3,737,820	13,531	5	0	0.36%
Oregon	3,831,074	3,813,542	17,532	5	0	0.46%
Pennsylvania	12,702,379	12,669,853	32,526	18	-1	0.26%
Rhode Island	1,052,567	1,049,887	2,680	2	0	0.25%
South Carolina	4,625,364	4,604,753	20,611	7	1	0.45%
South Dakota	814,180	808,599	5,581	1	0	0.69%
Tennessee	6,346,105	6,316,779	29,326	9	0	0.46%
Texas	25,145,561	25,022,704	122,857	36	4	0.49%
Utah	2,763,885	2,757,005	6,880	4	1	0.25%
Vermont	625,741	621,145	4,596	1	0	0.73%
Virginia	8,001,024	7,964,312	36,712	11	0	0.46%
Washington	6,724,540	6,695,711	28,829	10	1	0.43%
West Virginia	1,852,994	1,846,173	6,821	3	0	0.37%
Wisconsin	5,686,986	5,675,742	11,244	8	0	0.20%
Wyoming	563,626	558,952	4,674	1	0	0.83%
Total Apportionment Population	308,143,815	307,104,167	1,039,648	435		0.34%
					Min	0.18%
					Max	1.59%

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Table 1. Apportionment Population and Number of Representatives, by State: Census 2000

State	Apportionment Population	Resident	Overseas	Number of Apportioned Representatives Based on Census 2000	Change From 1990 Census Apportionment	Percent Overseas of Apportionment Population
Alabama	4,461,130	4,447,100	14,030	7	0	0.31%
Alaska	628,933	626,932	2,001	1	0	0.32%
Arizona	5,140,683	5,130,632	10,051	8	2	0.20%
Arkansas	2,679,733	2,673,400	6,333	4	0	0.24%
California	33,930,798	33,871,648	59,150	53	1	0.17%
Colorado	4,311,882	4,301,261	10,621	7	1	0.25%
Connecticut	3,409,535	3,405,565	3,970	5	-1	0.12%
Delaware	785,068	783,600	1,468	1	0	0.19%
Florida	16,028,890	15,982,378	46,512	25	2	0.29%
Georgia	8,206,975	8,186,453	20,522	13	2	0.25%
Hawaii	1,216,642	1,211,537	5,105	2	0	0.42%
Idaho	1,297,274	1,293,953	3,321	2	0	0.26%
Illinois	12,439,042	12,419,293	19,749	19	-1	0.16%
Indiana	6,090,782	6,080,485	10,297	9	-1	0.17%
Iowa	2,931,923	2,926,324	5,599	5	0	0.19%
Kansas	2,693,824	2,688,418	5,406	4	0	0.20%
Kentucky	4,049,431	4,041,769	7,662	6	0	0.19%
Louisiana	4,480,271	4,468,976	11,295	7	0	0.25%
Maine	1,277,731	1,274,923	2,808	2	0	0.22%
Maryland	5,307,886	5,296,486	11,400	8	0	0.21%
Massachusetts	6,355,568	6,349,097	6,471	10	0	0.10%
Michigan	9,955,829	9,938,444	17,385	15	-1	0.17%
Minnesota	4,925,670	4,919,479	6,191	8	0	0.13%
Mississippi	2,852,927	2,844,658	8,269	4	-1	0.29%
Missouri	5,606,260	5,595,211	11,049	9	0	0.20%
Montana	905,316	902,195	3,121	1	0	0.34%
Nebraska	1,715,369	1,711,263	4,106	3	0	0.24%
Nevada	2,002,032	1,998,257	3,775	3	1	0.19%
New Hampshire	1,238,415	1,235,786	2,629	2	0	0.21%
New Jersey	8,424,354	8,414,350	10,004	13	0	0.12%
New Mexico	1,823,821	1,819,046	4,775	3	0	0.26%
New York	19,004,973	18,976,457	28,516	29	-2	0.15%
North Carolina	8,067,673	8,049,313	18,360	13	1	0.23%
North Dakota	643,756	642,200	1,556	1	0	0.24%
Ohio	11,374,540	11,353,140	21,400	18	-1	0.19%
Oklahoma	3,458,819	3,450,654	8,165	5	-1	0.24%
Oregon	3,428,543	3,421,399	7,144	5	0	0.21%
Pennsylvania	12,300,670	12,281,054	19,616	19	-2	0.16%
Rhode Island	1,049,662	1,048,319	1,343	2	0	0.13%
South Carolina	4,025,061	4,012,012	13,049	6	0	0.32%
South Dakota	756,874	754,844	2,030	1	0	0.27%
Tennessee	5,700,037	5,689,283	10,754	9	0	0.19%
Texas	20,903,994	20,851,820	52,174	32	2	0.25%
Utah	2,236,714	2,233,169	3,545	3	0	0.16%
Vermont	609,890	608,827	1,063	1	0	0.17%
Virginia	7,100,702	7,078,515	22,187	11	0	0.31%
Washington	5,908,684	5,894,121	14,563	9	0	0.25%
West Virginia	1,813,077	1,808,344	4,733	3	0	0.26%
Wisconsin	5,371,210	5,363,675	7,535	8	-1	0.14%
Wyoming	495,304	493,782	1,522	1	0	0.31%
Total Apportionment Population	281,424,177	280,849,847	574,330	435		0.20%
					Min	0.10%
					Max	0.42%

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Table 1. Apportionment Population and Number of Representatives, by State: Census 1990

State	Apportionment Population	Resident	Overseas	Number of Apportioned Representatives Based on Census 1990	Change From 1980 Census Apportionment	Percent Overseas of Apportionment Population
Alabama	4,062,608	4,040,587	22,021	7	0	0.54%
Alaska	551,947	550,043	1,904	1	0	0.34%
Arizona	3,677,985	3,665,228	12,757	6	1	0.35%
Arkansas	2,362,239	2,350,725	11,514	4	0	0.49%
California	29,839,250	29,760,021	79,229	52	7	0.27%
Colorado	3,307,912	3,294,394	13,518	6	0	0.41%
Connecticut	3,295,669	3,287,116	8,553	6	0	0.26%
Delaware	668,696	666,168	2,528	1	0	0.38%
Florida	13,003,362	12,937,926	65,436	23	4	0.50%
Georgia	6,508,419	6,478,216	30,203	11	1	0.46%
Hawaii	1,115,274	1,108,229	7,045	2	0	0.63%
Idaho	1,011,986	1,006,749	5,237	2	0	0.52%
Illinois	11,466,682	11,430,602	36,080	20	-2	0.31%
Indiana	5,564,228	5,544,159	20,069	10	0	0.36%
Iowa	2,787,424	2,776,755	10,669	5	-1	0.38%
Kansas	2,485,600	2,477,574	8,026	4	-1	0.32%
Kentucky	3,698,969	3,685,296	13,673	6	-1	0.37%
Louisiana	4,238,216	4,219,973	18,243	7	-1	0.43%
Maine	1,233,223	1,227,928	5,295	2	0	0.43%
Maryland	4,798,622	4,781,468	17,154	8	0	0.36%
Massachusetts	6,029,051	6,016,425	12,626	10	-1	0.21%
Michigan	9,328,784	9,295,297	33,487	16	-2	0.36%
Minnesota	4,387,029	4,375,099	11,930	8	0	0.27%
Mississippi	2,586,443	2,573,216	13,227	5	0	0.51%
Missouri	5,137,804	5,117,073	20,731	9	0	0.40%
Montana	803,655	799,065	4,590	1	-1	0.57%
Nebraska	1,584,617	1,578,385	6,232	3	0	0.39%
Nevada	1,206,152	1,201,833	4,319	2	0	0.36%
New Hampshire	1,113,915	1,109,252	4,663	2	0	0.42%
New Jersey	7,748,634	7,730,188	18,446	13	-1	0.24%
New Mexico	1,521,779	1,515,069	6,710	3	0	0.44%
New York	18,044,505	17,990,455	54,050	31	-3	0.30%
North Carolina	6,657,630	6,628,637	28,993	12	1	0.44%
North Dakota	641,364	638,800	2,564	1	0	0.40%
Ohio	10,887,325	10,847,115	40,210	19	-2	0.37%
Oklahoma	3,157,604	3,145,585	12,019	6	0	0.38%
Oregon	2,853,733	2,842,321	11,412	5	0	0.40%
Pennsylvania	11,924,710	11,881,643	43,067	21	-2	0.36%
Rhode Island	1,005,984	1,003,464	2,520	2	0	0.25%
South Carolina	3,505,707	3,486,703	19,004	6	0	0.54%
South Dakota	699,999	696,004	3,995	1	0	0.57%
Tennessee	4,896,641	4,877,185	19,456	9	0	0.40%
Texas	17,059,805	16,986,510	73,295	30	3	0.43%
Utah	1,727,784	1,722,850	4,934	3	0	0.29%
Vermont	564,964	562,758	2,206	1	0	0.39%
Virginia	6,216,568	6,187,358	29,210	11	1	0.47%
Washington	4,887,941	4,866,692	21,249	9	1	0.43%
West Virginia	1,801,625	1,793,477	8,148	3	-1	0.45%
Wisconsin	4,906,745	4,891,769	14,976	9	0	0.31%
Wyoming	455,975	453,588	2,387	1	0	0.52%
Total Apportionment Population	249,022,783	248,102,973	919,810	435		0.37%
					Min	0.21%
					Max	0.63%

EXHIBIT E

2020 Population Projections Sorts and Apportionment

State	Seats	Average Size	Size Rank
Rhode Island	1	1,060,167	1
Delaware	1	980,031	2
Idaho	2	907,517	3
West Virginia	8	891,550	4
South Dakota	1	889,160	5
Alabama	6	819,142	6
Utah	4	811,479	7
Minnesota	7	809,260	8
Oklahoma	5	793,915	9
Iowa	4	789,980	10
Nevada	4	780,115	11
Ohio	15	779,912	12
Virginia	11	778,300	13
Louisiana	6	773,440	14
Missouri	8	768,664	15
Washington	10	768,399	16
Michigan	13	768,380	17
Massachusetts	9	766,657	18
North Dakota	1	765,064	19
Georgia	14	764,139	20
Tennessee	9	763,633	21
California	52	760,582	22
Maryland	8	756,638	23
Arkansas	4	755,968	24
North Carolina	14	754,911	25
Pennsylvania	17	753,105	26
Indiana	9	751,101	27
Texas	39	750,637	28
Florida	29	746,715	29
New York	26	746,007	30
Kentucky	6	745,428	31
Illinois	17	743,149	32
Mississippi	4	743,125	33
South Carolina	7	742,535	34
New Jersey	12	739,943	35
Arizona	10	737,076	36
Wisconsin	1	729,217	37
Alaska	1	728,863	38
Kansas	4	728,695	39
Colorado	8	726,240	40
Connecticut	5	712,124	41
Oregon	6	707,476	42
Hawaii	2	706,172	43
New Mexico	3	699,967	44
New Hampshir	2	682,209	45
Maine	2	674,047	46
Nebraska	3	647,011	47
Vermont	1	623,712	48
Wyoming	1	579,629	49
Montana	2	537,455	50
Washington DC	*2*		
Median =		754,008	
Min =		537,455	
Max =		1,060,167	

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PROOF OF SERVICE
LOS ANGELES, CALIFORNIA

I am employed in Los Angeles, California. I am over the age of 18 and am not a party to the within action; my business address is: 634 S. Spring St., Ste. 1100, Los Angeles, CA 90014.

On March 13, 2020, I served the following document(s) described as: **RULE 26(A)(2) EXPERT REPORT AND DECLARATION OF KIMBALL W. BRACE** on all interested parties in this action, by serving the following individuals:

Alexander V. SverdloV
Brad P. Rosenberg
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b(6)

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Attorney for Plaintiff Mo Brooks

[X] (By Electronic Service): By transmitting by email to the above Parties at the above email addresses.

[X] (Federal): I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on **March 13, 2020**, at Los Angeles, California.

Julia A. Gomez

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

STATE OF ALABAMA, *et al.,*

*Plaintiff*s,

v.

UNITED STATES DEPARTMENT OF COMMERCE; *et. al*.,

Defendants,

and

DIANA MARTINEZ; et. al; COUNTY OF SANTA CLARA, CALIFORNIA, *et al*; and STATE OF NEW YORK, *et al*.,

Defendant-Intervenors.

Civil Action No. 2:18-cv-00772-RDP

DECLARATION OF DR. DOUGLAS S. MASSEY FOR MARTINEZ INTERVENORS AND CROSS CLAIMAINTS

[Fed. R. Civ. Pro. 26(a)(2)]

DECLARATION OF DR. DOUGLAS S. MASSEY

I, Douglas S. Massey declare:

1. I am currently the Henry G. Bryant Professor of Sociology and Public Affairs at Princeton University where I direct the Office of Population Research (OPR), the nation's oldest population research center. I am retained by Martinez Intervenors and Cross Claimants in this action to provide expert testimony pertaining to Plaintiffs' lawsuit to exclude the undocumented population from the apportionment population count and the related cross claim.

2. A copy of my expert report is attached as Exhibit A to this declaration.

3. A complete list of my qualifications, including a list of all publications authored in the previous 10 years, is attached as Exhibit B to this declaration.

4. I am being compensated by Martinez Intervenors and Cross Claimants for my time in preparing this report at a rate of $250 per hour.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on March 13, 2020 in Jamaica, Vermont.



Dr. Douglas S. Massey

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EXHIBIT A

EXPERT REPORT OF DOUGLAS S. MASSEY, PH.D.

Background and Qualifications

1. My name is Douglas S. Massey, an adult aged 67 with 40 years of experience on the faculties of the University of Pennsylvania (1980-1987, 1994-2003), the University of Chicago (1987-1993), and Princeton University (2003-2020). A complete list of my qualifications, including a list of all publications authored in the previous ten years, is included in my curriculum vitae, attached at Exhibit B. I am retained by counsel for Martinez Intervenors in the above-captioned case, and in the cross claim brought by Martinez Intervenors, to provide expert witness testimony related to Alabama's lawsuit to exclude undocumented immigrants from the apportionment population count and the related cross claim. I am being compensated for my work on this case at a rate of $250 per hour.

2. I am currently the Henry G. Bryant Professor of Sociology and Public Affairs at Princeton University where I direct the Office of Population Research (OPR), the nation's oldest population research center. I received doctoral training in demography as a graduate student at OPR, earning a Ph.D. in Sociology with a specialization in demography from Princeton in 1978. I then remained at Princeton for an additional year of postdoctoral work at OPR before going to the Graduate Group in Demography at UC Berkeley with a postdoctoral fellowship from the National Science Foundation. I began my faculty career at the Population Studies Center of the University of Pennsylvania in the fall of 1980.

3. I am an internationally recognized expert in the field of demography with an extensive background in the collection, dissemination, and analysis of data on immigration to the United States, both documented and undocumented. I have accumulated a steady stream of research published in peer-reviewed scientific journals such as *Demography, Population Studies, Population Research and Policy Review, Population and Development Review, International Migration*, *International Migration Review*, and *The Journal of Ethnic and Migration Studies*.

4. In the course of my academic career, I have directed population research centers at the University of Pennsylvania, the University of Chicago, and Princeton University and also served as director of graduate training in demography at Penn and Chicago. Based on my contributions to the field of demography, I received both the Clifford Clogg Early Career Award and the Irene Taeuber Lifetime Achievement Award from the Population Association of America, the nation's leading professional association for demographers. I have also received the Distinguished Career Award from the International Migration Section of the American Sociological Association. I am Past-President of the Population Association of America, the American Sociological Association, and the American Academy of Political and Social Science, and an elected member of the American Academy of Arts and Sciences, the American Philosophical Society, the National Academy of Sciences, and the Academia Europea.

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5. In addition to my academic accomplishments, I have compiled a long record of public and professional service. From 1984 to 1989, I chaired the PAA's Committee on Population Statistics. I also served on the Social Sciences and Population Study Section of the National Institute of Child Health and Human Development from 1984 to 1988 and was a member of the institute's Population Research Committee from 1989 to 1993. From 2002 to 2004 I was a member of the National Academy of Sciences' Committee on Population, and from 2004 to 2010 I served two terms on the Committee on National Statistics, the principal overseer of the federal statistical system for the National Academy of Sciences. From 2012 to 2018, I served two terms on the Census Scientific Advisory Committee, the publicly appointed body officially charged with providing scientific advice to the U.S. Census Bureau on its plans and strategies for data collection. I was a member of the National Academy of Sciences panel that produced the report on *The Integration of Immigrants in U.S. Society* from 2012-2015 and a report reviewer for the National Academy of Sciences report on *The Economic and Fiscal Consequences of Immigration*.

6. Since 1987, I have codirected the Mexican Migration Project, the largest and most reliable source of data on documented and undocumented migration from Mexico to the United States. Funded by the National Institute of Child Health and human development, the project received the institute's MERIT Award for scientific excellence and innovation. It currently provides data to more than 5,000 registered users. Since 1998, I have also codirected the Latin American Migration project, which provides valid and reliable data on documented and undocumented migration from other nations in Latin America to the United States. It currently has nearly 2,000 registered data users. From 2003 to 2015, I codirected the New Immigrant Survey, the first-ever representative longitudinal survey of legal immigrants to the United States, which has more than 4,400 registered users.

7. I currently serve as an expert witness in *Texas v. United States*, Case No. 1:18-cv-68 (S.D. Texas). I previously served as an expert witness in *La Unión Del Pueblo Entero, et al. v. Ross, et al.*, Case No. 8:18-cv-01570-GJH (D. Md.) (later consolidated under *Kravitz, et al. v. Department of Commerce, et al.*, Case No. 8:18-cv-01041-GJH (D. Md.)).

Challenges to Determining an Individual's Immigration Status

8. The U.S. Constitution mandates enumerating the "whole number of persons in each State" and the Census Act of 1790 established "place of usual residence" as the principle determining where these "persons" should be counted. "Usual residence" is defined as the place "where a person lives and sleeps most of the time." It is not the place of legal residence, the place of voter registration, or any other place of bureaucratic relevance. Given these criteria, since 1790, the Decennial Census has always included many categories of non-citizens whose place of usual residence is the United States. In addition to lawful permanent resident aliens, the census enumerates international students, foreign business persons, international investors, asylum seekers, fiancés of U.S. citizens, recipients of temporary protected status, intracompany transferees, exchange visitors, non-

citizen contract workers, religious personnel, artists, entertainers, and sports figures, as well as persons who entered the country outside of an official port of entry, overstayed a legal visa, or violated the terms of their visa.

9. When the U.S. Constitution was adopted, immigration was open and unregulated. The only reference to immigration in the Constitution occurs in Article I, Section 8, which gave Congress the authority to establish rules for naturalization. In 1790, Congress passed the Naturalization Act, which authorized "free white persons" of "good moral character" who had resided in the country for two years to apply for citizenship. In 1875, the Supreme Court declared the regulation of immigration to be exclusively a federal responsibility. The first immigration-regulating legislation passed by Congress was the Chinese Exclusion Act of 1882. The Alien Contract Labor Laws of 1885 and 1887 prohibited certain laborers from immigration to the United States and the Immigration Act of 1891 established a federal bureau responsible for inspecting, processing, and admitting or rejecting immigrants seeking admission to the U.S. The Immigration Act of 1917 imposed a literacy requirement on immigrants but it was only haphazardly enforced. The first numerical limitations on immigration were the Quota Acts of 1921 and 1924, but they did not apply to nations in the Western Hemisphere. Although the Border Patrol was established in 1924, its original mission was to prevent the entry of Asian and European immigrants seeking to circumvent inspection at official ports of entry. Numerical limits on immigration from the Americas were not imposed until 1968 under legislation passed in 1965 and country-level quotas were not enacted until 1976. It wasn't until the 1970s, therefore, that "illegal immigration" became a recurring political issue in the United States.

10. At the individual level, even today determining who is present without authorization and therefore undocumented or "illegal" is far from straightforward. There is no formal definition used by immigration authorities to determine who is present in the United States "illegally." Legal status depends on a host of factors that vary from time to time, person to person, and context to context. Given the complexity of U.S. immigration laws, determinations about a person's legal status ultimately fall to the federal courts. Legal status is a fluid state that can change in response to shifting personal circumstances, court decisions, executive actions, and Congressional legislation. There is no bright line between authorized and unauthorized status. Rather there is a large gray area of transient categories that have proliferated over the years indicating what sociologists have termed "liminal legality." For example, certain categories of immigrants have been granted "temporary protected status" or "Deferred Action for Childhood Arrivals (DACA)," which allows them to live and work in the United States, but as the names imply they do not authorize legal permanent residence. These liminal statuses may last for years, even decades, during which people build lives in the United States and acquire ties that potentially could justify an "adjustment of status" to legal permanent resident, but whose situation cannot be definitively resolved in the absence of judicial or legislative actions. Individuals in a liminal status may also include those who have a pending application for immigration relief and who may or may not have a formal legal immigration status at the

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time but have permission to stay in the country pending the adjudication of their application. This might include applicants for lawful permanent residence, asylum withholding or removal, or with pending Violence Against Women Act applications, among others. Thus, with respect to immigration status there is no true binary between legal and "illegal."

11. Despite the foregoing caveats, demographers have developed indirect methods to estimate the size and characteristics of the undocumented population. The methodology entails estimating the number, age, and sex of people who are legally in the United States and then subtracting them from the number, age, and sex of those enumerated in the census, which is assumed to represent the population of all persons whose place of usual residence is the United States. Between census years, the size and composition of this population are estimated from samples such as the Current Population Survey or the American Community Survey.

12. In any given year, the only pieces of information that demographers reliably know based on lawful permanent resident applications are the number, age, and sex of persons admitted to lawful permanent residence and the number, age, and sex of persons included in the census. However, in order to estimate the size and characteristics of the undocumented population, in any given year one also needs to know how many lawful permanent residents leave the country, die, or become U.S. citizens, how many U.S. citizens die or leave the country, how many nonimmigrants enter the country, die, or leave. Nonimmigrants are people holding a legal visa that permits work or residence in the United States but is not valid for permanent settlement. The United States has no reliable registry of exits from the United States, so the out-migration of lawful permanent residents, citizens, and nonimmigrants has to be estimated by making assumptions about the rates of departure for different segments of the population. Deaths are estimated by making assumptions about the mortality to which different segments of the population are exposed. Finally, although we know the number, age, and sex of persons enumerated, we don't know the rate at which lawful permanent residents, U.S. citizens, and nonimmigrants are undercounted, and undercount rates vary for these three categories as well as by age and sex, so they also have to be estimated by making assumptions based on whatever evidence is available.

13. Demographers use a technique known as the residual method to estimate the size and composition of the undocumented population. After all of the assumptions, adjustments, and estimations, demographers end up with a final estimated total population by age and sex and an estimated population of non-citizens with formal legal status by age and sex, and these two populations are subtracted from one other to estimate of the number of undocumented migrants by age and sex. Since the estimate is computed by subtraction, the technique is known as a residual method and is understood to contain systematic and random errors linked to inadequacies in the underlying assumptions and data sources. At best, the method provides a rough indicator of the size and composition of the undocumented population at the national level, but the likelihood of error increases rapidly

as one moves from estimates at the national level to those at the state, county, city, or block levels.

14. Although we cannot know with certainty the true size and composition of the undocumented population at any level, including nationally, if the same methods and assumptions are consistently applied to the same data sources over time, trends in the size and composition of the undocumented population emerge. Since 1990, the federal government has prepared its own estimates of the undocumented population, estimates that since 2005 have been done by the Office of Immigration Statistics in the Department of Homeland Security. In addition, beginning in 2006, the Pew Research Center in Washington, DC has also prepared annual estimates of the size and composition of the undocumented population; and since 2010 estimates have also been prepared by the Center for Migration Studies in New York.

15. The scale of the error incurred in making the foregoing estimates is indicated by the fact that in 2010 the number of undocumented migrants was estimated to be 11,590,000 by the Office of Immigration Statistics, 11,725,000 by the Center for Migration Studies, and 11,400,000 by the Pew Research Center. None of these estimates is necessarily more "correct" than the others.

16. Despite variability in the specific figures estimated in different years, all sources show the same trend over time. Undocumented migration began to rise in the 1960s, increased through the 1970s and early 1980s, and came to a peak of around 3.2 million in 1986. In that year, the Immigration Reform and Control Act authorized two separate legalization programs—one for long-term undocumented residents and another for undocumented farmworkers. The resulting legalizations reduced the undocumented population to around 1.9 million persons by 1988. Thereafter, growth resumed at roughly the same pace, but after 1993 the rate of growth accelerated markedly. After 2000, however, the growth rate slowed and peaked at around 12 million in 2007, after which growth ceased and since 2008 the undocumented has fluctuated around 11 million persons.

17. Recent estimates of the undocumented population's size are 11,960,000 in 2015 from the Office of Immigration Statistics, 10,700,000 in 2016 from the Pew Research Center, and 10,664,000 in 2017 from the Center for Migration Studies. All the estimates agree that the number of undocumented Mexicans has been falling since 2008, which means that undocumented Mexican departures annually have exceed undocumented Mexican arrivals. The net loss of undocumented Mexicans has been partially offset by net undocumented arrivals from Central America (principally El Salvador, Guatemala, and Honduras) and Asia (principally India and China); but these gains have not been sufficient to offset the net loss of undocumented Mexicans, and the undocumented population declined by about 1.1 million between 2010 and 2017.

18. Estimates based on data from the Mexican Migration Project indicate that the rate of undocumented in-migration from Mexico began to decline around the year 2000 and since

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2008 has plummeted to near zero. According to data from the Border Patrol, the number of Mexican apprehensions in 2019 reached its lowest level since 1969. Although the number of apprehensions of Central Americans did increase in 2019, total border apprehensions remain at historically low levels, and the undocumented population of Central Americans grew slowly at just 1.7% per year between 2010 and 2017, while the undocumented populations of persons from Caribbean and South America declined by around 1.1% per year, implying an excess of departures over arrivals.

19. The fact that the Mexican, Caribbean, and South American undocumented populations are shrinking, and that the Central American population is growing only slowly, implies that the large majority of undocumented migrants have been present in the country for a very long time. The latest estimates from the Center for Migration Studies indicate that as of 2017, 78% of all undocumented residents have lived in the United States for at least five years and 61% have been present for at least ten years. If we assume that three-fifths of those in the country for less than five years in 2017 aged into the five-years-or-greater category by 2000, around 90% of all undocumented migrants will have accumulated at least five years of continuous residence in the country at the time of the Decennial Census.

20. As a consequence of their long duration in the United States, undocumented migrants and those in liminal statuses, often acquire strong connections to the United States that render return migration unlikely, and in some cases support an adjustment to permanent resident status. As of 2017, for example, the Center for Migration Studies estimated that among undocumented migrants 67% were employed, 34% were homeowners, 31% were parents of a U.S. citizen, 12% were married to someone legally present in the U.S., and 3% were married to a U.S. citizen. The CMS also estimated that among 302,000 persons from El Salvador, Honduras, and Haiti who held Temporary Protected Status in the United States in January of 2017, 44% had been in the U.S. for at least 20 years, 9% were married to a legal permanent resident, and together they had produce some 273,000 U.S.-born citizen children. As of 2016, the Pew Research Center estimated that around five million children were living with an undocumented parent, and at the end of 2019, U.S. Citizenship and Immigration Services reported that 653,000 persons who entered the country as minors were registered under the program of Deferred Action for Childhood Arrivals. Given the fluidity of legal status categories, people who believe themselves to be legally present are often surprised they are not, WHILE others who believe themselves to be undocumented are surprised to discover they are eligible for permanent residence or even citizenship.

SOURCES

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Center for Migration Studies. 2020. "State-Level Unauthorized Population and Eligible-to-Naturalize Estimates." New York: Center for Migration Studies. http://data.cmsny.org/

Passel, Jeffrey S., and D'Vera Cohn. 2018. "U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade." Washington, DC: Pew Research Center. https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/

Passel, Jeffrey S., D'Vera Cohn, and John Gramlich. 2018. "Number of U.S.-Born Babies with Unauthorized Immigrant Parents Has Fallen Since 2007." Washington, DC: Pew Research Center. https://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines/

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Warren, Robert, and Donald Kerwin. 2020. "A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti." New York: Center for Migration Studies. https://cmsny.org/publications/jmhs-tps-elsalvador-honduras-haiti/

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Executed this 13th day of March, 2020, in Jamaica, Vermont



Douglas S. Massey, Ph.D.

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EXHIBIT B

Douglas S. Massey
Curriculum Vitae
January 2, 2020

Address: Office of Population Research
Princeton University
Wallace Hall
Princeton, NJ 08544
dmassey@princeton.edu

Birth: Born October 5, 1952 in Olympia, Washington, USA

Citizenship: Citizen and Resident of the United States

Education: Ph.D., Sociology, Princeton University, 1978
M.A., Sociology, Princeton University, 1977
B.A., Magna Cum Laude in Sociology-Anthropology, Psychology, and Spanish, Western Washington University, 1974

Honorary Degrees: Master in Arts and Sciences, Honoris Causa, University Pennsylvania, 1985.
Doctor of Social Science Honoris Causa, Ohio State University, 2012

Languages: Fluent in Spanish

Employment:
(9/05-present) Henry G. Bryant Professor of Sociology and Public Affairs, Princeton University
(7/03- 8/05) Professor of Sociology and Public Policy, Princeton University
(7/94-6/03) Dorothy Swaine Thomas Professor, Department of Sociology, Graduate Group in Demography, and Lauder Program in International Studies, University of Pennsylvania
(7/90-6/94) Professor, Irving B. Harris School of Public Policy Studies, University of Chicago
(7/87-6/94) Professor, Department of Sociology, University of Chicago
(7/85-7/87) Associate Professor, Department of Sociology and Graduate Group in Demography, University of Pennsylvania
(9/80-7/85) Assistant Professor, Department of Sociology and Graduate Group in Demography, University of Pennsylvania
(9/79-9/80) NSF Postdoctoral Fellow, Graduate Group in Demography, University of California at Berkeley
(1/79-6/79) Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton University
(9/78-9/79) Research Associate, Office of Population Research, Princeton University

Major Fields: Demography, Urban Sociology, Stratification, Social Research Methods, Latin American Studies, Race/Ethnic Relations, Biosociology, Immigration

BC-DOC-0000028225

Honors and Awards:

Academia Europaea, elected member 2018-present

Bronislaw Malinowsky Award 2018. Given by the Society for Applied . Anthropology to individuals widely recognized for their efforts to understand and serve the needs of the world through the use of social science (Shared with Jorge Durand for their 30 years of work on the Mexican Migration Project)

Henry Allen Moe Prize in the Humanities 2017. Given annually by the American Philosophical Society to the author of the best paper in the humanities or jurisprudence read at a meeting of the Society

John Hope Franklin Award 2016, for exceptional scholarship in the field of Race, Racism and the Law, from the Law and Society Association

President, American Academy of Political and Social Science, 2006-2015

Robert and Helen Lynd Career Award 2014, Community and Urban Studies Section, American Sociological Association

Robert E. Park Award for Best Book 2014. Community and Urban Studies Section, American Sociological Association

Paul Davidoff Award, 2013. From the Association of Collegiate Schools of Planning for *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb* (Princeton U. Press)

Irene B. Taeuber Award, Given by the Population Association of America in

Award for the Public Understanding of Sociology, American Sociological Association, 2012

Lifetime National Associate of the National Research Council, 2011

Julian Simon Lecture, 8th Annual Migration Meeting, Deutsches Institut für Wirtschaftsforschung--DC, May 13, 2011

External Fellow, Center for Research and Analysis of Migration, University College London, 2011-present

Visiting Scholar, Russell Sage Foundation, 2009-2010

Distinguished Career Award, International Migration Section, American Sociological Association, 2009

Award for Distinguished Contribution to Scholarship in Population, for "From Illegal to Legal: Estimating Previous Illegal Experience Among New Legal Immigrants to the United States" published in Demography and coauthored with Guillermina Jasso, Mark Rosenzweig, and James Smith, from the Population Section of the American Sociological Association

Premio de Reconocimiento de Destacado Mérito, El Consejo Cultural Mundial, México, D.F., 2008

Fellow, American Association for the Advancement of Science, 2006

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Senior Prize, 2005, Vereinigung der Freunde des Deutschen Instituts für Wirtschaftsforschung (Association of Friends of the German Institute for Social Research–Berlin) for the paper "Return Migration by German Guestworkers: Neoclassical versus New Economic Theories" published in International Migration 40(4):5-38.

Otis Dudley Duncan Award, Population Section of the American Sociological Association (for Beyond Smoke and Mirrors), 2004.

W.E.B. DuBois Fellow, American Academy of Political and Social Science, 2003-present

Antonio García Cubas Prize, Best Book on Mexican Art, National Institute of Anthropology and History, Mexico City, 2001 (for Milagros en la Frontera)

President, American Sociological Association, 2000-2001

Member, American Philosophical Society, Elected 2004
Member, National Academy of Sciences, Elected 1998
Member, American Academy of Arts and Sciences, Elected 1995
Member, Sociological Research Association, Elected 1989

Exemplary Alumnus Award, Western Washington University, 2000

Clifford C. Clogg Award (outstanding early career), Population Association of America, 1998

President, Population Association of America, 1996

Member, Council of the American Sociological Association, 1996-99

Southwest Book Award, Border Regional Library Association (for Miracles on the Border), 1996

Distinguished Publication Award, American Sociological Association (for American Apartheid), 1995

Otis Dudley Duncan Award, Population Section of the American Sociological Association (for American Apartheid), 1994

Critics' Choice Award, American Educational Studies Association (for American Apartheid), 1993

First Vice President, Population Association of America, 1994

John Simon Guggenheim Memorial Fellow, 1990-91

MERIT Award, National Institute of Child Health and Human Development, 1987-97

Board of Directors, Population Association of America, 1986-1989

NSF Postdoctoral Fellow, University of California, Berkeley, 1979-1980

Charlotte Elizabeth Proctor Fellowship, Princeton University, 1977-78

NIH Trainee in Demography, Princeton University, 1975-77

Outstanding Graduate in Sociology-Anthropology, Western Washington University, 1975

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Administrative Experience:

(7/11- present) Director, Office of Population Research, Woodrow Wilson School of Public and International Affairs, Princeton University
(1/09-6/09) Chair, Dean Search Committee, Woodrow Wilson School of Public and International Affairs, Princeton University
(7/04-6/09) Director of Ph.D. Program in Policy Studies, Woodrow Wilson
(7/06-6/07) Interim Director, Program in Latin American Studies, Princeton University
(7/96-6/03) Chair, Department of Sociology, University of Pennsylvania
(1/97-12/97) Chair, Dean Search Committee, School of Arts & Sciences, University of Pennsylvania
(9/95-7/96) Director, Population Studies Center, University of Pennsylvania
(10/90-6/94) Director, Center for Latin American Studies, University of Chicago
(7/87-9/90) Director, Population Research Center, University of Chicago
(10/87-9/90) Chair, Committee on Demographic Training, University of Chicago
(7/85-6/87) Chair, Graduate Group in Demography, University of Pennsylvania

Professional Affiliations:

Population Association of America
American Sociological Association
International Union for the Scientific Study of Population
Southwestern Social Science Association
Latin American Studies Association
International Sociological Association
Mexican Demographic Society
American Association for the Advancement of Science

Funded Grants:

(9/1/97-5/31/20) "Public Use Data on Mexican Immigration." National Institute of Child Health and Human Development, Principal Investigator, $1,125,000 1 R01 HD35643

(1/1/09-11/30/15) The Latin American Migration Project and the Center for Migration and Development, John D. and Catherine T. MacArthur Foundation, $750,000,

(6/1/11-12/31/11) "Segregation, Securitized Lending and Foreclosure Outcomes in New York City." Center for New York City Neighborhoods, $10,000

(1/1/09-12/31/11) "Monitoring Mt. Laurel." John D. and Catherine T. MacArthur Foundation, $450,000.

(2/1/08-12/31/08) "Proposal for a Pilot Survey of New Immigrant Destinations." Russell Sage Foundation, $150,000. Co-PI with Marta Tienda

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(6/1/07 - 5/31/12) "Social Influences on Early Adult Stress Biomarkers," National Institute of Child Health and Human Development, $323,969.

(7/01/02-6/30/04) "Transnational Identities and Behavior." Russell Sage Foundation. $65,000.

(6/1/01-5/31/04) "Theoretical and Methodological Analysis of Mexico-U.S. Migration." NICHD, R3TW01223A, $120,582

(8/1/01-7/31/08) "Religion and Religious Practice among New Immigrants to the United States." Pew Charitable Trusts, $500,000. Co-PI with Guillermina Jasso.

3/1/98-11/1/2014) "New Immigrant Survey." NICHD, R01HD33834, $4,239,124, Subcontract, Co-PI with Guillermina Jasso, Mark Rosenzweig, and James Smith.

(9/1/98-8/31/2010) "National Longitudinal Survey of Freshmen at Selective Colleges and Universities." Andrew W. Mellon Foundation, $6.5 million (with Camille Charles).

(3/1/98-2/28/05) "The Latin American Migration Project," Principal Investigator, National Institute of Child Health and Human Development, $738,769, 1 R01 HD3584-01.

(12/1/95-11/30/98) "The New Immigrant Survey: A Pilot Study." NICHD, $1,218,550. Co-PI with Guillermina Jasso, Mark Rosenzweig, and James Smith.

(7/1/95-6/30/96) "The Hourglass Economy." Russell Sage Foundation, Principal Investigator, $24,500.

(11/1/94-12/31/05) "The Socioeconomic and Demographic Consequences of Mexico-U.S. Migration." Hewlett Foundation, Principal Investigator, $400,000, 94-7795.

(9/1/91-8/31/92) "Neighborhood Effects on Family Formation, Education, and Employment among the Poor." Hewlett Foundation, Principal Investigator, $26,000.

(1//1/90-7/1/92) "The Effects of the Immigration Reform and Control Act of 1986: Mexican Immigration to the United States." Sloan Foundation, Co-Principal Investigator (with Katharine Donato), $105,000.

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(9/87-8/97) "Public Use Data on Mexican Immigration," National Institute of Child Health and Human Development, Principal Investigator, $391,027, HD-23415, MERIT Award

(6/87-5/90) "The Consequences of Residential Segregation," National Institute of Child Health and Human Development, Principal Investigator, $342,532, HD-22992.

(6/84-5/87) "Spatial Segregation of Hispanics, Blacks, and Asians," National Institute of Child Health and Human Development, Principal Investigator, $278,719, HD-18594.

(9/81-8/84) "Mexican Migration: The Settlement Process," National Institute of Child Health and Human Development, Principal Investigator, $200,800, HD-15166.

(8/81-1/82) "Problems of Hispanics in the Labor Market," National Commission for Employment Policy, Principal Investigator, $18,343, 99-1-3050-50-52.

(9/79-9/80) "Processes of Residential Segregation Among Hispanic Americans," National Science Foundation, Postdoctoral Research Grant, $13,980, SPI-7914866.

Surveys Designed:

New Jersey Housing and Community Survey (2009-2010)
New Immigrant Survey 2003-2014
National Longitudinal Survey of Freshmen (1998-2004)
Survey of African American Home Buyers in Suburban Baltimore (1998)
Survey of Latin American Immigrants to the United States (1997-present)
Survey of Mexican Immigrants to the United States (1987-present)
New Immigrant Survey Pilot (1995-2000)

Editorial Boards:

Annual Review of Sociology, Board, 2002-2004; Co-Editor 2004-present
Proceedings of the National Academy of Sciences, 2019-present
Social Science Research, 1999-present
Social Science Quarterly, 1991-present
Race and Social Problems, 2008-present
International Migration Review, 2010-2018
Russell Sage Journal of the Social Sciences, 2012-2017
Cityscape, 2008-2014
World Politics, 2007-2013
Migraciones Internacionales, 2001-2011
Ethnicities, 1998-2012
International Journal of Conflict and Violence, 2006-2014
Race and Society, 1996-2002
Latino Review of Books, 1995-2002
Encyclopedia of Sociology, 1997-2001

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American Journal of Sociology, 1987-1994
Demography, 1984-1987

Professional Service:

Member, Board on Higher Education and Workforce, National Academies of Sciences, Engineering, and Medicine, 2019-present
Member, Census Scientific Advisory Committee, U.S. Bureau of the Census 2012-2018
Associate Member, Amsterdam Centre for Inequality Studies, 2013-2018.
Member, Advisory Board, Koshland Science Museum, Washington, DC, 2012-2016
Member, Council of the National Academy of Sciences 2011-2014
Member, Governing Board, National Research Council, 2012-2015
Member, National Academies Committee on the Integration of Immigrants in U.S. Society, 2012-2015
Member, Scientific Advisory Board, Max Planck Institute for the Study of Religious and Ethnic Diversity, 2011-2015
Chair, Class V–Social and Behavioral Sciences, National Academy of Sciences, 2010-2012
Member, Committee on Estimating Costs to the Department of Justice of Increased Border Security Enforcement by the Department of Homeland Security, 2009-2011
Member, Committee on National Statistics, National Research Council, 2004-2010
Secretary, Class V--Social and Behavioral Sciences, National Academy of Sciences, 2008-2010
Member, International Advisory Board, Institute for Interdisciplinary Research on Conflict and Violence, University of Bielefeld, Germany, 2006-present
Member, Advisory Board, Opportunity New Jersey, 2008-present
Member, Panel Evaluating HUD Office of Research and Policy Development, National Research Council, 2005-2008
Chair, Section 53--Social and Political Sciences, National Academy of Science, 2005-2008
Chair, Membership Committee for Class III,--Social and Behavioral Sciences, American Philosophical Society 2005-2008
Member, Class III Social Sciences Membership Committee--American Academy of Arts and Sciences, 2006-2008
Member, Advisory Board, Program on Intercultural Conflict and Societal Integration, Wissenschaftszentrum Berlin für Sozialforschung, 2003-2007.
Consultant, Center for Strategic and International Studies, Global Aging Initiative, 2005-2006
Member, Panel on the Measurement of Discrimination, Committee on Population, National Research Council, 2001-2003
Member, Committee on Population, National Research Council, 2002-2005
Member, National Advisory Board, Leadership Council for Metropolitan Open Communities, 1995-2003
Member, Immigration Advisory Board, Russell Sage Foundation, 1993-

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2006Member, Advisory Board, Mexican Cultural Center of Philadelphia,
1998- Visiting Professor, Mannheim University, Germany, Summer 2002
Member, Council of the American Sociological Association, 1997-2002
Member, Committee of Executive Office and Budget, American Sociological Association, 2000-2002
Member, Panel on Population Projections, Committee on Population, National Research Council, 1998-2000
Keynote Speaker, Meeting of the Advisory Board of the President's Initiative on Race, Georgetown University Law Center, Washington, D.C., July 13, 1998
Panelist, Meeting of the Advisory Board of the President's Initiative on Race, San Jose, California, February 11, 1998
Chair, Committee on South-North Migration, International Union for the Scientific Study of Population 1991-1996
Member, Nominating Committee, Latin American Studies Association, 1994-1995.
Member, Research and Planning Advisory Board, Chicago Urban League, 1990-1994
Member, Board of Trustees, Leadership Council for Metropolitan Open Communities, Chicago, 1993-1994
Member, Board of Trustees, Mexican Cultural and Education Institute, Chicago, 1993-1994
Member, NICHD Population Research Committee, NICHD, 1989-93
Member, Committee for Public Policy Research on Contemporary Hispanic Issues, Social Science Research Council, 1988-1993
Member, International Organizing Committee, Conference on the Peopling of the Americas, 1989-1992
Chair, Committee on Population Statistics, Population Association of America, 1984-1989
Member, Social Sciences and Population Study Section, NICHD, 1984-1988
Member, Subcommittee on Migration Statistics, Committee on Population Statistics, Population Association of America, 1987-88
Member, Subcommittee on the 1990 Census, PAA, 1985-86
Member, Ad Hoc Advisory Committee, Demographic and Behavioral Sciences Branch, Center for Population Research, NICHD, 1986
Visiting Lecturer, El Colegio de Michoacán, Zamora, Michoacán, México, 1985
Consultant, National Academy of Sciences, Committee on National Statistics, Panel on Immigration Statistics, 1980-85
Consultant, National Commission for Employment Policy, 1982
Consultant, Commission on International Migration and Cooperative Economic Development 1987-1988

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Authored and Coauthored Books:

2017 Comprender las Migraciones Internacionales: Teorías, Prácticas, Políticas. (Understanding International Migration: Theory, Practice, Politics). Barcelona:Bellaterra Edicions. A compilation of key works by Douglas S. Massey edited and introduced by Lorenzo Cachón Rodríguez.

2014 Spheres of Influence: The Social Ecology of Racial and Class Inequality. New York: Russell Sage Foundation.(Coauthored with Stefanie Brodmann)

2013 Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb. Princeton, NJ: Princeton University Press. (Coauthored with Len Albright, Rebecca Casciano, Elizabeth Derickson, and David Kinsey).

Paul Davidoff Award 2014, Best Book Promoting Participatory Planning and Positive Social Change, Association of Collegiate Schools of Planning

Robert E. Park Award 2014, Best Book, Community and Urban Studies Section, American Sociological Association

Chinese Edition published by the Social Sciences Academic Press of China.

2010 Brokered Boundaries: Creating Immigrant Identity in Anti-Immigrant Times. New York: Russell Sage Foundation. (Coauthored with Magaly Sánchez R.)

2009 Taming the River: Negotiating the Academic, Financial, and Social Currents in America's Selective Colleges and Universities. Princeton, NJ: Princeton University Press. (Coauthored with Camille Z. Charles, Mary J. Fischer, and Margarita Mooney)

2007 Categorically Unequal: The American Stratification System. New York: Russell Sage Foundation. (Commissioned for the Centennial of the Russell Sage Foundation)

2005 Return of the L-Word: A Liberal Vision for the New Century. Princeton: Princeton University Press.

2005 Strangers in a Strange Land: Humans in an Urbanizing World. New York: Norton Publishers.

2003 Clandestinos: Migración México-Estados Unidos en los Albores del Siglo XXI. México, D.F.: Editorial Porrua. (Coauthored with Jorge Durand)

Chapter 2 reprinted in Diálagos—Foro Universal de la Cultura: Identidad y Diversidad. Monterrey: Foro Editorial de Nuevo León.

BC-DOC-0000028233

2003 Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities. Princeton: Princeton University Press. (Coauthored with Camille Charles, Garvey Lundy, and Mary J. Fischer)

2002 Beyond Smoke and Mirrors: Mexican Immigration in an Age of Economic Integration. New York: Russell Sage Foundation. (with Jorge Durand and Nolan Malone)

Otis Dudley Duncan Award 2004, Best Book, Population Section of the American Sociological Association.

Honorable Mention, *Thomas and Znaniecki Award* of the International Migration Section of the American Sociological Association

Spanish Edition. 2009. Detrás de la Trama: Políticas Migratorias entre México y Estados Unidos. México, D.F.: City: Editorial Porrua.

1998 Worlds in Motion: International Migration at the End of the Millennium. Oxford: Oxford University Press. (Coauthored with Joaquín Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino, and J. Edward Taylor)

1995 Miracles on the Border: Retablos of Mexican Migrants to the United States. Tucson: University of Arizona Press. (Coauthored with Jorge Durand).

Spanish Edition. Milagros en la Frontera: Retablos de Migrantes Mexicanos a Estados Unidos. Editorial El Colegio de San Luis y el Centro de Investigación y Estudios Superiores en Antropología Social, San Luis Potosí y Guadalajara, 2001.

Antonio García Cubas Prize, Best Book on Mexican Art, National Institute of Anthropology and History, Mexico City, 2001.

Southwest Book Award, Border Regional Library Association, El Paso, TX, 1996

Design Award, Bookbuilders West (Now Publishing Professionals Network), 1995

1993 American Apartheid: Segregation and the Making of the Underclass. Cambridge: Harvard University Press. (Coauthored with Nancy A. Denton)

Distinguished Publication Award of the American Sociological Association, 1995

Otis Dudley Duncan Award of the ASA Population Section., 1994

Critics' Choice Award, American Educational Studies Association, 1993

BC-DOC-0000028234

French Edition. American Apartheid. Collection "Les Urbanités," Dirigée par Jean-Marc Rennes, Francis Godard, Sophie Body-Gendrot, et Thierry Paquot. Paris: Descartes & Cie, 1995.

Chapter 1, "The Missing Link" reprinted as "American Apartheid" in Margaret L. Anderson, Kim A. Logio, and Howard F. Taylor, eds., Understanding Society: An Introductory Reader. Stamford, CT: Wadsworth Publishing. Pp. 476-83.

Chapter 1, "The Missing Link" reprinted as "American Apartheid: Segregation and the Making of the Underclass" reprinted in David B. Grusky, ed., Social Stratification in Sociological Perspective: Race, Class, and Gender, Boulder: Westview, pp. 660-70.

Chapter 4, "The Continuing Causes of Segregation," reprinted in Amanda Konradi and Martha Schmidt, eds., Social Problems: Perspectives and Approaches (Mayfield Publishing Company, 1997)

Chapter 4, "The Continuing Causes of Segregation," reprinted in Thomas M. Shapiro, ed., Great Divides: Readings in Social Inequality in the United States. Moutainview, Ca: Mayfield Publishing, 2000, pp. 249-64.

Chapter 6, "The Perpetuation of the Underclass," reprinted in Charles A. Gallagher, ed., Rethinking the Color Line: Readings in Race and Ethnicity. Mountain View, Ca.: Mayfield Publishing.

Chapter 8 , "The Future of the Ghetto," reprinted in Stephen Steinberg, ed., Race and Ethnicity in the United States: Issues and Debates (Blackwell Publishers, Oxford, 2000), pp. 114-26.

1990 Doy Gracias: Iconografía de la Emigración México-Estados Unidos. Guadalajara: Programa de Estudios Jaliscienses, Secretraría de Educación y Cultura, Universidad de Guadalajara; Published in cooperation with the Instituto Nacional de Antropología e Historia. (Coauthored with Jorge Durand)

1990 Milagros en la Frontera. Museum Catalogue to Exhibit "Milagros en la Frontera" at the Diego Rivera Studio Museum, Mexico City, December-February, 1990-1991; the Centenario Museum, Monterrey, Mexico; and Pape Library Museum, Monclova, Coahuila, Mexico. (Coauthored with Jorge Durand)

1987 Return to Aztlan: The Social Process of International Migration from Western Mexico. Berkeley and Los Angeles: University of California Press. (Coauthored with Rafael Alarcón, Jorge Durand, and Humberto González).

Spanish Edition. 1991. Los Ausentes: El Proceso Social de Migración Internacional en México Occidental. México, D.F.: Alianza Editorial Mexicana and Consejo Nacional para la Cultura y las Artes. (with Rafael Alarcón, Jorge Durand, y Humberto González)

BC-DOC-0000028235

Edited Volumes:

2020 Segregation and Stratification in 21st Century America. New York: Springer. Special issue of *Race and Social Problems*.

2019 Behind the Smoke and Mirrors of U.S. Immigration Policy: Research from the Mexican Migration Project. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science.* (Co-edited with Jorge Durand with two coauthored chapters)

2016 Undocumented Migration in a Global Economy. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science* (Co-edited with Katharine Donato and includes three coauthored chapters)

2013 Immigration and the Future of America. Cambridge, MA: MIT Press. Special issue of *Daedalus*. (Edited with an introductory chapter).

2013 The Non-Response Challenge to Surveys and Statistics. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science* (Co-edited with Roger Tourangeau)

2010 Continental Divides: International Migration in the Americas. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science*. (Co-edited with Katharine Donato, John Hiskey, and Jorge Durand)

Spanish Edition: Salvando Fronteras: Migración Internacional en Amérca Latina y el Caribe. México, D.F.: Porrúa.

2009 The Moynihan Report Revisited: Lessons and Reflections after Four Decades. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science*. (Co-edited with Robert J. Sampson and co-author of introductory chapter).

2008 New Faces in New Places: The Changing Geography of American Immigration. New York: Russell Sage Foundation.. (Edited with an introduction, conclusion, and contributed chapter).

BC-DOC-0000028236

2006 Chronicle of a Myth Foretold: The Washington Consensus in Latin America. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science*. (Co-edited with and introduction by Jere R. Behrman and Magaly Sanchez R.)

2004 Crossing the Border: Research from the Mexican Migration Project. New York: Russell Sage Foundation. (Co-edited with Jorge Durand)

2004 International Migration: Prospects and Policies in a Global Market. Oxford: Oxford University Press. (Co-edited with J. Edward Taylor)

2001 Problem of the Century: Racial Stratification in the United States. New York: Russell Sage Foundation. (Co-edited with Elijah Anderson)

Scholarly Articles and Book Chapters (* indicates refereed publication):

2020 "The Ethnosurvey Revisited: New Migrations, New Methodologies?"' Central and Eastern European Migration Review, forthcoming.

2020 "Still the Linchpin: Segregation and Stratification in the United States." Race and Social Problems, forthcoming.

2020 "America's Unequal Metropolitan Geography: Segregation and the Spatial Concentration of Affluence and Poverty" Forthcoming in Frances Rosenbluth and Margaret Weir, eds., The New Politics of Insecurity. New York: Cambridge University Press.

2020 "What were the paradoxical consequences of militarizing the border with Mexico?." Chapter 2 in Edward E. Telles and Raul Hinojosa, eds., Equitable Globalization? Migration, Trade and Race in US-Mexico Relations. Berkeley: University of California Press, forthcoming.

2020 "Immigration Policy Mismatches and Counterproductive Outcomes: Unauthorized Migration to the U.S. in Two Eras." Comparative Migration Studies, forthcoming.

2020 "Creating the Exclusionist Society: From the War on Poverty to the War on Immigrants." Ethnic and Racial Studies 43(1):18-37

2019 "Debacles at the Border: Five Decades of Fact-Free Immigration Policy." Annals of the American Academy of Political and Social Science 684: 6-20. (with Jorge Durand)

2019 "Evolution of the Mexico-U.S. Migration System: Insights from the Mexican Migration Project." Annals of the American Academy of Political and Social Science 684:21-42. (with Jorge Durand)

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Cherice Landers, Sociology (Winner of Lisa Bryant Thesis Award)
Cynthia Loomis, Politics
Venkatram N. Rao, Sociology

2007
Laura Boyce, Woodrow Wilson School
Robert Braun, Sociology (Winner of Ruth Simmons Thesis Prize in African American Studies, *Summa Cum Laude*, *Phi Beta Kappa*)
Timothy Callahan, Sociology
Kristin Clarke, Woodrow Wilson School
Ana Cordovil, Sociology
Joseph Falit, Woodrow Wilson School
Alexander Maugeri, Woodrow Wilson School
Meghan McCormick, Woodrow Wilson School
Samara Penn, Woodrow Wilson School
Amelia Rawls, Woodrow Wilson School
Stephanie Steel, Politics

2008
Luke Cohler, Woodrow Wilson School and Program (Winner of Stanley Stein Thesis Prize in Latin American Studies)
Kathryn Lankester, Woodrow Wilson School, High Honors
Regina Lee, Politics (Winner of Center for Migration and Development Thesis Prize)
Sian O'Faolain, Woodrow Wilson School (Winner of Frederick Douglass Service Award and the Henry Richardson Labouisse '28 Prize)

2009
Chanté Coleman, Sociology
Amirah Mercer, Sociology
Barry Newell, Sociology
Colleen Poynton, Politics

2010
On sabbatical leave

2011
Margaret Boberg, Politics

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Katherine Gaudyn, Woodrow Wilson School
Megan Kelly, Sociology
Caaminee Pandit, Sociology, High Honors
Emily Persons, Sociology

2012
Katherine Alvarez, Sociology, Honors
Bianca Cabrera, Sociology
Omar Carrillo, Woodrow Wilson School
Raven Keith, Woodrow Wilson School
Destiny Ortega, Woodrow Wilson School
Nicole Phan, Woodrow Wilson School, Honors
Maya Reid, Sociology,
Alicia Zeng, Woodrow Wilson School, Highest Honors

2013
Rana Campbell, Sociology, Honors
Charles Du, Sociology, Isadore Brown Prize, Highest Honors
Merik Mulcahey, Politics

2014
Brittany Serafino, WWS, Honors
Jacob Jackson, WWS
Luc Cohen, WWS
Taylor Platt, WWS, Honors
Rukiya Ross, Sociology, Honorable Mention, Ruth J. Simmons Thesis Prize in African American Studies

2015
Jacob Intrator, WWS, High Honors
Diane Hu, WWS, Honors
Ali Pankowski, WWS
Nshira Turkson, WWS, Bain-Swigget Poetry Prize
Jiayan Yu, WWS, Center for Migration and Development Thesis Prize, Highest Honors

2016
On sabbatical leave

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2017
Julio Castillo, WWS
Jabari Johnson, WWS
Anne Kartheiser. WWS
Vivian Ramirez, WWS
Jessica Vickerman, Sociology
Michelle Mui, WWS

2018
Mary Claire Bartlett, WWS, Honors
My Bui, Politics
Chandler Cleveland, WWS
Jacob Hammel, WWS
Isabella Nappa, Sociology
Christopher Park, WWS
Taylor Pearson, WWS
Maria Perales, WWS
Caitlin Quinn, WWS

2019
Michjael Asparrin. WWS
Qalea, Ismael, SOC
Maria Jerez, WWS
Jackson Simcox, SOC
Jessica Wright, WWS

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PROOF OF SERVICE

I am employed in Washington, DC. I am over the age of 18 and am not a party to the within action; my business address is: 1016 16th Street NW, Washington, DC 20036.

On March 13, 2020, I served the following document(s) described as: **EXPERT DECLARATION OF DOUGLASS S. MASSEY, PH.D** on all interested parties in this action, by serving the following individuals:

Alexander V. Sverdlow
Brad P. Rosenberg
Attorneys for Defendants

b(6)

Mo Brooks marshall.Yates@mail.house.gov
Plaintiff

Anil Mujumdar anil@zarzaur.com
Dorian Spence dspence@lawyerscommittee.org
Ezra Rosenberg erosenberg@lawyerscommittee.org
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Jonathan Weissglass jonathan@weissglass.com
Marcelo Quinones marcelo.quinones@cco.sccgov.org
Ravi Rajendra raphael.rajendra@cco.sccgov.org
Robert Segall segall@copelandfranco.com
Robin Thurston rthurston@democracyforward.org
Ryan Kusmin rmkusmin@debevoise.com
Local Government Intervenors

Barry Ragsdale bragsdale@sirote.com
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Joyce Vance joycevance4@gmail.com
Liz Morgan elizabeth.Morgan@ag.ny.gov
Matthew Colangelo matthew.Colangelo@ag.ny.gov
State and Other Governmental Entities Intervenors

[X] (By Electronic Service): By transmitting by email to the above Parties at the above email addresses.

[X] (Federal): I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on **March 13, 2020**, at Washington, District of Columbia.

/s/Andrea Senteno
Andrea Sentno

From: Olson, Stephanie (Federal) [SOlson@doc.gov]
Sent: 4/2/2020 2:30:15 PM
To: Walsh, Michael (Federal) [MWalsh@doc.gov]
Subject: FW: CUI//PRIV FW: Def-Int Expert Report
Attachments: Expert Report of D. Sunshine Hillygus dated March 13, 2020.pdf; 2020-03-13 - AL v. Commerce - Rule 26(a)(2) Disclosure - Kimball W. Brace.pdf; Martinez Intervenors - Expert Report of Douglas Massey 3-13-2020.pdf; b(5) - AC/WP/DP

Hi Mike,

Just re-upping to the top of your inbox. Thanks!

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

From: Olson, Stephanie (Federal)
Sent: Tuesday, March 31, 2020 1:34 PM
To: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: CUI//PRIV FW: Def-Int Expert Report

CUI//PRIV

Hi Mike,

FYSA, please see the Defendant-Intervenor's expert reports in the AL case. I've also attached Brian's b(5) - AC/WP/DP

b(5) - AC/WP/DP

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

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, and DIANA MARTINEZ, et al., Defendant-Intervenors, COUNTY OF SANTA CLARA, CALIFORNIA, et al., Defendant-Intervenors, and STATE OF NEW YORK, et al., Defendant-Intervenors.	Civil Action No. 2:18-cv-00772-RDP

SWORN DECLARATION AND EXPERT REPORT OF D. SUNSHINE HILLYGUS

Sworn Declaration and Expert Report of D. Sunshine Hillygus

I. Qualifications

I am a Professor of Political Science and Public Policy at Duke University. I earned a Ph.D. in political science from Stanford University in 2003. From 2003-2009, I was a faculty member at Harvard University in the Department of Government. In 2009, I joined the faculty at Duke University as an associate professor and was promoted to full professor in 2015.

I have more than 20 years of experience in survey design, implementation, and analysis. Of relevance to this report, I have published research on the topics of census participation, survey methodology, survey non-response, and data quality. This work has been funded by the National Science Foundation and published in respected academic journals including *Public Opinion Quarterly*, *Journal of Survey Statistics and Methodology*, *Statistical Science*, *Political Analysis*, and *Annals of Applied Statistics*. I am co-author of *The Hard Count: The Political and Social Challenges of Census Mobilization*.[1] My other experience of relevance includes serving as associate principal investigator of the American National Election Study, on the editorial boards of several academic journals, and as director of the Initiative on Survey Methodology at Duke University. I was also founding director of the Program on Survey Research at Harvard University. From 2012-2018, I served as a member of the Census Scientific Advisory Committee (the "CSAC"), a committee that advises the director of the U.S. Census Bureau (the "Census Bureau") on the uses of scientific developments in statistical data collection, survey methodology, geospatial and statistical analysis, econometrics, cognitive psychology, business operations, and computer science as they pertain to the full range of Census Bureau programs and activities, including census tests, policies, and operations.

[1] Hillygus, D.S., Nie, N.H., Prewitt, K. & Pals, H. (2006). *The hard count: The political and social challenges of census mobilization*, Russell Sage Foundation, New York.

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I have previously served as an expert witness *in League of Women Voters of North Carolina, et al. v. North Carolina, et al.*, No. 1:13-CV-00660-TDS-JEP (M.D.N.C.); *State of New York, et al., v. United States Department of Commerce, et al.*, No. 18-CV-2921-JMF (S.D.N.Y.); and *NAACP, et al. v. Bureau of the Census*, No. 18-CV-891-PWG (D. Md.). A copy of my curriculum vitae is attached.

II. Retainer Information and Summary of Opinions

Defendant-Intervenors in this action, and Martinez Intervenors in the cross claim brought against the federal government, retained me to evaluate (1) the claims made by Dr. Dudley Poston in his expert report for the State of Alabama ("Alabama" or "Plaintiff") that inclusion of undocumented immigrants[2] in the total population for apportionment after the 2020 decennial count will cause a loss of one congressional seat in the U.S. House of Representatives (the "House") for Alabama, whereas exclusion of undocumented immigrants from the apportionment count will result in Alabama retaining seven seats; and (2) whether exclusion of undocumented immigrants from the 2020 apportionment count is possible. My compensation in this case is $350 per hour.[3]

Based on the knowledge I have amassed over my education, training, and experience, as well as a detailed review of government and academic research, data, and reports, I have reached the following opinions:

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[2] For the purposes of this report, I use the term "undocumented immigrant" to include foreign-born non-citizens that reside in the U.S. but do not have formal legal status. Pew Research Center refers to these individuals as "unauthorized immigrants." I recognize that those with Deferred Action for Childhood Arrivals, or some other form of lawful presence, may or may not be categorized as undocumented immigrants, depending on the context. I offer no opinion as to the legal significance of these various classifications.

[3] To formulate an expert opinion in this case, I reviewed a variety of materials from academic, governmental, legal, and media sources, *see* References, including the Complaint for Declaratory Relief and the exhibits in the Depositions of Karen Battle on January 16, 2020 and March 2, 2020 in *Alabama et al. v. United States Department of Commerce et al.*, No. 2:18-cv-00772-RDP (N.D. Al. 2018). Moreover, I relied on my own experiences and familiarity with survey practices and standards and Census Bureau programs and activities.

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First, Dr. Poston does not demonstrate, to any degree of reasonable certainty, that Alabama will (a) lose a congressional seat because of the inclusion of undocumented immigrants in the 2020 apportionment count, or (b) maintain a congressional seat because of the exclusion of undocumented immigrants in the 2020 apportionment count.

Second, there is no reliable way to exclude undocumented immigrants from the 2020 apportionment count because (a) there is currently no reliable methodology or data product that the Census Bureau may use to do so; (b) no administrative records are of sufficient quality to use to exclude undocumented immigrants from the 2020 apportionment count; and (c) the nature, scope, and methodology of the statistical modeling needed to produce estimates of the undocumented population is fundamentally different from the statistical modeling currently used in producing the apportionment population, and would result in a less accurate and reliable enumeration.

In this report, I first provide background with respect to the Census Bureau's relevant responsibilities and standards, as related to the apportionment count. I then explain why Dr. Poston's methodology, data, and key conclusions are unreliable, and cannot be used to demonstrate that Alabama will likely lose a congressional seat because of the inclusion of undocumented immigrants in the 2020 apportionment count, or maintain a congressional seat if undocumented immigrants are excluded from the 2020 apportionment count. Finally, I explain why I conclude that there is currently no feasible way to reliably exclude undocumented immigrants from the apportionment count.[4]

III. Relevant Background

A. The Census Bureau's Relevant Responsibilities

[4] I am not an attorney and my references to constitutional and statutory provisions and court cases are for the purposes of providing factual context.

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Article 1, Section 2 of the U.S. Constitution requires that an "actual enumeration" of the population be taken every 10 years for the purpose of apportioning seats in the House among the states, with the provision that each state must have at least one Representative. The 14th Amendment 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."

The Census Bureau has the responsibility of both counting the population in the decennial census, and using the results to calculate the number of House seats each state is entitled to have based on that population count. The Census Bureau counts all people (citizens and foreign-born immigrants) who are living in the state at the time of the census.[5] This total resident population, along with the overseas federal employees and their dependents, make up the apportionment population count for each state. To count all people, the Census Bureau uses a multi-part process that starts with (1) creating the Master Address File (the "MAF")—a database containing every known housing unit in the country, then (2) asking every household in the MAF to self-respond with information about their household, followed by (3) employing the Non-Response Follow-up (the "NRFU") operation, which attempts to enumerate all non-responding households through an in-person visit,[6] and, finally, (4) applying count imputation to any remaining uncounted households to estimate the number of household members using information from neighboring households. By law, the Census Bureau must submit the apportionment count to the President within nine months of the census date. For the 2020 Census, the census date is April 1, 2020, and the President will receive the counts by December 31, 2020.

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[5] Immigrants, called "foreign-born" by the Census Bureau, include naturalized U.S. citizens, lawful permanent residents, temporary migrants (such as foreign students), refugees and asylees, and undocumented immigrants.

[6] If a household is not enumerated after one visit, administrative records will be used to enumerate the household in those cases in which multiple, high-quality records are available. If administrative records cannot be used, at least two more in-person visits are attempted before the household becomes eligible to be enumerated through a proxy, such as a neighbor or landlord.

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Since 1940, the Census Bureau has used the Equal Proportions Method to allocate the number of Representatives among the states—after each state is assigned the one seat it is entitled to receive, the remaining 385 seats are assigned sequentially, on the basis of a list of descending "priority values" that are calculated based on each state's share of the total U.S. population.[7] Because apportionment is based on population size relative to other states, under- or over- counting the population in one state has implications for the fair distribution of representation among all states.[8]

Within one year of the census date—April 1, 2021 for the 2020 Census—the Census Bureau is also required to make redistricting data available to the states. Whereas the apportionment count is produced using the Census Unedited File (the "CUF"), the redistricting data products are produced using the Census Edited File (the "CEF"), which applies characteristic imputation—statistically imputing missing or conflicting information about the people in the household (i.e., race, ethnicity, age, date of birth, sex, tenure, and relationship).[9] The redistricting data are also altered to meet the confidentiality requirements of Title 13 of the United States Code.[10]

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[7] This method ensures that no additional transfer of a seat (from one state to another) will reduce the ratio between the numbers of persons per representative in any two states. For more detail, *see* https://www.census.gov/population/apportionment/about/faq.html and https://www.census.gov/population/apportionment/about/computing.html.

[8] Prewitt, K. (2010). The US decennial census: Politics and political science. Annual Review of Political Science, 13, 237-254.

[9] The total resident population count in the CUF and CEF has applied count imputation—an estimate of the number of household members—for the limited number of households not enumerated in the decennial count. In 2010, count imputation accounted for only 0.39% of the total population. 2020 Census Operational Plan: A New Design for the 21st Census, v. 4. (December 2018), available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf.

[10] The data are processed through the disclosure avoidance system that injects noise into the estimates, creating uncertainty in the numbers to protect confidentiality. *See* https://www.census.gov/newsroom/blogs/research-matters/2018/08/protecting_the_confi0.html.

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Neither the CUF nor the CEF has information about the citizenship or legal status[11] of the population.

Following President Trump's July 2019 Executive Order 13880,[12] the Census Bureau plans to use administrative records to separately produce data on block-level Citizen Voting-Age Population ("CVAP data" or "CVAP") by race and ethnicity.[13] As of the date of this report, the methodology to produce this data product is still under development.[14]

B. The Census Bureau's Quality Standards

The Census Bureau has formal standards for data quality governing all information products and the processes that generate them.[15] These guidelines require that all information collected and disseminated by the Census Bureau be designed to ensure and maximize the utility, objectivity, and integrity of the information. *Utility* or "fitness of use" refers to the "usefulness of the information for its intended users;" *objectivity* means the information is "accurate, reliable, and unbiased, and is presented in an accurate, clear, complete, and unbiased manner;" and *integrity* refers to the security of the information, including protection of such information from unauthorized access or revision.[16]

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[11] For the purposes of this report, I use the term "legal status" to encompass determinations of whether individuals are immigrants with formal legal status, or immigrants without formal legal status. I offer no opinion as to the legal significance of these various classifications.

[12] *See* 84 Fed. Reg. 33,821 (July 11, 2019).

[13] *See* https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_Post2020_Census_documentation_v5.pdf?. The Census Bureau previously provided CVAP tables annually from each year's most recent 5-year American Community Survey ("ACS") data. The Post-2020 Census CVAP Special Tabulation will replace CVAP tables based on the ACS that would have been released in February 2021. A census block is the smallest geographic unit used by the Census Bureau. Census blocks are defined by geographic features, such as roads, so they vary in the exact number of households they contain—many contain no population. More than 11 million census blocks were enumerated in 2010. *See* https://transition.fcc.gov/form477/Geo/more_about_census_blocks.pdf.

[14] *See* https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap/Post-2020-CVAP.html.

[15] *See* U.S. Census Bureau Statistical Quality Standards (July 2013), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf. These standards were established to incorporate and adhere to Policy Directive No. 1 of the Office of Management and Budget ("OMB"). *See* https://www.govinfo.gov/content/pkg/FR-2014-12-02/pdf/2014-28326.pdf.

[16] *See* U.S. Census Bureau Statistical Quality Standards (July 2013), i-ii.

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These formal standards govern the Census Bureau's mission to "count everyone once, only once, and in the right place" in the decennial census.[17] Critically, objectivity refers not only to the overall accuracy of the information, but also to distributional accuracy—a complete and accurate count across geography and population subgroups so that the proportional distribution of the population is correct.[18] If the Census Bureau misses more people living in one state than another, the census count is not only inaccurate, it is will also be unfair for apportionment in violation of both the utility and objectivity quality standards.

IV. Dr. Poston's Data, Methodology and Key Conclusions Are Not Credible.

Dr. Poston opines that in 2020, Alabama will receive six seats if undocumented persons are included in the apportionment count, compared to seven seats if undocumented persons are excluded from the apportionment count.[19] To reach these opinions, Dr. Poston's analysis hypothetically apportions congressional seats for all states using a projected 2020 total population count, and then compares the results to a hypothetical apportionment of congressional seats using a 2020 projected population count that excludes undocumented persons.[20] Dr. Poston's conclusions depend on: (1) projections of total population numbers of each state (including the overseas population) in 2020 based on 2010 Census Bureau apportionment counts, and 2018 and 2019 Census Bureau population estimates; and (2) projections of the population of undocumented immigrants in each state in 2020 based on estimates in 2016 of the undocumented immigrant population from Pew Research Center ("Pew"), an independent American think tank founded in 2004 by pollster Andrew Kohut.

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[17] *See* https://www.census.gov/programs-surveys/decennial-census/about/why.html.
[18] Prewitt, K. (2010). The US decennial census: Politics and political science. *Annual Review of Political Science*, 13, 237-254.
[19] Sworn Declaration & Expert Report of Dudley L. Poston, Jr., Ph.D. (January 23, 2020) (the "Poston Report"), 3.
[20] Poston Report.

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Dr. Poston's overall conclusions, methodology, and underlying data are unreliable. Dr. Poston fails to acknowledge massive uncertainty in his estimates, and he relies on flawed assumptions that are likely to bias his results. Statisticians and demographers readily acknowledge that projections of future populations figures can be unreliable.[21] Projection outside of known data requires assumptions that should be validated. Dr. Poston, however, fails to assess the reasonableness of the modeling and data assumptions that he makes.[22]

Moreover, Dr. Poston ignores the uncertainty in his estimates, in violation of basic statistical principles. All modeled estimates, like the projections Dr. Poston advances in his report, have uncertainty, which is a quantification of accuracy and precision, placing confidence limits, or bounds, on modeled estimates. Such uncertainty is especially critical to acknowledge in the context of apportionment because apportionment outcomes are sensitive to small changes in population counts. Statisticians have called this issue "the apportionment problem"— that very small inaccuracies in a state population can change the number of representatives received—and have shown this to be an "inescapable property of any method of apportionment that is a function of population."[23] This means that predictions about apportionment outcomes are often wrong given the difficulty of precisely projecting population. For example, prior to the 1990 Census, the Census Bureau correctly predicted only three of the five eventual seat

[21] Skerry, P. (2000). Counting on the census? Race, group identity, and the evasion of politics (Vol. 56). Brookings Institution Press, 131.
[22] For review of various approaches, *see* Hyndman, R. J., & Athanasopoulos, G. (2018). Forecasting: principles and practice. OTexts. A key assumption is the time frame that informs the forward projection, e.g., 2010-2018 versus 2017 to 2018. The other key assumption is the modeling of the trend, whether linear or exponential, for example.
[23] Keyfitz, N. (1979). Information and allocation: two uses of the 1980 census. *The American Statistician*, 33, 45-50. It is highly unlikely, but theoretically possible, that the omission of a single person from a state population could result in the loss of a representative. On the other hand, an omission of 100,000 persons would have a one in five chance of depriving that state of a representative.

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changes.[24] The Census Bureau 2009 population estimates similarly did not predict all of the 12 seats gained and 12 seats lost.[25]

Below, I discuss in more detail the significant flaws in each of Dr. Poston's projections, and then explain how these errors contribute to massive uncertainty in his estimates, and result in unreliable and unconvincing conclusions.

A. Dr. Poston's Data and Methodology for Projecting Total Population Counts Are Flawed.

In projecting total population numbers for each state in 2020, Dr. Poston starts with Census Bureau population estimates for each state from July 2018, and, in his supplemental report, from July 2019.[26] In contrast to the actual enumeration that the Census Bureau conducts in each decennial census, these yearly population estimates from the Census Bureau are statistically modeled—i.e., they are adjustments to the decennial count made to attempt to account for births, deaths, and migration.[27] These population estimates can differ significantly from census counts, most notably because of the difficulty of estimating net international migration.[28]

Dr. Poston then assumes, without evidence, that each state's population will grow or decline in population at the same average annual rate between 2018 (or 2019 in the supplemental report) and 2020 as it did between 2010 to 2018 (or 2019 in the supplemental report).[29]

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[24] According to Skerry (2000), 131.
[25] *See* https://www.psc.isr.umich.edu/dis/census/Features/apportionment/apportion_estimates.html.
[26] *See* Poston Report, 14; Supplement to Sworn Declaration & Expert Report of Dudley L. Poston, Jr., Ph.D. (Jan. 28, 2020) ("Poston Supplementary Report"), 3.
[27] *See* https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2010-2018/2018-natstcopr-meth.pdf?#.
[28] In 1980 and 2000, for example, the population estimated underestimated relative to the census count by more than 2 percentage points. Tiffany Yowell and Jason Devine. (July 2013, Revised May 2014). Evaluating Current and Alternative Methods to Produce 2010 County Population Estimates, U.S. Census Bureau, https://www.census.gov/population/www/documentation/twps0100/E2%20County%20Totals_FINAL.pdf.
[29] Poston report, 14; Poston Supplementary Report, 3.

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However, documentation of significant geographic and temporal variability in population change by the Census Bureau indicate that this is a flawed assumption. With respect to geography, there has been wide variability in population growth patterns across states within the decade; for example, the Census Bureau reports that, from 2010 to 2019, states have seen changes in total population growth and loss ranging from a 3.3% loss in population (West Virginia) to a 16% growth in population (Utah).[30] With respect to time, the nation's overall population growth rate, for instance, has slowed over the course of the decade.[31] And there is temporal variation in the population growth across states. For example, the state of New York saw population growth from 2010 until 2015, but population loss in the years since; in contrast, the state of Texas has seen population growth.[32] These inconsistent population growth patterns indicate that Dr. Poston's population projections are inaccurate and demonstrate the unreliability in Dr. Poston's estimates, undermining confidence in his conclusions.

Dr. Poston also assumes, without evidence, that a state's overseas population will be the same proportion of the population in 2020 as it was in 2010.[33] This too is inaccurate. In 2016, the number of active-duty U.S. military troops stationed overseas declined to its lowest level in at least 60 years.[34] A change in the residency rules affecting overseas-deployed military personnel also makes it untenable to assume the overseas population will be the same in 2010 as it was in 2020. Specifically, in 2010, deployed military personnel were counted in their "home of record" state (the address provided at the time of enrollment in the military). In 2020, by contrast, military personnel will be counted at their usual residence. This will likely increase the

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[30] *See* https://www.census.gov/quickfacts/geo/chart/US/PST120219.
[31] *See* https://www.census.gov/library/visualizations/2019/comm/slower-growth-nations-pop.html.
[32] *See* https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html.
[33] Poston Report, 14.
[34] Bialik, Kristen. (August 22, 2017). U.S. Active-Duty Military Presence Overseas Is At Its Smallest In Decades. Pew Research Center. https://www.pewresearch.org/fact-tank/2017/08/22/u-s-active-duty-military-presence-overseas-is-at-its-smallest-in-decades/.

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overseas populations of states with major military installations, which further emphasizes the uncertainty, of Dr. Poston's calculations.[35] And finally, as noted above, there has also been wide variability in population growth patterns across states, which means that the overseas population is likely to increase in some states but decrease in others in 2020. Dr. Poston concedes that he has not taken into account any of these issues with respect to the overseas population.[36]

In sum, the assumptions underlying Dr. Poston's total population projections are problematic, undermining the credibility of his calculations and highlighting the difficulty of accurately predicting apportionment outcomes.

B. Dr. Poston's Data and Methodology for Projecting Apportionment Counts Excluding Undocumented Immigrants is Flawed.

Dr. Poston next projects a population count for each state excluding undocumented immigrants by (1) relying on the flawed projection of the total population count, as described above, and (2) subtracting from that count a projected count of the undocumented immigrants in each state.[37] To reach a count of the undocumented immigrants in each state, Dr. Poston relies on 2016 state-level estimates of undocumented immigrants from Pew, and assumes that the proportion of the undocumented immigrant population in a state will be unchanged from the population proportion Pew estimated for a state in 2016.[38] This approach is flawed for a number of reasons, as follows.

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[35] Jarosz, Beth. (October 28, 2019). How Does the U.S. Census Bureau Count People Who Have More Than One Address? PRB. https://www.prb.org/how-does-the-u-s-census-bureau-count-people-who-have-more-than-one-address/.

[36] Deposition of Dudley L. Poston, Jr., Ph.D. (Feb. 27, 2020), at 105-114.

[37] Poston report, 16.

[38] Pew defines unauthorized immigrants as "all foreign-born noncitizens residing in the country who are not `lawful immigrants…The vast majority of unauthorized immigrants entered the country without valid documents or arrived with valid visas but stayed past their visa expiration date or otherwise violated the terms of their admission." Passel et al. (2018), 2. This is the same definition I use throughout this report.

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First, Dr. Poston's assumption that the proportion of the undocumented immigrant population in a state will not change between 2016 and 2020 is simply wrong. Most glaringly, the assumption contradicts Pew's own updated estimates for 2017.[39] Indeed, Pew reports significant variation across states and time in the undocumented population, including a continued decline in the overall numbers of undocumented immigrants in the United States.[40] As one example, Pew reports that California's undocumented immigrant population was 2.2 million in 2016, compared to 2.0 million in 2017—at the same time, the Census Bureau reports an overall growth in total population for the California between 2016 to 2017.[41] Moreover, there are substantial reasons to believe that the changes in immigration policy from 2010 to 2020 have had significant impacts on the undocumented immigrant populations in many states, none of which are taken into account by Dr. Poston's numbers.[42] Given the already mentioned variation in the total population change across states—the denominator for calculating the proportion of the undocumented immigrants in a state—some states will see their proportion of undocumented immigrants increase in 2020 relative to 2016, while others will likely see it decrease.

Second, and more fundamentally, Dr. Poston ignores the massive and undisputed uncertainty in Pew's estimates of undocumented immigrants. Uncertainty is a critical part of *every* statistical estimate, but it is especially remiss to ignore it when estimating the size of the undocumented immigrant population in the United States given that government agencies, scholars, and policy-makers widely acknowledge that this population is difficult to estimate.[43]

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[39] 2017 estimates were released in June 2019 so it's unclear why Dr. Poston did not use the more recent estimates.
[40] *See* https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/.
[41] *See* https://www.census.gov/content/dam/Census/library/visualizations/2017/comm/popest-idaho.pdf.
[42] Warren, Robert. (February 27, 2019). Sharp Multiyear Decline in Undocumented Immigration Suggests Progress at US-Mexico Border, Not a National Emergency. https://cmsny.org/publications/essay-warren-022719/.
[43] For review, *see* Woodrow-Lafield, K. A. (1998). Undocumented immigrants in the United States in 1990: Issues of uncertainty in quantification. International Migration Review, 32(1), 145-173. Demographers acknowledge that many methods fail to account for uncertainty, instead treated "values as if they were true" (Van Hook et al. 2015, 331). However, previous estimates have not be considered for use to determine political representation.

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For example, while Pew estimated an undocumented population of 10.7 million in 2016, researchers at Yale estimated that the 2016 number of undocumented immigrants ranged from a conservative 16.7 million to a high of 27.5 million.[44] While Dr. Poston admits (in a footnote) that "there are inherent difficulties in counting undocumented immigrants," he fails to account for that uncertainty in his conclusions.[45] These massive uncertainties include (1) uncertainties with respect to Pew's overall methodological approach, and (2) uncertainties with respect to the specific data and methodology on which components of Pew's estimates rely, as described below.

1. Pew's Overall Methodology for Projecting Apportionment Counts Excluding Undocumented Immigrants Produces an Unreliable Estimate.

Estimates of the undocumented population vary widely depending on the methodological approach, assumptions, and underlying data used. Broadly, Pew relies on a method called the residual technique for estimating numbers of undocumented immigrants in the United States. The residual technique estimates the number of undocumented immigrants by subtracting the number of lawful immigrants—estimated from government records—from the total number of immigrants in the country, as estimated from self-report responses to government surveys. The residual technique is one that has also been used by the Department of Homeland Security ("DHS"),[46] the Migration Policy Institute, the Center for Migration Studies of New York, and, in previous years, by the Census Bureau.[47]

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[44] Fazel-Zarandi, M. M., Feinstein, J. S., & Kaplan, E. H. (2018). The number of undocumented immigrants in the United States: Estimates based on demographic modeling with data from 1990 to 2016. PloS one, 13(9).
[45] Poston Report, 16 n.2.
[46] Prior to 2018, DHS population estimates referred to foreign-born non-citizens unlawfully present in the United States as "unauthorized immigrants." The 2018 report changes the term to "illegal aliens."
[47] *E.g.*, Baker, B. (2018). Population Estimates: Illegal Alien Population Residing in the United States: January 2015. Washington, DC: Department of Homeland Security. https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

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Although the aggregate numbers of undocumented immigrants resulting from the residual technique can be somewhat similar—recent estimates ranging from 10.5 million to 12 million[48]—there is considerable variability within subgroups and at smaller geographies.[49] In recognition of the limitations of the residual technique, when the Census Bureau released 2001 residual estimates of the undocumented population, they provided the following disclaimer:

> "Although the residual technique . . . is based on the simple idea of subtracting the expected legal population from the counted foreign-born population at the census date, *the approach suffers from a number of limitations.* These limitations stem from anomalies and shortcomings in the data sets used, assumptions made to correct for data deficiencies or to derive intermediate estimates, and the exclusion of components that may prove to be relevant in the changing migration environment."[50]

Similarly, DHS also acknowledges that their estimates of undocumented populations are "subject to sampling error in the ACS and considerable non-sampling error because of uncertainty in some of the assumptions required for estimation . . . Caution is recommended."[51] A March 2019 DHS report explains:

> DHS's ability to describe the illegal alien population depends on its ability to describe the different population groups included in the residual methodology: the total foreign-born population and the subgroups that comprise the legally resident foreign-born population. *Data limitations mean that neither of these populations can be described with precision.*[52]

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[48] Kamarck, Elaine and Christine Stenglein. (November 12, 2019). How many undocumented are in the United States and who are they? Brookings Institute. https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/.

[49] Van Hook, J., Bachmeier, J. D., Coffman, D. L., & Harel, O. (2015). Can we spin straw into gold? An evaluation of immigrant legal status imputation approaches. Demography, 52(1); Baker, B. (2018). Population Estimates: Illegal Alien Population Residing in the United States: Jan. 2015. Washington, DC: Dep. of Homeland Security.

[50] Costanzo et al. Evaluating Components of International Migration: The Residual Foreign Born. June 2002, page 20. https://www.census.gov/content/dam/Census/library/working-papers/2001/demo/POP-twps0061.pdf (emphasis added). The Census Bureau emphasized that "Our assumptions include a great deal of uncertainty, especially for small migration components. Therefore, the residual may be quite different from the actual number of unauthorized migrants" (2).

[51] Office of Immigration Statistics, Homeland Security. (December 2018). Population Estimates: Illegal Aliens Population Residing in the United States: January 2015, 11. Although DHS produces an estimate of the undocumented immigrant population using a residual method similar to Pew, they do not produce population estimates for every state.

[52] Department of Homeland Security, "Potential Improvements to DHS Illegal Alien Population Estimates: Collection and Use of Data," Fiscal Year 2018 Report to Congress, March 5, 2019, page 1.

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In employing the residual method, Pew estimates the number of undocumented immigrants by subtracting the number of immigrants with formal legal status—estimated from government records from DHS—from the total number of immigrants in the country, as estimated from self-report responses to the American Community Survey (the "ACS").[53] Because it is known that immigrants (especially undocumented immigrants) are harder to locate, harder to contact, harder to persuade, and harder to interview,[54] Pew then "augments and adjusts" their estimates in an attempt to account for the fact that surveys are more likely to miss immigrants.[55] To get state-level estimates, the legal status of each foreign-born respondent is imputed based on their survey responses and the total population estimates, aggregated, and then weighted to develop state-level estimates that take into account trends over time.[56] Additionally, Pew often makes revisions to previous estimates and the exact way in which it employs the residual method. For example, Dr. Poston used Pew's 2016 estimate of 55,000 for the undocumented population in Alabama in 2016; yet, their 2017 estimates report the 2016 undocumented population in Alabama to be 60,000.[57]

The accuracy of the residual technique estimates critically depends on the accuracy of the individual data components, and the assumptions used.[58] While Pew is not transparent about all of their data components and assumptions, those that can be scrutinized show that Pew's approach is error-prone and massively uncertain. It is not surprising, then, that demographers

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[53] Passel et al. (2018), 37.
[54] Tourangeau, R., Edwards, B., Johnson, T. P., Wolter, K. M., & Bates, N. (Eds.). (2014). Hard-to-survey populations. Cambridge University Press.
[55] *See* https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/.
[56] Passel et al. (2018), 44.
[57] *See* https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/.
[58] Margo Anderson and Stephen Feinberg (Who Counts?), 59: "The accuracy of the demographic analysis depends on the accuracy of the inputs. Several of the statistical inputs are incomplete.

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call their estimates "difficult to replicate."[59] An evaluation of the approach also found significant biases in the resulting estimates.[60] One recent peer-reviewed academic research article explained that although Pew's estimates "have come to be trusted and widely cited outside of academia," the method has never been evaluated and "[t]he specific details of the Pew[ ] method are not publicly available, thus making it difficult for other researchers to replicate the method."[61] The authors conclude that "it is not possible to spin straw into gold."[62] The specific flaws in each of the components of Pew's estimates that contribute to the unreliability of Dr. Poston's conclusions are discussed in detail below.

2. The Data Components and Specific Method of Pew's Residual Approach Are Not Reliable.

i. Pew and Dr. Poston rely on unreliable and inaccurate ACS estimates of the total foreign-born population.

In estimating the number of undocumented immigrants using the residual technique, Pew starts by estimating the total number of foreign-born residents—anyone who was not a U.S. citizen from birth—from the ACS. The ACS is a nationwide survey designed and conducted by the Census Bureau that collects social, economic, housing, and demographic characteristics from approximately 1.6% of households annually.[63] The ACS asks about the citizenship status—but not the legal status—of each household member. The sampling errors and nonsampling errors in ACS, and Pew's undercount adjustments with respect to this population, undermine confidence in Pew's estimates of the total foreign-born population, on which Dr. Poston relies.

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[59] Van Hook, J., Bachmeier, J. D., Coffman, D. L., & Harel, O. (2015). Can we spin straw into gold? An evaluation of immigrant legal status imputation approaches. Demography, 52(1), 333.
[60] *Ibid.*
[61] *Ibid*, 330.
[62] *Ibid*, 330.
[63] The ACS replaced the Census long form after 2000. The ACS is implemented as a continuous survey, with about 3.5 million household addresses contacted each year. The Census Bureau releases yearly estimates that allow for characteristic estimates for populations of 65,000 or more. The ACS accumulates sample into 5-year estimates for smaller geographic areas, including census tracts and block groups.

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1. Sampling errors in underlying ACS estimates make Pew's numbers unreliable.

Because the ACS is a sample of the population, rather than a census, any resulting population estimates are subject to uncertainty from random sampling error.[64] That sampling error is often reported as a margin-of-error with survey statistics. The greater the margin of error, the less confidence one should have in the resulting statistical estimate.[65] For small population subgroups or geographies—such as state-level estimates of the foreign-born population—the sampling error in the ACS can be quite large.

Although Pew reports its estimates of undocumented immigrants with a sampling error,[66] Dr. Poston fails to acknowledge or account for such sampling error in his calculations. For example, Pew's estimate of the number of undocumented immigrants in Alabama in 2016 was 55,000 +/- 10,000.[67] That is, Pew's estimate has a 90% confidence interval of 45,000 to 65,000 undocumented immigrants in Alabama in 2016—revealing a large degree of uncertainty in the estimate, even before trying to make projections in the future.[68] To put that level of uncertainty into context, consider that in the 2000 Decennial Census, Utah would have needed fewer than 1,000 additional residents to qualify for the 435th and final congressional seat instead of North Carolina.[69] In other words, the margin of error on the number of undocumented immigrants was larger than the population difference between two states determining priority values for

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[64] Groves, R. M., Fowler Jr, F. J., Couper, M. P., Lepkowski, J. M., Singer, E., & Tourangeau, R. (2011). Survey methodology (Vol. 561). John Wiley & Sons.
[65] Error has a statistical meaning—referencing the unknown difference between an estimate and its true value. Sampling error that there will be random sample-to-sample variation if one was to draw multiple samples from the population.
[66] Passel et al. (2018), 45.
[67] Passel et al. (2018) and https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/.
[68] This means that 90% of the time, the true population estimate of undocumented immigrants in Alabama would fall between 45,000 to 65,000.
[69] *See* https://www.pewsocialtrends.org/2011/01/11/census-2010-the-last-seat-in-congress/.

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apportionment.[70] Pew further reports that this margin of error *underestimates* the extent of uncertainty in the estimate because it captures only sampling, but not nonsampling, errors:

> "The ranges reported represent a 90% confidence interval around the estimates. They represent the sampling error associated with the survey-based estimate. Other sources of potential error—including the variability associated with the random assignment of statuses, potential errors in the status assignment process and non-sampling error in the surveys—are not represented in the reported margins of error. For this report, statistical tests rely on a 90% confidence level."[71]

2. Nonsampling errors in underlying ACS estimates make Pew's numbers unreliable and inaccurate.

There are a variety of other sources of error in Pew's estimates in addition to sampling errors that threaten the accuracy and reliability of Pew's estimates. Broadly called nonsampling errors, these include all other sources of error, such as those that arise from misreporting, incomplete coverage, or data processing. Although nonsampling errors can be more difficult to quantify than sampling errors, they still demonstrate the lack of precision in Pew's, and in turn, Dr. Poston's estimates of undocumented immigrants.

First, it is widely recognized that citizenship status is often inaccurately reported in government surveys.[72] One study using the Census Bureau's Current Population Survey estimated that 75 percent of those who reported being naturalized citizens and living in the U.S. fewer than five years were in fact non-citizens at the time of the survey.[73] In a recent comparison of administrative records from the Social Security Administration with individual

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[70] *See* https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/. Similarly, Pew estimates the number of undocumented immigrants in North Carolina in 2010 to be 350,000 +/- 15,000; the number in Minnesota was 90,000 +/- 10,000, so that the uncertainty again exceeds the population difference.

[71] Passel, J. S., & Cohn, D. (2018). US Unauthorized immigrant total dips to lowest level in a decade. Pew Research Center.

[72] Bachmeier, J. D., Van Hook, J., & Bean, F. D. (2014). Can we measure immigrants' legal status? Lessons from two US surveys. International Migration Review, 48(2), 538-566.

[73] Passel JS, Clark RL. How Many Naturalized Citizens Are Thee? An Assessment of Data Quality in the Decennial Census and CPS. Paper presented at the Annual Meeting of the Population Association of America; Washington, DC. March 1997, as reported in Brown et al. (2018).

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responses to the ACS, census researchers found that 37.6 percent of those individuals who were recorded as non-citizens in administrative records had self-reported being U.S. citizens in the ACS.[74] As explained by the researchers, undocumented immigrants "have a strong incentive to provide an incorrect survey answer, if they answer at all, due to concerns about the data being used for enforcement."[75]

Second, and, even more problematic for Dr. Poston's apportionment estimates, misreporting is likely to vary by geography, raising concerns about the way that measurement error might disproportionately affect estimates of undocumented immigrants in some states more than others, and thus threaten the distributional accuracy of the resulting estimates. Census researchers acknowledge that "the extent of intentional misreporting is most likely to vary across geographical areas and over time, depending on the degree of concern about personal security."[76] Indeed, Census Bureau research finds that match rates between the ACS and administrative records is lower in Alabama than any other state—65% compared to a high of 89% in Maine.[77] This both highlights the inherent difficulty of estimating the undocumented immigrant population, and suggests that Pew, and in turn, Dr. Poston, underestimates the number of undocumented immigrants in Alabama compared to other states, which would lead to an overestimate of Alabama's apportionment population if undocumented immigrants are excluded.

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[74] Moreover, this is likely an underestimate because the noncitizens able to be matched to administrative records are more likely to be legal noncitizens. Brown et al. (2018).

[75] J. Brown et. al., Working Paper: Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census, Center for Economic Studies, U.S. Census Bureau, 18–38 (2018), https://www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf.

[76] Brown et al., 21.

[77] Bhaskar, R., Fernandez, L. E., & S. Rastogi. (2018). Assimilation and coverage of the foreign-born population in administrative records. Center for Administrative Records Research and Applications (CARRA) Working Paper Series #2015-02., April 21, 2015. Mulrow et al. (2011) similarly find considerable geographic variation in the ability match administrative records to ACS respondents. Mulrow, Edward, Ali Mushtaq, Santanu Pramanik, and Angela Fontes. 2011. "Final Report: Assessment of the U.S. Census Bureau's Person Identification Validation System," NORC at the University of Chicago, http://www.norc.org/PDFs/May%202011%20Personal%20Validation%20and%20Entity%20Resolution%20Conference/PVS%20Assessment%20Report%20FINAL%20JULY%202011.pdf.

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In other words, in Dr. Poston's analysis, Alabama would inaccurately benefit from higher levels of misreporting in the state.

In sum, there is clear evidence that Pew's estimates are subject to large amounts of measurement error in the ACS estimates of foreign-born residents, jeopardizing the reliability of the resulting estimates. Misreporting of citizenship status is pervasive and appears to vary across states, resulting in biased estimates of an apportionment population with undocumented immigrants excluded.

3. Undercount adjustments in the total foreign-born population make Pew's numbers unreliable.

Another source of imprecision in the Pew estimates involves the statistical adjustment made to try to account for immigrants being disproportionately missed by the ACS. Surveys always miss some people, but immigrants (and especially undocumented immigrants) are especially likely to be undercounted—a source of error called coverage error. Unfortunately, the extent of the undercount is unknown and unknowable, so Pew has to make a guess as to how and how much to adjust their statistical estimates.

Pew reports that their adjustment increases the size of the undocumented immigrant population by 5% to 7% for the years 2010-16.[78] It is not possible to assess the reasonableness of Pew's statistical adjustment because the methodology is not disclosed. Pew simply states that undercount adjustments are based on "comparisons with Mexican data, U.S. mortality data and specialized surveys conducted at the time of the 2000 census."[79] For comparison, DHS assumes

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[78] Passel et al. (2018), 44.

[79] *See* 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, 44. Research shows, for example, that the undercount of young children varies across states and county size—undercounts are large in more populous counties than less populous ones. O'Hare, W. P. (2019). Differential undercounts in the US Census: Who is missed?. Cham: Springer Open.

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that the undercount of undocumented immigrants is 10% based on a study about LA County in California in the 2000 decennial census.[80] It is, of course, also problematic to assume that the undercount hasn't changed since 2000, or that it is the same across the country as it is in Los Angeles,[81] given geographic variation in the size and nature of the immigrant population. In 2014, for example, the estimated share of undocumented immigrants from Mexico was 5% nationwide, but 70 percent in California, variation that is undoubtedly related to the undercount.[82] For their part, DHS acknowledges that "the exact degree of the undercount is unknown."[83]

The adjustments undergirding the Pew data further undermine confidence in Dr. Poston's estimates. Pew statistically adjusts estimates of the undocumented population to try to account for the undercount of this population; in contrast the total population estimates used by Dr. Poston have not been statistically adjusted for the undercount because the Census Bureau does not statistically adjust census numbers. Following the 2000 Census, the Census Bureau spent enormous resources to research whether statistical methods could be used to adjust for the undercount for use in redistricting and other purposes not related to reapportionment (given the Supreme Court's prohibition on its use for reapportionment).[84] In the end, the Census Bureau determined that the research could not conclude, with a high level of certainty, that the adjusted

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[80] Enrico Marcelli, "2000 Census Coverage of Foreign-born Mexicans in Los Angeles County: Implications for Demographic Analysis," presented at 2000 Annual Meeting of the Population Association of American, Atlanta GA.
[81] *See* 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, 44.
[82] *See* https://www.ppic.org/publication/undocumented-immigrants-in-california/.
[83] Department of Homeland Security, "Potential Improvements to DHS Illegal Alien Population Estimates: Collection and Use of Data," Fiscal Year 2018 Report to Congress, March 5, 2019, 3.
[84] Whitford, D. C. (2002) Chronologic Overview of the Census 2000 Adjustment Decision. Joint Statistical Meetings - Section on Survey Research. Methods. New York City. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.380.7478&rep=rep1&type=pdf.

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census results would be more accurate than the unadjusted results.[85] Any requests for the already-produced adjusted data acknowledged:

> [T]he adjusted estimates were determined to be so severely flawed that all potential uses of these data would be inappropriate. Accordingly, the Department of Commerce deems that these estimates should not be used for any purpose that legally require use of data from the decennial census and assumes no responsibility for the accuracy of the data for any purpose whatsoever.[86]

The very fact that the Census Bureau concluded statistical adjustment could reduce the accuracy of the census count undermines Pew's decision to adjust. It also highlights the inherent imprecision in Pew's estimates, and makes the components of Dr. Poston's calculations (total population count and total population count with undocumented immigrants excluded) incomparable, both of which contribute further to the lack of confidence in Dr. Poston's resulting estimates.[87]

ii. Pew and Dr. Poston rely on unreliable estimates of the lawful immigrant population.

From the total foreign-born population estimated from ACS, the residual technique subtracts the estimated population of naturalized citizens and immigrants with formal legal status—lawful naturalized citizens, legal permanent residents, temporary migrants (such as foreign students), and refugees and asylees—based on estimates from administrative records.[88] In the case of immigrants with formal legal status, lawful permanent residents are estimated using data from DHS's Office of Immigration Statistics, and refugees are estimated using data from the Office of Refugee Resettlement.[89]

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[85] *See* U.S. Bureau of the Census (2001) Report: Recommendation Concerning the Methodology to be Used in Producing Tabulations of Population Reported to States and Localities Pursuant to 13 U.S.C. 141(c) (March 1) Washington, DC Department of Commerce https://www.census.gov/dmd/www/pdf/Escap2.pdf.
[86] *See* https://www.icpsr.umich.edu/icpsrweb/ICPSR/themes/census2000/disclaimer.jsp.
[87] *See* https://govinfo.library.unt.edu/cmb/cmbc/articles-archive/031201.asp.
[88] Administrative records refer to micro data records contained in files collected and maintained by administrative agencies, such as the U.S. Postal Service, Internal Revenue Service, or the Social Security Administration.
[89] *See* https://www.pewresearch.org/hispanic/2018/11/27/unauthorized-immigration-estimate-methodology/.

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Scrutiny of Pew's documentation of its reliance on DHS data, and its method with respect to that data, reveals that its estimates are far from an actual count and involve considerable imprecision. Administrative data is incomplete and untimely. As the Census Bureau has recognized, DHS has "incomplete records prior to 2001. These data do not cover naturalizations occurring before 1988, and they miss some between 1988 and 2000."[90] Moreover, available records "do not always cover children under 18 at the time a parent became a naturalized U.S. citizen. These children automatically become U.S. citizens under the Child Citizenship Act of 2000."[91]

Because the administrative records are incomplete and unreliable, Pew estimates the number of legal immigrants by "applying demographic methods . . . with projections to current years, when necessary."[92] Pew makes statistical adjustments to the estimates from administrative records to account for deaths and departures from the country. Once again, the accuracy of the estimates depends on the accuracy of the individual components of the underlying data—yet these components are not known quantities, nor can they assumed to be stable across time or geography. In calculating its own estimates of the undocumented population, DHS admits that the agency "does not know how many lawfully admitted aliens have deceased or departed the United States."[93] Mortality rates are a source of considerable controversy and disagreement among demographers.[94] Departures from the country also vary across time and geography. Pew makes projections, but the exact assumptions underlying those projections are not disclosed and it is clear that precise numbers simply do not exist.

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[90] Brown et al., 18.
[91] Brown et al., 18.
[92] Passel et al. (2018), 36.
[93] Department of Homeland Security, "Potential Improvements to DHS Illegal Alien Population Estimates: Collection and Use of Data," Fiscal Year 2018 Report to Congress, March 5, 2019, 3.
[94] Warren, R., & Warren, J. R. (2013). Unauthorized Immigration to the United States: Annual Estimates and Components of Change, by State, 1990 to 2010. International Migration Review, 47(2), 296–329.

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In sum, the estimation of the population of immigrants with formal legal status from administrative records on which Pew relies is not an actual enumeration. Instead, such population is imprecisely estimated using a combination of incomplete administrative records and contentious assumptions. Taken together with the other sources of error outlined above, it is clear that the Pew estimates, and in turn Dr. Poston's results, are imprecise and error prone.

iii. Pew and Dr. Poston rely on unreliable estimates of undocumented immigrants at the state-level.

The state-level estimates of the undocumented immigrant populations that Dr. Poston uses require many additional steps after computation of the national residual estimate outlined above; although Pew treats these steps as deterministic, scrutiny of the complex and unverified set of modeling and data assumptions reveal the imprecision and uncertainty in such estimates.

Specifically, state-level estimates of undocumented immigrants are produced after assigning a legal status to all foreign-born respondents in the ACS. A variety of approaches are used in that assignment—logical decision rules, statistical imputation, and weighting adjustments. The initial categorization of someone as "potentially unauthorized" relies on decision rules using self-reported information about arrival year, country of origin, occupation, participation in government programs, and family relationships that could be indicators of legality. Here, again, Dr. Poston's estimates rest on strong assumptions that are unsubstantiated. For example, the survey responses can be inaccurate (e.g., there can be high levels of missingness and misreporting in arrival year). And the decision rules are not 100% accurate. Some immigrant veterans are deported[95]; some households have mixed immigration status; and some who should be eligible to adjust to lawful permanent resident status do not apply for such

[95] Zamudio, Maria. (June 21, 2019). Deported U.S. Veterans Feel Abandoned By The Country They Defended. NPR. https://www.npr.org/local/309/2019/06/21/733371297/deported-u-s-veterans-feel-abandoned-by-the-country-they-defended.

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an adjustment, whether due to lack of money, language barriers, or other reasons.[96] Reflecting the imprecision of Pew's assignment process, Pew acknowledges that the resulting "number of potentially unauthorized immigrants typically exceeds the estimated number of unauthorized immigrants from the residual estimates by 20-35% nationally."[97] This mismatch between the assignment process and the national residual estimates demonstrates the inaccuracy of Pew's complex and opaque process, and highlights the extent to which their resulting population estimates are not precise counts.

To adjust the numbers of undocumented immigrants to bring them in line with the national residual estimates, Pew assigns legal status based on an estimated probability of being an undocumented immigrant, which is in turn based on the occupation distribution by age, sex, and state of residents from the 1989 Legalized Population Survey.[98] This survey benchmark is 30 years old, and overrepresents Mexicans and those in the Southwest.[99] To get state estimates, "the final estimated state totals for any given year take into account estimates for surrounding years; however, only a small number of state estimates require significant adjustment based on the trend analysis."[100] Critically for Dr. Poston's state-by-state count of the undocumented population on which his conclusions rely, Pew does not report which states have inaccurate outcomes that must be significantly adjusted.

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[96] Frost, Amanda. (June 19, 2016). The Overlooked Pathways to Legal Status. The Atlantic. As reported, one study found individuals in removal proceedings with legal representation were 15 times more likely to apply for relief than those without lawyers and are 5.5 times more likely to be granted legal status.
[97] Passel and Cohn, 2018, 40.
[98] As reported in Van Hook et al. (2015).
[99] Van Hook, J., Bachmeier, J. D., Coffman, D. L., & Harel, O. (2015). Can we spin straw into gold? An evaluation of immigrant legal status imputation approaches. Demography, 52(1), 332.
[100] Passel and Cohn, 2018, 40.

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3. Dr. Poston's Conclusions Are Not Credible.

As I have shown, the individual population projections underlying Dr. Poston's calculations are imperfect approximations subject to considerable uncertainty and sampling and nonsampling errors. To recap, Dr. Poston's projection of the total state population rests on flawed assumptions about population growth over time, geographic variation in population growth over time, and the overseas population, and fails to acknowledge inherent uncertainty in projecting population trends into the future. Regarding the estimates of the number of undocumented immigrants in each state, it is clear that the numbers are not counts, but rather rough and imprecise estimates calculated from incomplete and outdated data using an opaque methodology criticized by demographers. Although Dr. Poston's calculations give the illusion of precision, the individual data components underlying his analysis are error-prone and unreliable. Pew's estimates are not "fit for use" for apportionment; nor are they sufficiently reliable or accurate to support Dr. Poston's opinions that Alabama will lose a seat if undocumented immigrants are included in the population counts, or maintain a seat if they are included.

Given these outlined problems and the sensitivity of apportionment outcomes to small changes in population counts, as discussed above, Alabama's claim that they will lose a seat from the inclusion of undocumented immigrants in the apportionment count, or maintain a seat if undocumented immigrants are excluded, is only speculative. The lack of precision in the data means that different states could have reasonable claims to "priority" to the available seats depending on the particular assumptions made about the many and varying components that underlie Dr. Poston's estimates. Indeed, a 2015 analysis by the Congressional Research Service in which seats were hypothetically apportioned using the 2013 estimated citizen population

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reported that Alabama received the same number of seats whether estimated numbers of non-citizens were included or excluded in the apportionment population.[101]

To highlight the uncertainty of Dr. Poston's estimates, sampling error alone is enough to undermine Dr. Poston's conclusion that Alabama is likely to lose a congressional seat if undocumented immigrants are included in the apportionment population, or to maintain a seat of undocumented immigrants are excluded. The reported margin of error on the estimate of the undocumented population ranged from 45,000 to 65,000—that confidence interval (spanning 20,000 persons) is in fact wider than the population difference of the approximately 10,000 additional persons that Election Data Services estimates Alabama would need to gain another congressional seat.[102]

In addition to the extensive uncertainty in the estimates, the geographic variation ignored by Dr. Poston means that both the total population projections and the undocumented population projections are likely to be overestimated in some states and underestimated in others (but not necessarily in the same direction for the two quantities).

V. There Is Currently No Feasible Way to Reliably Exclude Undocumented Immigrants From the 2020 Apportionment Count.

I also examined whether there is a feasible way in which undocumented immigrants could be excluded from the 2020 apportionment count. For numerous reasons, I conclude that there is currently no feasible method by which to exclude undocumented immigrants from the 2020 apportionment count. Specifically, I conclude that excluding undocumented immigrants from the apportionment count in 2020 is impossible because (1) there is no current methodology or data product at the time of this writing that the Census Bureau can use to exclude

[101] Congressional Research Service. 7-5700. R41636. https://crsreports.congress.gov/product/pdf/R/R41636.
[102] *See* https://www.electiondataservices.com/wp-content/uploads/2019/12/NR_Appor19wTablesMaps.pdf, Appendix Main, Page 1.

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undocumented immigrants from the 2020 apportionment count; (2) it is not currently feasible for the Census Bureau to produce estimates of undocumented immigrants from administrative records that would be of sufficient quality to use to exclude undocumented immigrants from the 2020 apportionment count; and (3) the nature, scope, and methodology of the statistical modeling needed to produce estimates of the undocumented population is fundamentally different from the statistical modeling currently used in producing the apportionment population, and would result in a less accurate and reliable enumeration.

A. Current Methodologies and Data Products Are Not Sufficient for Excluding Undocumented Immigrants from the Apportionment Count.

It is my opinion that there is no current methodology or data product at the time of this writing that the Census Bureau may use to reliably exclude undocumented immigrants from the 2020 apportionment count. First, as discussed above, the apportionment count is an "actual enumeration" of the population. The Pew methodology on which Dr. Poston relies, and the residual techniques currently used by the federal government to estimate undocumented populations are inadequate for the apportionment count because reliance on estimates from ACS controverts the prohibition on the use of statistical sampling in the production of apportionment population totals.[103] In *Department of Commerce v. U.S. House of Representatives* (1999), the Supreme Court ruled that the Census Act precluded the use of sampling to produce the apportionment count "[w]hether used as a 'supplement' or as a 'substitute.'"[104]

Second, there are no known data products from the 2020 Census that would identify the undocumented immigrant population that Alabama proposes to exclude from the apportionment count. The planned CVAP datafile, described above, is obviously not sufficient for excluding

[103] *Department of Commerce v. U.S. House of Representatives* (1999).
[104] *Department of Commerce v. U.S. House of Representatives* (1999), 24.

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undocumented immigrants from the apportionment count because it only identifies the total number of citizens of voting age population. Subtracting the CVAP numbers from total population numbers does not provide the numbers to apportion excluding undocumented immigrants because CVAP does not distinguish undocumented immigrants from legal non-citizen residents, and it does not provide the citizenship or legal status of those younger than 18 years of age. Even if CVAP had sufficient data—which it does not—it is unlikely to be considered of sufficient quality for use in apportionment. In addition, the other data products, sources, and analysis that the Census Bureau is examining to fulfill the Executive Order are insufficient, as discussed below.

B. Reliance on Administrative Records to Exclude Undocumented Immigrants from the Apportionment Count is Not Sufficient for the 2020 Apportionment Count.

It is my opinion that it is not currently feasible for the Census Bureau to produce estimates of undocumented immigrants from administrative records that would be of sufficient quality to use as a basis to exclude undocumented immigrants from the 2020 apportionment count. To date, administrative record usage for purposes of enumerating households is limited to those nonresponding addresses where the Census Bureau has multiple "high-quality" administrative records available.[105] More importantly, the Census Bureau does not use administrative records *on their own*—administrative records are used only after giving the entire population an opportunity to self-respond and after an attempt to enumerate the household by field staff.[106]

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[105] 2020 Census Operational Plan.
[106] Memorandum from Deborah M. Stempowski to The Record Regarding Use of Administrative Records in the 2018 End-to-End Census Test (Mar. 26, 2018), 7.

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Although administrative records are being used to fulfill President Trump's executive order to produce block-level citizen voting age population estimates,[107] administrative records lack the coverage, accuracy, and reliability needed to produce an actual enumeration of the undocumented population, which would be necessary to exclude undocumented immigrants from the 2020 apportionment count. Specifically, as I explain below, (1) very few administrative records directly identify those individuals with undocumented status, and the few that do so are fundamentally flawed; and (2) administrative records that may theoretically be used to estimate the number of undocumented immigrants lack sufficient coverage, accuracy, and reliability for this purpose.

1. Direct Identification of Undocumented Immigrants from Administrative Records is Not Feasible.

Very few administrative records directly identify those with undocumented status. Indeed, administrative records are "weak in their coverage of undocumented aliens because programs typically require documentation that many undocumented aliens do not have."[108] The limited records available with respect to undocumented immigrants, described below, are woefully deficient because they are incomplete, outdated, and often inaccurate.

i. Administrative records from the Department of Justice

The Census Bureau is unable to attain a precise number of individuals who entered the country undetected, because it is likely to only have records for those individuals who are apprehended.[109] The Census Bureau expects to receive administrative records about

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[107] *See generally* 84 Fed. Reg. at 33,891.

[108] Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias? The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.

[109] Some research has attempted to roughly estimate this number by using annual number of apprehensions and estimating the probability that an undocumented migrant is apprehended along the U.S. Mexico border to produce an estimate of the number undocumented migrants from Mexico (e.g., Massey and Singer 1995). These estimates, however, only speak to migration across the Mexico border.

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incarcerations and apprehensions of undocumented immigrants from the Department of Justice ("DOJ"),[110] but the most recent report (Alien Incarceration Report, Fiscal Year 2018 Q2, April 16, 2019) summarizing those records report only 43,519 individuals.[111] This is surely a far cry from the total number of undocumented immigrants in the country.

Scrutiny of these DOJ records also highlights the difficulty of obtaining complete, accurate, and timely information—even among those in federal custody. The report notes that an additional 16,426 individuals—27.4% of all "known or suspected aliens" in federal custody—were still under investigation by Immigration and Customs Enforcement to determine alienage, and many others are difficult to classify: 1,281 were legally present and undergoing removal proceedings, 1,100 were granted relief or protection from removal, and 4,903 were deemed undocumented but under adjudication.[112] If determination of undocumented status is difficult for Immigration and Customs Enforcement, the Census Bureau cannot be expected to make such determinations with incomplete and deficient administrative records.

Finally, it is worth noting the time lag of about a year from the date of the incarceration data to the report's release. Specifically, the April 16, 2019 report summarizes incarcerations as of the end of fiscal year 2018, Quarter 2. This is just one example of both the time it takes to process and analyze administrative records, and the fact that such records are outdated by the time they can be summarized. This lag in reporting—plus the large number of unresolved statuses—calls into question the ability of the Census Bureau to produce apportionment numbers that exclude undocumented immigrants in the required nine months from the date of the census.

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[110] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data. The Department of Interior is also sharing records on security interactions, although scant information about the coverage or quality of these records is available.
[111] Alien Incarceration Report, Fiscal Year 2018 Q2 (April 16, 2019). https://www.justice.gov/opa/page/file/1154711/download.
[112] Alien Incarceration Report, 2.

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ii. Administrative records from the Department of Homeland Security

The Census Bureau is unable to attain a precise number of individuals who have overstayed their visas because DHS records are similarly unreliable. DHS is providing the Census Bureau with Arrival/Departure Information System and Visa Data, but these data do not completely or accurately identify visa overstays.[113] Record-keeping challenges make it difficult to match arrival and departure records for the same person, which could result in erroneously counting as an overstayer someone who actually left the country.[114] Consider the enormity of the task—more than 47 million people visit the United States from abroad for tourism and business.[115] When departure records are incompletely collected by the airlines and transmitted to DHS, errors result. The land borders are even harder to track, since the ports of entry are primarily focused on screening incoming traffic rather than checking who is departing. More than 254 million people annually pass through the border checkpoints (nearly 700,000 travelers on a given day)—mostly individuals who are legally able to "travel back and forth across the border for commercial trade, tourism, work, school, family visits or a simple trip to the store."[116] As admitted in the DHS Privacy Impact Assessment for the Immigration-Related Information Sharing with the U.S. Census Bureau: "Determining an individual's citizenship based on various DHS data is a challenging task . . . . Due to the decentralized nature of admission and immigration information, as well as the lack of a nationwide departure control system, [U.S.

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[113] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[114] *See* https://thehill.com/opinion/immigration/447607-illegal-immigration-by-the-numbers-visa-violators-and-border-crossers.
[115] Morral, Anrew, Henry Willis, Peter Brownell. (2011). Measuring Illegal Border Crossing Between Ports of Entry: An Assessment of Four Promising Methods. Rand, Homeland Security and Defense Center. https://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP328.pdf.
[116] Davis, Kristina. (April 7, 2019). "The impossible challenge of tracking visa overstays," The San Diego Union-Tribune. https://www.sandiegouniontribune.com/news/immigration/story/2019-04-06/the-impossible-challenge-of-tracking-visa-overstays.

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Customs and Border Protection] collects different data points from different data set."[117] As a result, the classification of an individual as an overstayer is often inaccurate. Indeed, research by the Center for Migration Studies found nearly half the visa overstayers identified by DHS had likely left the U.S. unnoticed.[118] Others have emphasized that the data are quickly out of date because "many overstayers leave or adjust their status within a few months of their visa expiration date."[119] In the Memorandum of Agreement to share this data with the Census Bureau, DHS acknowledges that the shared information "is assumed to be accurate at the time it was collected. However, because DHS is providing information at a point in time, it is reasonable to believe that eventually data accuracy issues may arise."[120]

iii. Additional records with respect to undocumented status

In addition to the records described above, a handful of administrative records may have some information with respect to small groups of undocumented immigrants. One group with administrative records that identify immigrants without formal legal status are those with Deferred Action for Childhood Arrivals ("DACA") status, and who may be considered by some to fall under the category of "undocumented."[121] DACA recipients do not have formal legal status, but they are currently protected from deportation, and retain lawful presence in the U.S. Administrative records also exist for undocumented immigrants with pending asylum cases. The Census Bureau has not, however, requested DACA or records with respect to pending asylum

[117] Department of Homeland Security. (Dec. 20, 2019). Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau, 6.
[118] Warren, Robert (February 27, 2019). Sharp Multiyear Decline in Undocumented Immigration Suggests Progress at US-Mexico Border, Not a National Emergency. https://cmsny.org/publications/essay-warren-022719/
[119] Fazel-Zarandi, Feinstein, Kaplan 2018.
[120] Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 6.
[121] To be eligible, individuals needed to have arrived in the U.S. before turning 16 and must meet education and other related requirements.

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cases.[122] In any event, both of these groups represent a tiny part of the undocumented population.

In sum, the limited number of administrative records that identify undocumented status mean it is impossible to directly enumerate the undocumented population from available administrative records.

2. Indirect Identification of Undocumented Immigrants from Administrative Records is Not Feasible.

The Census Bureau is also unable to produce an accurate and reliable enumeration of the undocumented population by indirectly estimating the undocumented immigrant population through a process of elimination based on information in administrative records. Doing so requires correct identification of citizens and the lawful non-citizen immigrant population—those persons granted lawful permanent residence, persons granted asylum, persons admitted as refugees, and persons admitted as nonimmigrants under classes of admission associated with residence (e.g., students and temporary workers, as opposed to tourists) and with authorized periods of admission in the future of any estimated date.[123]

Here, again, administrative records lack the necessary coverage, accuracy, and reliability to produce high quality estimates. Regarding the estimation of citizenship status, John Abowd, Chief Scientist of the Census Bureau, acknowledges that the Census Bureau "will most likely never possess a fully adequate truth deck to benchmark to."[124] Determining the specific legal

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[122] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[123] Alabama has not clearly explained how to handle so-called quasi-legal cases, such as foreign nationals granted Temporary Protected Status (TPS) because they are from countries in which they cannot return home safely or those with DACA status, who have work authorization and protection against deportation. Pew includes in the authorized immigrant estimates those with temporary protection from deportation under DACA, TPS, and pending asylum cases. This would mean that a resident with 18-month temporary protected status (that could be extended) would be excluded from political representation but a student or temporary worker on a 12-month visa would be included.
[124] Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Sec'y, U.S. Dep't of Commerce (Mar. 1, 2018).

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status (undocumented or otherwise) among immigrants is even more difficult. DHS admits that "immigration status information is challenging, complicated, and dynamic . . . . No one source of citizenship information is complete and up-to-date"[125] In another report, DHS acknowledges, "while Census and DHS data provide a wealth of information on the total foreign-born population broken down by citizenship and on annual migration flows and status changes, national population data on the major subcategories of non-citizens, including lawful permanent residents, students, temporary workers, and unauthorized immigrants, are not readily available from any source and must be estimated."[126]

Below, I will show how the Census Bureau's most complete source of citizenship, the Numident, is inadequate, and then I will demonstrate that the other administrative records that the Bureau could consider using to fill the gaps in data are also insufficient.

i. The Numident

The Census Bureau's most complete source of citizenship data is the Census Numident file, a record of individual applications for Social Security cards and any changes subsequently made (such as change of name).[127] In an effort to evaluate the potential use of administrative records to estimate the citizenship status for the 2020 Census, the Census Bureau undertook extensive research evaluating the strengths and weaknesses of Numident. These results were reported in a 2018 white paper titled, "Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census" (hereinafter, "The Brown Memo"). As the Census Bureau found, there are several sources of error in these records. First, there will be individuals enumerated in the 2020 census who will not have information in the Numident. While this is more likely

[125] *See* Department of Homeland Security. (Dec. 20, 2019). Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau.
[126] *See* https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015.pdf, 2.
[127] See Layne, Wagner, and Rothaas (2014) and NORC (2011). Also Rastogi and Ohara (2012), Bond et al. 2014.

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among undocumented immigrants, citizens and non-citizens with formal legal status can also be missing because of linkage errors, or incomplete identifying information provided by the household.[128] Of those enumerated in the 2010 census, the Brown Memo reports that 89.4% could be matched to the Numident file.[129]

A second issue is that some individuals in Numident have missing information about citizenship status. In 2017, 6.6 million persons born outside the U.S. have blank citizenship among those born in 1920 or later with no year of death.[130] Some of the individuals missing citizenship status could be undocumented immigrants, but a much higher share appear to be U.S. citizens.[131] The Brown Memo outlines the different groups of people who could have missing citizenship status in Numident, as follows:

1. U.S. citizens from birth with no Social Security number or U.S. passport;
2. U.S. citizens from birth born outside the U.S., who do not have a U.S. passport, and either applied for a Social Security number prior to 1974 and were 18 or older or applied before the age of 18 prior to 1978;
3. U.S. citizens who were automatically naturalized if they were under the age of 18 when their parents became naturalized in 2000 or later, and they did not inform USCIS or receive a U.S. passport;

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[128] The internal unique person identifier is called the protected identification key or PIK.
[129] Brown et al, 14 (as reported, 91% can be assigned a PIK; once assigned, 98.2% could be matched to Numident).
[130] *See* https://www.supremecourt.gov/DocketPDF/18/18-966/91016/20190306200155135_18-966%20Commerce%20J.A.pdf, 153. In total, 20.0 percent of 2010 Numident records have missing citizenship status, but some of those will not be in the 2020 Census—either because they no longer reside in the U.S. (e.g., those who had temporary work status), or because they fail to respond.
[131] Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Sec'y, U.S. Dep't of Commerce (Mar. 1, 2018).

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4. U.S. citizens who were naturalized prior to 2001 and did not inform the Social Security Administration of their naturalization and had never applied for a Social Security number; and
5. Lawful permanent residents (LPR) who received that status prior to 2001 and had never applied for a Social Security number.[132]

The reason for the gap in citizenship status information is related to the history of the Social Security number, which was not created to track citizenship status, but rather created for the sole purpose of tracking earnings for use in determining benefit levels. Evidence of citizenship was not added to the Social Security application until 1974. Now, parents typically apply for an infant's Social Security number at the hospital where the infant is born, but there was variation across states in the rollout of this enumeration-at-birth ("EAB") program, which potentially resulted in geographic variation in the accuracy of the data.[133] For example, New Mexico, Indiana, and Iowa were early adopters of EAB in 1987, while California, Rhode Island, and Connecticut did not participate in EAB until 1995.[134] This means that late adopting states could be more likely to have citizens with missing citizenship status in Numident, potentially leading to their exclusion from apportionment numbers.

A third issue is inaccuracies in Numident. There are a number of cases where Numident indicates a person is a non-citizen, but the individual is in fact a citizen. This includes U.S. citizens who were naturalized prior to 2001 and who did not inform the Social Security Administration of their naturalization. Similarly, lawful permanent residents who received that

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[132] Brown et al., 19.
[133] *See* https://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html.
Today, over 90 percent of parents use the EAB process, which is offered in all 50 states plus Puerto Rico and the District of Columbia. The Social Security Administration receives nearly three-quarters of original Social Security number applications through the EAB process and issues over 4 million Social Security numbers via EAB each year (Social Security Administration 2006).
[134] *See* https://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html.

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status prior to 2001 and had applied for a Social Security number prior 1974 would also have inaccurate data. Of course, there can also be inaccuracies in which a non-citizen is listed as a citizen. According to a 2005 GAO report, the Social Security number system had quality control issues for many years.[135] Audits during the 2000s found widespread misuse, with millions of workers showing mismatches.[136]

In sum, Numident lacks coverage of the entire population, and missing citizenship in Numident is not a clear indication of undocumented status. The Census Bureau is receiving other administrative records from federal agencies and state governments to supplement Numident, but they do not completely fill in the gaps, as explained below. Moreover, these administrative records can introduce inconsistencies across data sources that have to be reconciled, as also explained below.

ii. Other administrative records

DHS offers the most complete information about legal non-citizens, but the records it is providing to the Census Bureau are still inadequate for the purpose of apportionment. DHS is providing the Census Bureau with the Lawful Permanent Resident File, Naturalization Data from the Citizen and Immigration Services, and Arrival/Departure Information System and Visa Data.[137] As outlined when discussing Pew's residual method, these records are incomplete and often outdated, and can only partially address Numident's weaknesses.[138] For example, these data "do not cover naturalizations occurring before 1988 . . . and do not always cover children under 18 at the time a parent became a naturalized U.S. citizen."[139] As another example, the

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[135] *See* https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-05-115/html/GAOREPORTS-GAO-05-115.htm.
[136] *See* July 2004 OIG report, 25
[137] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[138] Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Sec'y, U.S. Dep't of Commerce (Mar. 1, 2018).
[139] Brown et al., 18.

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Worldwide Refugee Admission Processing System for the Department of State contains only some of the asylum cases.[140]

Other administrative records that the Census Bureau currently plans to use have considerable variability in availability and coverage across states. For example, Medicaid/Children's Health Insurance Program data from the Department of Health and Human Services ("HHS") has "some citizenship information potentially available."[141] However, Census Bureau research finds that the availability of HHS varies widely across states.[142] A similar issue arises in the use of state Department of Motor Vehicle ("DMV") records. The Census Bureau has requested DMV data, including with respect to citizenship status and eye color, but the citizenship data can be inaccurate.[143] For example, when Florida and Texas attempted to purge registered voters who were identified as having been noncitizens when they applied for the driver licenses from voter rolls, they found that most were naturalized citizens who had outdated information in DMV records.[144]

Finally, any reliance by the Census Bureau on commercial data (i.e. CoreLogic data) cannot fill the gaps.[145] CoreLogic fails to provide full coverage of the population and its availability and accuracy varies across states. Households of higher socioeconomic status are better represented among linked CoreLogic records than are households of lower socioeconomic

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[140] Applicants obtain asylum in one of two ways: affirmatively through a USCIS asylum officer, or defensively in removal proceedings before an immigration judge of DOJ's Executive Office for Immigration Review. The database only contains state of residence information for those receiving affirmative asylum.
[141] *See* Background Sheet 2: Creating an Interagency Working Group and Established Agreement for New Data.
[142] Brown et al. 2018, 14.
[143] Wang, Hansi Lo. (November 20, 2019). Nebraska Is 1st State To Share Driver's License Records With Census Bureau. https://www.npr.org/2019/11/20/781373128/nebraska-1st-to-say-it-will-share-drivers-license-records-with-census-bureau.
[144] Lopez, Ashley. (February 14, 2019). There's No Easy Way For Texas To Vet Its List Of Alleged Noncitizen Voters. Just Ask Florida. National Public Radio Kut 90.5. https://www.kut.org/post/theres-no-easy-way-texas-vet-its-list-alleged-noncitizen-voters-just-ask-florida.
[145] *See* https://www.federalregister.gov/documents/2018/06/08/2018-12365/proposed-information-collection-comment-request-2020-census.

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status.[146] Even more importantly, research finds that the availability and quality of these data vary across states, raising concerns about distributional accuracy.[147] One study evaluating the potential for commercial data in the 2020 census found that "the quality of the CoreLogic data varies between counties and townships around the country, both in the coverage of the CoreLogic data and in the correspondence between ACS and CoreLogic property tax values."[148]

Such variation in data availability and accuracy across states raises concerns about the fairness or distributional accuracy of the resulting population counts. The Census Bureau will have far more information available about the population of some states compared to others. As of this writing, for example, only Nebraska had provided DMV data to the Census Bureau.[149] Asymmetries in information about state populations could make it easier or harder to identify and exclude undocumented persons from apportionment populations. Consider, for instance, that some states, but not others, allow undocumented immigrants to obtain driver's licenses. To the extent those DMV records improve the ability to identify undocumented immigrants in a state, it will increase the chance that those states will be more likely to have undocumented immigrants identified and excluded from their apportionment total, jeopardizing the distributional accuracy of the resulting apportionment count.

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[146] Bond, B., Brown, J. D., Luque, A. & O'Hara, A. (2014). The nature of the bias when studying only linkable person records: Evidence from the American Community Survey. CARRA Working Paper #2014-08. Washington, D.C.: U.S. Census Bureau. https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-08.pdf. Similarly, Brummet (2014) found that 63.4 percent of records could be linked to the Master Address File, but the number varied across structure type—just 14.8 percent of multi-unit structure were linked, compared to 79 percent of single-unit structures. Brummet, Q. O. (2014). Comparison of survey, federal, and commercial address quality. CARRA Working Paper #2014-06. Washington, D.C.: U.S. Census Bureau. https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-06.pdf.

[147] Moore, B. (2015). Preliminary research for replacing or supplementing the year built question on the American Community Survey with administrative records. Washington, D.C.: U.S. Census Bureau. https://www.census.gov/library/working-papers/2015/acs/2015_Moore_02.html.

[148] Seeskin, Z. H. (2016). Evaluating the Use of Commercial Data to Improve Survey Estimates of Property Taxes (No. 2016-06). Center for Economic Studies, US Census Bureau, 5.

[149] The Census Bureau reports that they had reached verbal agreements with about 1/3 of states. *See* Deposition Transcript of Karen Battle. (Mar. 2, 2020), 175, 201-02.

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In sum, it is not possible to conduct an actual enumeration of the undocumented population using administrative records given their incomplete coverage of the population. Very few administrative records provide timely and accurate information about legal status. As a result, administrative records cannot be used to directly enumerate the population, and so any attempt to produce a count of the undocumented population for purposes of exclusion from the 2020 apportionment count would require extensive statistical modeling. In the next section, I explain how this modeling would differ in fundamental ways from that previously used to enumerate the apportionment population, and would result in a less accurate and reliable population enumeration.

C. Statistical Modeling to Exclude Undocumented Immigrants From the 2020 Apportionment Count Would Result in a Less Accurate and Reliable Enumeration.

It is my opinion that the use of statistical modeling to exclude undocumented immigrants would result in a less accurate and reliable enumeration. Below, I (1) explain how current statistical methods used in the enumeration process fundamentally differ from what would be required to estimate an apportionment population that excludes undocumented immigrants; and (2) explain why, in light of the Census Bureau Standards, implementation of any such statistical model would not be feasible for the 2020 apportionment count.

I start by first outlining what the Census Bureau currently plans with respect to estimating citizenship status to produce CVAP because that informs my understanding of the type of statistical modeling that might be considered, although I note that CVAP is not clearly being developed for the purpose of apportionment.[150] Given the shortcomings of available

[150] Trump's executive order calls for identification of citizenship status for states to use for "districting purposes," while acknowledging that it might not be permissible: "Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population." 84 Fed. Reg. at 33,824. To date, no states have actually requested the data.

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administrative records, explained above, the Census Bureau also must use modeling to estimate CVAP. Although the exact methodology for doing so has not been finalized, documents indicate that a model will be estimated for each person in the census "using the most current citizenship status from each available citizenship source for the person, as well as the person's other demographic, household, and location information as explanatory variables."[151] I presume that any model to estimate legal status would rely on a similar model specification.

1. The Extent of Any Planned Statistical Modeling to Exclude Undocumented Immigrants is Fundamentally Different than the Census Bureau's Current Uses of Statistical Modeling in Apportionment.

The current statistical methods used by the Census Bureau to address missing and erroneous values in the census include data editing and imputations. Data editing is the process of identifying missing, invalid, or inconsistent entries, and changing the entries according to checks of logical relationships.[152] For example, an individual who leaves blank the age question on the census form but completes information with respect to her date of birth would have age filled in through the process of editing. Statistical imputation is the process of filling in missing or conflicting values with a substitute. To produce population numbers from the decennial census, deterministic hot-deck count imputation is used in the small number of cases when an individual or a household does not answer a question, or when a household is not enumerated through self-completion or the Census Bureau's NRFU process, as described above.[153] The hot-

[151] *See* Department of Homeland Security (Dec. 20, 2019). Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau.
[152] This is sometimes called logical imputation. Editing can also rely on recontacts with the respondent or reliance on other data sources.
[153] Earlier in the data collection process, modeling on the basis of administrative records is used, for example, in the creation of the MAF and in the determination of a household as occupied or vacant. Count imputation occurs when the Census Bureau is unable to get information about an address in the MAF: (1) when records indicate housing unit is occupied but did not have number of residents; (2) when records say a housing unit exists, but they are unclear whether occupied or vacant, then the Bureau imputes both information with respect to if occupied and household size; (3) status imputation: if unclear if a unit exists, then impute if occupied, vacant, or nonexistent and then

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deck procedure uses contemporaneous data from neighboring housing units to fill in deterministic values for the missing information.[154]

The nature of the statistical modeling that would be required for estimating legal status fundamentally differs from the statistical modeling currently used in producing population numbers for apportionment in several ways. First, excluding undocumented immigrants from the apportionment population requires imputing not just the household count, but also the characteristics (namely, citizenship status and legal status) of the household. As explained above, the Census Bureau currently produces apportionment numbers from the CUF, which only relies on count imputation. Characteristic imputation occurs in the CEF as a separate process, after the final population count is established and for the purposes of redistricting and other data tabulations.[155]

Second, the scope of any statistical modeling required to estimate the number of undocumented immigrants would be unprecedented for use in enumerating the apportionment population. For example, in 2010, 0.39% (less than one half of one percent) of the total population was added via count imputation; in 2000, 0.43% of total population was added using count imputation.[156] In other words, count imputation is used sparingly, and only after giving the entire population an opportunity to self-respond, and attempting to enumerate through NRFU.[157]

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household size. For official statistics beyond apportionment numbers, the Census Bureau also conducts characteristic imputation, in which the characteristics of the household are imputed using hot-deck methods.

[154] In contrast, a cold-deck imputation procedure would use information from outside sources.

[155] Memorandum from Deborah M. Stempowski to The Record Regarding Use of Administrative Records in the 2018 End-to-End Census Test (Mar. 26, 2018), 8.

[156] *See* https://www.pewsocialtrends.org/2011/05/04/imputation-adding-people-to-the-census/.

[157] Relatedly, the Census Bureau acknowledges in the 2020 Operational Plan that "[t]he accuracy and usefulness of the data collected for the 2020 Census are dependent upon the ability to obtain information from the public, which is influenced partly by the public's perception of how well their privacy and confidentiality concerns are being addressed . . . . If a substantial segment of the public is not convinced that the Census Bureau can safeguard their response data against data breaches and unauthorized use, then response rates may be lower than projected, leading to an increase in cases for follow-up and cost increases." For review of research on this topic, *see* U.S. Census Bureau, Privacy Research in Census 2000, Census 2000 Topic Report No. 1 (2003).

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In contrast, estimation of the apportionment population excluding undocumented immigrants requires extensive modeling to account for gaps and inconsistencies in administrative records. With almost no administrative records directly identifying undocumented persons, the Census Bureau would need to impute the vast majority of the population to be excluded. The Census Bureau also acknowledges the inaccuracy of the models for those in the 2020 Census who are unable to be linked to administrative records. These individuals will have their citizenship probability "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."[158]

Third, the shortcomings of the inputs to any model to estimate undocumented status would seriously implicate the accuracy of the outputs to such a model. All of the issues outlined above regarding the accuracy, reliability, and timeliness of administrative records will impact the predictive accuracy of the model results. Census research acknowledges that the modeling of missing information on citizenship will be challenging, with the accuracy of the models "not known."[159] Critically, the concern is not just with the accuracy and reliability of information about citizenship and legal status in administrative records, but also the other information from the administrative records that might be used in building the predictive model—such as race, ethnicity, sex, age, or country of origin.[160] If there are errors in the other explanatory variables, the model results can be biased and unreliable.

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[158] Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 17.
[159] Brown et al, 44.
[160] As explained in Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 17: "A model will be estimated for each person using the most current citizenship status from each available citizenship source for the person, as well as the person's other demographic, household, and location information as explanatory variables."

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Specifically, one key input of concern is the quality of the measures of race and ethnicity in administrative records. The quality of the race and ethnicity data in Numident is poor.[161] The race data included in the Numident file is collected at the time an application is made to obtain a Social Security number. Prior to 1980, the application form only permitted the racial categories of white, black, and other.[162] Individuals added to Numident through state vital records (the EAB program)—roughly one-fourth of the population—are typically missing race entirely because states do not transfer that information.[163] Also problematic is that Hispanic origin data are indirectly estimated through country of birth—a flawed assumption given that Hispanics often select more than one race or "some other race."[164] Given the problems with Hispanic ethnicity in Numident, census research has warned that statistical imputation could result in "bias in the resulting proportion of persons who are Hispanic," which could, in turn, bias estimates of citizenship and legal status.[165]

Finally, there are critical unanswered questions about how unverifiable modeling assumptions will be translated into any model results that would be used to exclude individuals from apportionment counts. The modeling of legal status seems likely to follow the same modeling strategy taken for estimating citizenship status, in which the planned model will result

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[161] The Census Bureau has built an internal Best Race and Hispanic Origin file, a composite from various government and commercial sources that uses a rules-based approach to resolve unique race and Hispanic origin codes for person records where those values vary across different files. Unfortunately, the content and quality of this file "is mysterious to observers." Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias?. The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.
[162] The current OMB race and ethnicity categories were not used until 1997.
[163] Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias?. The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.
[164] Czajka, J. L. (2013). Can administrative records be used to reduce nonresponse bias?. The ANNALS of the American Academy of Political and Social Science, 645(1), 171-184.
[165] Richard A. Griffin. (2014). "Issues Concerning Imputation of Hispanic Origin due to Administrative Record Enumeration for the 2020 Census," Proceedings of the Survey Research Methods Section, American Statistical Association, available at http://ww2.amstat.org/sections/srms/proceedings/y2014/Files/311893_88330.pdf.

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in a probability of best citizenship status.[166] This means that the model output for each individual is a value that ranges from 0 to 1, where 0 would indicate a 0% chance of being a citizen and 1 would indicate a 100% chance of being a citizen, but where most values will fall somewhere in between. It is unclear, however, how the Census Bureau will decide on the threshold that will be used to classify an individual as a citizen or not based on their predicted probability.[167] Any appropriate rate of false positives and false negatives that would be considered acceptable in producing an apportionment population based on such probabilities are unclear. Indeed, a probabilistic model inherently implies error in the underlying data and clearly contravenes an actual enumeration of "whole number of persons in each State." And it is unclear how the uncertainty in the prediction will be accounted for in the enumeration count. What is clear, however, is that the resulting population count from the use of such probabilities will be less reliable than the existing method of counting the population, given that these modeling decisions will introduce uncertainty and bias into the resulting population numbers.

In sum, there are fundamental differences in the statistical modeling that would be necessary to produce apportionment populations excluding undocumented immigrants compared to the current use of statistical modeling in the enumeration process. The nature and scope of the statistical modeling required to produce estimates of undocumented immigrants from incomplete and outdated administrative records requires untested modeling approaches and unverified modeling assumptions that will inherently result in a population count that is less reliable and less accurate than the current enumeration methods.[168]

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[166] Memorandum of Agreement Between the U.S. Department of Commerce, U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship Related Data, 17.

[167] For example, it is unclear if, say, a 50%, 70%, or 90% predicted chance of being a legal non-citizen would be considered sufficient for inclusion in the apportionment population.

[168] Additionally, any attempt to exclude the undocumented immigrant population from the apportionment count threatens the accuracy and reliability of the apportionment population by reducing cooperation with the decennial census. The very exercise of asking the Census Bureau to use administrative records beyond their originally

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2. Any Implementation of a Statistical Model to Exclude Undocumented Immigrants from the 2020 Apportionment Count is Not Feasible in the Limited Available Time.

The Census Bureau's Statistical Quality Standards govern the development and implementation of statistical methods in the design, collection, and dissemination of census products. These standards require an explicit plan that addresses (1) requirements for the editing and imputation systems; (2) verification and testing of the editing and imputation systems; and (3) monitoring and evaluation of the quality of the editing and imputation operations.[169] To date, there is no indication that sufficient planning and evaluation of the statistical modeling required to estimate an apportionment population that excludes undocumented immigrants has occurred, and there is likely not time for it to occur prior to December 31, 2020. It is telling to consider the time typically required to produce estimates of undocumented populations. For example, the most recent DHS estimate of the undocumented population—from December 2018—reports on numbers considered current as of July 2015.

With respect to the Census Bureau's timing, consider, as a point of comparison, that the Census Bureau began investigating methods for utilizing administrative records in NRFU operations shortly after the 2010 census. By the time the 2018 Operational Plan was drafted, the

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intended purpose to identify the legal status of the population will stoke fears about confidentiality and will undermine trust in the Census Bureau. As the former director of the Census John Keane explained: "If the Census Bureau were directed to enumerate undocumented aliens separately in order to remove them from the apportionment count, we would run the risk of being perceived as an enforcement agency . . . . The Census Bureau goes to great lengths to avoid misperception that could adversely affect cooperation. We must convince the population that it is safe to be included in the census." John G. Keane. Statement of the Director of the Bureau of the Census Before the Subcommittee on Energy, 5. Research shows that attitudes about privacy and confidentiality are strong predictors of census self-response—those individuals reporting higher levels of concern about the confidentiality of census data are less likely to return their census forms, more likely to skip individual questions, and more likely to provide inaccurate responses. *E.g.*, Singer, E., Mathiowetz, N. A., & Couper, M. P. (1993). The impact of privacy and confidentiality concerns on survey participation: The case of the 1990 U.S. census. Public Opinion Quarterly, 57, 465–482. Lower levels of self-response, in turn, increase the cost and reduce the quality of the census count. Brown, J. D., Heggeness, M. L., Dorinski, S. M., Warren, L., & Yi, M. (2019). Predicting the Effect of Adding a Citizenship Question to the 2020 Census. Demography, 56(4), 1173-1194.

[169] *See* https://www.census.gov/about/policies/quality/standards/standardc2.html.

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use of administrative records had undergone years of research led by a team of census researchers (i.e. the Administrative Records Modeling Team), extensive testing in large-scale tests, engagement with stakeholders (e.g., I served on an administrative records working group for the Census Scientific Advisory Committee), publication and presentation in professional outlets, and significant revisions in light of the results of that research.[170] Such a process is simply not possible before apportionment population numbers are due to the President on December 31, 2020.

VI. Conclusion

To reiterate my opinions:

First, Dr. Poston does not demonstrate, to any degree of reasonable certainty, that Alabama will (a) lose a congressional seat because of the inclusion of undocumented immigrants in the 2020 apportionment count, or (b) maintain a congressional seat because of the exclusion of undocumented immigrants in the 2020 apportionment count.

Second, there is no reliable way to exclude undocumented immigrants from the 2020 apportionment count because (a) there is currently no reliable methodology or data product that the Census Bureau may use to do so; (b) no administrative records are of sufficient quality to use to exclude undocumented immigrants from the 2020 apportionment count; and (c) the nature, scope, and methodology of the statistical modeling needed to produce estimates of the undocumented population is fundamentally different from the statistical modeling currently used in producing the apportionment population, and would result in a less accurate and reliable enumeration.

[170] The final 2020 Census Operational Plan scaled back the plans to use administrative records compared to initial plans in the 2015 version 1.1. Operational Plan.

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Executed on March 13, 2020 at Durham, NC.

I declare under penalty of perjury that the foregoing is true and correct.



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Zamudio, Maria. (June 21, 2019). Deported U.S. Veterans Feel Abandoned By The Country They Defended. NPR. https://www.npr.org/local/309/2019/06/21/733371297/deported-u-s-veterans-feel-abandoned-by-the-country-they-defended.

D. SUNSHINE HILLYGUS

Department of Political Science
Duke University
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ACADEMIC APPOINTMENT

Duke University
Professor of Political Science, July 2015-
Professor of Public Policy (by courtesy), Nov 2015-
Associate Professor of Political Science, July 2009-2015
Director, Duke Initiative on Survey Methodology, July 2010-

Harvard University
Frederick S. Danziger Associate Professor of Government, July 2007-June 2009
Director, Program on Survey Research, July 2005-June 2009
Assistant Professor of Government, July 2003-June 2007

EDUCATION

Stanford University
Ph.D., Political Science, 2003
M.A., Political Science, 2000
Dissertation: Understanding Receptivity to Political Campaigns: Three Essays on Voter Decision Making in Election 2000.
Committee: Morris Fiorina (chair), Norman Nie, Simon Jackman, David Brady

University of Arkansas
M.A., Political Science, May 1998
B.A., Political Science and B.A., Spanish, *Summa Cum Laude*, May 1996

BOOKS

Holbein, J. and D.S. Hillygus. *Making Young Voters: Converting Civic Attitudes into Civic Action.* Cambridge University Press, 2020.

Hillygus, D.S. and T. Shields. *The Persuadable Voter: Wedge Issues in Presidential Campaigns.* Princeton University Press, 2008. Paperback, 2009.
Winner of the 2009 Robert E. Lane Award.
Excerpt reprinted in *Controversies in Voting Behavior*, 5th edition(2011).

Hillygus, D.S., N. Nie, K. Prewitt, and H. Pals. *The Hard Count: The Political and Social Challenges of Census Mobilization.* Russell Sage Foundation, 2006.

JOURNAL PUBLICATIONS

Bail, C.A., Guay, B., Maloney, E., Combs, A., Hillygus, D.S., Merhout, F., Freelon, D. and Volfovsky, A., 2020. Assessing the Russian Internet Research Agency's impact on the political attitudes and behaviors of American Twitter users in late 2017. *Proceedings of the National Academy of Sciences*, 117(1).

Madson, G. and D.S. Hillygus. 2019. "Who Trusts the Polls? Motivated Reasoning in Evaluations of Polling Results," *Political Behavior.*

Carlson, C., V. Dounoucos, and D.S. Hillygus. 2019. "The Message and the Medium: The Communication Effects of Twitter Commentary," *Journal of Information Technology & Politics*.

Holbein, J., D.S. Hillygus, C. Gibson-Davis, M. Lenard, and D. Hill. 2018. "The Development of Students' Engagement in School, Community, and Democracy," *British Journal of Political Science*.

Hillygus, D.S. 2018. "Navigating Scholarly Exchange in Today's Media Environment," *Journal of Politics* 80(3), 1064-1068(editor-reviewed).

Xing, Z. D.S. Hillygus and L. Carin. 2017. "Evaluating U.S. Electoral Representation with a Joint Statistical Model of Congressional Roll-Calls, Legislative Text, and Voter Registration Data," *Proceedings of the 23nd ACM SIGKDD Conference on Knowledge Discovery and Data Mining (KDD)*, 1205-1214.

Knutson, K, J. Phelan, M. Paskow, A. Roach, K. Whiton, G. Langer; D.S. Hillygus, M. Mokrzycki, W.A. Broughton, S. Chokroverty, K.L. Lichstein, M. Hirshkowitz. 2017. "The National Sleep Foundation's Sleep Health Index," *Sleep Health* 3 (4): 234-40.

DeYoreo, M., Reiter, J. and D.S. Hillygus. 2017."Nonparametric Bayesian Models With Focused Clustering for Mixed Ordinal and Nominal Data," *Bayesian Analysis*.

Hillygus, D.S., McKee, S., and M. Young. 2017. "Reversal of Fortune: The Political Behavior of White Migrants to the South," *Presidential Studies Quarterly*.

Henderson, M. and D.S. Hillygus. 2016. "Contextual Factors in Time of Decision in the 2008 Presidential Election," *Public Opinion Quarterly*.

Holbein, J. and D.S. Hillygus. 2016. "Making Young Voters: The Impact of Preregistration on Youth Turnout," *American Journal of Political Science*.

Ballard, A., D.S. Hillygus, and T. Konitzer. 2016. "Campaigning Online: Web Display Ads in the 2012 Presidential Campaign," *PS: Political Science & Politics*.

Si, Y., J. Reiter, and D.S. Hillygus. 2016. "Bayesian Latent Pattern Mixture Models For Handling Attrition In Panel Studies With Refreshment Samples," *Annals of Applied Statistics*.

Schifeling, T. C. Cheng, J. Reiter and D.S. Hillygus. 2015. "Accounting for Nonignorable Unit Nonresponse and Attrition in Panel Studies with Refreshment Samples," *Journal of Survey Statistics and Methodology*.

Gerber, A., K. Arceneaux, C. Boudreau, C. Dowling, and D.S. Hillygus. 2015."Reporting Balance Tables, Response Rates and Manipulation Checks in Experimental Research: A Reply from the Committee that Prepared the Reporting Guidelines," *Journal of Experimental Political Science*.

Johnston, C., D.S. Hillygus, and B. Bartels. 2014. "Ideology, The Affordable Care Act Ruling, and Supreme Court Legitimacy," *Public Opinion Quarterly*, 78 (4): 963-973.

Gerber, A., K. Arceneaux, C. Boudreau, C. Dowling, D.S. Hillygus, T. Palfrey, D. Biggers, D. Hendry. 2014. "Reporting Guidelines for Experimental Research: A Report from the Experimental Research Section Standards Committee," *Journal of Experimental Political Science*, 1(1): 81-98.

Si, Y., J. Reiter and D.S. Hillygus. 2014. "Semi-parametric Selection Models for Potentially Non-ignorable Attrition in Panel Studies with Refreshment Samples," *Political Analysis*, 23(1): 92-112.

Frankel, L. and D.S. Hillygus. 2014. "Panel Attrition and the Survey Experience," *Political Analysis*, 22(3): 336-353.

Hillygus, D.S. and S. Treul. 2014. "Assessing Strategic Voting in the 2008 Presidential Primaries," *Public Choice*, 161(3): 517-536.

Aldrich, J., B. Bishop, R. Hatch, D.S. Hillygus, and D. Rohde. 2013. "Blame, Responsibility, and the Tea Party in the 2010 Midterm Elections," *Political Behavior*, 36(3), 471-491.

Deng, Y., D.S. Hillygus, J. Reiter, and Y. Si. 2013. "Handling Attrition in Longitudinal Studies: The Case for Refreshment Samples," *Statistical Science*, 28(2): 238-256.

Hillygus, D.S. 2011. "The Evolution of Election Polling in the United States," *Public Opinion Quarterly*, 75(5): 962-981.

Henderson, M. and D.S. Hillygus. 2011. "The Dynamics of Health Care Opinion, 2008-2010: Partisanship, Self-Interest, and Racial Resentment," *Journal of Health Politics, Policy, and Law*, 36(6): 945-960.

Henderson, M., D.S. Hillygus, and T. Tompson. 2010. "'Sour Grapes' or Rational Voting? Voter Decision Making Among Thwarted Primary Voters in 2008," *Public Opinion Quarterly*, 74(3): 499-529.

Ellis, R., D.S. Hillygus and N. Nie. 2010. "Retrospective and Prospective Candidate Evaluations and the Dynamics of Vote Choice in 2008," *Electoral Studies* 29(4): 582-593.

Hillygus, D.S. and M. Henderson. 2010. "Policy Issues and the Dynamics of Vote Choice in the 2008 Presidential Election," *Journal of Elections, Public Opinion, and Parties*, 20(2): 241-269.

Treier, S. and D.S. Hillygus. 2009. "The Nature of Political Ideology in the Contemporary Electorate," *Public Opinion Quarterly*, 73(4):679-703.

Burden, B. and D.S. Hillygus. 2009. "Opinion Formation, Polarization, and Presidential Reelection." *Presidential Studies Quarterly*, 39: 619-35.

Hillygus, D.S. and T. Shields. 2008. "Southern Discomfort? Regional Differences in Voter Decision Making in the 2000 Presidential Election," *Presidential Studies Quarterly*, 38(3): 506-520.

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Hillygus, D.S. 2007. "The Dynamics of Voter Decision Making Among Minor Party Supporters: The 2000 U.S. Presidential Election," *British Journal of Political Science*, 37(2): 225-244.

Hillygus, D.S. 2005. "Campaign Effects and the Dynamics of Turnout Intention in Election 2000," *Journal of Politics*, 66(1): 50-68.

Hillygus, D.S. 2005. "The Missing Link: Exploring the Relationship between Higher Education and Political Behavior," *Political Behavior*, 27(1): 25-47.

Hillygus, D.S. and T. Shields. 2005. "Moral Issues and Voter Decision Making in the 2004 Presidential Election," *PS: Political Science and Politics*, 38(2): 201-10.
Reprinted in *Quantitative Methods in Practice*, D. Rochefort (ed) CQ Press, 2006.

Hillygus, D.S. and S. Jackman. 2003. "Voter Decision Making in Election 2000: Campaign Effects, Partisan Activation, and the Clinton Legacy," *American Journal of Political Science*, 47(4): 583-596.

Nie, N. and D.S. Hillygus. 2002. "Where Does Internet Time Come From?: A Reconnaissance," *IT & Society*, 1(2): 1-20.

Nie, N. and D.S. Hillygus. 2002. "The Impact of Internet Use on Sociability: Time-Diary Findings," *IT & Society*, 1(1): 1-29.

OTHER PUBLICATIONS

Zhou, J., D.S. Hillygus, and J. Aldrich. 2019. "Understanding the Trump Win: Populism, Partisanship, and Polarization in the 2016 Election," *Publications of the Bavarian American Academy*, Heidelberg University Press.

Guay, B. and D.S. Hillygus. 2018. "Online Public Opinion Polling," *Oxford Bibliographies*

Hillygus, D.S. and S. Snell. 2018. "Longitudinal Surveys: Issues and Opportunities," *Oxford Handbook on Polling and Polling Methods*. L. Atkeson and M. Alvarez, eds. New York: Oxford University Press.

Hillygus, D.S. and B. Guay. 2016. "The Virtues and Limitations of Election Polling in the United States," *Seminar Magazine*.

Hillygus, D.S. 2016. "The Practice of Survey Research: Changes and Challenges," *New Directions in Public Opinion*, second edition. Adam Berinsky, ed. Routledge Press.

Hillygus, D.S., N. Jackson, and M. Young. 2014. "Professional Respondents in Online Survey Panels," *Online Panel Research: A Data Quality Perspective*. M.Callegaro, R. Baker, P. Lavrakas, J. Krosnick, J. Bethlehem, and A. Göritz, eds.

Frankel, L. and D.S. Hillygus. 2014. "Niche Communication in Political Campaigns," *Oxford Handbook on Political Communication*. Kathleen Hall Jamieson and Kate Kenski, eds. New York: Oxford University Press.

Hillygus, D.S. and B. Burden. 2013. "Mass Polarization in the Bush Presidency," *The Presidency of George W. Bush: Perspectives on the Forty-Third President of the United States*, D. Kelly and T. Shields, eds. Texas A&M Press.

Hillygus, D.S. 2011. "The Practice of Survey Research: Changes and Challenges" *New Directions in Public Opinion*. Adam Berinsky, ed. Routledge Press.

Bishop, B. and D.S. Hillygus. 2011. "Campaigning, Debating, Advertising," *Oxford Handbook on Public Opinion and Media*. Larry Jacobs and Robert. Shapiro, eds. New York: Oxford University Press.

Hillygus, D.S. 2010. "Campaign Effects on Vote Choice," *Oxford Handbook on Elections and Political Behavior*. Jan Leighly and George C. Edwards III, eds. Oxford University Press.

Bishop, B., A. Cooper, and D.S. Hillygus. 2009. "Innovative Survey Methodologies for the Study of Attitudes Toward Terrorism and Counterterrorism Strategies," Institute for Homeland Security Solutions, Duke University.

Hillygus, D.S. 2009. "Guest Editor Introduction: Understanding the 2008 Presidential Election," *Public Opinion Quarterly* 73: 841-844.

Hillygus, D.S. 2009. "The Need for Survey Reporting Standards in Political Science," *The Future of Political Science: 100 Perspectives*, G. King, N. Nie, and K. Schlozman (eds).

Hillygus, D.S. 2008. "Internet and Politics 2008: Microtargeting," *The Publius Project*, The Berkman Center.

Hillygus, D.S. and T. Shields. 2008. "Moderation or Polarization in Candidates' Campaign Agendas?" *The Polling Report*, 24(15).

Hillygus, D.S. 2007. "Moral Values: Media, Voters, and Candidate Strategy," in *A Matter of Faith? Religion in the 2004 Presidential Election*, Brookings Institution Press.

Hillygus, D.S. 2004. Review of Models of Voting in Presidential Elections: The 2000 Election, H. Weisberg and C. Wilcox (eds), in *Presidential Studies Quarterly*, 34(3).

Brady, D. and D.S. Hillygus. 2004. "Assessing the Clinton Presidency: The Political Constraints of Legislative Policy" in *The Clinton Riddle: Perspectives on the 42nd President*, Shields, Whayne, and Kelley (eds). U of Arkansas Press.

Nie, N., D.S. Hillygus, and L. Erbring. 2003."Internet Use, Interpersonal Relations and Sociability: A Time Diary Study" in *The Internet in Everyday Life*, Wellman and Haythornthwaite (eds). Oxford: Blackwell Publishers.

Nie, N. and D.S. Hillygus. 2001. "Education and Democratic Citizenship," in *Making Good Citizens: Education and Civil Society*, Ravitch and Viteritti (eds). Yale University Press.

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CURRENT PROJECTS

Valentino, N., K. Zhirkov, D.S. Hillygus, B. Guay. "Personality Differences between Face-to-Face and Online Samples," R&R, *Public Opinion Quarterly*.

Olanrewaju A., G. Madson, D.S. Hillygus and J. Reiter. "Leveraging Auxiliary Information on Marginal Distributions in Nonignorable Models for Item and Unit Nonresponse in Surveys," under review.

Lopez, J. and D.S. Hillygus. "Why So Serious?: Survey Trolls and Political Misinformation" available at SSRN.

Endres, K. D.S. Hillygus, and S. Snell, "Big Data, Big Problems: Overcoming Barriers to Consent for Data Linking."

HONORS/AWARDS

Duke University Howard D. Johnson Distinguished Teaching Award, 2019.

National Science Foundation, Political Science Program ($3.9m) "ANES Web: American National Election Study," (Co-PI with PI S. Iyengar), 2018-2021.

Provost "Together Duke" Initiative ($454,000), "Duke Polarization Lab" (Co-PI with K. Heller, J. Moody, G. Sapiro, A. Volfovsky and PI C. Bail), 2018-2019

National Science Foundation, Political Science Program, Grant SES-1657821 ($335,690), "Making Young Voters: Policy Reforms to Increase Youth Turnout" (PI with Co-PI J. Holbein) 2017-2019

National Science Foundation, MMS Program, Grant SES-1733835 ($300,000), "Leveraging Auxiliary Information on Marginal Distributions in Multiple Imputation for Survey Nonresponse" (Co-PI with PI J. Reiter) 2017-2019

Bass Connections, Education and Human Development grant ($23,000), 2017-2019

Facebook Academic Program gift ($25,000), 2016

National Science Foundation, Political Science Program, Grant SES-1416816 ($249,999), "Education, Engagement, and Well-being among Adolescents" (PI with Co-PI C. Gibson-Davis) 2014-2016

National Science Foundation, MMS Program, Grant SES-1131897 supplement ($199,000), "Conducting Research Using the Survey of Income and Program Participation (SIPP) Panel Study," 2013-2015

Information Initiative at Duke, Research Incubator Award ($75,000) "Using Big Data to Understand the American Electorate," (with L. Carin), 2013-2015

National Science Foundation, MMS Program, Grant SES-1131897 ($2,997,591), "Triangle Census Research Network" (Senior Co-Investigator with L. Cox, D. Dunson, J. Hotz, F. Li, and PI J. Reiter and Co-PI A. Karr), 2011-2016

National Science Foundation, MMS Program, Grant SES-1061241 ($160,000), "Multiple Imputation Methods for Handling Missing Data in Longitudinal Studies with Refreshment Samples." (with PI J. Reiter), 2011-2012

National Science Foundation, Political Science Program, SES-1110341"Balancing Innovation and Continuity in Longitudinal Surveys"($38,235), 2011

IHSS Award, Innovative Survey Methodologies($25,081), 2009

Robert E. Lane Award for best book published in political psychology in 2008

CAPS Junior Faculty Seed Grant ($5000), 2008

Shorenstein Center for Press and Politics Fellow, Fall 2005

Program on the Global Demography of Aging Grant ($17,130), 2005-06

Institute for Quantitative Social Science Research Grant ($10,000), 2005-06

Institutional Development Initiative ($10,000), 2005-06

Blair Center for Southern Politics, 2004 Election Survey Funding ($85,000)

CAPS Junior Faculty Seed Grant ($5000), 2004-2005

Milton Fund Grant, Harvard University ($3500), 2004-2005

Harvard University Cooke-Clark Grant ($6000)

Westview Paper Prize, 2003 Midwest Political Science Meeting

Heinz Eulau Political Behavior Fellowship, 2002-2003

Best Graduate Student Poster Award, 2002 Political Methodology Meeting

National Conference of State Legislators Women's Graduate Fellowship, 1998

PROFESSIONAL SERVICE

Associate PI, American National Election Study, 2018-2021
Associate Editor, *Political Analysis*, 2018-
Chair, POQ Advisory Committee, 2011-
Methods, Measurement, and Statistics Advisory Panel, National Science Foundation, 2018-2020
Board Member, American National Election Studies, 2010-2013, 2014-2017
Scientific Advisory Committee, U.S. Census Bureau, 2012-2018
Political Science Advisory Panel, National Science Foundation, 2010-2012
Member, Executive Council, Midwest Political Science Association, 2014-17
Member, Executive Council, Southern Political Science Association, 2014-17
Editorial Board, *American Political Science Review*, 2016-
Editorial Board, *Journal of Politics*, 2010-
Editorial Board, *Public Opinion Quarterly*, 2008-
Editorial Board, *Political Communication*, 2015-

Editorial Board, *Journal of Experimental Political Science*, 2013-
Editorial Board, *Political Behavior*, 2011-
Editorial Board, *Journal of Elections, Public Opinion and Parties*, 2008-
Editorial Board, *Political Science Network*, 2007-
Editorial Board, *The Forum*, 2011-
Editorial Board, *Political Analysis*, 2015-2017
Editorial Board, *American Journal of Political Science*, 2009-2012
Guest Editor, *Public Opinion Quarterly* 2009 Special Issue
AAPOR Journals Committee (2019)
APSA EPOVB Best Article in Political Behavior Award Committee (2019)
APSA Experimental Research Section: Reporting Standards Committee (2011)
APSA Political Meth Section: Nominations Committee (2010-2012), Diversity Committee (2005-08, 2011-12), Miller Prize (2017), Emerging Scholar (2018-2020)
SPSA, VO Key Award Committee, 2013
APSA Gladys M. Kammerer Award Committee, 2012
APSA Philip Converse Book Award Committee, 2009, 2010 and 2012
SPSA Program Committee, 2009 and 2012
JOP Best Paper Award Committee, 2011
AAPOR Book Award Committee, 2011, 2016

CONFERENCES ORGANIZED

International Total Survey Error Workshop (6/18)
Conducting Research Using the Survey of Income and Program Participation (SIPP) Panel Study, Durham, NC (2/14)
Balancing Innovation and Continuity in Longitudinal Surveys, Durham, NC (2/11)
Assessing Survey Quality, Cambridge, MA (4/09)
Surveying Multiethnic America, Cambridge, MA (4/07)
Advances in Questionnaire Design, Cambridge, MA (2/06)

Expert Witness Work

League of Women Voters v. State of North Carolina, Case No. 1:13-CV-660
NAACP et al. v. Bureau of the Census et al., Case No. 8:18-CV-00891
New York Immigration Coalition v. Dept. of Commerce, Case No. 18-CV-5025

INVITED PRESENTATIONS(last 5 years)

Plenary, Pacific Association of Public Opinion Research Meeting (12/19)
Massachusetts Institute of Technology (10/19)
Michigan State University (9/19)
Plenary, American Association of Public Opinion Research Meeting (5/19)
University of North Carolina (2/19)
Emory University (11/18)
Duke Alumni Association of Philadelphia (4/18)
Duke Alumni Association of Los Angeles (6/17)
Duke Alumni Association of Austin (6/17)
Duke Alumni Association of Denver (5/17)
Fordham University (4/17)
Qualtrics Innovation Summit, Salt Lake City (3/17)
Stanford Alumni Association, Durham (2/17)

Duke Alumni Association of San Diego (11/16)
Wake Forest University (11/16)
Reed College (10/16)
UNC-Wilmington (10/16)
Duke Alumni Association of North Texas (9/16)
Duke Alumni Association of Charlotte (5/16)
Dept of Political Science, MIT (4/16)
Center for the Study of Democratic Politics, Princeton (3/16)
Appalachian State University (3/16)
Computers, Privacy, and Data Protection Conference, Brussels (1/16)
Political Persuasion Conference, Laguna Beach, CA (1/16)
Duke Alumni Association of Tampa (1/16)
Keynote, Australian Society for Quantitative Political Science, Melbourne (12/15)
Dept of Communication, U. of Michigan (11/15)
Dept of Political Science, UNC-Greensboro (11/15)
Microsoft Panel on Campaign Technology, D.C. (11/15)
Political Science Dept, U. Texas (12/14)
ElectionsLive!, Duke University (11/14)
American Politics Research Group, UNC (11/14)
American Politics Workshop, UCLA (01/14)
The American Panel Survey Workshop, Wash U (11/13)
Intro to Survey Methods, Shanghai Jiao Tong University (06/13)
Senior Scholar Career Presentation, Visions in Methodology, FSU (04/13)
American Politics Workshop, Yale University (03/13)
Google Political Innovation Summit, New York (01/13)

DEPARTMENTAL AND UNIVERSITY SERVICE

Founding Director, Duke Initiative on Survey Methodology, 2010-
Associate Director, Institutional Review Board, Duke University, 2010-
Social Science Research Institute Steering Committee, 2011-
Duke Advisory Committee on Investment Responsibility, 2017-
EHD-Bass Connections Team Leader, 2017-2020
Standing Committee for Misconduct in Research, 2019-2022
Social Science Research Institute (SSRI) Director Search chair, 2018
Faculty Fellow, Duke Alumni Association, 2015-2018
POLIS steering committee, 2015-2017
Social Science Research Institute Planning Committee, 2012
Behavior and Identity Field Chair, 2011-2012, 2014, 2016-2018
Behavior and Identity Workshop Organizer, 2010-2012, 2016
American Politics Field Organizer, 2010-2012
REP Search Committee, Duke Political Science, 2013, 2017
China Search Committee, Duke Political Science, 2011
Graduate Admissions Committee, Duke Political Science, 2009, 2014
Undergraduate Curriculum Committee, Duke Political Science, 2009
Faculty Organizer, Duke Political Science Graduate Orientation, 2009
Harvard University Faculty Advisory Group for Metrics and Analysis, 2006-2009
Faculty Advisory Board for the Social Sciences, Harvard FAS, 2008-2009

Executive Committee, Center for American Political Studies, 2003-2009
Organizer, Political Psychology and Behavior Workshop, 2003-2008
Standing Committee on Women, Harvard FAS 2004-2005

BC-DOC-0000028370

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, and DIANA MARTINEZ, et al., COUNTY OF SANTA CLARA, CALIFORNIA, et al., STATE OF NEW YORK, et al., Defendant-Intervenors.	Civil Action No. 2:18-cv-00772-RDP

RULE 26(A)(2)(B) EXPERT REPORT AND DECLARATION OF KIMBALL W. BRACE

EXPERT REPORT AND DECLARATION OF KIMBALL W. BRACE
MARCH 13, 2020

I. Introduction

My name is Kimball William Brace. I am the president of Election Data Services, Inc. ("Election Data Services" or "EDS, Inc."), a Manassas, Virginia-based consulting firm whose specialty is reapportionment, redistricting matters, election administration issues, and the census.

I have been retained by all of the Defendant-Intervenors in *Alabama, et al. v. Department of Commerce, et al.*, 2:18-cv-00772-RDP. My understanding of the case is that Alabama seeks to require the federal government to exclude undocumented immigrants from congressional reapportionment calculations, and that Alabama alleges that it will lose a congressional seat that it otherwise would have kept following the 2020 census if undocumented immigrants are not excluded from the apportionment count. I have been asked by Defendant-Intervenors to provide background and history on the congressional reapportionment process, including my continuing involvement with creating EDS, Inc.'s yearly reapportionment reports based on United States Census Bureau ("Census Bureau") population estimates from the Population Estimates Program that are also released yearly. I have also been asked to review and opine on the report and supplemental report submitted by Plaintiff's expert witness, Dr. Dudley Poston, in this case.

All the materials considered in forming the opinions contained herein are identified in this report. I am being compensated at an hourly rate of $275 per hour for my work, and at an hourly rate of $185 for work performed by another Election Data Services staffer.

II. Background and Qualifications

I attended American University in Washington, D.C., from 1969 through 1974 (having taken a year off for the 1972 campaign), where I earned a B.A. degree in Political Science. I started Election Data Services in 1977 and have been with the company since that time. Prior to 1977, I was a journalist and was employed by such companies as NBC News, Congressional Quarterly, and Plus Publications.

As president of Election Data Services I supervise and direct all major projects in which the company is involved. Election Data Services has been viewed by clients, the press, academics, and the general public as a research facility and consulting firm dealing with many aspects of the electoral process. The company and its staff have been hired by state and local governments across the nation to provide software, database development services, and consulting services for the creation of districting plans and the analysis of many aspects of the redistricting process.

Since 1979, I, individually and with Election Data Services, have been actively involved in many aspects of the redistricting process, having gone through four full census and redistricting cycles. I have been a consultant to many state and local governmental organizations around the nation, providing strategic advice and consulting on redistricting matters, coordinating the development of extensive databases used in the redistricting process, creating

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and assisting others with the creation of districting plans, and analyzing many aspects of districts and district configurations. Over the past 41 years, Election Data Services's clients for redistricting services have come from more than half the states in the nation. In addition, over the past four decades I have been called upon to provide reports, expert witness testimony, and assistance to attorneys in more than 75 different court cases.

I frequently give speeches to groups and organizations and participate in numerous conferences and panels on various aspects of apportionment, redistricting, and the census. Since the early 1980s, I have been a regular participant and speaker at annual and bi-annual meetings of the Task Force on Redistricting of the National Conference of State Legislatures ("NCSL"). I have also been on their faculty, as NCSL has conducted five regional "Get Ready for Redistricting" seminars each decade since 1980. I was also appointed by the U.S. Secretary of Commerce to the 2010 Census Advisory Committee, a 20-person advisory board to the Director of the Census Bureau. Just this week I was asked to be NCSL's representative on a series of half-day small-group expert meetings, being arranged by the Committee on National Statistics (CNSTAT), to delve deeply into and provide informal discussion/feedback with Census Bureau staff as they continue to develop the differential privacy-based Disclosure Avoidance System for the 2020 census. I am regularly called upon by members of the press with questions on redistricting, reapportionment, the census, election administration issues, and politics in general.

For the past four decades I and Election Data Services have studied and issued yearly reports on the apportionment process using new population estimates released by the Census Bureau and private demographic firms. All of our reports can be found at our website: www.electiondataservices.com, under the "Research" tab. We have become a staple for the press and others to cite when looking at the shift that is occurring in population between different states.

A copy of my curriculum vitae is attached as **Exhibit A**, which includes a complete list of cases in which, during the previous four years, I have testified as an expert at trial or by deposition.

III. Summary of Conclusions

Based upon my decades of experience with congressional reapportionment, population projections, and the census generally, it is my opinion that Dr. Poston does not show with any level of certainty that Alabama will lose its seventh congressional seat following the 2020 census if undocumented immigrants are not excluded from the population counts. In addition, it is my opinion that Dr. Poston does not show with any level of certainty that Alabama will retain a seventh congressional seat following the 2020 Census as a result of excluding undocumented immigrants from the apportionment count. Finally, it is my opinion that Dr. Poston's argument that all states should have the same average congressional district population size, and that this is better achieved by excluding the undocumented population, is specious. Dr. Poston ignores the constitutional requirement that each state be assigned at least one congressional seat, which results in a wide range of congressional district sizes across states.

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With respect to his apportionment calculations, Dr. Poston makes the following series of mistakes and assumptions that render his ultimate conclusions unreliable:

First, Dr. Poston's projections of the 2020 resident populations of each state are not a reliable projection of the resident population of each state on Census Day, or April 1, 2020. Dr. Poston uses a long-term trend line to project the 2020 resident population of each state, notwithstanding the fact that such a projection incorporates population changes early in the decade which may not apply to more recent conditions. More importantly, Dr. Poston's projections are not a projection of the resident population of each state on April 1, 2020, the count of the population necessary for congressional reapportionment, but instead appear to be a projection of the resident population of each state on July 1, 2020, three months past census day.

Second, Dr. Poston's projections of the overseas population of each state are not reliable projections of the overseas population of each state on April 1, 2020. Dr. Poston assumes, without any basis, that the proportion of the overseas population of each state on April 1, 2020, will be the same proportion of the overseas population of each state on July 1, 2010. Not only did Dr. Poston fail to explore whether this assumption was appropriate, Dr. Poston was unaware that the Census Bureau changed the way that it will count certain portions of the overseas population from the 2010 census to the 2020 census. Dr. Poston then added his unreliable projections of the 2020 overseas population of each state to his unreliable projections of the 2020 resident population of each state to calculate an unreliable 2020 apportionment population.

Third, Dr. Poston's projections of the undocumented population of each state are not reliable projections of the undocumented population of each state on April 1, 2020. Dr. Poston assumes, without any basis, that the proportion of the undocumented population of each state on April 1, 2020, will be the same proportion of the undocumented population of each state in 2016. Dr. Poston then subtracted his unreliable projections of the 2020 undocumented population from his unreliable projections of the 2020 apportionment population and used these numbers to run a flawed apportionment calculation.

Fourth, even if Dr. Poston had developed a way to more reliably project the 2020 apportionment population and his calculations showed Alabama would lose a seat, the issue still remains whether he can reliably claim with any level of certainty that the loss would come about, because the apportionment process is so susceptible to small changes. As explained in more detail below, because Alabama is so close to gaining its seventh seat back under any of the projections in Election Data Service's 2019 Reapportionment Analysis ("2019 EDS, Inc. Report"), Alabama could very possibly keep or lose its seventh seat when the new numbers become available.

Finally, Dr. Poston compares his apportionment results in his first report to the 2019 EDS, Inc. Report results. But these comparisons are not appropriate because the calculations are based on different inputs.

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IV. United States Congressional Reapportionment and the Method of Equal Proportions

As required by the Constitution, each state is provided at least one initial seat in the House of Representatives. The apportionment of the remaining 385 congressional districts or seats to the states is governed by the "method of equal proportions" formula that was adopted by Congress in 1941. The formula works as follows:

> The [remaining 385] seats are handed out based on statistical "priority values" assigned to each additional seat that a state might get. In as close to plain English as the formula will allow, these priority values are calculated in a two-step process that requires dividing a state's population by the square root of the product of the number of seats it's already been assigned and that number plus one. The priority numbers are then rank ordered: "State A" will get an additional seat if its priority value for that seat is greater than any other state's. The seats are disbursed to states based on these rankings until all 435 have been awarded.[1]

Each decade, by December 31, in the year ending in zero, the Census Bureau releases the initial state-level resident total population results, counts of military and other U.S. government employees and their families living abroad, and the resulting apportionment population counts for each state by December 31, in the year ending in zero. At the same time, the Census Bureau performs the administrative task of running the state numbers through an apportionment program that is based on the method of equal proportions to determine the number of representatives to which each state is entitled. They release the results of both the census counts (by state) and the apportionment results that same day.

Some states and many commentators interchange the terms reapportionment and redistricting to describe the process that occurs each decade with the taking of the census. However, they are two different and rather distinct processes. I always say that reapportionment is the process by which seats or districts are assigned **to** an area, such as congressional districts being assigned **to** different states. Redistricting, however, is the process whereby districts are drawn or created **within** that area. Before the Supreme Court's one-person, one-vote rulings in the 1960s relating to state legislative districts, a number of states allocated State Senate districts to their counties, hence they called the process "reapportionment," even though the process was in fact redistricting.

V. EDS, Inc.'s Reapportionment Work

A. EDS, Inc.'s Initial Involvement with Reapportionment

As noted above, EDS, Inc. first developed a computer program to calculate apportionment results according to the method of equal proportions in the early 1990s. We also

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[1] Greg Giroux, *Before Redistricting, That Other 'R' Word*, CQ Weekly (Nov. 30, 2009); *see also* Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

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programmed options so that we could, for example, include the District of Columbia in an apportionment calculation or change the total number of congressional seats. We did this in the event additional states came into existence, or in the event someone inquired about the impact of adding seats to the House of Representatives.

Since the early 1990s we have studied and issued yearly reports on the apportionment process as new population estimates have been released both by the Census Bureau (as part of the Bureau's Population Estimates Program, discussed below), and by private demographic firms. Our annual studies are usually released the same day the Census Bureau releases its population estimates (usually in late December) and can be found on our website: http://www.electiondataservices.com/, under the "Research" tab. All our historical studies (back to when we started them in 1994) and press releases are also kept on our website, available for all to see. The same tables have also been generated from the final official decennial population numbers for each decade from 1940 to 2010. Our website also has a historical table, that we have continued to update, showing the number of seats given to each state each decade back to the nation's founding in 1789.

B. EDS, Inc.'s Reapportionment Reports

When the Census Bureau releases the final state apportionment population counts by December 31 of any year ending in zero, the Census Bureau also reports its apportionment calculations. However, the Census Bureau does not report any calculations for how close or how far away each state was from gaining or losing an additional seat. In addition to reporting its apportionment calculations, the Census Bureau also reports as a separate column of the overseas counts (both military and non-military overseas residents), so EDS, Inc. is able to create a separate apportionment table showing whether the overseas numbers caused a state to gain or lose a seat.

In contrast to the Census Bureau's apportionment counts and calculations, EDS, Inc.'s reapportionment program calculates not only how many seats each state would receive based on the population or other numbers put into the formula, but it also calculates and reports the number of people a state gained its last seat by or lost the next seat by. EDS, Inc.'s program, using the Census Bureau's reporting creates a separate apportionment table showing whether the overseas numbers caused a state to gain or lose a seat. It also reports the last seat number that is given to a state, as well as what number seat the next district would be if the calculations continued past the 435 seat cut-off. The program allows the user to change the maximum number of seats to be calculated. Finally, the program calculates the ideal district size for each state, by taking the state's total population and dividing it by the number of seats that the state has been awarded.

Our current report was generated on December 30, 2019 and is available on the front page of EDS, Inc.'s webpage. A copy of the 2019 EDS, Inc. Report is also attached to this document as **Exhibit B**.

This new study follows our normal practice of taking the census's new state-level total resident population estimates, using a straight line projection to move the estimates forward to be

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as of April 1 in the year ending in zero (to correspond to when the census is taken), and then using the resulting state resident population projections as input to the apportionment program. We have always recognized the importance of showing population estimates to correspond to Census Day (April 1) because this is the population count necessary for apportionment, and have always projected the last year of estimates to be $9/12^{th}$ of a year (i.e., from July 1 to April 1, or nine months). EDS, Inc. has never, however, included any projections in its yearly apportionment studies for the overseas population because there have not been any reliable numbers available for such projections. EDS, Inc. has also never attempted to calculate projections of the undocumented population because available estimates of this population vary widely.

It is important to note that estimates from the Population Estimates Program are based on the premise of a data date of July 1 for each year (i.e., different from Census Day of April 1).[2] While the Census Bureau uses the enumerated resident population from the 2010 census as a starting point for all post-2010 population estimates, they modify the data to produce the "April 1, 2010 Population Estimates base" so that the data reflect the following information:

1) Changes brought about by the Count Question Resolution program, where local jurisdictions can challenge their decennial census results. Successful changes are incorporated into the estimates base.
2) Legal boundary changes. While this does not impact state-level population numbers, it will impact county, city or town boundaries within a state (these jurisdictions also see population estimates being generated over the decade).
3) Revisions to racial categorizations, most significantly the "Some other race" category. Again, this does not impact the state-level total population estimates used in the reapportionment studies.[3]

Each year when the Census Bureau releases their state estimates for the current year, part of the Population Estimates Program also revises all past year's estimates in that decade. As the Census Bureau's documentation notes:

> With each annual release of population estimates, the Population Estimates Program revises and updates the entire time series of estimates from April 1, 2010 to July 1 of the current year, which we refer to as the vintage year. We use the term "vintage" to denote an entire time series created with a consistent population starting point and methodology. The release of a new vintage of estimates supersedes any previous series and incorporates the most up-to-date input data and methodological improvements.[4]

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[2] U.S. Census Bureau, *Methodology for the United States Population Estimates: Vintage 2019, Nation, States, Counties, and Puerto Rico – April 1, 2010 to July 1, 2019* 1 (2019), *available at* https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2010-2019/2019-natstcopr-meth.pdf (hereinafter "Methodology for the U.S. Population Estimates").

[3] *Id.* at 2-3.

[4] *Id.* at 1.

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These revisions to the estimates reflect new information Census Bureau staff may have received from the states on their births, deaths and migration estimates in previous time periods.[5] As a result, EDS, Inc. always completely replaces the entire decade's estimates for each state for each year with the Census Bureau's new tables.

Over the decades, EDS, Inc. has also developed a spreadsheet that automatically calculates both raw number and percentage changes for individual yearly population data, as well as multiple time period changes. This allows us to test multiple time period ranges to see whether different time periods will yield different apportionment results. In each of the past two decades we have observed that different national events have caused changes in population movements. For example, we could see how the 2008 recession significantly changed the nation's growth pattern for not only that year, but for several subsequent years into the next decade.

As a result of these observed changes, for the past several years we have generated different trend line scenarios, and given them easily recognized names (such as "long-term trend," "mid-term trend," and "short-term trend") and then utilized them in our studies. With each new year's estimates, the years covered by these trends may change, but generally the "long-term trend" looks at the entire decade's worth of change to calculate. Usually the "short-term trend" period only covers the immediate one or two years of change, in order to project the population estimates forward.

When we performed the analysis for our 2019 EDS, Inc. Report, we discovered and reported that all the different trend models ultimately produced the same overall outcome results as it relates to reapportionment results. We theorized that this was because of the very short time before April 2020 (basically nine months from the July 1, 2019 date of the 2019 estimates) resulted in the projections not shifting much in the trending forward process. It is unusual for this to happen, but we observed that the different trend models did produce different margins of how much a state gained or lost a seat by, and where states fell at the 435-seat cut-off point. As a result, the EDS, Inc. 2019 Study focused on using the "short-term" trend model to generate 2020 populations for apportionment. A short-term trend projection that focuses on more recent population changes is a better projection of what will happen on April 1, 2020 when compared to a long-term trend projection that incorporates and potentially amplifies population changes earlier in the decade.

i. A Number of States Are Close to Gaining or Losing a Seat in the 2019 EDS, Inc. Report

The apportionment process is very susceptible to small changes in the population. As a result, one of the focuses of our studies is to see which, and how many states are "sitting on the edge" of the 435-seat cut-off for the allocation of seats in Congress, but most importantly by what margin of gain or loss. Each of our studies contains a table that shows which states receive seat numbers 430 through 435, and which states just missed the cut-off by receiving theoretical seats numbers 436 through 440. Each year different states fall into this "watch" category, as population estimates change and different states get seat numbers around the magic 435 cut-off

[5] *See id.*

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each year, particularly if they would have received seat number 436. Any state that falls into seat ranges 429 through 440, particularly if they gained or lost the seat by under 50,000 people, could very possibly change when new numbers become available.

The 2019 EDS, Inc. Report shows the State of Alabama would receive seat number 436, or, in other words, would just miss that last seat (435) by only 10,072 people, assuming all other state populations stay the same.[6] Although our 2019 EDS, Inc. Report shows Alabama losing a seat, in earlier parts of the decade the margin that Alabama would lose their seventh seat by was much larger than it is in our new study. Our 2015 study showed Alabama would lose that seat by 64,891 people.[7] By the time of our 2018 study, Alabama's loss margin dropped to just over 40,000 people,[8] and, as noted above, the margin is now only 10,072.

Other states are also close to the cut-off mark, at least one by a smaller number of people: Montana would gain back their second seat by only 2,402 people to spare.[9] To demonstrate how susceptible the states are to gain or lose a seat, I took away 2,403 people from the Montana estimate, leaving it with 1,072,507 people, and re-ran the apportionment calculator. In this revision Montana lost its second seat and went back to receiving just a single seat. As a result of this small change, and with every other state keeping the same population estimates, the State of Alabama would avoid losing its seventh seat by a margin of only nine (9) people. This is without adding the overseas population to the resident population, subtracting undocumented immigrants from the apportionment population count, or considering any other factors that may ultimately affect the counting process. **Exhibit C** attached to this report are the results of a revised 2019 apportionment table reflecting the above population changes and resulting apportionment.

Because a number of states are "sitting on the edge" and by relatively close margins, it's very likely that the final official population totals released at the end of the year will produce a different shift in where states fall at the 435-seat cut-off mark. Certainly, the addition of the overseas population, which we have no way of reliably projecting, will also shift these final seat assignments.

ii. Factors That Contribute to Uncertainty in Apportionment Projections

There are a wide range of factors that will ultimately impact the final population numbers. As noted in the 2019 EDS, Inc. Report,[10] there are several factors that govern any apportionment study that deals with population estimates, as well as several factors that govern specifically relevant to the 2020 congressional reapportionment. As explained below, these include:

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[6] Exhibit B at 4.
[7] Election Data Services, *2015 Reapportionment Analysis* at Appendix 2020Proj10-15 (Dec. 22, 2015), *available at* https://www.electiondataservices.com/wp-content/uploads/2015/12/NR_Appor15wTables.pdf.
[8] Election Data Services, *2018 Reapportionment Analysis* 3 (Dec. 19, 2018), *available at* https://www.electiondataservices.com/wp-content/uploads/2018/12/NR_Appor18.pdf.
[9] *Id.*
[10] Exhibit B at 3.

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- What is the method used to project estimates forward to Census Day, 2020?
- How well will the census be conducted this year? Will the Internet option for filling out the form work?
- Will people respond to the census? Will the citizenship question debate over the past year cause some people to not respond?
- How will the addition of overseas military populations impact apportionment? What impact will the change in method of counting overseas military impact the additional numbers?
- What will be the impact of the current COVID-19 crisis?

a. What is the method used to project estimates forward to Census Day, 2020?

All firms or entities that create population estimates always pick a specific date in time their estimates reflect. Some are good as of January 1 or December 31. For instance, the Census Bureau Population Estimates Program uses July 1, a date which tends to follow state fiscal year dates and when the states update their own source data. This becomes important when one uses a time series of estimates to project the data forward to something like Census Day (officially April 1). If a researcher uses a whole number of years to project the Census Bureau's estimate data forward to Census Day, then they will either fall nine months short or (as Dr. Poston does in his report and admitted at his deposition)[11] three months longer in time. In the event the estimate includes an extra three months of change, it will include extra births, deaths, and migrations, [12] and the resulting population numbers are likely to be higher than expected. The bottom line, however, is that Dr. Poston's data does not constitute a projection of the population on Census Day, the day relevant for congressional reapportionment.

I have also seen instances where different population time series will create different population projections. This is why EDS, Inc. has its time series calculate not only the individual year population changes, but also population changes for parts of a decade (for example, for 2011 through 2019, and then from 2012 through 2019, followed by 2013 through 2019, etc.). We've particularly seen different population projections being created in the first half of the decade, as projections forward are much more susceptible to slight changes that get magnified at the end of the decade.

b. How well will the census be conducted this year? Will the Internet option for filling out the form work?

There has been a wide-ranging discussion over the past several years about whether enough funds will be, or have been, allocated to conduct this census. This was a problem initially raised in the first part of this decade, as planning and development of programs for the 2020 census were being formulated. Advocacy groups have expressed concerns that not enough funds were allocated to the Bureau early enough in the decade to conduct all the planning steps

[11] Sworn Declaration and Expert Report of Dudley L. Poston, Jr., Ph.D. (Jan. 23, 2020) ("Poston Report") at 14; Supplement to Sworn Declaration and Expert Report of Dudley L. Poston, Jr., Ph.D. ("Poston Supp. Report") at 3; February 27, 2020 Transcript of Deposition of Dudley L. Poston, Jr., Ph.D. ("Poston Dep.") 41:20-42:2, 43:1-6.
[12] *See* Methodology for the U.S. Population Estimates at 1.

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necessary to ensure a good census. Instead of four testing sites, for example, the Census Bureau had to cut back to only one location in order to test out some of their processes.[13] Moreover, if different hard to count groups are not properly enumerated, then population counts could suffer, including final state resident population data for states with larger hard-to-count populations.[14]

There have also been concerns surfacing over the past several weeks on whether the Internet option for filling out the census form will work properly. This is the first time the Census Bureau will implement a primarily online census.[15] The sudden decision to change from the vendor-provided solution to one developed in-house has surfaced immense concerns.[16] While the Census Bureau has touted the Internet option as a new improvement to the whole census experience in this new decade, it remains to be seen if all groups will accept and make use of this process.

These are just a few examples of where things might go wrong as the census is conducted over the next several months. Any or all these problems have a potential of impacting the census and are likely to result in different population counts being generated. As a result, state reapportionment calculations would be impacted and change the likely outcome.

c. Will people respond to the census? Will the citizenship question debate over the past year cause some people not to respond?

There is also the issue of whether people will respond to the census, and the impact of the citizenship question debate on response rates. While this issue could apply to several individuals or groups over the next several months, this is of great concern in the Hispanic community because of last year's attempt by the Trump Administration to add a citizenship question to the 2020 census questionnaire. Although the decision was enjoined by the courts, there is still concern that discussion of the larger citizenship issue will cause large numbers of this group to not answer the census.

d. How will the addition of overseas military populations impact apportionment? What impact will the change in method of counting overseas military impact the additional numbers?

Since at least the 1990 census, the Census Bureau has created the total state population numbers that are used for apportionment by adding each state's overseas population (which primarily includes military personnel, but also includes other civilian employees of the U.S. government and their dependents) to their respective resident population. For 2020, however, and as noted elsewhere in this report, the Census Bureau and the Department of Defense have modified the way the military overseas population will be counted. The new residency rules

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[13] Michelle Wines, *Census Officials Say Rhode Island Rehearsal is Going Well. Not Everyone Agrees*, N.Y. Times (Apr. 28, 2018), https://www.nytimes.com/2018/04/28/us/2020-census-test-rhode-island.html.

[14] Hard-to-count groups are groups that that the Census Bureau identifies as difficult to fully enumerate, including children and certain racial and ethnic minorities.

[15] Nick Brown, *Census Says Switching Software for U.S. Population Count*, Reuters.com (Feb. 13, 2020), https://www.reuters.com/article/us-usa-census-technology/census-says-switching-software-for-u-s-population-count-idUSKBN2072SN.

[16] *Id.*

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released by the Trump Administration in the last several years will take short-term "deployed" military personnel and count them back at the states of their usual residence in the United States. They will be counted as part of their respective states' resident population for both apportionment and redistricting purposes. This means that they will no longer constitute part of the overseas population.

In contrast, in 2010 deployed military personnel were counted at their "home state of record," the address they provided when they entered military service. They were counted only as part a state's overseas population, but not the state's resident population, and were counted only for apportionment purposes. Department of Defense documents seem to indicate the new rules regarding deployed personnel will reduce the military overseas population by about 15% because deployed personnel will instead be counted as part of the resident population of the states of their usual residence in the United States.[17]

The addition of the military overseas population has affected the reapportionment process twice since 1990. In 2000, had the overseas populations not been included in the apportionment calculation, North Carolina's surprise gain of a seat would have instead gone to the state of Utah.[18] Utah would have gained the 435th and final seat, with just 691 persons to spare, while North Carolina would have missed the seat by 2,493 people.[19] North Carolina's gain was directly attributable to the way the overseas population was counted. That decade, individuals were allocated to states using the "home of record" in their personnel files, or the state from which Americans overseas entered government service. Although several military bases are in the state of Utah, the number of North Carolina residents living overseas was almost six times the number of Utah residents overseas.

The inclusion of overseas personnel for congressional apportionment had a similar impact following the 1990 census. In 1990, the state of Washington gained a seat at Massachusetts' expense after the overseas population was included in the apportionment calculations.[20]

e. What will be the impact of the current COVID-19 crisis?

With three weeks to go before Census Day, the rapidly changing coronavirus crisis is bound to impact how the Census is taken and could impact the apportionment results. The fact that many college campuses are closing, and students sent home, raises the question of where they will be counted.[21] For students that go to school out of state, will they still have an

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[17] Hansi Lo Wang, *Restrictions On Deployed U.S. Troop Data Could Put 2020 Census 'At Risk'*, NPR (Feb. 25, 2019), https://www.npr.org/2019/02/25/697315761/restrictions-on-deployed-u-s-troop-data-could-put-2020-census-at-risk.

[18] Election Data Services, *2000 Census Counts Produce Surprises in Congressional Delegations* 2 (Dec. 28, 2000), https://www.electiondataservices.com/wp-content/uploads/2014/12/reap2000_nr.pdf

[19] *Id.*

[20] Margo Anderson and Stephen E. Fienberg, *A Short Story About the Reapportionment of Congress and the 1990 Census*, UWMilwake (accessed Mar.13, 2020), https://sites.uwm.edu/margo/history-myth-making-and-statistics/.

[21] Lily Jackson, *Universities Across the State End Lectures, Go Online*, AL.com (Mar. 13, 20220), https://www.al.com/coronavirus/2020/03/auburn-and-samford-end-lectures-universities-cancel-travel-as-alabama-prepares-for-coronavirus.html.

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attachment to the college campus when the census form arrives in the mail, or will they fill it out based on their parents' address? This could have a significant impact on states with large college populations, like Alabama. More than 100,000 undergraduate students attend public four-year colleges in Alabama.[22] Where will the over 100,000 students be counted, particularly if they are sent home during the census?

VI. ISSUES WITH DR. POSTON'S REPORTS

I reviewed Dr. Poston's initial report and supplemental report. Methodologically, there are a number of issues with Dr. Poston's projections in both reports, which I have outlined below. These issues render Dr. Poston's projections unreliable. Even if Dr. Poston had conducted sound projections, however, because of the closeness of Alabama to the magic 435 cut-off mark, it is impossible to say with any level of certainty that not excluding undocumented immigrants will cause Alabama to lose its seventh congressional seat. Given the unreliability in Dr. Poston's projections and the fact that so many issues are still in flux on the eve of the 2020 census, it is my opinion that Dr. Poston cannot reliably predict that Alabama will lose its seventh congressional district following the 2020 census. In addition, it is my opinion that Dr. Poston cannot reliably predict that Alabama would keep its seventh congressional district following the 2020 census as a result of excluding undocumented immigrants from the apportionment population counts.

A. Projection of the 2020 Resident Population

There are several problems in the method Dr. Poston's uses to project his population numbers forward to correspond to 2020. Dr. Poston uses a long-term trend line to project the 2020 resident population of each state, notwithstanding the fact that such a projection incorporates population changes early in the decade that resulted from factors that do not reflect more recent conditions. More importantly, Dr. Poston's projections are not a projection of the resident population of each state on April 1, 2020, the count of the population necessary for congressional apportionment, but instead it appears Dr. Poston's numbers are a projection of the resident population of each state on July 1, 2020, three months after Census Day.

i. Trend Line Used by Dr. Poston

Dr. Poston has adopted a "long-term" model where he looks at the trend in the overall decade (2010 through 2018, or 2010 to 2019 in his supplemental report) to project his data forward.[23] He attempted to create "annualized" change estimates (average change of the whole decade, reflected as an annual number) that he then added to the 2018 and 2019 Census Bureau estimates.[24]

By taking all ten years into account Dr. Poston is giving too much weight to demographic and population changes that occurred at the beginning of the decade that no longer have an

[22] *Public Four-Year FTE, Fall 2019*, Alabama Commission on Higher Education, *available at* https://ache.edu/ACHE_Reports/Reports/SDB_Reports/FTE/FTE-4YR-Fall-2019.pdf.
[23] Poston Report at 14; Poston Supp. Report at 3.
[24] *Id.*

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impact, such as the 2008 recession. Because of the immediacy of Census Day, a short-term trend projection that focuses on more recent population changes is a better projection of what will happen on April 1, 2020.

ii. Incorrect Starting Point for Projections

The Census Bureau's population estimates series is built around the prospect that the numbers are an estimate of the resident population as of July 1 of each year. As a result, the Census Bureau publishes "adjusted 2010 Census numbers" to correspond to the different July 1 timetable, as opposed to the official 2010 census count numbers from April 1.[25] In addition, the Census Bureau updates the population estimates base to reflect changes brought about by their Count Question Resolution program.[26] This program allows jurisdictions to challenge their population counts, and successful challenge results are incorporated into the estimate program.[27]

I follow the Census Bureau's practice and always use the "adjusted 2010 Census numbers" as the starting point in the EDS, Inc. projection models. [28] Dr. Poston's calculations, however, are anchored to the April 1, 2010 census counts, not the July 1, 2010 starting point for the Census Bureau estimates series.[29] This is problematic not only because it ignores adjustments to the 2010 census count numbers that better reflect the population, but also because Dr. Poston subtracted April 1, 2010 census counts from the July 1, 2018 (or 2019) Census Bureau estimates, and divided this number by nine instead of nine and one third. In other words, Dr. Poston did not correctly annualize the differences that he then added to the 2018 (or 2019) Census Bureau estimates.

iii. Incorrect Ending Point for Projections

Dr. Poston also does not have a correct ending point for his projections. Dr. Poston used a whole number of years to project the Census Bureau estimates forward to 2020.[30] Because Dr. Poston used a whole number of years to project the Census Bureau's July 1 population estimate data, his projections fall three months over in time from Census Day.[31] This means that Dr. Poston's resident population projections include births, deaths, and migrations for a three-month period beyond Census Day. Put another way, Dr. Poston's population projections are not estimates of the apportionment resident population on Census Day, the population needed for congressional reapportionment, but for July 1, 2020, a date that has no significance to congressional reapportionment.

B. Projection of overseas populations and impact of changes to residency rules

Dr. Poston attempted to project the 2020 overseas population for the states by calculating the proportion of each state's 2010 resident population to the 2010 overseas population and

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[25] *Methodology for the U.S. Population Estimates* at 1.
[26] *Id.* at 2-3.
[27] *Id.*
[28] *See id.* at 1.
[29] Poston Report at 14; Poston Supp. Report at 3; Poston Dep. at 97:4-98:14.
[30] Poston Report at 14; Poston Supp. Report at 3; Poston Dep. at 41:20-42:2, 43:1-6, 97:4-98:14.
[31] Poston Report at 14; Poston Supp. Report at 3; Poston Dep. at 41:20-42:2, 43:1-6.

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applying those proportions to his 2020 resident population projections.[32] Those resulting numbers were then added to his 2020 resident population estimates to create his 2020 apportionment counts.[33]

Dr. Poston's overseas population estimates are highly problematic because there is no indication that each state's proportion of the overseas population in 2010 will be the same proportion in 2020. We know the proportions are very likely to be different because of changes, discussed above, to the residency rule dealing with how the overseas population will be counted in 2020. Despite the fact that this information was cited in the 2019 EDS, Inc. Report, Dr. Poston was apparently not aware of these changes when he decided to apply the 2010 proportion of each state's overseas population to his 2020 projections, nor was he aware of the way in which the overseas population was counted in 2010.[34] Changes in foreign policy will also likely impact the overseas population counts for 2020, and no good data is available to determine how much of an impact this will have.

A look at past overseas population state proportions further highlight Dr. Poston's flawed assumption. For the past three censuses the numbers of the overseas population have significantly changed with each decennial census, in both raw numbers and the percentages they represent of the total apportionment count. In 1990, the Census Bureau reported 919,810 individuals living overseas, but in 2000 it dropped to only 574,330. This ballooned to 1,039,648 in 2010. While these represented low percentages of the total apportionment population count (0.37% in 1990, 0.20% in 2000, and 0.34% in 2010), there is a great deal of variation in the individual states' percentages. Further, within states the overseas population numbers see changes in the thousands from decade to decade. For example, in 1990, California's overseas population was 88,033 and constituted 0.24% of its total apportionment population. In 2000, California's overseas population fell to 59,150 and constituted 0.17% of its total apportionment population. Finally, in 2010, California's overseas population jumped back up to 79,229 and constituted 0.27% of California's total apportionment population. Tables for each decade's overseas numbers are attached as **Exhibit D.**

At best, Dr. Poston's projections of the 2020 overseas population are a guessing game, based on an assumption that is not supported by any facts, and should be disregarded.

C. Undocumented Immigrant Population

The central claim in Dr. Poston's report is that it is substantially likely that the continued inclusion of undocumented immigrants in the 2020 census apportionment population will cause the State of Alabama to lose a congressional seat in 2020. In addition, he claims it is likely that the exclusion of undocumented immigrants from the apportionment population will allow Alabama to keep a seventh congressional seat.[35] Because there are no Census Bureau state-by-state estimates of undocumented immigrants, Dr. Poston uses four-year old estimates from the Pew Research Center to generate undocumented immigrant counts that he then removes from his

[32] Poston Report at 14; Poston Supp. Report at 3.
[33] *Id.*
[34] Poston Dep. at 105:10-23.
[35] Poston Report at 2, 3.

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2020 apportionment population projections.[36] He specifically says that his "assumption is that the proportions of undocumented immigrants in the states in 2016 will be the same proportions in 2020."[37]

As with his projections of the 2020 resident and overseas populations, Dr. Poston's projections of the 2020 undocumented population are highly problematic. As an initial matter, there are no official estimates of the undocumented population, and the available estimates of the undocumented population vary widely. For example, a study by professors at the Yale School of Management estimates that in 2016 there were 16.7 million undocumented immigrants in the country,[38] while Pew estimates that in 2016 there were 10.7 undocumented immigrants in the country.[39] Because apportionment calculations are very susceptible to even small population changes, the choice of one estimate over another can have a large impact on the final apportionment results.

Despite the fact that there is variability in the available undocumented population estimates, Dr. Poston decided to use the 2016 Pew estimates[40] and did not to look into whether other estimates were more accurate or reliable.[41] Dr. Poston used the Census Bureau's 2016 population estimates for the resident population totals of each state.[42] There is no indication, however, that the Pew estimates are tied to any particular date in 2016, much less that they are tied to July 1, 2016. Are the Pew estimates for the beginning of the calendar year? The end? How does this correspond to the April 1 Census Day or the July 1 Census estimate date? Dr. Poston does not appear to have grappled with these questions.

Even assuming that the 2016 Pew estimates were reliable, however, there is no indication that each state's proportion of the undocumented population in 2016 will be the same proportion in 2020. Pew's own estimates show that between 2010 and 2016, the undocumented population decreased from 11.4 million to 10.7 million, with varying changes state by state.[43] While total population estimates from different sources vary, other estimates also show that the undocumented population has been decreasing over time. For example, the Center for Migration Studies reports that the undocumented population decreased from 11.7 million in 2010 to 10.7 million in 2017.[44]

Further, data released over the past several years indicates that the number of undocumented immigrants has continued to decrease since 2016 as a result of the Trump Administration's efforts to lower the flow of immigrants into the country. News agencies have

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[36] *Id.* at 15-16.
[37] Poston Supp. Report at 5.
[38] Mohammad M. Fazel Zarandi, Jonathan S. Feinstein, and Edward H. Kaplan, *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS ONE (Sept. 21, 2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0201193.
[39] Jeffrey S. Passel and D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade* 5, Pew Research Center (Nov. 27, 2018) (hereinafter "2016 Pew Estimates").
[40] Poston Report at 15-16; Poston Supp. Report at 4-5.
[41] Poston Dep. at 146:23-147:5.
[42] *Id.*
[43] 2016 Pew Estimates at 5, 14.
[44] State-Level Unauthorized Population and Eligible-to-Naturalize Estimates, Center for Migration Studies, http://data.cmsny.org/.

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recently reported that the "Illegal immigrant population shrinks as Mexicans head back home"[45] and "A Mexican Exodus is Helping Shrink the Undocumented Population."[46] If the Trump Administration's policies have been even moderately successful, then it is likely that Dr. Poston's proportional methodology will overestimate the undocumented population.

D. Dr. Poston's District Size Argument

Dr. Poston argues that it is important that all states have the same average congressional district population size, seeming to argue that this is closer to the one-person, one-vote requirement from the courts and that this is better achieved by excluding undocumented immigrants.[47] This is a specious argument because Dr. Poston fails to take into account the first step of the apportionment process: that every state is guaranteed at least one congressional district, no matter their total population.

Article 1, section 2 of the Constitution specifically states that: "The Number of Representatives shall not exceed one for every thirty thousand, *but each State shall have at least one Representative*." (emphasis added). One can see the results of this tenet in any of the apportionment tables attached to any EDS, Inc. apportionment study, where we calculate the ideal district size (labeled "average size") for each state.[48] The 2019 EDS, Inc. Report shows this column as the second column from the right.[49] At the bottom of each of our tables we report not only the median average district size for the country, but also the minimum and maximum district population for the 50 states. For example, the 2019 EDS, Inc. Report apportionment calculations based on EDS, Inc.'s 2020 resident population projections shows that Rhode Island's single seat is projected to have a population of 1,060,167.[50] This is nearly double the size of a congressional district in the state of Montana (537,455), which would go back to two seats in the 2019 EDS, Inc. Report.[51] The seven "at-large" states that have only a single congressional district demonstrate the largest and smallest extremes of the district population size issue.[52] **Exhibit E** sorts the states by their average district size to further show this dichotomy.

Dr. Poston attempts to obscure these basic facts of apportionment by bringing in a standard deviation calculation, but this is irrelevant to the basic premise of reapportionment when every state gets at least one seat. Whether the ideal district size includes or excludes undocumented immigrants has little bearing on the issue of whether there is disparity in district population sizes when every state gets at least one district, no matter its total population.

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[45] Stephen Dinan, *Illegal Immigrant Population Shrinks as Mexicans Go Home*, Wash. Times (Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/26/illegal-immigrant-population-shrinks-mexicans-go-h/.
[46] Miriam Jordan, *A Mexican Exodus Is Helping Shrink the Undocumented Population*, N.Y. Times (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/undocumented-population-study-mexicans.html.
[47] Poston Report at 17-19.
[48] *E.g.*, Exhibit B at Appendix Main.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

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E. Dr. Poston's Reference to the 2019 EDS, Inc. Report

Dr. Poston compares his apportionment results in his first report to the 2019 EDS, Inc. Report results, presumably in support of his conclusions. But this comparison is not appropriate because the calculations are based on different inputs. Thus, any consistency between the two reports is as much the result of happenstance as anything else.

The 2019 EDS, Inc. Report is based on the Census Bureau's 2019 population estimates and uses only the 2020 resident population projections for the apportionment calculations. That is, the apportionment population does not include a projection of the overseas population. Further, the 2019 EDS, Inc. Report uses a short-term trend line and projects the estimates to April 1, 2020, or Census Day. Importantly, Election Data Services recognizes the report's limitations as a projection of the actual 2020 congressional reapportionment because there is no reliable overseas population projection to use in the calculations.

Dr. Poston's analysis in his main report, on the other hand, relies on the Census Bureau's 2018 population estimates. Dr. Poston conducted the reapportionment calculation using apportionment population counts that include his projected 2020 resident population counts *plus* his projected 2020 overseas population counts. Further, Dr. Poston uses a long-term trend line and projects the estimates to July 1, 2020. His introduction of unreliable projections renders his calculations a wholly different animal than the 2019 EDS, Inc.'s Report's calculations. Importantly, because Dr. Poston used different inputs for his calculations, the different inputs for the 50 states will have an effect on the gain or loss population margins and on the seat positions.

VII. Conclusion

Dr. Poston compounds mistake upon mistake in reaching his conclusions, and does not show with any level of certainty that Alabama will lose its seventh congressional seat following the 2020 census if undocumented immigrants are not excluded from the apportionment count. Neither does he show with any level of certainty that Alabama will retain a seventh congressional seat following the 2020 Census as a result of excluding undocumented immigrants from the apportionment count.

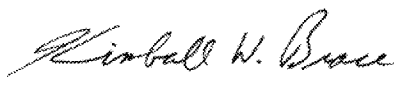

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EXHIBIT A

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Kimball Brace is the president of Election Data Services Inc., a consulting firm that specializes in redistricting, election administration, and the analysis and presentation of census and political data. Mr. Brace graduated from the American University in Washington, D.C., (B.A., Political Science) in 1974 and founded Election Data Services in 1977.

Redistricting Consulting

Activities include software development; construction of geographic, demographic, or election databases; development and analysis of alternative redistricting plans; general consulting, and onsite technical assistance with redistricting operations.

Congressional and Legislative Redistricting

Arizona Independent Redistricting Commission: Election database, 2001

Arizona Legislature, Legislative Council: Election database, 2001

Colorado General Assembly, Legislative Council: Geographic, demographic, and election databases, 1990–91

Connecticut General Assembly

- Joint Committee on Legislative Management: Election database, 2001; and software, databases, general consulting, and onsite technical assistance, 1990–91
- Senate and House Democratic Caucuses: Demographic database and consulting, 2001

Florida Legislature, House of Rep.: Geographic, demographic, and election databases, 1989–92

Illinois General Assembly

- Speaker of House and Senate Minority Leader: Software, databases, general consulting, and onsite technical assistance, 2000–02,
- Speaker of House and President of Senate: Software, databases, general consulting, and onsite technical assistance, 2018-current, 2009-2012, 1990–92, and 1981-82

Iowa General Assembly, Legislative Service Bureau and Legislative Council: Software, databases, general consulting, and onsite technical assistance, 2000–01 and 1990–91

Kansas Legislature: Databases and plan development (state senate and house districts), 1989

Massachusetts General Court

- Senate Democratic caucus: Election database and general consulting, 2001–02

- Joint Reapportionment Committees: Databases and plan development (cong,, state senate, and state house districts), 1991–93, 2010-2012(Redistricting Consulting, cont.)

Michigan Legislature: Geographic, demographic, and election databases, 1990–92; databases and plan development (cong., state senate, and state house districts), 1981-82

Missouri Redistricting Commission: General consulting, 1991–92

Commonwealth of Pennsylvania: General consulting, 1992

Rhode Island General Assembly and Reapportionment Commissions

- Software, databases, plan development, and onsite assistance (cong., state senate, and state house districts), 2016- current, 2010-2012, 2001–02 and 1991–92
- Databases and plan development (state senate districts), 1982-83

State of South Carolina: Plan development and analysis (senate), U.S. Dept. of Justice, 1983–84

Local Government Redistricting

Orange County, Calif.: Plan development (county board), 1991–92

City of Bridgeport, Conn.: Databases and plan development (city council), 2011-2012 and 2002–03

Cook County, Ill.: Software, databases, and general consulting (county board), 2010-2012, 2001–02, 1992–1993, and 1989

Lake County, Ill.: Databases and plan development (county board), 2011 and 1981

City of Chicago, Ill.: Software, databases, general consulting, and onsite technical assistance (city wards), 2010-2012, 2001–02 and 1991–92

City of North Chicago, Ill.: Databases and plan development (city council), 1991 and 1983

City of Annapolis, Md.: Databases and plan development (city council), 1984

City of Boston, Mass.: Databases and plan development (city council), 2011-2012, 2001-2002, and 1993

City of New Rochelle, N.Y.: Databases and plan development (city council), 1991–92

City of New York, N.Y.: Databases and plan development (city council), 1990–91

Cities of Pawtucket, Providence, East Providence, and Warwick, and town of North Providence, R.I.: Databases and plan development (city wards and voting districts), 2011-2012, 2002

City of Woonsocket and towns of Charlestown, Johnston, Lincoln, Scituate and Westerly, R.I.: Databases and plan development (voting districts), 2011-2012, 2002; also Westerly 1993

City of Houston, Tex.: Databases and plan development (city council), 1979 — recommended by U.S. Department of Justice

City of Norfolk, Va.: Databases and plan development (city council), 1983–84 — for Lawyers' Committee for Civil Rights

Virginia Beach, Va.: Databases and plan development (city council), 2011-2012, 2001–02, 1995, and 1993

Other Activities

International Foundation for Electoral Systems (IFES) and U.S. Department of State: redistricting seminar, Almaty, Kazakhstan, 1995

Library of Congress, Congressional Research Service: Consulting on reapportionment, redistricting, voting behavior and election administration

National Conference of State Legislatures (NCSL): Numerous presentations on variety of redistricting and election administration topics, 1980 - current

Election Administration Consulting

Activities include seminars on election administration topics and studies on voting behavior, voting equipment, and voter registration systems.

Prince William County, VA:
2013 – Appointed by Board of County Supervisors to 15 member Task Force on Long Lines following 2012 election. Asked and appointed by County's Electoral Board to be Acting General Registrar for 5-month period between full-time Registrars.
2008 - current – poll worker and now chief judge for various precincts in county

U.S. Election Assistance Commission (EAC): Served as subcontractor to prime contractors who compiled survey results from 2008 and 2010 Election Administration and Voting Survey.

U.S. Election Assistance Commission (EAC): Compile, analyze, and report the results of a survey distributed to state election directors during FY–2007. Survey results were presented in the following reports of the EAC: *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 2005–2006, A Report to the 110th Congress,* June 30, 2007; *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Survey Report Findings,* September, 2007; and *The 2006 Election Administration and Voting Survey, A Summary of Key Findings,* December, 2007.

U.S. Election Assistance Commission (EAC): Compile, analyze, and report the results of three surveys distributed to state election directors during FY–2005: Election Day, Military and Overseas Absentee Ballot (UOCAVA), and Voter Registration (NVRA) Surveys. Survey results were presented in the following reports: *Final Report of the 2004 Election Day Survey,* by Kimball W. Brace and Dr. Michael P. McDonald, September 27, 2005; and *Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 2003–2004, A Report to the 109th Congress,* June 30, 2005.

Rhode Island Secretary of State: Verification of precinct and district assignment codes in municipal registered voter files and production of street files for a statewide voter registration database, on-going maintenance of street file, 2004-2006, 2008-2014, 2016-2017.

Rhode Island Secretary of State, State Board of Elections & all cities & towns: production of precinct maps statewide, 2012, 2002, 1992

District of Columbia, Board of Elections and Ethics (DCBOEE): Verification of election ward, Advisory Neighborhood Commission (ANC), and Single-Member District (SMD) boundaries and production of a new street locator, 2003. Similar project, 1993.

Harris County, Tex.: Analysis of census demographics to identify precincts with language minority populations requiring bilingual assistance, 2002–03

(Election Administration Consulting, cont.)

Cook County, Ill., Election Department and Chicago Board of Election Commissioners:
- Analysis of census demographics to identify precincts with language minority populations requiring bilingual assistance, 2019, 2010-2013, 2002–03
- Study on voting equipment usage and evaluation of punch card voting system, 1997

Chicago Board of Election Commissioners: Worked with Executive Director & staff in Mapping Dept. to redraw citywide precincts, eliminate over 600 to save costs, 2011-12

Library of Congress, Congressional Research Service: Nationwide, biannual studies on voter registration and turnout rates, 1978–2002

U.S. General Accounting Office (GAO), U.S. Dept. of Justice, and numerous voting equipment vendors and media: Data on voting equipment usage throughout the United States, 1980–present

Needs assessments and systems requirement analyses for the development of statewide voter registration systems:
- Illinois State Board of Elections: 1997
- North Carolina State Board of Elections, 1995
- Secretary of Commonwealth of Pennsylvania, 1996

Federal Election Commission, Office of Election Administration:
- Study on integrating local voter registration databases into statewide systems, 1995
- Nationwide workshops on election administration topics, 1979–80
- Study on use of statistics by local election offices, 1978–79

Cuyahoga County, Ohio, Board of Elections: Feasibility study on voting equipment, 1979

Winograd Commission, Democratic National Committee: Analysis of voting patterns, voter registration and turnout rates, and campaign expenditures from 1976 primary elections

Mapping and GIS

Activities include mapping and GIS software development (geographic information systems) for election administration and updating TIGER/Line files for the decennial census.

2000 Census Transportation Planning Package (CTPP), 1998–99: GIS software for the U.S. Department of Transportation to distribute to 400 metropolitan planning organizations (MPOs) and state transportation departments for mapping traffic analysis zones (TAZs) for the 2000 census; provided technical software support to MPOs

Census 2000, 2010 and 2020 Redistricting Data Program, Block Boundary Suggestion Project (Phase 1) and Voting District Project (Phase 2), 1995–99: GIS software and provided software, databases, and technical software support to the following program participants:
- Alaska Department of Labor
- Connecticut Joint Committee on Legislative Management

- Illinois State Board of Elections
- Indiana Legislative Services Agency
- Iowa Legislative Service Bureau

(Mapping & GIS Support, cont.)

- New Mexico Legislative Council Service
- Rhode Island General Assembly
- Virginia Division of Legislative Services

Developed PRECIS® Precinct Information System—GIS software to delineate voting precinct boundaries—and delivered software, databases, and technical software support to the following state and local election organizations (with date of installation):

- Cook County, Ill., Department of Elections (1993)
- Marion County, Fla., Supervisor of Elections (1995)
- Berks County Clerk, Penn. (1995)
- Hamilton County, Ohio, Board of Elections (1997)
- Brevard County, Fla., Supervisor of Elections (1999)
- Osceola County, Fla., Supervisor of Elections (1999)
- Multnomah County, Ore, Elections Division (1999)
- Chatham County, Ga., Board of Elections (2000)
- City of Chicago, Ill., Board of Election Commissioners (2000)
- Mahoning County, Ohio, Board of Elections (2000)
- Iowa Secretary of State, Election and Voter Registrations Divisions (2001)
- Woodbury County, Iowa, Elections Department (2001)
- Franklin County, Ohio, Board of Elections (2001)
- Cobb County, Ga., Board of Elections and Voter Registration (2002)

Illinois State Board of Elections, Chicago Board of Election Commissioners, and Cook County Election Department: Detailed maps of congressional, legislative, judicial districts, 1992

Associated Press: Development of election night mapping system, 1994

Litigation Support

Activities include data analysis, preparation of court documents and expert witness testimony. Areas of expertise include the census, demographic databases, district compactness and contiguity, racial bloc voting, communities of interest, and voting systems. Redistricting litigation activities also include database construction and the preparation of substitute plans.

State of Alabama vs. US Department of Commerce, et al (2019-2020) apportionment & citizenship data

NAACP vs. Denise Merrill, CT Secretary of State, et al (2019-2020) state legislative redistricting and prisoner populations

Latasha Holloway, et al. v. City of Virginia Beach, VA (2019) city council redistricting

Joseph V. Aguirre vs. City of Placentia, CA (2018-2019), city council redistricting

Davidson, et al & ACLU of Rhode Island vs. City of Cranston, RI (2014-16), city council & school committee redistricting with prisoner populations.

Navaho Nation v. San Juan County, UT (2014-17) county commissioner & school board districts.

Michael Puyana vs. State of Rhode Island (2012) state legislature redistricting

(Litigation Support, cont.)

United States of America v. Osceola County, Florida, (2006), county commissioner districts.

Deeds vs McDonnell (2005), Va. Attorney General Recount

Indiana Democratic Party, et al., v. Todd Rokita, et al. (2005), voter identification.

Linda Shade v. Maryland State Board of Elections (2004), electronic voting systems

Gongaley v. City of Aurora, Ill. (2003), city council districts

State of Indiana v. Sadler (2003), ballot design (city of Indianapolis-Marion County, Ind.)

Peterson v. Borst (2002–03), city-council districts (city of Indianapolis-Marion County, Ind.)

New Rochelle Voter Defense Fund v. City of New Rochelle, City Council of New Rochelle, and Westchester County Board Of Elections (2003), city council districts (New York)

Charles Daniels and Eric Torres v. City of Milwaukee Common Council (2003), council districts (Wisconsin)

The Louisiana House of Representatives v. Ashcroft (2002–03), state house districts

Camacho v. Galvin and *Black Political Caucus v. Galvin* (2002–03), state house districts (Massachusetts)

Latino Voting Rights Committee of Rhode Island, et al., v. Edward S. Inman, III, et al. (2002–03), state senate districts

Metts, v. Harmon, Almond, and Harwood, et al. (2002–03), state senate districts (Rhode Island)

Joseph F. Parella, et al. v. William Irons, et al. (2002–03), state senate districts (Rhode Island)

Jackson v. County of Kankakee (2001–02), county commissioner districts (Illinois)

Corbett, et al., v. Sullivan, et al. (2002), commissioner districts (St Louis County, Missouri)

Harold Frank, et al., v. Forest County, et al. (2001–02), county commissioner districts (Wisc.)

Albert Gore, Jr., et al., v. Katherine Harris as Secretary of State, State of Florida, et al., and The Miami Dade County Canvassing Board, et al., and The Nassau County Canvassing Board, et al., and The Palm Beach County Canvassing Board, et al., and George W. Bush, et al (2000), voting equipment design — Leon County, Fla., Circuit Court hearing, December 2, 2000, on disputed ballots in Broward, Volusia, Miami-Dade, and Palm Beach counties from the November 7, 2000, presidential election.

Barnett v. Daley/PACI v. Daley/Bonilla v. Chicago City Council (1992–98), city wards

Donald Moon, et al. v. M. Bruce Meadows, etc and Curtis W. Harris, et al. (1996–98), congressional districts (Virginia)

Melvin R. Simpson, et al. v. City of Hampton, et al. (1996–97), city council districts (Va.)

Vera vs. Bush (1996), Texas redistricting

In the Matter of the Redistricting of Shawnee County Kansas and Kingman, et al. v. Board of County Commissioners of Shawnee County, Kansas (1996), commissioner districts

Vecinos de Barrio Uno v. City of Holyoke (1992–96), city council districts (Massachusetts)

(Litigation Support, cont.)

Torres v. Cuomo (1992–95), congressional districts (New York)

DeGrandy v. Wetherell (1992–94), congressional, senate, and house districts (Florida)

Johnson v. Miller (1994), congressional districts (Georgia)

Jackson, et al v Nassau County Board of Supervisors (1993), form of government (N.Y.)

Gonzalez v. Monterey County, California (1992), county board districts

LaPaille v. Illinois Legislative Redistricting Commission (1992), senate and house districts

Black Political Task Force v. Connolly (1992), senate and house districts (Massachusetts)

Nash v. Blunt (1992), house districts (Missouri)

Fund for Accurate and Informed Representation v. Weprin (1992), assembly districts (N.Y.)

Mellow v. Mitchell (1992), congressional districts (Pennsylvania)

Phillip Langsdon v. Milsaps (1992), house districts (Tennessee)

Smith v. Board of Supervisors of Brunswick County (1992), supervisor districts (Virginia)

People of the State of Illinois ex. rel. Burris v. Ryan (1991–92), senate and house districts

Good v. Austin (1991–92), congressional districts (Michigan)

Neff v. Austin (1991–92), senate and house districts (Michigan)

Hastert v. Illinois State Board of Elections (1991), congressional districts

Republican Party of Virginia et al. v. Wilder (1991), senate and house districts

Jamerson et al. v. Anderson (1991), senate districts (Virginia)

Ralph Brown v. Iowa Legislative Services Bureau (1991), redistricting database access

Williams, et al. v. State Board of Election (1989), judicial districts (Cook County, Ill.)

Fifth Ward Precinct 1A Coalition and Progressive Association v. Jefferson Parish School Board (1988–89), school board districts (Louisiana)

Michael V. Roberts v. Jerry Wamser (1987–89), St. Louis, Mo., voting equipment

Brown v. Board of Commissioners of the City of Chattanooga, Tenn. (1988), county commissioner districts

Business Records Corporation v. Ransom F. Shoup & Co., Inc. (1988), voting equip. patent

East Jefferson Coalition for Leadership v. The Parish of Jefferson (1987–88), parish council districts (Louisiana)

Buckanaga v. Sisseton School District (1987–88), school board districts (South Dakota)

Griffin v. City of Providence (1986–87), city council districts (Rhode Island)

United States of America v. City of Los Angeles (1986), city council districts

Latino Political Action Committee v. City of Boston (1984–85), city council districts

Ketchum v. Byrne (1982–85), city council districts (Chicago, Ill.)

(Litigation Support, cont.)

State of South Carolina v. United States (1983–84), senate districts — U.S. Dept. of Justice

Collins v. City of Norfolk (1983–84), city council districts (Virginia) — for Lawyers' Committee for Civil Rights

Rybicki v. State Board of Elections (1981–83), senate and house districts (Illinois)

Licht v. State of Rhode Island (1982–83), senate districts (Rhode Island)

Agerstrand v. Austin (1982), congressional districts (Michigan)

Farnum v. State of Rhode Island (1982), senate districts (Rhode Island)

In Re Illinois Congressional District Reapportionment Cases (1981), congressional districts

Publications

"EAC Survey Sheds Light on Election Administration", *Roll Call*, October 27, 2005 (with Michael McDonald)

Developing a Statewide Voter Registration Database: Procedures, Alternatives, and General Models, by Kimball W. Brace and M. Glenn Newkirk, edited by William Kimberling, (Washington, D.C.: Federal Election Commission, Office of Election Administration, Autumn 1997).

The Election Data Book: A Statistical Portrait of Voting in America, 1992, Kimball W. Brace, ed., (Bernan Press, 1993)

"Geographic Compactness and Redistricting: Have We Gone Too Far?", presented to Midwestern Political Science Association, April 1993 (with D. Chapin and R. Niemi)

"Whose Data is it Anyway: Conflicts between Freedom of Information and Trade Secret Protection in Redistricting", *Stetson University Law Review*, Spring 1992 (with D. Chapin and W. Arden)

"Numbers, Colors, and Shapes in Redistricting," *State Government News*, December 1991 (with D. Chapin)

"Redistricting Roulette," *Campaigns and Elections*, March 1991 (with D. Chapin)

"Redistricting Guidelines: A Summary", presented to the Reapportionment Task Force, National Conference on State Legislatures, November 9, 1990 (with D. Chapin and J. Waliszewski)

"The 65 Percent Rule in Legislative Districting for Racial Minorities: The Mathematics of Minority Voting Equality," *Law and Policy*, January 1988 (with B. Grofman, L. Handley, and R. Niemi)

"Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?" *Journal of Politics*, February 1987 (with B. Grofman and L. Handley)

"New Census Tools," *American Demographics*, July/August 1980

Professional Activities

Member, Task Force on Long Lines in 2012 Election, Prince William County, VA

Member, 2010 Census Advisory Committee, a 20-member panel advising the Director of the Census on the planning and administration of the 2010 census.

Delegate, Second Trilateral Conference on Electoral Systems (Canada, Mexico, and United States), Ontario, Canada, 1995; and Third Trilateral Conference on Electoral Systems, Washington, D.C., 1996

Member, American Association of Political Consultants

Member, American Association for Public Opinion Research

Member, American Political Science Association

Member, Association of American Geographers, Census Advisory Committee

Member Board of Directors, Association of Public Data Users

Member, National Center for Policy Alternatives, Voter Participation Advisory Committee

Member, Urban and Regional Information Systems Association

Historical Activities

Member, Manassas Battlefield Trust Board Member, 2018 -- current

Member, Historical Commission, Prince William County, VA., 2015 – current. Elected Chairman in 2017, re-elected 2018

Member of Executive Committee & head of GIS Committee, Bull Run Civil War Round Table, Centerville, VA. 2015 – current

Member, Washington Capitals Fan Club, Executive Board 2017 -- current

February, 2020

EXHIBIT B

Election Data Services

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FOR IMMEDIATE RELEASE

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Montana Gains California's Seat With New 2019 Census Estimates; But Alabama & Ohio to also lose by 2020

New Census Bureau population estimates for 2019 released today shows a change of one more seat between two states from last year's study generated by Election Data Services, Inc. on which states would gain or lose congressional seats if the current estimate numbers were used for apportionment in 2019. But projecting these numbers to 2020, using several different methods, leads to more states being impacted by the decennial census scheduled to take place in just four months. These numbers could also be majorly impacted by how well the Commerce Department and Census Bureau conducts the census, how well the American public responds to this decennial exercise, the first where major components will be conducted via the internet, and whether the discussion on citizenship over the past year will cause some groups to avoid participating. A changed practice on how to count the military overseas could also change the final apportionment when it is announced December 31, 2020.

The Bureau's 2019 total population estimates show that now 15 states will be impacted by changes in their congressional delegation if these new numbers were used for apportionment today. The state of **Montana** joins the previously indicated states of **Arizona, Colorado, Florida**, **North Carolina**, and **Oregon** to each gain a single seat while the state of **Texas** is now shown to gain a second seat with the new data. The state of **California** joins the states of **Illinois**, **Michigan**, **Minnesota, New York, Pennsylvania, Rhode Island,** and **West Virginia** to lose a seat in Congress using the new data. A map of the 2019 numbers is attached.

The new numbers, however, reflect subtle changes taking place across the nation in birth and death rates and resulting total population numbers that become magnified when the information is projected forward to coincide with the taking of the Census on April 1, 2020. Election Data Services created a variety of different methodologies to project the 2019 data forward nine months (from the July1, 2019 date of the Census estimates) to April 1, 2020 (several short-term projection methods for the trend occurring in 2018-2019, and 2017-2019, a middle term

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methodology using the 2015-2019 trend, and a long-term projection for 2011-2019). The different methodologies benefit some states and disadvantage others in the "musical-chairs" effort of allocating 435 seats to the 50 states. All the methods would add a second seat for **Florida** and a third seat for **Texas,** to the list of states noted above that will gain one or more seats by 2020. The list of losing states will expand to also include **Alabama** and **Ohio**, by the time the Census is taken in 2020. A map showing the 2020 projected apportionment using the 2018-2019 trend is attached. Because all the projection models produce the same state overall results in seats as the 2018-2019 trend map, only the tables of the calculations for the different projection models are attached so that how close states are to changes can be observed.

The new 2019 data and all projections forward to 2020 now confirms that **California** will lose a congressional district in 2020. Our 2018 study first picked up the possibility that **California** could lose a congressional district for the first time in their nearly 160-year history. The new 2019 numbers from the Bureau indicate the state would lose that seat by 98,709 people but projecting the data forward to 2020 shows the state further away from potentially keeping that seat, losing it by over 300,000 people in 2020.

While the 2019 Census estimate numbers show **Alabama** keeping their seventh seat by a slim margin of just 18,516 people, projecting the data forward to 2020 would find the state losing the seventh seat by only 10,072 to 19,074 people, depending on the projection model utilized. All of the projection models find **Alabama** just missing the last seat to be apportioned, coming in at seat #436 when there are only 435 seats to hand out (a cut-off mark established in 1910).

The state of **Montana** is just barely able to reverse previous decades of population shifts when it went from two seats down to one in 1990. For 2020 the state is projected to go back to having two seats, but that gain of a second seat is because the state occupies the dubious distinction of obtaining seat #435, the last one to be apportioned. Election Data Services calculations show **Montana** getting that additional seat by only between 2,402 and 4,163 people to spare; a very close margin.

Rhode Island is also a state with an extremely close margin. For most of the decade our studies have projected that **Rhode Island** would lose their second seat by the end of the decade and the new numbers confirm that projection. But their margin has gotten tighter with the new data. For the past several years we saw that **Rhode Island** would lose that second seat by more than 25,000 people. But this new data shows the state missing the seat by only 14,539 residents.

Previous Election Data Services studies have hinted that the states of **Illinois** and **New York** might be in a position to each lose a second seat by 2020. However, these new Census numbers seem to indicate this will not be the case, with both states just losing a single seat each.

The state of **Minnesota** is also close to the margin of likely losing a seat in Congress. All of the projections place the state at position #437, having lost their last seat (their 8th) by between 6,740 people (the 2019 estimate) to around 21,000 people. **Minnesota**'s state demographer has indicated that recent influx of people to the state has boosted their numbers and it is likely to have had an impact on reapportionment.

Using any methodology, the population projections points toward a ten (10) seat change over 17 states across the nation by year 2020. States that will gain single seats include **Arizona**, **Colorado**, **Montana**, **North Carolina**, and **Oregon**, while **Florida** is set to gain two congressional districts and **Texas** would gain three seats. Single seat losses will again occur in the Midwest and Northeast sections of the nation, where **Alabama**, **California, Illinois, Michigan**, **Minnesota, New York**, **Ohio**, **Pennsylvania, Rhode Island** and **West Virginia** would each lose a seat. All other states would keep the same number of representatives they were awarded in December 2010 when the official 2010 Census numbers were released.

In table form, the gainers and losers are:

States Gaining Districts (7)	States Losing Districts (10)
Arizona +1 (from 9 to 10)	**Alabama** -1 (from 7 to 6)
Colorado +1 (from 7 to 8)	**California** -1 (from 53 to 52)
Florida +2 (from 27 to 29)	**Illinois** -1 (from 18 to 17)
Montana +1 (from At-large to 2)	**Michigan** -1 (from 14 to 13)
North Carolina +1 (from 13 to 14)	**Minnesota** -1 (from 8 to 7)
Oregon +1 (from 5 to 6)	**New York** -1 (from 27 to 26)
Texas +3 (from 36 to 39)	**Ohio** -1 (from 16 to 15)
	Pennsylvania -1 (from 18 to 17)
	Rhode Island -1 (from 2 to 1)
	West Virginia -1 (from 3 to 2)

With only four months until Census Day, many states have appropriated funds to help send a message to their constituents about the importance of participating in the Census[i]. Many of these states are on the edge of gaining or losing a seat in the apportionment process, but there are some notable exceptions. For example, Texas has not appropriated any funds for Complete Count efforts, and yet whether they stand to gain only two or maybe three additional seats may depend on how good the counting is conducted in the state. This could also be impacted by the reaction to the citizenship issue that has become more of a focus in the past year. Florida has also failed to appropriate any funds for Complete Count efforts in 2020, but they are more firm in the projection of receiving two additional seats in 2020. Thus, the two largest gaining states in number of seats are those that didn't spend their own money to help the counting process.

Since 1941, by law the number of seats in the U.S. House of Representatives has been capped at 435. As a result, there has always been interest in finding which states are close to that magic bubble, either just gaining their last seat, or just missing their next seat. The following table shows the results of the 2019 population estimates, as well as one of the short-term trend methodology calculations (2018-2019) for the seats within five positions of the 435 cut off.

2019 Reapportionment Analysis

2019 Population Estimates			2020 Projections (using 2018-2019 short-term trend)		
Last Five Seats		**Margin of Gain**	**Last Five Seats**		**Margin of Gain**
431	Arizona (10th)	128,294	431	Illinois (17th))	126,052
432	New York (26th)	237,376	432	New York (26th)	61,279
433	Alabama(7th)	18,516	433	Texas (39th)	79,742
434	Montana (2nd)	2,856	434	Montana (2nd)	2,402
435	Ohio (16th)	12,508	435	Florida (29th)	44,285

2019 Reapportionment Analysis

2019 Population Estimates			2020 Projections (using 2018-2019 short-term trend)		
Next Seats		**Margin of Loss**	**Next Seats**		**Margin of Loss**
436	Florida (29th)	23,006	436	Alabama (7th)	10,072
437	Minnesota (8th)	6,740	437	Minnesota (8th))	21,992
438	Texas (39th)	51,004	438	Ohio (16th)	74,135
439	California (53rd)	98,709	439	California (53rd)	344,367
440	Rhode Island (2nd)	7,703	440	Rhode Island (2nd)	14,539

The Census Bureau's yearly release of population estimates also results in a revision of previous year estimates. While Election Data Services has traditionally reflected those revisions in our projection methodology, we have created a new apportionment table that shows the apportionment results for each year in the decade based upon those revised numbers. The table, entitled "2020 Apportionment Calculations based on different trend lines coming from the 2019 Census Bureau Estimates" is attached to this press release. The table shows consistent gains and losses of seats over the entire decade with the new data. The table also includes a chart of where seats # 430 through # 440 would be assigned to states in each projection.

Kimball Brace, President of Election Data Services, Inc. cautioned users that even though there is a very short time before the Census, the population projections are still subject to change. "We are now at a place where the rubber meets the road. How well does the Census Bureau and the Trump administration put on the greatest mobilization of government resources outside of war time? How well will the public respond and answer the Census, given the competing focuses of everyday life and the need to utilize the internet? Will the fear of foreign intervention also impact the census?" Brace noted. "Having worked with Census data and estimates since the 1970s, it is important to remember that major events like Katrina and the 2008 recession each changed population growth patterns and that impacted and changed the next apportionment," he said.

Brace also noted that major changes in the counting process are in the works for 2020 and that reduced budget funding could impact those plans. "History can also be a guide, recalling that the 1920 apportionment was cancelled because the numbers showed for the first time that more people resided in urban areas than rural areas" said Brace. "I have had my share of nightmares that a failed Census process could lead to unreliable numbers and a repeat of 1920."

Because congressional apportionment also impacts the Electoral College and the vote for President, Election Data Services took the 2020 projections for each state and applied the Presidential election results from the past five Presidential contests to determine the Electoral College outcomes in the past 16 years. The study shows that none of the presidential contests would have elected a different presidential candidate using the new apportionment counts but they would have been more Republican in nature. For example, in 2016 President Trump would have gained two additional electoral college votes under the new apportionment projections. In 2012 President Obama would still have won the Electoral College, but with four less votes (328 vs 332) than he won at the time of the voting. The biggest change would have occurred in the 2000 presidential election where George Bush would have gained an additional 20 electoral votes had the new 2020 apportionment projections determined the number of congressional seats in each state.

The 2016 Electoral College was muddled because 7 electors voted for a different candidate than what they had pledged based on the vote totals. As a result, the overall change in candidate votes based on the new apportionment numbers shows just two vote difference in the bottom line results. President elect Trump's ability to carry states that will be losing congressional seats in 2020 also contributed to a reversal of the pattern depicted in previous elections.

It should be noted that the 2020 Presidential election and resulting Electoral College will occur before the results of the 2020 Census are released by December 31, 2020. Therefore, the Electoral College results in 2020 will be governed by the state's apportionment allocation as they exist today, having been first determined in 2011. The first time the new 2020 apportionment results will be utilized will be the 2024 Presidential election. Election Data Services, Inc. has also worked with the website 270ToWin, who has built an interactive map of the these new apportionment results where users can adjust state outcomes to discover Electoral College outcomes for the presidential elections back to 2000.

Major weather events have also affected apportionment. The Census Bureau's estimated populations released for 2005 showed **Louisiana** would keep all their congressional districts that decade. Even the Bureau's own projections for 2010 released that same year showed **Louisiana** staying the same. Then hurricane Katrina hit **Louisiana** at the end of August 2005 (after the date of the population estimates). Devastation and population loss impacted New Orleans in a major way, and when the Bureau's 2006 population estimates were released **Louisiana** was looking at losing a congressional seat. That was ultimately confirmed when the 2010 Census was taken, and state data was released at the end of that year.

As Election Data Services, Inc. noted last year in the 2017 study, the year of 2017 saw 18 hurricanes and tropical storms, three of which had a potential of impact on population movements in the United States. Two of these storms: Irma (impacting Miami and the Florida Gulf Coast), and Maria (which devastated Puerto Rico)) affected **Florida** and the new population estimates reflect that fact. Last years study showed **Florida** was 366,735 people away from gaining a third seat.

The 2019 data shows the state is only 172,169 people away from a third additional seat, an improvement of nearly 200,000 people.

The 2019 population estimates have not been statistically adjusted for any known undercount that may take place when the Census is conducted. In addition, no estimates were provided for U.S. military personnel overseas. This component has in the past been counted by the Census Bureau and allocated to the states based on administrative records retained by the military. Overseas military personnel have been a factor in the apportionment formula for the past several decades, including the switching of the final district in 2000 that went from **Utah** to **North Carolina**.

For 2020 the Census Bureau has changed the "residency rules" for counting the military by creating a distinction between personnel who are *deployed* overseas (usually for short periods of time) compared to those who are *stationed* or *assigned* overseas (frequently for longer periods of time). The Bureau will use DOD's administrative records to count *deployed* personnel at their usual residence in the US for both apportionment and redistricting purposes (they will be embedded within the state's resident population counts). On the other hand, personnel who are *stationed* or *assigned* overseas will be counted to their "home state of record" for apportionment purposes only and will show up as part of a state's total "overseas count" when the Bureau releases the final and official apportionment data by December, 31, 2020. Military sources have told the Census Bureau that of all overseas military, approximately 15% are *deployed* personnel and 85% are *stationed* or *assigned* overseas.

Past apportionment studies by Election Data Services, Inc. can be found at https://www.electiondataservices.com/reapportionment-studies/. A historical chart on the number of districts each state received each decade from 1789 to current is also available at this web address and linkable at https://www.electiondataservices.com/wp-content/uploads/2014/10/CD-apportionment-1789-2010.pdf.

Election Data Services Inc. is a political consulting firm that specializes in redistricting, election administration, and the analysis of census and political data. Election Data Services, Inc. conducts the congressional apportionment analyses with each annual release of the census population estimates. For more information about the reapportionment analysis, contact Kimball Brace (703-580-7267 or 202-789-2004 or kbrace@electiondataservices.com).

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[i] National Conference of State Legislatures reports 26 states have appropriated funds for Census counting. http://www.ncsl.org/research/redistricting/2020-census-resources-and-legislation.aspx

2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,903,185	7	7	0	743,187	18,516	433	502	700,455	43
Alaska	731,545	1	1	0			at large	637	731,545	34
Arizona	7,278,717	9	10	1	634,842	128,294	431	472	727,872	37
Arkansas	3,017,804	4	4	0	356,549	406,839	378	490	754,451	24
California	39,512,223	53	52	-1	98,709	697,431	430	439	759,850	20
Colorado	5,758,736	7	8	1	643,648	118,406	428	487	719,842	39
Connecticut	3,565,287	5	5	0	567,434	194,546	413	507	713,057	40
Delaware	973,764	1	1	0			at large	477	973,764	2
Florida	21,477,737	27	28	1	23,006	753,842	421	436	767,062	15
Georgia	10,617,423	14	14	0	316,729	449,174	419	446	758,387	22
Hawaii	1,415,872	2	2	0	432,337	349,950	330	565	707,936	41
Idaho	1,787,065	2	2	0	61,144	721,143	262	449	893,533	4
Illinois	12,671,821	18	17	-1	527,032	241,139	429	454	745,401	29
Indiana	6,732,219	9	9	0	425,864	336,686	417	465	748,024	28
Iowa	3,155,070	4	4	0	219,283	544,105	362	468	788,768	9
Kansas	2,913,314	4	4	0	461,039	302,349	393	505	728,329	36
Kentucky	4,467,673	6	6	0	422,229	339,375	402	474	744,612	30
Louisiana	4,648,794	6	6	0	241,108	520,496	390	459	774,799	11
Maine	1,344,212	2	2	0	503,997	278,290	344	597	672,106	46
Maryland	6,045,680	8	8	0	356,704	405,350	407	462	755,710	23
Massachusetts	6,892,503	9	9	0	265,580	496,970	405	451	765,834	16
Michigan	9,986,857	14	13	-1	192,285	572,888	411	442	768,220	13
Minnesota	5,639,632	8	7	-1	6,740	754,963	379	437	805,662	6
Mississippi	2,976,149	4	4	0	398,204	365,184	385	493	744,037	31
Missouri	6,137,428	8	8	0	264,956	497,098	399	456	767,179	14
Montana	1,068,778	1	2	1	779,431	2,856	434	734	534,389	50
Nebraska	1,934,408	3	3	0	679,355	88,177	418	586	644,803	47
Nevada	3,080,156	4	4	0	294,197	469,191	371	476	770,039	12
New Hampshire	1,359,711	2	2	0	488,498	293,789	339	589	679,856	45
New Jersey	8,882,190	12	12	0	541,864	222,598	426	464	740,183	32
New Mexico	2,096,829	3	3	0	516,934	250,598	387	542	698,943	44
New York	19,453,561	27	26	-1	537,876	237,376	432	444	748,214	27
North Carolina	10,488,084	13	14	1	446,068	319,835	423	455	749,149	26
North Dakota	762,062	1	1	0			at large	613	762,062	18
Ohio	11,689,100	16	16	0	754,898	12,508	435	466	730,569	35
Oklahoma	3,956,971	5	5	0	175,750	586,230	374	457	791,394	8
Oregon	4,217,737	5	6	1	672,165	89,439	427	508	702,956	42
Pennsylvania	12,801,989	18	17	-1	396,864	371,307	424	447	753,058	25
Rhode Island	1,059,361	2	1	-1			at large	440	1,059,361	1
South Carolina	5,148,714	7	7	0	497,658	264,045	415	478	735,531	33
South Dakota	884,659	1	1	0			at large	524	884,659	5
Tennessee	6,829,174	9	9	0	328,909	433,641	409	458	758,797	21
Texas	28,995,881	36	38	2	51,004	733,864	425	438	763,050	17
Utah	3,205,958	4	4	0	168,395	594,993	355	460	801,490	7
Vermont	623,989	1	1	0			at large	729	623,989	48
Virginia	8,535,519	11	11	0	133,350	630,429	404	441	775,956	10
Washington	7,614,893	10	10	0	298,666	464,470	410	452	761,489	19
West Virginia	1,792,147	3	2	-1	56,062	726,225	261	448	896,074	3
Wisconsin	5,822,434	8	8	0	579,950	182,104	422	480	727,804	38
Wyoming	578,759	1	1	0			at large	781	578,759	49
Washington DC	705,749	*0*								
	328,239,523		435					Median =	751,104	
Other Inputs:	Seats to Apportion							Min =	534,389	
435	Max Seats to Calculate							Max =	1,059,361	
75	States									
50										
☐ Include										

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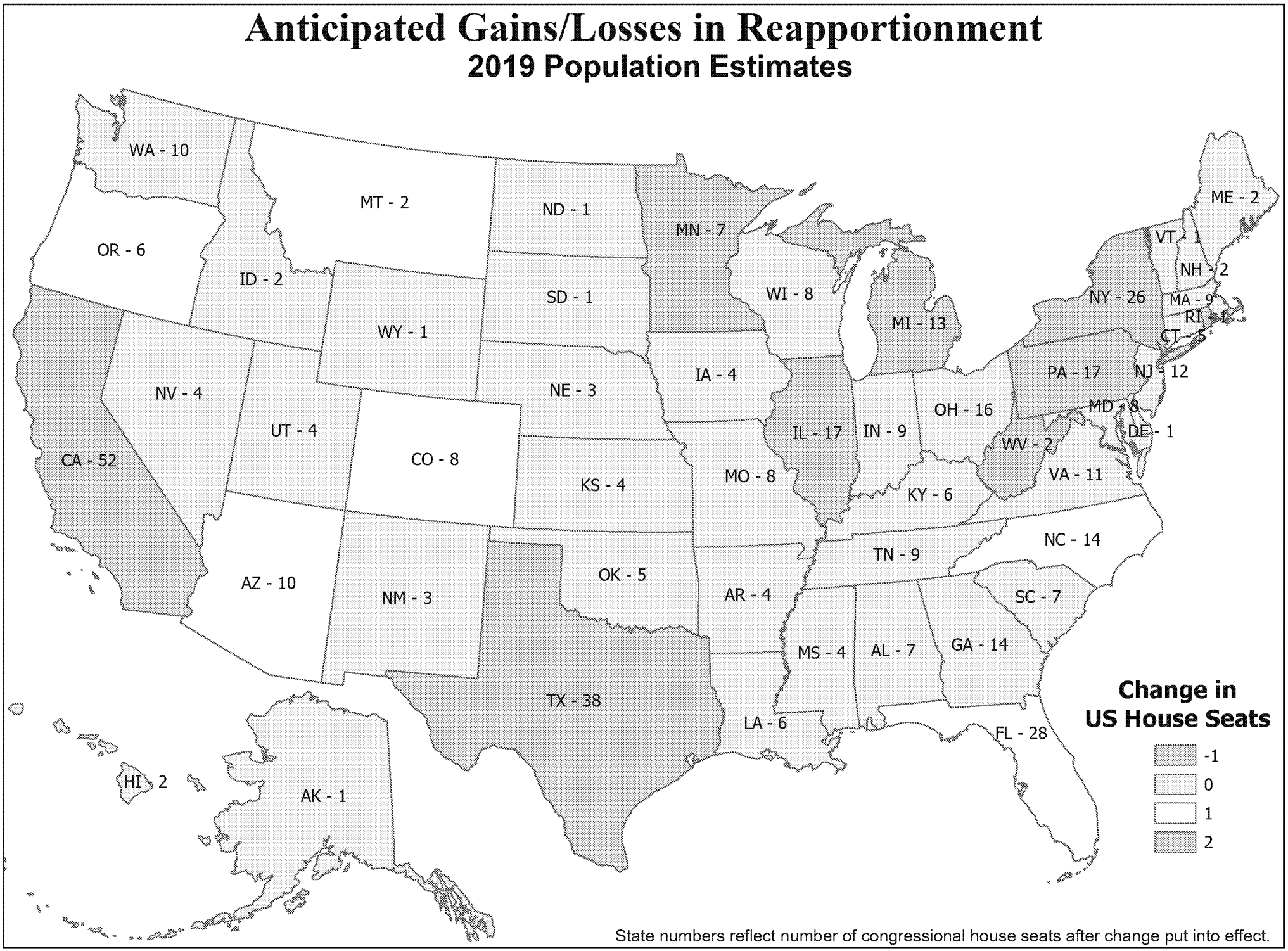
Anticipated Gains/Losses in Reapportionment

2019 Population Estimates



State numbers reflect number of congressional house seats after change put into effect.

Election Data Services

Based on Census Bureau estimates released 12/30/2019

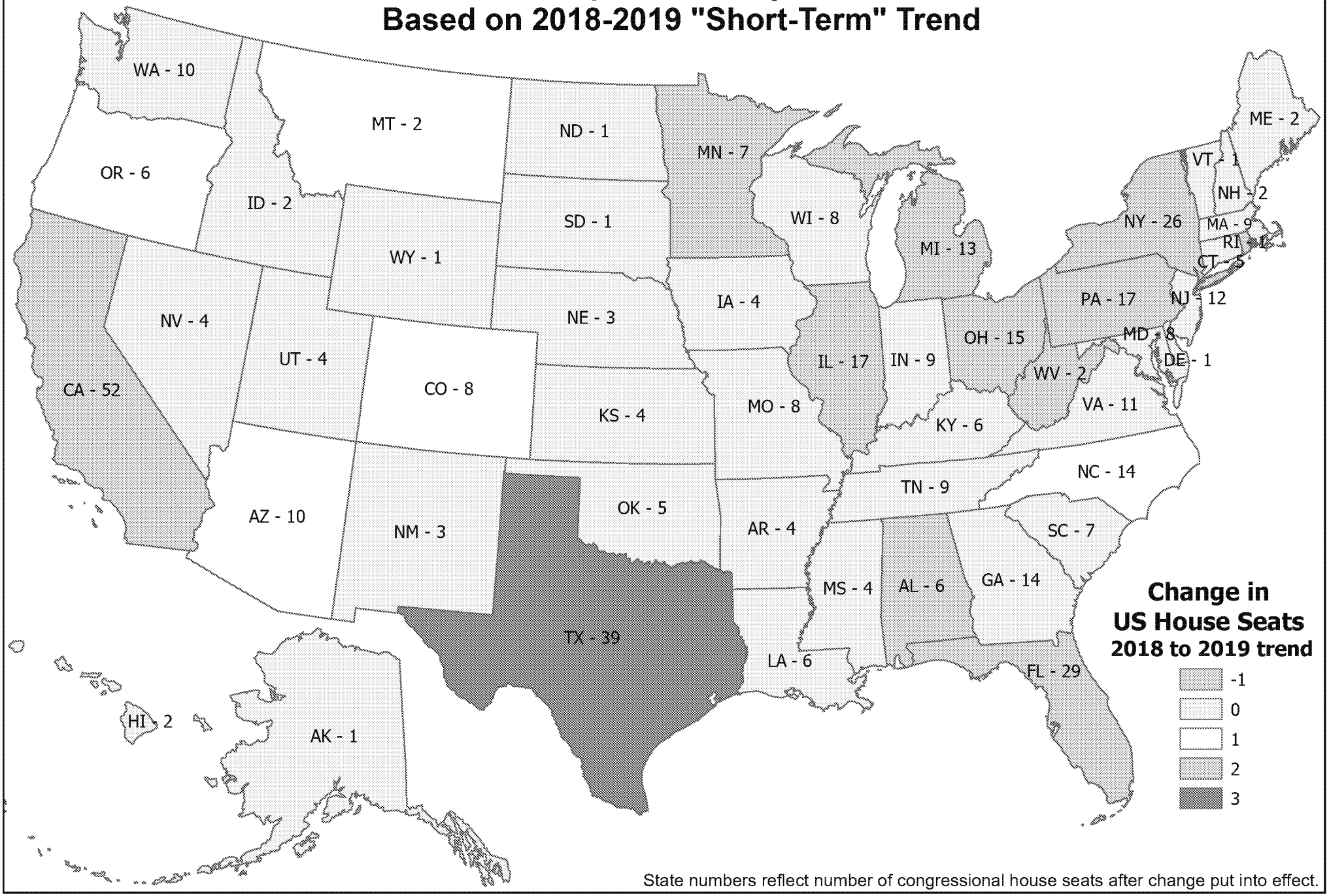
BC-DOC-0000028407

2020 Projections (short term 2018-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,914,850	7	6	-1	10,072	761,044	371	436	819,142	6
Alaska	728,863	1	1	0			at large	640	728,863	38
Arizona	7,370,763	9	10	1	599,470	176,160	425	471	737,076	36
Arkansas	3,023,873	4	4	0	374,646	396,776	379	489	755,968	24
California	39,550,248	53	52	-1	344,367	495,632	430	439	760,582	22
Colorado	5,809,922	7	8	1	638,314	134,743	426	485	726,240	40
Connecticut	3,560,620	5	5	0	601,698	169,052	416	508	712,124	41
Delaware	980,031	1	1	0			at large	475	980,031	2
Florida	21,654,726	27	29	2	760,045	44,285	435	447	746,715	29
Georgia	10,697,948	14	14	0	314,512	466,873	417	446	764,139	20
Hawaii	1,412,343	2	2	0	449,103	339,835	334	572	706,172	43
Idaho	1,815,033	2	2	0	46,412	742,526	261	443	907,517	3
Illinois	12,633,538	18	17	-1	659,841	126,052	431	460	743,149	32
Indiana	6,759,912	9	9	0	449,436	324,863	415	464	751,101	27
Iowa	3,159,919	4	4	0	238,600	532,822	362	468	789,980	10
Kansas	2,914,781	4	4	0	483,738	287,684	395	507	728,695	39
Kentucky	4,472,570	6	6	0	452,352	318,764	402	478	745,428	31
Louisiana	4,640,641	6	6	0	284,281	486,835	392	461	773,440	14
Maine	1,348,093	2	2	0	513,353	275,585	342	596	674,047	46
Maryland	6,053,101	8	8	0	395,136	377,921	409	462	756,638	23
Massachusetts	6,899,915	9	9	0	309,433	464,866	406	453	766,657	18
Michigan	9,988,946	14	13	-1	263,096	516,811	413	444	768,380	17
Minnesota	5,664,818	8	7	-1	21,992	749,969	377	437	809,260	8
Mississippi	2,972,502	4	4	0	426,017	345,404	386	497	743,125	33
Missouri	6,149,312	8	8	0	298,924	474,133	400	457	768,664	15
Montana	1,074,909	1	2	1	786,537	2,402	434	735	537,455	50
Nebraska	1,941,034	3	3	0	691,448	83,395	418	587	647,011	47
Nevada	3,120,458	4	4	0	278,061	493,361	369	473	780,115	11
New Hampshire	1,364,417	2	2	0	497,029	291,909	339	589	682,209	45
New Jersey	8,879,315	12	12	0	612,232	166,218	429	465	739,943	35
New Mexico	2,099,901	3	3	0	532,581	242,263	387	542	699,967	44
New York	19,396,195	27	26	-1	738,416	61,279	432	449	746,007	30
North Carolina	10,568,755	13	14	1	443,705	337,679	421	451	754,911	25
North Dakota	765,064	1	1	0			at large	612	765,064	19
Ohio	11,698,680	16	15	-1	74,135	708,742	410	438	779,912	12
Oklahoma	3,969,576	5	5	0	192,743	578,008	374	456	793,915	9
Oregon	4,244,856	5	6	1	680,066	91,050	428	505	707,476	42
Pennsylvania	12,802,789	18	17	-1	490,590	295,303	427	450	753,105	26
Rhode Island	1,060,167	2	1	-1			at large	440	1,060,167	1
South Carolina	5,197,747	7	7	0	489,063	282,898	412	474	742,535	34
South Dakota	889,160	1	1	0			at large	525	889,160	5
Tennessee	6,872,698	9	9	0	336,649	437,649	408	458	763,633	21
Texas	29,274,825	36	39	3	740,080	79,742	433	442	750,637	28
Utah	3,245,917	4	4	0	152,602	618,820	350	454	811,479	7
Vermont	623,712	1	1	0			at large	731	623,712	48
Virginia	8,561,297	11	11	0	169,656	607,364	403	441	778,300	13
Washington	7,683,987	10	10	0	286,246	489,384	407	448	768,399	16
West Virginia	1,783,100	3	2	-1	78,346	710,593	264	452	891,550	4
Wisconsin	5,833,734	8	8	0	614,502	158,555	424	483	729,217	37
Wyoming	579,629	1	1	0			at large	782	579,629	49
Washington DC	708,919	*0*								
	329,418,113		435					Median =	754,008	
Other Inputs:	Seats to Apportion							Min =	537,455	
435	Max Seats to Calculate							Max =	1,060,167	
75	States									
50										
☐ Include										

Anticipated Gains/Losses in Reapportionment

2020 Population Projections

Based on 2018-2019 "Short-Term" Trend



State numbers reflect number of congressional house seats after change put into effect.

Election Data Services

Based on Census Bureau estimates released 12/30/2019

BC-DOC-0000028409

2020 Projections (short term 2017-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,914,010	7	6	-1	12,184	760,914	372	436	819,002	6
Alaska	728,521	1	1	0			at large	640	728,521	39
Arizona	7,369,666	9	10	1	602,627	176,291	426	471	736,967	36
Arkansas	3,024,010	4	4	0	375,387	397,361	379	490	756,002	24
California	39,570,095	53	52	-1	334,826	522,150	430	439	760,963	22
Colorado	5,815,246	7	8	1	634,656	141,036	425	485	726,906	40
Connecticut	3,562,290	5	5	0	601,104	171,301	416	508	712,458	41
Delaware	980,229	1	1	0			at large	475	980,229	2
Florida	21,675,262	27	29	2	745,300	68,512	433	447	747,423	29
Georgia	10,696,628	14	14	0	318,677	467,300	417	446	764,045	20
Hawaii	1,412,696	2	2	0	449,231	340,371	334	572	706,348	43
Idaho	1,814,121	2	2	0	47,806	741,797	261	444	907,061	3
Illinois	12,632,029	18	17	-1	664,784	126,679	431	460	743,061	32
Indiana	6,760,331	9	9	0	450,878	326,382	415	464	751,148	27
Iowa	3,160,162	4	4	0	239,235	533,513	362	468	790,040	10
Kansas	2,915,040	4	4	0	484,357	288,392	395	507	728,760	38
Kentucky	4,473,470	6	6	0	452,724	320,373	402	478	745,578	31
Louisiana	4,640,670	6	6	0	285,525	487,573	392	461	773,445	14
Maine	1,347,838	2	2	0	514,089	275,513	343	597	673,919	46
Maryland	6,053,889	8	8	0	396,013	379,679	409	462	756,736	23
Massachusetts	6,904,829	9	9	0	306,381	470,880	406	453	767,203	18
Michigan	9,992,018	14	13	-1	262,673	521,500	413	443	768,617	17
Minnesota	5,667,521	8	7	-1	20,758	753,511	377	437	809,646	8
Mississippi	2,971,533	4	4	0	427,864	344,884	386	497	742,883	33
Missouri	6,149,020	8	8	0	300,882	474,810	400	457	768,628	16
Montana	1,074,984	1	2	1	786,943	2,659	435	735	537,492	50
Nebraska	1,941,398	3	3	0	691,764	84,077	418	587	647,133	47
Nevada	3,123,035	4	4	0	276,362	496,386	368	473	780,759	11
New Hampshire	1,363,841	2	2	0	498,086	291,516	339	589	681,920	45
New Jersey	8,880,940	12	12	0	613,059	169,331	429	465	740,078	35
New Mexico	2,098,725	3	3	0	534,436	241,405	387	543	699,575	44
New York	19,402,911	27	26	-1	736,901	71,298	432	449	746,266	30
North Carolina	10,572,293	13	14	1	443,011	342,965	421	451	755,164	25
North Dakota	764,757	1	1	0			at large	612	764,757	19
Ohio	11,700,172	16	15	-1	75,684	712,111	410	438	780,011	12
Oklahoma	3,966,654	5	5	0	196,740	575,666	374	458	793,331	9
Oregon	4,246,026	5	6	1	680,168	92,930	428	505	707,671	42
Pennsylvania	12,807,376	18	17	-1	489,438	302,025	427	450	753,375	26
Rhode Island	1,060,749	2	1	-1			at large	440	1,060,749	1
South Carolina	5,197,719	7	7	0	490,560	283,709	411	474	742,531	34
South Dakota	889,140	1	1	0			at large	525	889,140	5
Tennessee	6,875,125	9	9	0	336,085	441,175	408	456	763,903	21
Texas	29,265,114	36	39	3	757,545	75,018	434	442	750,388	28
Utah	3,246,633	4	4	0	152,765	619,984	350	455	811,658	7
Vermont	623,856	1	1	0			at large	731	623,856	48
Virginia	8,562,723	11	11	0	170,486	610,148	403	441	778,429	13
Washington	7,688,570	10	10	0	283,722	495,196	407	448	768,857	15
West Virginia	1,782,953	3	2	-1	78,974	710,629	264	452	891,477	4
Wisconsin	5,834,594	8	8	0	615,308	160,384	424	483	729,324	37
Wyoming	578,695	1	1	0			at large	783	578,695	49
Washington DC	709,879	*0*								
	329,489,985		435					Median =	754,269	
Other Inputs:	Seats to Apportion							Min =	537,492	
435	Max Seats to Calculate							Max =	1,060,749	
75	States									
50										
☐ Include										

BC-DOC-0000028410

2020 Projections (mid- term 2015-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,912,817	7	6	-1	19,074	760,729	372	436	818,803	6
Alaska	730,438	1	1	0			at large	638	730,438	37
Arizona	7,368,448	9	10	1	613,064	176,821	427	471	736,845	36
Arkansas	3,025,358	4	4	0	377,971	399,347	379	490	756,339	24
California	39,625,332	53	52	-1	325,736	586,871	430	439	762,026	22
Colorado	5,819,773	7	8	1	637,588	146,941	425	485	727,472	40
Connecticut	3,561,218	5	5	0	606,991	171,053	415	508	712,244	41
Delaware	980,071	1	1	0			at large	475	980,071	2
Florida	21,730,551	27	29	2	715,938	129,049	432	447	749,329	29
Georgia	10,703,281	14	14	0	324,762	476,437	417	446	764,520	19
Hawaii	1,414,718	2	2	0	449,362	342,654	334	570	707,359	43
Idaho	1,814,667	2	2	0	49,413	742,603	261	444	907,333	3
Illinois	12,637,252	18	17	-1	674,939	134,938	431	460	743,368	33
Indiana	6,755,866	9	9	0	463,683	323,479	416	465	750,652	28
Iowa	3,161,536	4	4	0	241,793	535,525	362	468	790,384	10
Kansas	2,914,122	4	4	0	489,206	288,111	395	507	728,531	39
Kentucky	4,475,565	6	6	0	456,326	323,477	402	478	745,927	31
Louisiana	4,645,835	6	6	0	286,056	493,748	392	461	774,306	14
Maine	1,347,239	2	2	0	516,841	275,174	344	598	673,619	46
Maryland	6,057,065	8	8	0	400,296	384,233	409	463	757,133	23
Massachusetts	6,911,196	9	9	0	308,353	478,809	406	452	767,911	18
Michigan	9,997,254	14	13	-1	269,296	529,036	414	443	769,020	16
Minnesota	5,670,032	8	7	-1	24,826	757,215	377	437	810,005	8
Mississippi	2,973,848	4	4	0	429,480	347,838	386	497	743,462	32
Missouri	6,149,879	8	8	0	307,482	477,047	400	456	768,735	17
Montana	1,076,227	1	2	1	787,853	4,163	435	735	538,113	50
Nebraska	1,942,679	3	3	0	693,527	85,810	418	587	647,560	47
Nevada	3,123,107	4	4	0	280,221	497,097	369	473	780,777	11
New Hampshire	1,364,168	2	2	0	499,912	292,104	340	589	682,084	45
New Jersey	8,884,864	12	12	0	620,113	175,371	429	466	740,405	35
New Mexico	2,098,247	3	3	0	537,959	241,378	388	543	699,416	44
New York	19,416,240	27	26	-1	746,863	89,321	433	449	746,778	30
North Carolina	10,577,560	13	14	1	450,483	350,716	422	451	755,540	25
North Dakota	763,577	1	1	0			at large	614	763,577	21
Ohio	11,702,603	16	15	-1	86,871	717,210	410	438	780,174	12
Oklahoma	3,965,980	5	5	0	202,229	575,815	375	458	793,196	9
Oregon	4,257,506	5	6	1	674,385	105,418	426	502	709,584	42
Pennsylvania	12,805,211	18	17	-1	506,979	302,898	428	450	753,248	26
Rhode Island	1,059,981	2	1	-1			at large	440	1,059,981	1
South Carolina	5,199,387	7	7	0	495,471	286,570	412	474	742,770	34
South Dakota	890,616	1	1	0			at large	526	890,616	5
Tennessee	6,875,411	9	9	0	344,138	443,024	408	457	763,935	20
Texas	29,297,864	36	39	3	759,514	114,857	434	442	751,227	27
Utah	3,251,140	4	4	0	152,189	625,129	350	455	812,785	7
Vermont	623,759	1	1	0			at large	731	623,759	48
Virginia	8,568,766	11	11	0	174,542	618,123	404	441	778,979	13
Washington	7,704,829	10	10	0	276,683	513,202	407	448	770,483	15
West Virginia	1,783,044	3	2	-1	81,036	710,980	266	453	891,522	4
Wisconsin	5,834,087	8	8	0	623,274	161,255	424	483	729,261	38
Wyoming	577,489	1	1	0			at large	785	577,489	49
Washington DC	711,695	*0*								
	329,739,397		435					Median =	754,394	
Other Inputs:	Seats to Apportion							Min =	538,113	
435	Max Seats to Calculate							Max =	1,059,981	
75	States									
50										
☐ Include										

2020 Projections (long- term 2011-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,913,158	7	6	-1	17,500	760,782	372	436	818,860	6
Alaska	732,439	1	1	0			at large	637	732,439	37
Arizona	7,363,698	9	10	1	615,818	171,572	428	472	736,370	36
Arkansas	3,025,225	4	4	0	377,252	399,033	379	490	756,306	24
California	39,696,643	53	52	-1	244,435	655,474	430	438	763,397	22
Colorado	5,825,957	7	8	1	629,790	152,731	425	485	728,245	40
Connecticut	3,563,145	5	5	0	604,021	172,745	415	508	712,629	41
Delaware	980,443	1	1	0			at large	475	980,443	2
Florida	21,733,957	27	29	2	706,919	130,957	433	447	749,447	29
Georgia	10,700,181	14	14	0	325,104	472,628	419	445	764,299	20
Hawaii	1,419,389	2	2	0	444,225	347,250	333	568	709,694	42
Idaho	1,808,554	2	2	0	55,060	736,415	261	446	904,277	3
Illinois	12,653,759	18	17	-1	655,102	150,579	431	460	744,339	32
Indiana	6,753,109	9	9	0	464,634	320,276	416	465	750,345	28
Iowa	3,163,630	4	4	0	238,848	537,437	362	468	790,907	10
Kansas	2,917,511	4	4	0	484,966	291,318	395	507	729,378	38
Kentucky	4,477,052	6	6	0	453,606	324,676	404	477	746,175	31
Louisiana	4,655,763	6	6	0	274,894	503,388	392	461	775,961	14
Maine	1,345,723	2	2	0	517,891	273,585	344	599	672,862	46
Maryland	6,065,700	8	8	0	390,046	392,475	408	463	758,212	23
Massachusetts	6,919,755	9	9	0	297,989	486,922	406	452	768,862	18
Michigan	9,996,752	14	13	-1	267,230	527,878	414	444	768,981	17
Minnesota	5,668,657	8	7	-1	24,776	755,500	378	437	809,808	8
Mississippi	2,975,907	4	4	0	426,570	349,714	386	497	743,977	33
Missouri	6,149,601	8	8	0	306,145	476,376	400	458	768,700	19
Montana	1,075,958	1	2	1	787,656	3,819	435	735	537,979	50
Nebraska	1,943,643	3	3	0	691,904	86,645	418	587	647,881	47
Nevada	3,119,268	4	4	0	283,209	493,075	369	473	779,817	13
New Hampshire	1,363,526	2	2	0	500,088	291,387	340	589	681,763	45
New Jersey	8,887,290	12	12	0	615,310	177,193	429	466	740,608	35
New Mexico	2,098,377	3	3	0	537,171	241,378	388	544	699,459	44
New York	19,449,289	27	26	-1	708,771	121,030	432	448	748,050	30
North Carolina	10,572,638	13	14	1	452,647	345,085	422	451	755,188	25
North Dakota	770,073	1	1	0			at large	608	770,073	15
Ohio	11,702,810	16	15	-1	83,715	716,656	410	439	780,187	11
Oklahoma	3,973,480	5	5	0	193,687	583,080	374	456	794,696	9
Oregon	4,253,040	5	6	1	677,618	100,664	427	504	708,840	43
Pennsylvania	12,807,279	18	17	-1	501,583	304,098	426	450	753,369	26
Rhode Island	1,059,899	2	1	-1			at large	440	1,059,899	1
South Carolina	5,197,967	7	7	0	495,466	284,810	412	474	742,567	34
South Dakota	890,810	1	1	0			at large	526	890,810	5
Tennessee	6,872,183	9	9	0	345,561	439,350	409	459	763,576	21
Texas	29,350,998	36	39	3	698,863	165,968	434	442	752,590	27
Utah	3,247,776	4	4	0	154,702	621,583	351	455	811,944	7
Vermont	623,704	1	1	0			at large	732	623,704	48
Virginia	8,578,424	11	11	0	162,697	627,230	403	441	779,857	12
Washington	7,697,326	10	10	0	282,190	505,200	407	449	769,733	16
West Virginia	1,786,340	3	2	-1	77,273	714,202	265	453	893,170	4
Wisconsin	5,833,642	8	8	0	622,104	160,417	424	483	729,205	39
Wyoming	579,855	1	1	0			at large	782	579,855	49
Washington DC	714,924	*0*								
	329,956,225		435					Median =	754,279	
Other Inputs:	Seats to Apportion							Min =	537,979	
435	Max Seats to Calculate							Max =	1,059,899	
75	States									
50										
☐ Include										

		2020 Apportionment Calculations based on different trend lines coming from the 2019 Census Bureau Estimates																	
		2010-2019 Trend		2011-2019 Trend		2012-2019 Trend		2013-2019 Trend		2014-2019 Trend		2015-2019 Trend		2016-2019 Trend		2017-2019 Trend		2018-2019 Trend	
State	Compare To	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change	Seats	Change
Alabama	7	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1	6	-1
Alaska	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Arizona	9	10	1	10	1	10	1	10	1	10	1	10	1	10	1	10	1	10	1
Arkansas	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
California	53	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1	52	-1
Colorado	7	8	1	8	1	8	1	8	1	8	1	8	1	8	1	8	1	8	1
Connecticut	5	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0
Delaware	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Florida	27	29	2	29	2	29	2	29	2	29	2	29	2	29	2	29	2	29	2
Georgia	14	14	0	14	0	14	0	14	0	14	0	14	0	14	0	14	0	14	0
Hawaii	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
Idaho	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
Illinois	18	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1
Indiana	9	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0
Iowa	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Kansas	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Kentucky	6	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0
Louisiana	6	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0	6	0
Maine	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
Maryland	8	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0
Massachusetts	9	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0
Michigan	14	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1	13	-1
Minnesota	8	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1	7	-1
Mississippi	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Missouri	8	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0
Montana	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1
Nebraska	3	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0
Nevada	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
New Hampshire	2	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0	2	0
New Jersey	12	12	0	12	0	12	0	12	0	12	0	12	0	12	0	12	0	12	0
New Mexico	3	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0	3	0
New York	27	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1	26	-1
North Carolina	13	14	1	14	1	14	1	14	1	14	1	14	1	14	1	14	1	14	1
North Dakota	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Ohio	16	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1	15	-1
Oklahoma	5	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0	5	0
Oregon	5	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6	1	6	1
Pennsylvania	18	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1	17	-1
Rhode Island	2	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1	1	-1
South Carolina	7	7	0	7	0	7	0	7	0	7	0	7	0	7	0	7	0	7	0
South Dakota	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Tennessee	9	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0	9	0
Texas	36	39	3	39	3	39	3	39	3	39	3	39	3	39	3	39	3	39	3
Utah	4	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0	4	0
Vermont	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Virginia	11	11	0	11	0	11	0	11	0	11	0	11	0	11	0	11	0	11	0
Washington	10	10	0	10	0	10	0	10	0	10	0	10	0	10	0	10	0	10	0
West Virginia	3	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1	2	-1
Wisconsin	8	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0	8	0
Wyoming	1	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0	1	0
Washington DC	*0*																		
		435		435		435		435		435		435		435		435		435	
		State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat	State	Seat
	430	California	52	California	52	California	52	California	52	California	52	California	52	California	52	California	52	California	52
	431	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17	Illinois	17
	432	New York	26	New York	26	Florida	29	Florida	29	Florida	29	Florida	29	Florida	29	New York	26	New York	26
	433	Texas	39	Florida	29	New York	26	New York	26	New York	26	New York	26	New York	26	Florida	29	Texas	39
	434	Florida	29	Texas	39	Texas	39	Texas	39	Texas	39	Texas	39	Montana	2	Texas	39	Montana	2
	435	Montana	2	Montana	2	Montana	2	Montana	2	Montana	2	Montana	2	Texas	39	Montana	2	Florida	29
	436	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7	Alabama	7
	437	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8	Minnesota	8
	438	California	53	California	53	California	53	California	53	Ohio	16	Ohio	16	Ohio	16	Ohio	16	Ohio	16
	439	Ohio	16	Ohio	16	Ohio	16	Ohio	16	California	53	California	53	California	53	California	53	California	53
	440	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2	Rhode Island	2

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					2016 Presidential Election				
State	New Apportionment Count (2018-2019 Trend)	New Electoral College Count	2010s Electoral College Count	2000s Electoral College Count	2016 Presidential Victor	Electoral Votes For Clinton (D)	Electorial Votes For Trump (Rep)	Revised Electoral Votes For Clinton (D)	Revised Electorial Votes For Trump (Rep)
Alabama	6	8	9	9	Trump	0	9	0	8
Alaska	1	3	3	3	Trump	0	3	0	3
Arizona	10	12	11	10	Trump	0	11	0	12
Arkansas	4	6	6	6	Trump	0	6	0	6
California	52	54	55	55	Clinton	55	0	54	0
Colorado	8	10	9	9	Clinton	9	0	10	0
Connecticut	5	7	7	7	Clinton	7	0	7	0
Delaware	1	3	3	3	Clinton	3	0	3	0
Florida	29	31	29	27	Trump	0	29	0	31
Georgia	14	16	16	15	Trump	0	16	0	16
Hawaii	2	4	4	4	Clinton*	3	0	3	0
Idaho	2	4	4	4	Trump	0	4	0	4
Illinois	17	19	20	21	Clinton	20	0	19	0
Indiana	9	11	11	11	Trump	0	11	0	11
Iowa	4	6	6	7	Trump	0	6	0	6
Kansas	4	6	6	6	Trump	0	6	0	6
Kentucky	6	8	8	8	Trump	0	8	0	8
Louisiana	6	8	8	9	Trump	0	8	0	8
Maine	2	4	4	4	*Clinton*	3	1	4	0
Maryland	8	10	10	10	Clinton	10	0	10	0
Massachusetts	9	11	11	12	Clinton	11	0	11	0
Michigan	13	15	16	17	Trump	0	16	0	15
Minnesota	7	9	10	10	Clinton	10	0	9	0
Mississippi	4	6	6	6	Trump	0	6	0	6
Missouri	8	10	10	11	Trump	0	10	0	10
Montana	2	4	3	3	Trump	0	3	0	4
Nebraska	3	5	5	5	Trump	0	5	0	5
Nevada	4	6	6	5	Clinton	6	0	6	0
New Hampshire	2	4	4	4	Clinton	4	0	4	0
New Jersey	12	14	14	15	Clinton	14	0	14	0
New Mexico	3	5	5	5	Clinton	5	0	5	0
New York	26	28	29	31	Clinton	29	0	28	0
North Carolina	14	16	15	15	Trump	0	15	0	16
North Dakota	1	3	3	3	Trump	0	3	0	3
Ohio	15	17	18	20	Trump	0	18	0	17
Oklahoma	5	7	7	7	Trump	0	7	0	7
Oregon	6	8	7	7	Clinton	7	0	8	0
Pennsylvania	17	19	20	21	Trump	0	20	0	19
Rhode Island	1	3	4	4	Clinton	4	0	3	0
South Carolina	7	9	9	8	Trump	0	9	0	9
South Dakota	1	3	3	3	Trump	0	3	0	3
Tennessee	9	11	11	11	Trump	0	11	0	11
Texas	39	41	38	34	Trump#	0	36	0	39
Utah	4	6	6	5	Trump	0	6	0	6
Vermont	1	3	3	3	Clinton	3	0	3	0
Virginia	11	13	13	13	Clinton	13	0	13	0
Washington	10	12	12	11	Clinton&	8	0	8	0
West Virginia	2	4	5	5	Trump	0	5	0	4
Wisconsin	8	10	10	10	Trump	0	10	0	10
Wyoming	1	3	3	3	Trump	0	3	0	3
Washington DC	*1*	3	*3*	3	Clinton	3	0	3	0
						227	304	225	306
								-2	2
					#One elector voted for John Kasich for President				
					#One elector voted for Ron Paul for President				
					&Three electors voted for Colin Powell for President				
					&One elector voted for Faith Spotted Eagle				
					*One elector voted for Bernie Sanders				

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2012 Presidential Election					2008 Presidential Election				
2012 Presidential Victor	Electoral Votes For Obama (D)	Electoral Votes For Romney (Rep)	Revised Electoral Votes For Obama (D)	Revised Electorial Votes For Romney (Rep)	2008 Presidential Victor	Electoral Votes For Obama (D)	Electorial Votes For McCain (Rep)	Revised Electoral Votes For Obama (D)	Revised Electorial Votes For McCain (Rep)
Romney	0	9	0	8	McCain	0	9	0	8
Romney	0	3	0	3	McCain	0	3	0	3
Romney	0	11	0	12	McCain	0	10	0	12
Romney	0	6	0	6	McCain	0	6	0	6
Obama	55	0	54	0	Obama	55	0	54	0
Obama	9	0	10	0	Obama	9	0	10	0
Obama	7	0	7	0	Obama	7	0	7	0
Obama	3	0	3	0	Obama	3	0	3	0
Obama	29	0	31	0	Obama	27	0	31	0
Romney	0	16	0	16	McCain	0	15	0	16
Obama	4	0	4	0	Obama	4	0	4	0
Romney	0	4	0	4	McCain	0	4	0	4
Obama	20	0	19	0	Obama	21	0	19	0
Romney	0	11	0	11	Obama	11	0	11	0
Obama	6	0	6	0	Obama	7	0	6	0
Romney	0	6	0	6	McCain	0	6	0	6
Romney	0	8	0	8	McCain	0	8	0	8
Romney	0	8	0	8	McCain	0	9	0	8
Obama	4	0	4	0	Obama	4	0	4	0
Obama	10	0	10	0	Obama	10	0	10	0
Obama	11	0	11	0	Obama	12	0	11	0
Obama	16	0	15	0	Obama	17	0	15	0
Obama	10	0	9	0	Obama	10	0	9	0
Romney	0	6	0	6	McCain	0	6	0	6
Romney	0	10	0	10	McCain	0	11	0	10
Romney	0	3	0	4	McCain	0	3	0	4
Romney	0	5	0	5	McCain	1	4	1	4
Obama	6	0	6	0	Obama	5	0	6	0
Obama	4	0	4	0	Obama	4	0	4	0
Obama	14	0	14	0	Obama	15	0	14	0
Obama	5	0	5	0	Obama	5	0	5	0
Obama	29	0	28	0	Obama	31	0	28	0
Romney	0	15	0	16	Obama	15	0	16	0
Romney	0	3	0	3	McCain	0	3	0	3
Obama	18	0	17	0	Obama	20	0	17	0
Romney	0	7	0	7	McCain	0	7	0	7
Obama	7	0	8	0	Obama	7	0	8	0
Obama	20	0	19	0	Obama	21	0	19	0
Obama	4	0	3	0	Obama	4	0	3	0
Romney	0	9	0	9	McCain	0	8	0	9
Romney	0	3	0	3	McCain	0	3	0	3
Romney	0	11	0	11	McCain	0	11	0	11
Romney	0	38	0	41	McCain	0	34	0	41
Romney	0	6	0	6	McCain	0	5	0	6
Obama	3	0	3	0	Obama	3	0	3	0
Obama	13	0	13	0	Obama	13	0	13	0
Obama	12	0	12	0	Obama	11	0	12	0
Romney	0	5	0	4	McCain	0	5	0	4
Obama	10	0	10	0	Obama	10	0	10	0
Romney	0	3	0	3	McCain	0	3	0	3
Obama	3	0	3	0	Obama	3	0	3	0
	332	206	328	210		365	173	356	182
			-4	4				-9	9

2004 Presidential Election					2000 Presidential Election				
2004 Presidential Victor	Electoral Votes For Kerry (D)	Electorial Votes For Bush (Rep)	Revised Electoral Votes For Kerry (D)	Revised Electorial Votes For Bush (Rep)	2000 Presidential Victor	Electoral Votes For Gore (D)	Electorial Votes For Bush (Rep)	Revised Electoral Votes For Gore (D)	Revised Electorial Votes For Bush (Rep)
Bush	0	9	0	8	Bush	0	9	0	8
Bush	0	3	0	3	Bush	0	3	0	3
Bush	0	10	0	12	Bush	0	8	0	12
Bush	0	6	0	6	Bush	0	6	0	6
Kerry	55	0	54	0	Gore	54	0	54	0
Bush	0	9	0	10	Bush	0	8	0	10
Kerry	7	0	7	0	Gore	8	0	7	0
Kerry	3	0	3	0	Gore	3	0	3	0
Bush	0	27	0	31	Bush	0	25	0	31
Bush	0	15	0	16	Bush	0	13	0	16
Kerry	4	0	4	0	Gore	4	0	4	0
Bush	0	4	0	4	Bush	0	4	0	4
Kerry	21	0	19	0	Gore	22	0	19	0
Bush	0	11	0	11	Bush	0	12	0	11
Bush	0	7	0	6	Gore	7	0	6	0
Bush	0	6	0	6	Bush	0	6	0	6
Bush	0	8	0	8	Bush	0	8	0	8
Bush	0	9	0	8	Bush	0	9	0	8
Kerry	4	0	4	0	Gore	4	0	4	0
Kerry	10	0	10	0	Gore	10	0	10	0
Kerry	12	0	11	0	Gore	12	0	11	0
Kerry	17	0	15	0	Gore	18	0	15	0
Kerry	9	0	8	0	Gore	10	0	9	0
Bush	0	6	0	6	Bush	0	7	0	6
Bush	0	11	0	10	Bush	0	11	0	10
Bush	0	3	0	4	Bush	0	3	0	4
Bush	0	5	0	5	Bush	0	5	0	5
Bush	0	5	0	6	Bush	0	4	0	6
Kerry	4	0	4	0	Bush	0	4	0	4
Kerry	15	0	14	0	Gore	15	0	14	0
Bush	0	5	0	5	Gore	5	0	5	0
Kerry	31	0	28	0	Gore	33	0	28	0
Bush	0	15	0	16	Bush	0	14	0	16
Bush	0	3	0	3	Bush	0	3	0	3
Bush	0	20	0	17	Bush	0	21	0	17
Bush	0	7	0	7	Bush	0	8	0	7
Kerry	7	0	8	0	Gore	7	0	8	0
Kerry	21	0	19	0	Gore	23	0	19	0
Kerry	4	0	3	0	Gore	4	0	3	0
Bush	0	8	0	9	Bush	0	8	0	9
Bush	0	3	0	3	Bush	0	3	0	3
Bush	0	11	0	11	Bush	0	11	0	11
Bush	0	34	0	41	Bush	0	32	0	41
Bush	0	5	0	6	Bush	0	5	0	6
Kerry	3	0	3	0	Gore	3	0	3	0
Bush	0	13	0	13	Bush	0	13	0	13
Kerry	11	0	12	0	Gore	11	0	12	0
Bush	0	5	0	4	Bush	0	5	0	4
Kerry	10	0	10	0	Gore	11	0	10	0
Bush	0	3	0	3	Bush	0	3	0	3
Kerry	3	0	3	0	Gore	2	0	2	0
	251	286	239	298		266	271	246	291
			-12	12				-20	20

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EXHIBIT C

2020 Population Projections and Apportionment

2020 Projections wMTchange (short term 2018-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019

State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
Alabama	4,914,850	7	7	0	760,330	9	435	502	702,121	44
Alaska	728,863	1	1	0			at large	640	728,863	38
Arizona	7,370,763	9	10	1	583,171	176,173	425	471	737,076	36
Arkansas	3,023,873	4	4	0	367,696	396,781	379	489	755,968	24
California	39,550,248	53	52	-1	262,781	495,701	430	439	760,582	22
Colorado	5,809,922	7	8	1	625,127	134,753	426	485	726,240	40
Connecticut	3,560,620	5	5	0	593,186	169,058	416	508	712,124	41
Delaware	980,031	1	1	0			at large	475	980,031	3
Florida	21,654,726	27	29	2	714,206	44,323	434	447	746,715	29
Georgia	10,697,948	14	14	0	291,991	466,891	417	446	764,139	20
Hawaii	1,412,343	2	2	0	445,296	339,837	334	572	706,172	43
Idaho	1,815,033	2	2	0	42,606	742,528	261	443	907,517	4
Illinois	12,633,538	18	17	-1	632,656	126,074	431	460	743,149	32
Indiana	6,759,912	9	9	0	434,692	324,874	415	464	751,101	27
Iowa	3,159,919	4	4	0	231,650	532,826	362	468	789,980	10
Kansas	2,914,781	4	4	0	476,788	287,689	395	507	728,695	39
Kentucky	4,472,570	6	6	0	442,280	318,772	402	478	745,428	31
Louisiana	4,640,641	6	6	0	274,209	486,843	392	461	773,440	14
Maine	1,348,093	2	2	0	509,546	275,587	342	596	674,047	47
Maryland	6,053,101	8	8	0	381,949	377,931	409	462	756,638	23
Massachusetts	6,899,915	9	9	0	294,689	464,877	406	453	766,657	18
Michigan	9,988,946	14	13	-1	242,130	516,828	413	444	768,380	17
Minnesota	5,664,818	8	7	-1	10,362	749,978	377	437	809,260	8
Mississippi	2,972,502	4	4	0	419,067	345,409	386	497	743,125	33
Missouri	6,149,312	8	8	0	285,737	474,143	400	457	768,664	15
Montana	1,072,506	1	1	0			at large	436	1,072,506	1
Nebraska	1,941,034	3	3	0	686,065	83,399	418	587	647,011	48
Nevada	3,120,458	4	4	0	271,111	493,366	369	473	780,115	11
New Hampshire	1,364,417	2	2	0	493,222	291,911	339	589	682,209	46
New Jersey	8,879,315	12	12	0	592,821	166,233	429	465	739,943	35
New Mexico	2,099,901	3	3	0	527,197	242,266	387	542	699,967	45
New York	19,396,195	27	26	-1	697,240	61,313	432	449	746,007	30
North Carolina	10,568,755	13	14	1	421,184	337,697	421	451	754,911	25
North Dakota	765,064	1	1	0			at large	612	765,064	19
Ohio	11,698,680	16	15	-1	50,059	708,761	410	438	779,912	12
Oklahoma	3,969,576	5	5	0	184,230	578,014	374	456	793,915	9
Oregon	4,244,856	5	6	1	669,995	91,057	428	505	707,476	42
Pennsylvania	12,802,789	18	17	-1	463,405	295,325	427	450	753,105	26
Rhode Island	1,060,167	2	1	-1			at large	440	1,060,167	2
South Carolina	5,197,747	7	7	0	477,433	282,907	412	474	742,535	34
South Dakota	889,160	1	1	0			at large	525	889,160	6
Tennessee	6,872,698	9	9	0	321,906	437,661	408	458	763,633	21
Texas	29,274,825	36	39	3	678,699	79,794	433	442	750,637	28
Utah	3,245,917	4	4	0	145,652	618,825	350	454	811,479	7
Vermont	623,712	1	1	0			at large	731	623,712	49
Virginia	8,561,297	11	11	0	151,801	607,378	403	441	778,300	13
Washington	7,683,987	10	10	0	269,947	489,396	407	448	768,399	16
West Virginia	1,783,100	3	2	-1	74,539	710,595	264	452	891,550	5
Wisconsin	5,833,734	8	8	0	601,315	158,565	424	483	729,217	37
Wyoming	579,629	1	1	0			at large	782	579,629	50
Washington DC	708,919	*0*								
	329,415,710		435					Median =	754,008	
Other Inputs:	Seats to Apportion							Min =	579,629	
435	Max Seats to Calculate							Max =	1,072,506	
75	States									
50										
Include										

BC-DOC-0000028418

EXHIBIT D

Table 1. Apportionment Population and Number of Representatives, by State: Census 2010

State	Apportionment Population	Resident	Overseas	Number of Apportioned Representatives Based on Census 2010	Change From 2000 Census Apportionment	Percent Overseas ot Apportionment Population
Alabama	4,779,736	4,756,490	23,246	7	0	0.49%
Alaska	710,231	698,939	11,292	1	0	1.59%
Arizona	6,392,017	6,371,334	20,683	9	1	0.32%
Arkansas	2,915,918	2,905,607	10,311	4	0	0.35%
California	37,253,956	37,165,923	88,033	53	0	0.24%
Colorado	5,029,196	5,013,462	15,734	7	0	0.31%
Connecticut	3,574,097	3,566,566	7,531	5	0	0.21%
Delaware	897,934	894,991	2,943	1	0	0.33%
Florida	18,801,310	18,701,847	99,463	27	2	0.53%
Georgia	9,687,653	9,647,740	39,913	14	1	0.41%
Hawaii	1,360,301	1,353,740	6,561	2	0	0.48%
Idaho	1,567,582	1,561,665	5,917	2	0	0.38%
Illinois	12,830,632	12,796,884	33,748	18	-1	0.26%
Indiana	6,483,802	6,466,022	17,780	9	0	0.27%
Iowa	3,046,355	3,038,923	7,432	4	-1	0.24%
Kansas	2,853,118	2,842,423	10,695	4	0	0.37%
Kentucky	4,339,367	4,328,128	11,239	6	0	0.26%
Louisiana	4,533,372	4,512,782	20,590	6	-1	0.45%
Maine	1,328,361	1,323,648	4,713	2	0	0.35%
Maryland	5,773,552	5,757,175	16,377	8	0	0.28%
Massachusetts	6,547,629	6,535,614	12,015	9	-1	0.18%
Michigan	9,883,640	9,855,654	27,986	14	-1	0.28%
Minnesota	5,303,925	5,292,971	10,954	8	0	0.21%
Mississippi	2,967,297	2,956,354	10,943	4	0	0.37%
Missouri	5,988,927	5,966,376	22,551	8	-1	0.38%
Montana	989,415	984,414	5,001	1	0	0.51%
Nebraska	1,826,341	1,820,857	5,484	3	0	0.30%
Nevada	2,700,551	2,691,670	8,881	4	1	0.33%
New Hampshire	1,316,470	1,311,495	4,975	2	0	0.38%
New Jersey	8,791,894	8,776,287	15,607	12	-1	0.18%
New Mexico	2,059,179	2,051,085	8,094	3	0	0.39%
New York	19,378,102	19,335,149	42,953	27	-2	0.22%
North Carolina	9,535,483	9,505,185	30,298	13	0	0.32%
North Dakota	672,591	669,277	3,314	1	0	0.49%
Ohio	11,536,504	11,504,513	31,991	16	-2	0.28%
Oklahoma	3,751,351	3,737,820	13,531	5	0	0.36%
Oregon	3,831,074	3,813,542	17,532	5	0	0.46%
Pennsylvania	12,702,379	12,669,853	32,526	18	-1	0.26%
Rhode Island	1,052,567	1,049,887	2,680	2	0	0.25%
South Carolina	4,625,364	4,604,753	20,611	7	1	0.45%
South Dakota	814,180	808,599	5,581	1	0	0.69%
Tennessee	6,346,105	6,316,779	29,326	9	0	0.46%
Texas	25,145,561	25,022,704	122,857	36	4	0.49%
Utah	2,763,885	2,757,005	6,880	4	1	0.25%
Vermont	625,741	621,145	4,596	1	0	0.73%
Virginia	8,001,024	7,964,312	36,712	11	0	0.46%
Washington	6,724,540	6,695,711	28,829	10	1	0.43%
West Virginia	1,852,994	1,846,173	6,821	3	0	0.37%
Wisconsin	5,686,986	5,675,742	11,244	8	0	0.20%
Wyoming	563,626	558,952	4,674	1	0	0.83%
Total Apportionment Population	308,143,815	307,104,167	1,039,648	435		0.34%
					Min	0.18%
					Max	1.59%

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Table 1. Apportionment Population and Number of Representatives, by State: Census 2000

State	Apportionment Population	Resident	Overseas	Number of Apportioned Representatives Based on Census 2000	Change From 1990 Census Apportionment	Percent Overseas of Apportionment Population
Alabama	4,461,130	4,447,100	14,030	7	0	0.31%
Alaska	628,933	626,932	2,001	1	0	0.32%
Arizona	5,140,683	5,130,632	10,051	8	2	0.20%
Arkansas	2,679,733	2,673,400	6,333	4	0	0.24%
California	33,930,798	33,871,648	59,150	53	1	0.17%
Colorado	4,311,882	4,301,261	10,621	7	1	0.25%
Connecticut	3,409,535	3,405,565	3,970	5	-1	0.12%
Delaware	785,068	783,600	1,468	1	0	0.19%
Florida	16,028,890	15,982,378	46,512	25	2	0.29%
Georgia	8,206,975	8,186,453	20,522	13	2	0.25%
Hawaii	1,216,642	1,211,537	5,105	2	0	0.42%
Idaho	1,297,274	1,293,953	3,321	2	0	0.26%
Illinois	12,439,042	12,419,293	19,749	19	-1	0.16%
Indiana	6,090,782	6,080,485	10,297	9	-1	0.17%
Iowa	2,931,923	2,926,324	5,599	5	0	0.19%
Kansas	2,693,824	2,688,418	5,406	4	0	0.20%
Kentucky	4,049,431	4,041,769	7,662	6	0	0.19%
Louisiana	4,480,271	4,468,976	11,295	7	0	0.25%
Maine	1,277,731	1,274,923	2,808	2	0	0.22%
Maryland	5,307,886	5,296,486	11,400	8	0	0.21%
Massachusetts	6,355,568	6,349,097	6,471	10	0	0.10%
Michigan	9,955,829	9,938,444	17,385	15	-1	0.17%
Minnesota	4,925,670	4,919,479	6,191	8	0	0.13%
Mississippi	2,852,927	2,844,658	8,269	4	-1	0.29%
Missouri	5,606,260	5,595,211	11,049	9	0	0.20%
Montana	905,316	902,195	3,121	1	0	0.34%
Nebraska	1,715,369	1,711,263	4,106	3	0	0.24%
Nevada	2,002,032	1,998,257	3,775	3	1	0.19%
New Hampshire	1,238,415	1,235,786	2,629	2	0	0.21%
New Jersey	8,424,354	8,414,350	10,004	13	0	0.12%
New Mexico	1,823,821	1,819,046	4,775	3	0	0.26%
New York	19,004,973	18,976,457	28,516	29	-2	0.15%
North Carolina	8,067,673	8,049,313	18,360	13	1	0.23%
North Dakota	643,756	642,200	1,556	1	0	0.24%
Ohio	11,374,540	11,353,140	21,400	18	-1	0.19%
Oklahoma	3,458,819	3,450,654	8,165	5	-1	0.24%
Oregon	3,428,543	3,421,399	7,144	5	0	0.21%
Pennsylvania	12,300,670	12,281,054	19,616	19	-2	0.16%
Rhode Island	1,049,662	1,048,319	1,343	2	0	0.13%
South Carolina	4,025,061	4,012,012	13,049	6	0	0.32%
South Dakota	756,874	754,844	2,030	1	0	0.27%
Tennessee	5,700,037	5,689,283	10,754	9	0	0.19%
Texas	20,903,994	20,851,820	52,174	32	2	0.25%
Utah	2,236,714	2,233,169	3,545	3	0	0.16%
Vermont	609,890	608,827	1,063	1	0	0.17%
Virginia	7,100,702	7,078,515	22,187	11	0	0.31%
Washington	5,908,684	5,894,121	14,563	9	0	0.25%
West Virginia	1,813,077	1,808,344	4,733	3	0	0.26%
Wisconsin	5,371,210	5,363,675	7,535	8	-1	0.14%
Wyoming	495,304	493,782	1,522	1	0	0.31%
Total Apportionment Population	281,424,177	280,849,847	574,330	435		0.20%
					Min	0.10%
					Max	0.42%

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Table 1. Apportionment Population and Number of Representatives, by State: Census 1990

State	Apportionment Population	Resident	Overseas	Number of Apportioned Representatives Based on Census 1990	Change From 1980 Census Apportionment	Percent Overseas of Apportionment Population
Alabama	4,062,608	4,040,587	22,021	7	0	0.54%
Alaska	551,947	550,043	1,904	1	0	0.34%
Arizona	3,677,985	3,665,228	12,757	6	1	0.35%
Arkansas	2,362,239	2,350,725	11,514	4	0	0.49%
California	29,839,250	29,760,021	79,229	52	7	0.27%
Colorado	3,307,912	3,294,394	13,518	6	0	0.41%
Connecticut	3,295,669	3,287,116	8,553	6	0	0.26%
Delaware	668,696	666,168	2,528	1	0	0.38%
Florida	13,003,362	12,937,926	65,436	23	4	0.50%
Georgia	6,508,419	6,478,216	30,203	11	1	0.46%
Hawaii	1,115,274	1,108,229	7,045	2	0	0.63%
Idaho	1,011,986	1,006,749	5,237	2	0	0.52%
Illinois	11,466,682	11,430,602	36,080	20	-2	0.31%
Indiana	5,564,228	5,544,159	20,069	10	0	0.36%
Iowa	2,787,424	2,776,755	10,669	5	-1	0.38%
Kansas	2,485,600	2,477,574	8,026	4	-1	0.32%
Kentucky	3,698,969	3,685,296	13,673	6	-1	0.37%
Louisiana	4,238,216	4,219,973	18,243	7	-1	0.43%
Maine	1,233,223	1,227,928	5,295	2	0	0.43%
Maryland	4,798,622	4,781,468	17,154	8	0	0.36%
Massachusetts	6,029,051	6,016,425	12,626	10	-1	0.21%
Michigan	9,328,784	9,295,297	33,487	16	-2	0.36%
Minnesota	4,387,029	4,375,099	11,930	8	0	0.27%
Mississippi	2,586,443	2,573,216	13,227	5	0	0.51%
Missouri	5,137,804	5,117,073	20,731	9	0	0.40%
Montana	803,655	799,065	4,590	1	-1	0.57%
Nebraska	1,584,617	1,578,385	6,232	3	0	0.39%
Nevada	1,206,152	1,201,833	4,319	2	0	0.36%
New Hampshire	1,113,915	1,109,252	4,663	2	0	0.42%
New Jersey	7,748,634	7,730,188	18,446	13	-1	0.24%
New Mexico	1,521,779	1,515,069	6,710	3	0	0.44%
New York	18,044,505	17,990,455	54,050	31	-3	0.30%
North Carolina	6,657,630	6,628,637	28,993	12	1	0.44%
North Dakota	641,364	638,800	2,564	1	0	0.40%
Ohio	10,887,325	10,847,115	40,210	19	-2	0.37%
Oklahoma	3,157,604	3,145,585	12,019	6	0	0.38%
Oregon	2,853,733	2,842,321	11,412	5	0	0.40%
Pennsylvania	11,924,710	11,881,643	43,067	21	-2	0.36%
Rhode Island	1,005,984	1,003,464	2,520	2	0	0.25%
South Carolina	3,505,707	3,486,703	19,004	6	0	0.54%
South Dakota	699,999	696,004	3,995	1	0	0.57%
Tennessee	4,896,641	4,877,185	19,456	9	0	0.40%
Texas	17,059,805	16,986,510	73,295	30	3	0.43%
Utah	1,727,784	1,722,850	4,934	3	0	0.29%
Vermont	564,964	562,758	2,206	1	0	0.39%
Virginia	6,216,568	6,187,358	29,210	11	1	0.47%
Washington	4,887,941	4,866,692	21,249	9	1	0.43%
West Virginia	1,801,625	1,793,477	8,148	3	-1	0.45%
Wisconsin	4,906,745	4,891,769	14,976	9	0	0.31%
Wyoming	455,975	453,588	2,387	1	0	0.52%
Total Apportionment Population	249,022,783	248,102,973	919,810	435		0.37%
					Min	0.21%
					Max	0.63%

EXHIBIT E

2020 Population Projections Sorts and Apportionment

State	Seats	Average Size	Size Rank
Rhode Island	1	1,060,167	1
Delaware	1	980,031	2
Idaho	2	907,517	3
West Virginia	8	891,550	4
South Dakota	1	889,160	5
Alabama	6	819,142	6
Utah	4	811,479	7
Minnesota	7	809,260	8
Oklahoma	5	793,915	9
Iowa	4	789,980	10
Nevada	4	780,115	11
Ohio	15	779,912	12
Virginia	11	778,300	13
Louisiana	6	773,440	14
Missouri	8	768,664	15
Washington	10	768,399	16
Michigan	13	768,380	17
Massachusetts	9	766,657	18
North Dakota	1	765,064	19
Georgia	14	764,139	20
Tennessee	9	763,633	21
California	52	760,582	22
Maryland	8	756,638	23
Arkansas	4	755,968	24
North Carolina	14	754,911	25
Pennsylvania	17	753,105	26
Indiana	9	751,101	27
Texas	39	750,637	28
Florida	29	746,715	29
New York	26	746,007	30
Kentucky	6	745,428	31
Illinois	17	743,149	32
Mississippi	4	743,125	33
South Carolina	7	742,535	34
New Jersey	12	739,943	35
Arizona	10	737,076	36
Wisconsin	1	729,217	37
Alaska	1	728,863	38
Kansas	4	728,695	39
Colorado	8	726,240	40
Connecticut	5	712,124	41
Oregon	6	707,476	42
Hawaii	2	706,172	43
New Mexico	3	699,967	44
New Hampshir	2	682,209	45
Maine	2	674,047	46
Nebraska	3	647,011	47
Vermont	1	623,712	48
Wyoming	1	579,629	49
Montana	2	537,455	50
Washington DC	*2*		
Median =		754,008	
Min =		537,455	
Max =		1,060,167	

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PROOF OF SERVICE
LOS ANGELES, CALIFORNIA

I am employed in Los Angeles, California. I am over the age of 18 and am not a party to the within action; my business address is: 634 S. Spring St., Ste. 1100, Los Angeles, CA 90014.

On March 13, 2020, I served the following document(s) described as: **RULE 26(A)(2) EXPERT REPORT AND DECLARATION OF KIMBALL W. BRACE** on all interested parties in this action, by serving the following individuals:

Alexander V. SverdloV
Brad P. Rosenberg
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b(6)

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Attorneys for Plaintiff State of Alabama

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Attorney for Plaintiff Mo Brooks

[X] (By Electronic Service): By transmitting by email to the above Parties at the above email addresses.

[X] (Federal): I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on **March 13, 2020**, at Los Angeles, California.

Julia A. Gomez

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

STATE OF ALABAMA, *et al.,*

*Plaintiff*s,

v.

UNITED STATES DEPARTMENT OF COMMERCE; *et. al*.,

Defendants,

and

DIANA MARTINEZ; et. al; COUNTY OF SANTA CLARA, CALIFORNIA, *et al*; and STATE OF NEW YORK, *et al*.,

Defendant-Intervenors.

Civil Action No. 2:18-cv-00772-RDP

DECLARATION OF DR. DOUGLAS S. MASSEY FOR MARTINEZ INTERVENORS AND CROSS CLAIMAINTS

[Fed. R. Civ. Pro. 26(a)(2)]

DECLARATION OF DR. DOUGLAS S. MASSEY

I, Douglas S. Massey declare:

1. I am currently the Henry G. Bryant Professor of Sociology and Public Affairs at Princeton University where I direct the Office of Population Research (OPR), the nation's oldest population research center. I am retained by Martinez Intervenors and Cross Claimants in this action to provide expert testimony pertaining to Plaintiffs' lawsuit to exclude the undocumented population from the apportionment population count and the related cross claim.

2. A copy of my expert report is attached as Exhibit A to this declaration.

3. A complete list of my qualifications, including a list of all publications authored in the previous 10 years, is attached as Exhibit B to this declaration.

4. I am being compensated by Martinez Intervenors and Cross Claimants for my time in preparing this report at a rate of $250 per hour.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on March 13, 2020 in Jamaica, Vermont.



Dr. Douglas S. Massey

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EXHIBIT A

EXPERT REPORT OF DOUGLAS S. MASSEY, PH.D.

Background and Qualifications

1. My name is Douglas S. Massey, an adult aged 67 with 40 years of experience on the faculties of the University of Pennsylvania (1980-1987, 1994-2003), the University of Chicago (1987-1993), and Princeton University (2003-2020). A complete list of my qualifications, including a list of all publications authored in the previous ten years, is included in my curriculum vitae, attached at Exhibit B. I am retained by counsel for Martinez Intervenors in the above-captioned case, and in the cross claim brought by Martinez Intervenors, to provide expert witness testimony related to Alabama's lawsuit to exclude undocumented immigrants from the apportionment population count and the related cross claim. I am being compensated for my work on this case at a rate of $250 per hour.

2. I am currently the Henry G. Bryant Professor of Sociology and Public Affairs at Princeton University where I direct the Office of Population Research (OPR), the nation's oldest population research center. I received doctoral training in demography as a graduate student at OPR, earning a Ph.D. in Sociology with a specialization in demography from Princeton in 1978. I then remained at Princeton for an additional year of postdoctoral work at OPR before going to the Graduate Group in Demography at UC Berkeley with a postdoctoral fellowship from the National Science Foundation. I began my faculty career at the Population Studies Center of the University of Pennsylvania in the fall of 1980.

3. I am an internationally recognized expert in the field of demography with an extensive background in the collection, dissemination, and analysis of data on immigration to the United States, both documented and undocumented. I have accumulated a steady stream of research published in peer-reviewed scientific journals such as *Demography, Population Studies, Population Research and Policy Review, Population and Development Review, International Migration*, *International Migration Review*, and *The Journal of Ethnic and Migration Studies*.

4. In the course of my academic career, I have directed population research centers at the University of Pennsylvania, the University of Chicago, and Princeton University and also served as director of graduate training in demography at Penn and Chicago. Based on my contributions to the field of demography, I received both the Clifford Clogg Early Career Award and the Irene Taeuber Lifetime Achievement Award from the Population Association of America, the nation's leading professional association for demographers. I have also received the Distinguished Career Award from the International Migration Section of the American Sociological Association. I am Past-President of the Population Association of America, the American Sociological Association, and the American Academy of Political and Social Science, and an elected member of the American Academy of Arts and Sciences, the American Philosophical Society, the National Academy of Sciences, and the Academia Europea.

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5. In addition to my academic accomplishments, I have compiled a long record of public and professional service. From 1984 to 1989, I chaired the PAA's Committee on Population Statistics. I also served on the Social Sciences and Population Study Section of the National Institute of Child Health and Human Development from 1984 to 1988 and was a member of the institute's Population Research Committee from 1989 to 1993. From 2002 to 2004 I was a member of the National Academy of Sciences' Committee on Population, and from 2004 to 2010 I served two terms on the Committee on National Statistics, the principal overseer of the federal statistical system for the National Academy of Sciences. From 2012 to 2018, I served two terms on the Census Scientific Advisory Committee, the publicly appointed body officially charged with providing scientific advice to the U.S. Census Bureau on its plans and strategies for data collection. I was a member of the National Academy of Sciences panel that produced the report on *The Integration of Immigrants in U.S. Society* from 2012-2015 and a report reviewer for the National Academy of Sciences report on *The Economic and Fiscal Consequences of Immigration*.

6. Since 1987, I have codirected the Mexican Migration Project, the largest and most reliable source of data on documented and undocumented migration from Mexico to the United States. Funded by the National Institute of Child Health and human development, the project received the institute's MERIT Award for scientific excellence and innovation. It currently provides data to more than 5,000 registered users. Since 1998, I have also codirected the Latin American Migration project, which provides valid and reliable data on documented and undocumented migration from other nations in Latin America to the United States. It currently has nearly 2,000 registered data users. From 2003 to 2015, I codirected the New Immigrant Survey, the first-ever representative longitudinal survey of legal immigrants to the United States, which has more than 4,400 registered users.

7. I currently serve as an expert witness in *Texas v. United States*, Case No. 1:18-cv-68 (S.D. Texas). I previously served as an expert witness in *La Unión Del Pueblo Entero, et al. v. Ross, et al.*, Case No. 8:18-cv-01570-GJH (D. Md.) (later consolidated under *Kravitz, et al. v. Department of Commerce, et al.*, Case No. 8:18-cv-01041-GJH (D. Md.)).

Challenges to Determining an Individual's Immigration Status

8. The U.S. Constitution mandates enumerating the "whole number of persons in each State" and the Census Act of 1790 established "place of usual residence" as the principle determining where these "persons" should be counted. "Usual residence" is defined as the place "where a person lives and sleeps most of the time." It is not the place of legal residence, the place of voter registration, or any other place of bureaucratic relevance. Given these criteria, since 1790, the Decennial Census has always included many categories of non-citizens whose place of usual residence is the United States. In addition to lawful permanent resident aliens, the census enumerates international students, foreign business persons, international investors, asylum seekers, fiancés of U.S. citizens, recipients of temporary protected status, intracompany transferees, exchange visitors, non-

citizen contract workers, religious personnel, artists, entertainers, and sports figures, as well as persons who entered the country outside of an official port of entry, overstayed a legal visa, or violated the terms of their visa.

9. When the U.S. Constitution was adopted, immigration was open and unregulated. The only reference to immigration in the Constitution occurs in Article I, Section 8, which gave Congress the authority to establish rules for naturalization. In 1790, Congress passed the Naturalization Act, which authorized "free white persons" of "good moral character" who had resided in the country for two years to apply for citizenship. In 1875, the Supreme Court declared the regulation of immigration to be exclusively a federal responsibility. The first immigration-regulating legislation passed by Congress was the Chinese Exclusion Act of 1882. The Alien Contract Labor Laws of 1885 and 1887 prohibited certain laborers from immigration to the United States and the Immigration Act of 1891 established a federal bureau responsible for inspecting, processing, and admitting or rejecting immigrants seeking admission to the U.S. The Immigration Act of 1917 imposed a literacy requirement on immigrants but it was only haphazardly enforced. The first numerical limitations on immigration were the Quota Acts of 1921 and 1924, but they did not apply to nations in the Western Hemisphere. Although the Border Patrol was established in 1924, its original mission was to prevent the entry of Asian and European immigrants seeking to circumvent inspection at official ports of entry. Numerical limits on immigration from the Americas were not imposed until 1968 under legislation passed in 1965 and country-level quotas were not enacted until 1976. It wasn't until the 1970s, therefore, that "illegal immigration" became a recurring political issue in the United States.

10. At the individual level, even today determining who is present without authorization and therefore undocumented or "illegal" is far from straightforward. There is no formal definition used by immigration authorities to determine who is present in the United States "illegally." Legal status depends on a host of factors that vary from time to time, person to person, and context to context. Given the complexity of U.S. immigration laws, determinations about a person's legal status ultimately fall to the federal courts. Legal status is a fluid state that can change in response to shifting personal circumstances, court decisions, executive actions, and Congressional legislation. There is no bright line between authorized and unauthorized status. Rather there is a large gray area of transient categories that have proliferated over the years indicating what sociologists have termed "liminal legality." For example, certain categories of immigrants have been granted "temporary protected status" or "Deferred Action for Childhood Arrivals (DACA)," which allows them to live and work in the United States, but as the names imply they do not authorize legal permanent residence. These liminal statuses may last for years, even decades, during which people build lives in the United States and acquire ties that potentially could justify an "adjustment of status" to legal permanent resident, but whose situation cannot be definitively resolved in the absence of judicial or legislative actions. Individuals in a liminal status may also include those who have a pending application for immigration relief and who may or may not have a formal legal immigration status at the

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time but have permission to stay in the country pending the adjudication of their application. This might include applicants for lawful permanent residence, asylum withholding or removal, or with pending Violence Against Women Act applications, among others. Thus, with respect to immigration status there is no true binary between legal and "illegal."

11. Despite the foregoing caveats, demographers have developed indirect methods to estimate the size and characteristics of the undocumented population. The methodology entails estimating the number, age, and sex of people who are legally in the United States and then subtracting them from the number, age, and sex of those enumerated in the census, which is assumed to represent the population of all persons whose place of usual residence is the United States. Between census years, the size and composition of this population are estimated from samples such as the Current Population Survey or the American Community Survey.

12. In any given year, the only pieces of information that demographers reliably know based on lawful permanent resident applications are the number, age, and sex of persons admitted to lawful permanent residence and the number, age, and sex of persons included in the census. However, in order to estimate the size and characteristics of the undocumented population, in any given year one also needs to know how many lawful permanent residents leave the country, die, or become U.S. citizens, how many U.S. citizens die or leave the country, how many nonimmigrants enter the country, die, or leave. Nonimmigrants are people holding a legal visa that permits work or residence in the United States but is not valid for permanent settlement. The United States has no reliable registry of exits from the United States, so the out-migration of lawful permanent residents, citizens, and nonimmigrants has to be estimated by making assumptions about the rates of departure for different segments of the population. Deaths are estimated by making assumptions about the mortality to which different segments of the population are exposed. Finally, although we know the number, age, and sex of persons enumerated, we don't know the rate at which lawful permanent residents, U.S. citizens, and nonimmigrants are undercounted, and undercount rates vary for these three categories as well as by age and sex, so they also have to be estimated by making assumptions based on whatever evidence is available.

13. Demographers use a technique known as the residual method to estimate the size and composition of the undocumented population. After all of the assumptions, adjustments, and estimations, demographers end up with a final estimated total population by age and sex and an estimated population of non-citizens with formal legal status by age and sex, and these two populations are subtracted from one other to estimate of the number of undocumented migrants by age and sex. Since the estimate is computed by subtraction, the technique is known as a residual method and is understood to contain systematic and random errors linked to inadequacies in the underlying assumptions and data sources. At best, the method provides a rough indicator of the size and composition of the undocumented population at the national level, but the likelihood of error increases rapidly

as one moves from estimates at the national level to those at the state, county, city, or block levels.

14. Although we cannot know with certainty the true size and composition of the undocumented population at any level, including nationally, if the same methods and assumptions are consistently applied to the same data sources over time, trends in the size and composition of the undocumented population emerge. Since 1990, the federal government has prepared its own estimates of the undocumented population, estimates that since 2005 have been done by the Office of Immigration Statistics in the Department of Homeland Security. In addition, beginning in 2006, the Pew Research Center in Washington, DC has also prepared annual estimates of the size and composition of the undocumented population; and since 2010 estimates have also been prepared by the Center for Migration Studies in New York.

15. The scale of the error incurred in making the foregoing estimates is indicated by the fact that in 2010 the number of undocumented migrants was estimated to be 11,590,000 by the Office of Immigration Statistics, 11,725,000 by the Center for Migration Studies, and 11,400,000 by the Pew Research Center. None of these estimates is necessarily more "correct" than the others.

16. Despite variability in the specific figures estimated in different years, all sources show the same trend over time. Undocumented migration began to rise in the 1960s, increased through the 1970s and early 1980s, and came to a peak of around 3.2 million in 1986. In that year, the Immigration Reform and Control Act authorized two separate legalization programs—one for long-term undocumented residents and another for undocumented farmworkers. The resulting legalizations reduced the undocumented population to around 1.9 million persons by 1988. Thereafter, growth resumed at roughly the same pace, but after 1993 the rate of growth accelerated markedly. After 2000, however, the growth rate slowed and peaked at around 12 million in 2007, after which growth ceased and since 2008 the undocumented has fluctuated around 11 million persons.

17. Recent estimates of the undocumented population's size are 11,960,000 in 2015 from the Office of Immigration Statistics, 10,700,000 in 2016 from the Pew Research Center, and 10,664,000 in 2017 from the Center for Migration Studies. All the estimates agree that the number of undocumented Mexicans has been falling since 2008, which means that undocumented Mexican departures annually have exceed undocumented Mexican arrivals. The net loss of undocumented Mexicans has been partially offset by net undocumented arrivals from Central America (principally El Salvador, Guatemala, and Honduras) and Asia (principally India and China); but these gains have not been sufficient to offset the net loss of undocumented Mexicans, and the undocumented population declined by about 1.1 million between 2010 and 2017.

18. Estimates based on data from the Mexican Migration Project indicate that the rate of undocumented in-migration from Mexico began to decline around the year 2000 and since

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2008 has plummeted to near zero. According to data from the Border Patrol, the number of Mexican apprehensions in 2019 reached its lowest level since 1969. Although the number of apprehensions of Central Americans did increase in 2019, total border apprehensions remain at historically low levels, and the undocumented population of Central Americans grew slowly at just 1.7% per year between 2010 and 2017, while the undocumented populations of persons from Caribbean and South America declined by around 1.1% per year, implying an excess of departures over arrivals.

19. The fact that the Mexican, Caribbean, and South American undocumented populations are shrinking, and that the Central American population is growing only slowly, implies that the large majority of undocumented migrants have been present in the country for a very long time. The latest estimates from the Center for Migration Studies indicate that as of 2017, 78% of all undocumented residents have lived in the United States for at least five years and 61% have been present for at least ten years. If we assume that three-fifths of those in the country for less than five years in 2017 aged into the five-years-or-greater category by 2000, around 90% of all undocumented migrants will have accumulated at least five years of continuous residence in the country at the time of the Decennial Census.

20. As a consequence of their long duration in the United States, undocumented migrants and those in liminal statuses, often acquire strong connections to the United States that render return migration unlikely, and in some cases support an adjustment to permanent resident status. As of 2017, for example, the Center for Migration Studies estimated that among undocumented migrants 67% were employed, 34% were homeowners, 31% were parents of a U.S. citizen, 12% were married to someone legally present in the U.S., and 3% were married to a U.S. citizen. The CMS also estimated that among 302,000 persons from El Salvador, Honduras, and Haiti who held Temporary Protected Status in the United States in January of 2017, 44% had been in the U.S. for at least 20 years, 9% were married to a legal permanent resident, and together they had produce some 273,000 U.S.-born citizen children. As of 2016, the Pew Research Center estimated that around five million children were living with an undocumented parent, and at the end of 2019, U.S. Citizenship and Immigration Services reported that 653,000 persons who entered the country as minors were registered under the program of Deferred Action for Childhood Arrivals. Given the fluidity of legal status categories, people who believe themselves to be legally present are often surprised they are not, WHILE others who believe themselves to be undocumented are surprised to discover they are eligible for permanent residence or even citizenship.

SOURCES

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Passel, Jeffrey S., D'Vera Cohn, and John Gramlich. 2018. "Number of U.S.-Born Babies with Unauthorized Immigrant Parents Has Fallen Since 2007." Washington, DC: Pew Research Center. https://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines/

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Warren, Robert, and Donald Kerwin. 2020. "A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti." New York: Center for Migration Studies. https://cmsny.org/publications/jmhs-tps-elsalvador-honduras-haiti/

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Executed this 13th day of March, 2020, in Jamaica, Vermont



Douglas S. Massey, Ph.D.

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EXHIBIT B

Douglas S. Massey
Curriculum Vitae
January 2, 2020

Address: Office of Population Research
Princeton University
Wallace Hall
Princeton, NJ 08544
dmassey@princeton.edu

Birth: Born October 5, 1952 in Olympia, Washington, USA

Citizenship: Citizen and Resident of the United States

Education: Ph.D., Sociology, Princeton University, 1978
M.A., Sociology, Princeton University, 1977
B.A., Magna Cum Laude in Sociology-Anthropology, Psychology, and Spanish, Western Washington University, 1974

Honorary Degrees: Master in Arts and Sciences, Honoris Causa, University Pennsylvania, 1985.
Doctor of Social Science Honoris Causa, Ohio State University, 2012

Languages: Fluent in Spanish

Employment:
(9/05-present) Henry G. Bryant Professor of Sociology and Public Affairs, Princeton University
(7/03- 8/05) Professor of Sociology and Public Policy, Princeton University
(7/94-6/03) Dorothy Swaine Thomas Professor, Department of Sociology, Graduate Group in Demography, and Lauder Program in International Studies, University of Pennsylvania
(7/90-6/94) Professor, Irving B. Harris School of Public Policy Studies, University of Chicago
(7/87-6/94) Professor, Department of Sociology, University of Chicago
(7/85-7/87) Associate Professor, Department of Sociology and Graduate Group in Demography, University of Pennsylvania
(9/80-7/85) Assistant Professor, Department of Sociology and Graduate Group in Demography, University of Pennsylvania
(9/79-9/80) NSF Postdoctoral Fellow, Graduate Group in Demography, University of California at Berkeley
(1/79-6/79) Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton University
(9/78-9/79) Research Associate, Office of Population Research, Princeton University

Major Fields: Demography, Urban Sociology, Stratification, Social Research Methods, Latin American Studies, Race/Ethnic Relations, Biosociology, Immigration

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Honors and Awards:

Academia Europaea, elected member 2018-present

Bronislaw Malinowsky Award 2018. Given by the Society for Applied . Anthropology to individuals widely recognized for their efforts to understand and serve the needs of the world through the use of social science (Shared with Jorge Durand for their 30 years of work on the Mexican Migration Project)

Henry Allen Moe Prize in the Humanities 2017. Given annually by the American Philosophical Society to the author of the best paper in the humanities or jurisprudence read at a meeting of the Society

John Hope Franklin Award 2016, for exceptional scholarship in the field of Race, Racism and the Law, from the Law and Society Association

President, American Academy of Political and Social Science, 2006-2015

Robert and Helen Lynd Career Award 2014, Community and Urban Studies Section, American Sociological Association

Robert E. Park Award for Best Book 2014. Community and Urban Studies Section, American Sociological Association

Paul Davidoff Award, 2013. From the Association of Collegiate Schools of Planning for *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb* (Princeton U. Press)

Irene B. Taeuber Award, Given by the Population Association of America in

Award for the Public Understanding of Sociology, American Sociological Association, 2012

Lifetime National Associate of the National Research Council, 2011

Julian Simon Lecture, 8th Annual Migration Meeting, Deutsches Institut für Wirtschaftsforschung--DC, May 13, 2011

External Fellow, Center for Research and Analysis of Migration, University College London, 2011-present

Visiting Scholar, Russell Sage Foundation, 2009-2010

Distinguished Career Award, International Migration Section, American Sociological Association, 2009

Award for Distinguished Contribution to Scholarship in Population, for "From Illegal to Legal: Estimating Previous Illegal Experience Among New Legal Immigrants to the United States" published in Demography and coauthored with Guillermina Jasso, Mark Rosenzweig, and James Smith, from the Population Section of the American Sociological Association

Premio de Reconocimiento de Destacado Mérito, El Consejo Cultural Mundial, México, D.F., 2008

Fellow, American Association for the Advancement of Science, 2006

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Senior Prize, 2005, Vereinigung der Freunde des Deutschen Instituts für Wirtschaftsforschung (Association of Friends of the German Institute for Social Research–Berlin) for the paper "Return Migration by German Guestworkers: Neoclassical versus New Economic Theories" published in International Migration 40(4):5-38.

Otis Dudley Duncan Award, Population Section of the American Sociological Association (for Beyond Smoke and Mirrors), 2004.

W.E.B. DuBois Fellow, American Academy of Political and Social Science, 2003-present

Antonio García Cubas Prize, Best Book on Mexican Art, National Institute of Anthropology and History, Mexico City, 2001 (for Milagros en la Frontera)

President, American Sociological Association, 2000-2001

Member, American Philosophical Society, Elected 2004
Member, National Academy of Sciences, Elected 1998
Member, American Academy of Arts and Sciences, Elected 1995
Member, Sociological Research Association, Elected 1989

Exemplary Alumnus Award, Western Washington University, 2000

Clifford C. Clogg Award (outstanding early career), Population Association of America, 1998

President, Population Association of America, 1996

Member, Council of the American Sociological Association, 1996-99

Southwest Book Award, Border Regional Library Association (for Miracles on the Border), 1996

Distinguished Publication Award, American Sociological Association (for American Apartheid), 1995

Otis Dudley Duncan Award, Population Section of the American Sociological Association (for American Apartheid), 1994

Critics' Choice Award, American Educational Studies Association (for American Apartheid), 1993

First Vice President, Population Association of America, 1994

John Simon Guggenheim Memorial Fellow, 1990-91

MERIT Award, National Institute of Child Health and Human Development, 1987-97

Board of Directors, Population Association of America, 1986-1989

NSF Postdoctoral Fellow, University of California, Berkeley, 1979-1980

Charlotte Elizabeth Proctor Fellowship, Princeton University, 1977-78

NIH Trainee in Demography, Princeton University, 1975-77

Outstanding Graduate in Sociology-Anthropology, Western Washington University, 1975

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Administrative Experience:

(7/11- present) Director, Office of Population Research, Woodrow Wilson School of Public and International Affairs, Princeton University
(1/09-6/09) Chair, Dean Search Committee, Woodrow Wilson School of Public and International Affairs, Princeton University
(7/04-6/09) Director of Ph.D. Program in Policy Studies, Woodrow Wilson
(7/06-6/07) Interim Director, Program in Latin American Studies, Princeton University
(7/96-6/03) Chair, Department of Sociology, University of Pennsylvania
(1/97-12/97) Chair, Dean Search Committee, School of Arts & Sciences, University of Pennsylvania
(9/95-7/96) Director, Population Studies Center, University of Pennsylvania
(10/90-6/94) Director, Center for Latin American Studies, University of Chicago
(7/87-9/90) Director, Population Research Center, University of Chicago
(10/87-9/90) Chair, Committee on Demographic Training, University of Chicago
(7/85-6/87) Chair, Graduate Group in Demography, University of Pennsylvania

Professional Affiliations:

Population Association of America
American Sociological Association
International Union for the Scientific Study of Population
Southwestern Social Science Association
Latin American Studies Association
International Sociological Association
Mexican Demographic Society
American Association for the Advancement of Science

Funded Grants:

(9/1/97-5/31/20) "Public Use Data on Mexican Immigration." National Institute of Child Health and Human Development, Principal Investigator, $1,125,000 1 R01 HD35643

(1/1/09-11/30/15) The Latin American Migration Project and the Center for Migration and Development, John D. and Catherine T. MacArthur Foundation, $750,000,

(6/1/11-12/31/11) "Segregation, Securitized Lending and Foreclosure Outcomes in New York City." Center for New York City Neighborhoods, $10,000

(1/1/09-12/31/11) "Monitoring Mt. Laurel." John D. and Catherine T. MacArthur Foundation, $450,000.

(2/1/08-12/31/08) "Proposal for a Pilot Survey of New Immigrant Destinations." Russell Sage Foundation, $150,000. Co-PI with Marta Tienda

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(6/1/07 - 5/31/12) "Social Influences on Early Adult Stress Biomarkers," National Institute of Child Health and Human Development, $323,969.

(7/01/02-6/30/04) "Transnational Identities and Behavior." Russell Sage Foundation. $65,000.

(6/1/01-5/31/04) "Theoretical and Methodological Analysis of Mexico-U.S. Migration." NICHD, R3TW01223A, $120,582

(8/1/01-7/31/08) "Religion and Religious Practice among New Immigrants to the United States." Pew Charitable Trusts, $500,000. Co-PI with Guillermina Jasso.

3/1/98-11/1/2014) "New Immigrant Survey." NICHD, R01HD33834, $4,239,124, Subcontract, Co-PI with Guillermina Jasso, Mark Rosenzweig, and James Smith.

(9/1/98-8/31/2010) "National Longitudinal Survey of Freshmen at Selective Colleges and Universities." Andrew W. Mellon Foundation, $6.5 million (with Camille Charles).

(3/1/98-2/28/05) "The Latin American Migration Project," Principal Investigator, National Institute of Child Health and Human Development, $738,769, 1 R01 HD3584-01.

(12/1/95-11/30/98) "The New Immigrant Survey: A Pilot Study." NICHD, $1,218,550. Co-PI with Guillermina Jasso, Mark Rosenzweig, and James Smith.

(7/1/95-6/30/96) "The Hourglass Economy." Russell Sage Foundation, Principal Investigator, $24,500.

(11/1/94-12/31/05) "The Socioeconomic and Demographic Consequences of Mexico-U.S. Migration." Hewlett Foundation, Principal Investigator, $400,000, 94-7795.

(9/1/91-8/31/92) "Neighborhood Effects on Family Formation, Education, and Employment among the Poor." Hewlett Foundation, Principal Investigator, $26,000.

(1//1/90-7/1/92) "The Effects of the Immigration Reform and Control Act of 1986: Mexican Immigration to the United States." Sloan Foundation, Co-Principal Investigator (with Katharine Donato), $105,000.

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(9/87-8/97) "Public Use Data on Mexican Immigration," National Institute of Child Health and Human Development, Principal Investigator, $391,027, HD-23415, MERIT Award

(6/87-5/90) "The Consequences of Residential Segregation," National Institute of Child Health and Human Development, Principal Investigator, $342,532, HD-22992.

(6/84-5/87) "Spatial Segregation of Hispanics, Blacks, and Asians," National Institute of Child Health and Human Development, Principal Investigator, $278,719, HD-18594.

(9/81-8/84) "Mexican Migration: The Settlement Process," National Institute of Child Health and Human Development, Principal Investigator, $200,800, HD-15166.

(8/81-1/82) "Problems of Hispanics in the Labor Market," National Commission for Employment Policy, Principal Investigator, $18,343, 99-1-3050-50-52.

(9/79-9/80) "Processes of Residential Segregation Among Hispanic Americans," National Science Foundation, Postdoctoral Research Grant, $13,980, SPI-7914866.

Surveys Designed:

New Jersey Housing and Community Survey (2009-2010)
New Immigrant Survey 2003-2014
National Longitudinal Survey of Freshmen (1998-2004)
Survey of African American Home Buyers in Suburban Baltimore (1998)
Survey of Latin American Immigrants to the United States (1997-present)
Survey of Mexican Immigrants to the United States (1987-present)
New Immigrant Survey Pilot (1995-2000)

Editorial Boards:

Annual Review of Sociology, Board, 2002-2004; Co-Editor 2004-present
Proceedings of the National Academy of Sciences, 2019-present
Social Science Research, 1999-present
Social Science Quarterly, 1991-present
Race and Social Problems, 2008-present
International Migration Review, 2010-2018
Russell Sage Journal of the Social Sciences, 2012-2017
Cityscape, 2008-2014
World Politics, 2007-2013
Migraciones Internacionales, 2001-2011
Ethnicities, 1998-2012
International Journal of Conflict and Violence, 2006-2014
Race and Society, 1996-2002
Latino Review of Books, 1995-2002
Encyclopedia of Sociology, 1997-2001

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American Journal of Sociology, 1987-1994
Demography, 1984-1987

Professional Service:

Member, Board on Higher Education and Workforce, National Academies of Sciences, Engineering, and Medicine, 2019-present
Member, Census Scientific Advisory Committee, U.S. Bureau of the Census 2012-2018
Associate Member, Amsterdam Centre for Inequality Studies, 2013-2018.
Member, Advisory Board, Koshland Science Museum, Washington, DC, 2012-2016
Member, Council of the National Academy of Sciences 2011-2014
Member, Governing Board, National Research Council, 2012-2015
Member, National Academies Committee on the Integration of Immigrants in U.S. Society, 2012-2015
Member, Scientific Advisory Board, Max Planck Institute for the Study of Religious and Ethnic Diversity, 2011-2015
Chair, Class V–Social and Behavioral Sciences, National Academy of Sciences, 2010-2012
Member, Committee on Estimating Costs to the Department of Justice of Increased Border Security Enforcement by the Department of Homeland Security, 2009-2011
Member, Committee on National Statistics, National Research Council, 2004-2010
Secretary, Class V--Social and Behavioral Sciences, National Academy of Sciences, 2008-2010
Member, International Advisory Board, Institute for Interdisciplinary Research on Conflict and Violence, University of Bielefeld, Germany, 2006-present
Member, Advisory Board, Opportunity New Jersey, 2008-present
Member, Panel Evaluating HUD Office of Research and Policy Development, National Research Council, 2005-2008
Chair, Section 53--Social and Political Sciences, National Academy of Science, 2005-2008
Chair, Membership Committee for Class III,--Social and Behavioral Sciences, American Philosophical Society 2005-2008
Member, Class III Social Sciences Membership Committee--American Academy of Arts and Sciences, 2006-2008
Member, Advisory Board, Program on Intercultural Conflict and Societal Integration, Wissenschaftszentrum Berlin für Sozialforschung, 2003-2007.
Consultant, Center for Strategic and International Studies, Global Aging Initiative, 2005-2006
Member, Panel on the Measurement of Discrimination, Committee on Population, National Research Council, 2001-2003
Member, Committee on Population, National Research Council, 2002-2005
Member, National Advisory Board, Leadership Council for Metropolitan Open Communities, 1995-2003
Member, Immigration Advisory Board, Russell Sage Foundation, 1993-

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2006Member, Advisory Board, Mexican Cultural Center of Philadelphia,
1998- Visiting Professor, Mannheim University, Germany, Summer 2002
Member, Council of the American Sociological Association, 1997-2002
Member, Committee of Executive Office and Budget, American Sociological Association, 2000-2002
Member, Panel on Population Projections, Committee on Population, National Research Council, 1998-2000
Keynote Speaker, Meeting of the Advisory Board of the President's Initiative on Race, Georgetown University Law Center, Washington, D.C., July 13, 1998
Panelist, Meeting of the Advisory Board of the President's Initiative on Race, San Jose, California, February 11, 1998
Chair, Committee on South-North Migration, International Union for the Scientific Study of Population 1991-1996
Member, Nominating Committee, Latin American Studies Association, 1994-1995.
Member, Research and Planning Advisory Board, Chicago Urban League, 1990-1994
Member, Board of Trustees, Leadership Council for Metropolitan Open Communities, Chicago, 1993-1994
Member, Board of Trustees, Mexican Cultural and Education Institute, Chicago, 1993-1994
Member, NICHD Population Research Committee, NICHD, 1989-93
Member, Committee for Public Policy Research on Contemporary Hispanic Issues, Social Science Research Council, 1988-1993
Member, International Organizing Committee, Conference on the Peopling of the Americas, 1989-1992
Chair, Committee on Population Statistics, Population Association of America, 1984-1989
Member, Social Sciences and Population Study Section, NICHD, 1984-1988
Member, Subcommittee on Migration Statistics, Committee on Population Statistics, Population Association of America, 1987-88
Member, Subcommittee on the 1990 Census, PAA, 1985-86
Member, Ad Hoc Advisory Committee, Demographic and Behavioral Sciences Branch, Center for Population Research, NICHD, 1986
Visiting Lecturer, El Colegio de Michoacán, Zamora, Michoacán, México, 1985
Consultant, National Academy of Sciences, Committee on National Statistics, Panel on Immigration Statistics, 1980-85
Consultant, National Commission for Employment Policy, 1982
Consultant, Commission on International Migration and Cooperative Economic Development 1987-1988

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Authored and Coauthored Books:

2017 Comprender las Migraciones Internacionales: Teorías, Prácticas, Políticas. (Understanding International Migration: Theory, Practice, Politics). Barcelona:Bellaterra Edicions. A compilation of key works by Douglas S. Massey edited and introduced by Lorenzo Cachón Rodríguez.

2014 Spheres of Influence: The Social Ecology of Racial and Class Inequality. New York: Russell Sage Foundation.(Coauthored with Stefanie Brodmann)

2013 Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb. Princeton, NJ: Princeton University Press. (Coauthored with Len Albright, Rebecca Casciano, Elizabeth Derickson, and David Kinsey).

Paul Davidoff Award 2014, Best Book Promoting Participatory Planning and Positive Social Change, Association of Collegiate Schools of Planning

Robert E. Park Award 2014, Best Book, Community and Urban Studies Section, American Sociological Association

Chinese Edition published by the Social Sciences Academic Press of China.

2010 Brokered Boundaries: Creating Immigrant Identity in Anti-Immigrant Times. New York: Russell Sage Foundation. (Coauthored with Magaly Sánchez R.)

2009 Taming the River: Negotiating the Academic, Financial, and Social Currents in America's Selective Colleges and Universities. Princeton, NJ: Princeton University Press. (Coauthored with Camille Z. Charles, Mary J. Fischer, and Margarita Mooney)

2007 Categorically Unequal: The American Stratification System. New York: Russell Sage Foundation. (Commissioned for the Centennial of the Russell Sage Foundation)

2005 Return of the L-Word: A Liberal Vision for the New Century. Princeton: Princeton University Press.

2005 Strangers in a Strange Land: Humans in an Urbanizing World. New York: Norton Publishers.

2003 Clandestinos: Migración México-Estados Unidos en los Albores del Siglo XXI. México, D.F.: Editorial Porrua. (Coauthored with Jorge Durand)

Chapter 2 reprinted in Diálagos—Foro Universal de la Cultura: Identidad y Diversidad. Monterrey: Foro Editorial de Nuevo León.

BC-DOC-0000028446

2003 Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities. Princeton: Princeton University Press. (Coauthored with Camille Charles, Garvey Lundy, and Mary J. Fischer)

2002 Beyond Smoke and Mirrors: Mexican Immigration in an Age of Economic Integration. New York: Russell Sage Foundation. (with Jorge Durand and Nolan Malone)

Otis Dudley Duncan Award 2004, Best Book, Population Section of the American Sociological Association.

Honorable Mention, *Thomas and Znaniecki Award* of the International Migration Section of the American Sociological Association

Spanish Edition. 2009. Detrás de la Trama: Políticas Migratorias entre México y Estados Unidos. México, D.F.: City: Editorial Porrua.

1998 Worlds in Motion: International Migration at the End of the Millennium. Oxford: Oxford University Press. (Coauthored with Joaquín Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino, and J. Edward Taylor)

1995 Miracles on the Border: Retablos of Mexican Migrants to the United States. Tucson: University of Arizona Press. (Coauthored with Jorge Durand).

Spanish Edition. Milagros en la Frontera: Retablos de Migrantes Mexicanos a Estados Unidos. Editorial El Colegio de San Luis y el Centro de Investigación y Estudios Superiores en Antropología Social, San Luis Potosí y Guadalajara, 2001.

Antonio García Cubas Prize, Best Book on Mexican Art, National Institute of Anthropology and History, Mexico City, 2001.

Southwest Book Award, Border Regional Library Association, El Paso, TX, 1996

Design Award, Bookbuilders West (Now Publishing Professionals Network), 1995

1993 American Apartheid: Segregation and the Making of the Underclass. Cambridge: Harvard University Press. (Coauthored with Nancy A. Denton)

Distinguished Publication Award of the American Sociological Association, 1995

Otis Dudley Duncan Award of the ASA Population Section., 1994

Critics' Choice Award, American Educational Studies Association, 1993

BC-DOC-0000028447

French Edition. American Apartheid. Collection "Les Urbanités," Dirigée par Jean-Marc Rennes, Francis Godard, Sophie Body-Gendrot, et Thierry Paquot. Paris: Descartes & Cie, 1995.

Chapter 1, "The Missing Link" reprinted as "American Apartheid" in Margaret L. Anderson, Kim A. Logio, and Howard F. Taylor, eds., Understanding Society: An Introductory Reader. Stamford, CT: Wadsworth Publishing. Pp. 476-83.

Chapter 1, "The Missing Link" reprinted as "American Apartheid: Segregation and the Making of the Underclass" reprinted in David B. Grusky, ed., Social Stratification in Sociological Perspective: Race, Class, and Gender, Boulder: Westview, pp. 660-70.

Chapter 4, "The Continuing Causes of Segregation," reprinted in Amanda Konradi and Martha Schmidt, eds., Social Problems: Perspectives and Approaches (Mayfield Publishing Company, 1997)

Chapter 4, "The Continuing Causes of Segregation," reprinted in Thomas M. Shapiro, ed., Great Divides: Readings in Social Inequality in the United States. Moutainview, Ca: Mayfield Publishing, 2000, pp. 249-64.

Chapter 6, "The Perpetuation of the Underclass," reprinted in Charles A. Gallagher, ed., Rethinking the Color Line: Readings in Race and Ethnicity. Mountain View, Ca.: Mayfield Publishing.

Chapter 8 , "The Future of the Ghetto," reprinted in Stephen Steinberg, ed., Race and Ethnicity in the United States: Issues and Debates (Blackwell Publishers, Oxford, 2000), pp. 114-26.

1990 Doy Gracias: Iconografía de la Emigración México-Estados Unidos. Guadalajara: Programa de Estudios Jaliscienses, Secretraría de Educación y Cultura, Universidad de Guadalajara; Published in cooperation with the Instituto Nacional de Antropología e Historia. (Coauthored with Jorge Durand)

1990 Milagros en la Frontera. Museum Catalogue to Exhibit "Milagros en la Frontera" at the Diego Rivera Studio Museum, Mexico City, December-February, 1990-1991; the Centenario Museum, Monterrey, Mexico; and Pape Library Museum, Monclova, Coahuila, Mexico. (Coauthored with Jorge Durand)

1987 Return to Aztlan: The Social Process of International Migration from Western Mexico. Berkeley and Los Angeles: University of California Press. (Coauthored with Rafael Alarcón, Jorge Durand, and Humberto González).

Spanish Edition. 1991. Los Ausentes: El Proceso Social de Migración Internacional en México Occidental. México, D.F.: Alianza Editorial Mexicana and Consejo Nacional para la Cultura y las Artes. (with Rafael Alarcón, Jorge Durand, y Humberto González)

BC-DOC-0000028448

Edited Volumes:

2020 Segregation and Stratification in 21st Century America. New York: Springer. Special issue of *Race and Social Problems*.

2019 Behind the Smoke and Mirrors of U.S. Immigration Policy: Research from the Mexican Migration Project. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science.* (Co-edited with Jorge Durand with two coauthored chapters)

2016 Undocumented Migration in a Global Economy. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science* (Co-edited with Katharine Donato and includes three coauthored chapters)

2013 Immigration and the Future of America. Cambridge, MA: MIT Press. Special issue of *Daedalus*. (Edited with an introductory chapter).

2013 The Non-Response Challenge to Surveys and Statistics. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science* (Co-edited with Roger Tourangeau)

2010 Continental Divides: International Migration in the Americas. Thousand Oaks, CA: Sage Publications. Special issue of the *Annals of the American Academy of Political and Social Science*. (Co-edited with Katharine Donato, John Hiskey, and Jorge Durand)

Spanish Edition: Salvando Fronteras: Migración Internacional en Amérca Latina y el Caribe. México, D.F.: Porrúa.

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Scholarly Articles and Book Chapters (* indicates refereed publication):

2020 "The Ethnosurvey Revisited: New Migrations, New Methodologies?"' Central and Eastern European Migration Review, forthcoming.

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Buxton Midyette, Lauder Program, Wharton School, 1998
Jill Scriba, Lauder Program, Wharton School, 1998
Ernesto Garza, Lauder Program, Wharton School, 1998
Matthew Laessig, Lauder Program, Wharton School, 1998
Roberto Junguito, Lauder Program, Wharton School, 1998

David Buenfil, Lauder Program, Wharton School, 1998

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Elizabeth Menke, Lauder Program Wharton School, 1998
Dan Feldman, Lauder Program. Wharton School, Spring 1999
Sean Ludwick, Lauder Program, Wharton School, Spring 1999
Jeffrey Smith, Lauder Program, Wharton School, Spring 1999
Sarene Riley, Lauder Program, Wharton School, Spring 1999
Richard Caballero, Lauder Program, Wharton School, Spring 1999
Nora Ruedi, Demography Program, Spring 1999
Douglas Asiello, Lauder Program, Wharton School, Spring 2000
Erica Blewer, Lauder Program, Wharton School, Spring 2000
Stewart Hobbs, Lauder Program, Wharton School, Spring 2000
Stephen Schafer, Lauder Program, Wharton School, Spring 2000
Andrew Bond, Lauder Program, Wharton School, Spring 2000
William Belleville, Lauder Program, Wharton School, Spring 2000
Anthony Diggle, Lauder Program, Wharton School, Spring 2001
Jason Nelson, Lauder Program, Wharton School, Spring 2001
Shimon Shkury, Lauder Program, Wharton School, Spring 2001
Tal Lev, Lauder Program, Wharton School, , Spring 20001
Cassandra Santos, Lauder Program, Wharton School, Spring 2001
Jonathan Masland, Lauder Program, Wharton School, Spring 2002
Maria Aysa, Demography Program, Spring 2002
Ilana Redstone, Demography Program, Spring 2002
Kevin Johnson, Lauder Program, Wharton School, Spring 2003
Erik Sandorff, Lauder Program, Wharton School, Spring 2003
William McClain, Lauder Program, Wharton School, Spring 2003

Undergraduate Theses Supervised at University of Chicago

Andrew Gross, Sociology, 1991
Aracely Muñoz, Sociology, 1994

Undergraduate Theses Supervised at University of Pennsylvania

Andrew Borinstein, Sociology, 1981
Leonardo Simpser, Development Studies, 1995
Azucena Rangel, Sociology, 1996
Bryan Hirsch, Political Economy, 2003

Senior Theses Supervised at Princeton University

2004

Alison Epting, Woodrow Wilson School
Kathryn Parolin, Sociology

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2005
Mark C. Parrett, Politics
Joseph Robinson III, Sociology
Rebecca Stewart, Sociology
Camille Coates, Woodrow Wilson School

2006
Lindsay F. Tintenfass, Woodrow Wilson School
Karen Barajas, Woodrow Wilson School
Rishard P.O. Cooper, Woodrow Wilson School
Cherice Landers, Sociology (Winner of Lisa Bryant Thesis Award)
Cynthia Loomis, Politics
Venkatram N. Rao, Sociology

2007
Laura Boyce, Woodrow Wilson School
Robert Braun, Sociology (Winner of Ruth Simmons Thesis Prize in African American Studies, *Summa Cum Laude*, *Phi Beta Kappa*)
Timothy Callahan, Sociology
Kristin Clarke, Woodrow Wilson School
Ana Cordovil, Sociology
Joseph Falit, Woodrow Wilson School
Alexander Maugeri, Woodrow Wilson School
Meghan McCormick, Woodrow Wilson School
Samara Penn, Woodrow Wilson School
Amelia Rawls, Woodrow Wilson School
Stephanie Steel, Politics

2008
Luke Cohler, Woodrow Wilson School and Program (Winner of Stanley Stein Thesis Prize in Latin American Studies)
Kathryn Lankester, Woodrow Wilson School, High Honors
Regina Lee, Politics (Winner of Center for Migration and Development Thesis Prize)
Sian O'Faolain, Woodrow Wilson School (Winner of Frederick Douglass Service Award and the Henry Richardson Labouisse '28 Prize)

2009
Chanté Coleman, Sociology
Amirah Mercer, Sociology
Barry Newell, Sociology
Colleen Poynton, Politics

2010
On sabbatical leave

2011
Margaret Boberg, Politics

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Katherine Gaudyn, Woodrow Wilson School
Megan Kelly, Sociology
Caaminee Pandit, Sociology, High Honors
Emily Persons, Sociology

2012
Katherine Alvarez, Sociology, Honors
Bianca Cabrera, Sociology
Omar Carrillo, Woodrow Wilson School
Raven Keith, Woodrow Wilson School
Destiny Ortega, Woodrow Wilson School
Nicole Phan, Woodrow Wilson School, Honors
Maya Reid, Sociology,
Alicia Zeng, Woodrow Wilson School, Highest Honors

2013
Rana Campbell, Sociology, Honors
Charles Du, Sociology, Isadore Brown Prize, Highest Honors
Merik Mulcahey, Politics

2014
Brittany Serafino, WWS, Honors
Jacob Jackson, WWS
Luc Cohen, WWS
Taylor Platt, WWS, Honors
Rukiya Ross, Sociology, Honorable Mention, Ruth J. Simmons Thesis Prize in African American Studies

2015
Jacob Intrator, WWS, High Honors
Diane Hu, WWS, Honors
Ali Pankowski, WWS
Nshira Turkson, WWS, Bain-Swigget Poetry Prize
Jiayan Yu, WWS, Center for Migration and Development Thesis Prize, Highest Honors

2016
On sabbatical leave

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2017
Julio Castillo, WWS
Jabari Johnson, WWS
Anne Kartheiser. WWS
Vivian Ramirez, WWS
Jessica Vickerman, Sociology
Michelle Mui, WWS

2018
Mary Claire Bartlett, WWS, Honors
My Bui, Politics
Chandler Cleveland, WWS
Jacob Hammel, WWS
Isabella Nappa, Sociology
Christopher Park, WWS
Taylor Pearson, WWS
Maria Perales, WWS
Caitlin Quinn, WWS

2019
Michjael Asparrin. WWS
Qalea, Ismael, SOC
Maria Jerez, WWS
Jackson Simcox, SOC
Jessica Wright, WWS

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PROOF OF SERVICE

I am employed in Washington, DC. I am over the age of 18 and am not a party to the within action; my business address is: 1016 16th Street NW, Washington, DC 20036.

On March 13, 2020, I served the following document(s) described as: **EXPERT DECLARATION OF DOUGLASS S. MASSEY, PH.D** on all interested parties in this action, by serving the following individuals:

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[X] (By Electronic Service): By transmitting by email to the above Parties at the above email addresses.

[X] (Federal): I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on **March 13, 2020**, at Washington, District of Columbia.

/s/Andrea Senteno
Andrea Sentno

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants,

DIANA MARTINEZ, et al.,

Defendant-Intervenors,

COUNTY OF SANTA CLARA, CALIFORNIA, et al.,

Defendant-Intervenors,

and

STATE OF NEW YORK, et al.,

Defendant-Intervenors.

CIVIL ACTION NO. 2:18-cv-00772-RDP

DEFENDANT-INTERVENORS' NOTICE OF DEPOSITION OF CENSUS BUREAU PURSUANT TO RULE 30(b)(6)

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, the State of New York, State of California, State of Colorado, State of Connecticut, District of Columbia, State of Illinois, State of Massachusetts, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of Oregon, State of Rhode Island, State of Vermont, State of Virginia, State of Washington, Cities and Counties of Cameron County, Texas, Central Falls, Rhode Island, Chicago, Illinois, Hidalgo County, Texas, Monterey County, California, New York, New York, Philadelphia, Pennsylvania, Providence, Rhode Island, Seattle, Washington, the United States Conference of Mayors (collectively, the "State and

Other Government Intervenors"), and the City of Atlanta, Georgia, City of San José California, Arlington County, Virginia, County of Santa Clara, California, and King County, Washington (collectively, the "Local Government Intervenors") (together with the State and Other Government Intervenors, the "Defendant-Intervenors") hereby notice the deposition upon oral examination of the United States Census Bureau ("Census Bureau"), through the officers, directors, agents, or other persons with the most knowledge concerning the topics listed in Exhibit A annexed to Defendant-Intervenors' Notice of Deposition of Census Bureau, dated January 8, 2020, which is incorporated by reference as if set forth fully herein. The deposition will commence at 9:00 a.m. on February 26, 2020 at Census Bureau Headquarters, 4600 Silver Hill Road, Hillcrest Heights, Maryland, or at such date, time, and place as is otherwise agreed to by the parties or ordered by the Court.

The topics identified in Exhibit A are an initial list that is being offered for purposes of coordination only, and without prejudice to Defendant-Intervenors' addition of new topics or revision of existing topics based on their receipt of additional discovery in this case. While Defendant-Intervenors have attempted to coordinate topics with the other parties in this case, none of the Defendant-Intervenors is waiving any rights with respect to propounding additional 30(b)(6) notices covering different or additional topics, or any other rights.

PLEASE TAKE FURTHER NOTICE that the deposition will be taken before a notary public or other officer duly authorized to administer oaths, will be recorded by stenographic and videographic means, and will continue from day to day until completed. You are invited to attend and participate in the manner provided for in the Federal Rules of Civil Procedure. The Census Bureau is requested to provide counsel for Defendant-Intervenors with written notice, at least two business days prior to the date of the deposition, of the name(s) and position(s) of the

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designee(s) who will testify on behalf of the Census Bureau and to identify the matters on which each designee will testify.

Dated: New York, New York
January 8, 2020

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Attorney General of the State of New York

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CERTIFICATE OF SERVICE

This is to certify that on the 8th day of January, 2020, a copy of the foregoing and attached Exhibit A were served electronically to counsel of record agreed to by the parties.

/s/ Elena Goldstein

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EXHIBIT A

DEFINITIONS

A. "Apportionment Count" means the process by which the Census Bureau counts the population for purposes of calculating the number of representatives in the House of Representatives that each state is entitled to have.

B. "Census Bureau" or the "Bureau" means the United States Census Bureau, including its agents, employees, representatives, and assigns, inclusively.

C. "Decennial Census" means each and every census conducted every ten years by the Census Bureau pursuant to Article I, § 2 of the United States Constitution.

D. "2020 Apportionment Count" means the process that will be conducted in the year 2020, including all studies, surveys, analyses, and testing conducted in preparation for such Apportionment Count.

E. "2020 Decennial Census" means the Decennial Census that will be conducted in the year 2020, including all studies, surveys, analyses, and testing conducted in preparation for such Decennial Census.

F. "Defendants" means the United States Department of Commerce, Wilbur L. Ross in his official capacity as Secretary of Commerce, the Census Bureau, and Ron S. Jarmin, in his capacity as performing the non-exclusive functions and duties of the Director of the Census Bureau.

G. "Executive Order 13880" means the Executive Order issued by President Donald J. Trump on July 11, 2019, and published in the Federal Register on July 16, 2019, at 84 FR 33,821.

H. "Plaintiffs" means the State of Alabama and Morris J. Brooks, Jr.,

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Representative for Alabama's 5th Congressional District.

TOPICS OF EXAMINATION

1. The compilation and completeness of the Administrative Record, as produced on November 1, 2019.

2. The practices for logging, memorializing, or otherwise documenting conversations with anyone outside the Census Bureau regarding the census.

3. The Census Bureau's coordination with its advisory committees, including the role of advisory committees in Bureau decision-making and planning, and the effect of advisory committee recommendations on the Bureau's determinations.

4. The Census Bureau's historical practice to determine and/or count the number of documented or undocumented immigrant residents in the United States in the Decennial Census and/or the Apportionment Count.

5. The Census Bureau's efforts to determine and/or count the number of documented or undocumented immigrant residents in the 2020 Decennial Census and/or the 2020 Apportionment Count.

6. The Census Bureau's general practices, policies, and procedures for developing methodologies and/or standards applicable to the Decennial Census and/or the Apportionment Count, including but not limited to standards with respect to accuracy.

7. Any consideration or analysis conducted by the Census Bureau on gathering information to determine and/or count the number of documented or undocumented immigrant residents in the United States since 1990, and the outcomes of any such consideration or analysis.

8. Any methodology and/or standards the Census Bureau has used, developed,

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plans to use, or plans to develop to determine the number of citizens, non-citizens, documented or undocumented immigrant residents of the United States with respect to the 2020 Decennial Census and/or the 2020 Apportionment Count, including but not limited to standards with respect to accuracy of such methodologies and/or data.

9. The ability of the Census Bureau to accurately exclude undocumented immigrants from the population count in the 2020 Decennial Census and/or the 2020 Apportionment Count.

10. Any evaluation that the Census Bureau has conducted or intends to conduct concerning the feasibility and/or accuracy of using any administrative records in the possession of any federal agency to determine the number of documented or undocumented immigrant residents of the United States.

11. Any plans the Census Bureau has to address situations in which the Census Bureau possesses conflicting information relating to an individual's immigration status.

12. Any plans the Census Bureau has for determining the citizenship and immigration status for households that do not respond to the 2020 Decennial Census.

13. Any evaluation that the Census Bureau has conducted or intends to conduct concerning the feasibility and/or accuracy of using the Department of Homeland Security's records of Lawful Permanent Residents to determine the number of documented or undocumented immigrant residents of the United States.

14. Any evaluation that the Census Bureau has conducted or intends to conduct concerning the feasibility and/or accuracy of using the Department of Homeland Security's data elements that the Department of Homeland Security committed to share, and/or that the Census Bureau has requested it to share, including but not limited to the data elements identified in the

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document: U.S. Department of Homeland Security, DEPARTMENT OF HOMELAND SECURITY (DHS) IMMIGRATION-RELATED INFORMATION SHARING WITH U.S. CENSUS BUREAU (Dec. 20, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf to determine the number of citizens, non-citizens, and undocumented immigrants in the United States.

15. Any evaluation that the Census Bureau has conducted or intends to conduct concerning the feasibility and/or accuracy of using the National-Level file of Lawful Permanent Residents, Naturalizations ("LPR File"), records relating to F1 & M1 Nonimmigrant Visas, the National-level file of Customs and Border Arrival/Departure transaction data, the Worldwide Refugee and Asylum Processing System, the National-level passport application data, the Master Beneficiary Records, and/or the CMS Medicaid and Chip Information System to determine the number of citizens, non-citizens, and undocumented immigrants in the United States.

16. The Census Bureau's general adherence to the following standards:

a) OMB Statistical Policy Directive No. 1;

b) OMB Statistical Policy Directive No. 2;

c) The Census Bureau Statistical Quality Guidelines;

d) The Census Bureau Statement of Commitment to Scientific Integrity; and

e) The Census Bureau's Disclosure Avoidance policies, procedures, and methodologies.

17. The Census Bureau's adherence to the following standards in conjunction with any efforts, methodology, or evaluation that the Census Bureau has undertaken, is planning to

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undertake, uses, is developing, or is planning to use to determine the number of documented or undocumented immigrant residents of the United States:

a) OMB Statistical Policy Directive No. 1;

b) OMB Statistical Policy Directive No. 2;

c) The Census Bureau Statistical Quality Guidelines;

d) The Census Bureau Statement of Commitment to Scientific Integrity; and

e) The Census Bureau's Disclosure Avoidance policies, procedures, and methodologies.

18. Any testing the Census Bureau has conducted at any time in the past, or intends to conduct concerning the feasibility and/or accuracy of determining the number of documented or undocumented immigrant residents of the United States.

19. Any efforts the Census Bureau has taken at any time in the past, or intends to take to fulfill the President's order to "determin[e] the number of citizens, non-citizens, and illegal aliens in the country" pursuant to Section 3(a) of Executive Order 13880, including but not limited to any coordination with other federal departments.

20. Each topic identified in Exhibit A of Plaintiffs' Notice of Deposition Pursuant to Rule 30(b)(6), served on October 1, 2019, as narrowed by Plaintiffs and Defendants in the Letter from Brad P. Rosenberg to Jim Davis, Esq., dated December 27, 2019.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

WILBUR L. ROSS, JR., *et al.*,

Defendants.

Case No. 5:20-cv-05799-LHK

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR STAY OR PRELIMINARY INJUNCTION

Hearing Date: September 17, 2020
Time: 1:30 p.m.
Judge: Hon. Lucy H. Koh

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INTRODUCTION

The Constitution "vests Congress with virtually unlimited discretion in conducting the decennial" census. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). Exercising that discretion, Congress has promulgated a statute that entrusts the Secretary of Commerce with "tak[ing] a decennial census of population . . . in such form and content as he may determine"—but *requires* that the Secretary report results to the President before the census year's end. 13 U.S.C. § 141(a), (b). At the Commerce Department and Census Bureau's request, Congress has considered extending the December 31, 2020 deadline in light of the disruptions caused by the COVID-19 pandemic. But Congress has not yet acted. Accordingly, the Secretary, with the Bureau, have developed a plan to meet the end-of-year deadline. And, as senior Bureau officials have assured Congress and the public, the Bureau is confident that, following this plan, it can deliver a full and complete census within the allotted time. Clearly, Plaintiffs harbor concerns about the Bureau's plan and the timeline, but they should take those concerns to the branch of Government in position to address them: Congress. Contrary to what Plaintiffs may think, the Bureau is not free to disregard a statutory deadline in pursuit of some ethereal notion of a better census. And this Court—a court of limited jurisdiction—should not set aside the Bureau's entire operational plan for completing the census, a 15.6-billion dollar operation years in the making, on the basis of Plaintiffs' frustration with Congress' processes.

Decisions about how and when to complete a census turn on policy choices that are unreviewable political questions. The manner and means of conducting the census is constitutionally committed to Congress, and neither the Constitution nor any other statute sets forth a judicially discoverable or manageable standard for evaluating the Bureau's complex operational plans for a decennial census. Article III tribunals are simply not equipped to weigh and evaluate the myriad decisions and complicated tradeoffs that define how a census is to be performed—in the midst of a pandemic or otherwise.

Separately, even if disputes about the timing and operation of a census were theoretically justiciable, Plaintiffs' claims are not cognizable here, because they fail to establish standing. Specifically, because all of their concerns arise from the statutory timeline under which the Bureau

must complete the census—a statutory timeline they do not challenge—Plaintiffs fail to establish concrete, particularized injury that is traceable to the Bureau's actions, or redressable by a favorable Court ruling. Absent an extension of the deadline in § 141(b), the Bureau has no choice but to meet that statutory requirement.

Beyond these fatal threshold defects, Plaintiffs' efforts to shoehorn their policy disagreements into an Administrative Procedure Act ("APA") framework fail as a legal matter. The APA permits review only of final agency action that is circumscribed and discrete; as other courts have recognized, the Bureau's general operational plans do not fit that framework. Plaintiffs thus cannot use the APA to redirect a massive, nationwide effort of enormous complexity. Nor can Plaintiffs repackage what amounts to a lobbying brief as a legal challenge under the Enumeration Clause. The Enumeration Clause requires only that the population must be determined through a person-by-person headcount, rather than through estimates or conjecture. Despite Plaintiffs' suggestions otherwise, that Clause does not speak in any way to the degree of accuracy required in the enumeration that is performed.

Separate from the unlikelihood of success on their claims, Plaintiffs also fail to establish the other elements required for an injunction: irreparable injury or that the harms weigh in their favor. The balance of harms and public interest instead weigh squarely against forcing the Census Bureau to replan a massive operation that is designed and run by scientists and statisticians to achieve the best possible results within Congress's established parameters. Compelling the Bureau by mandatory injunction—disfavored relief under any scenario—to reshuffle its operations at this late juncture would risk undermining the Bureau's ability to meet its statutory deadline. Plaintiffs cite no authority for the proposition that a litigant can successfully petition a court to compel a federal agency to violate its statutory obligations, and so far as Defendants are aware there is none. Simply put, Plaintiffs are not entitled to an injunction requiring the Bureau to flout the law.

BACKGROUND

I. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR THE CENSUS

The Constitution's Enumeration Clause requires that an "actual Enumeration" of the population be conducted every ten years and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. Through the Census Act, Congress has delegated to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). The Census Bureau assists the Secretary in the performance of this responsibility. *See id.* §§ 2, 4.

Notably, however, Congress has required the Secretary to provide in a report to the President the "tabulation of total population by States . . . within 9 months after the census date," defined as April 1 of the census year. 13 U.S.C. § 141(b). That is, the Secretary must provide the final census report to the President by December 31 of this year. After receiving the Secretary's report, the President, under a different statutory provision, calculates "the number of Representatives to which each State would be entitled," and transmits the resulting information to Congress. 2 U.S.C. § 2a(a).

II. 2020 CENSUS PROCEDURES

As detailed in the declaration submitted by Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the Census Bureau ("Fontenot Decl."), the operational plan for the 2020 Census is a massive undertaking. It entails a budget estimate of $15.6 billion, Fontenot Decl. ¶ 15, and is tailored to enumerate all persons, and contains components designed to reach hard-to-count populations, *id.* ¶ 12. The latest version of the Bureau's operational plan is Version 4.0, which was issued in December 2018. *See* ECF No. 37-5.

In March 2020, as the gravity of the COVID-19 pandemic emerged, it became clear to the Census Bureau that it would need to change its operational plans for the census. Fontenot Decl. ¶¶ 77-78. The Bureau accordingly undertook an effort to re-plan operations contingent on obtaining an extension of § 141(b)'s deadline until April 30, 2021. *Id.* ¶ 79. The Secretary and Bureau Director announced, on April 13, 2020, a new schedule for the census and that they were formally requesting scheduling relief from Congress. *Id.* ¶ 80.

Once it became apparent that Congress was not likely to grant an extension, the Census Bureau in late July began replanning census operations so that the end-of-year deadline could be met. *Id.* ¶ 81. The Secretary further directed the Bureau to present a plan for how it could accelerate operations to meet the deadline. *Id.* Senior managers in the Bureau worked to consider how it could effectively replan operations, formalized that plan, and presented that plan to the Secretary on August 3, 2020. *Id.* The Secretary approved the Bureau's proposal, and Director Dillingham announced the adjusted plan, referred to as the "Replan," later that afternoon. *Id.* Since that time the Bureau has been working to conduct the census under the Replan, mindful of its need to meet the statutory deadline. *Id.* ¶ 91. In designing the Replan, the Bureau "evaluated the risks and quality implications of each suggested time saving measure and selected those that [it] believed presented the best combination of changes to allow [it] to meet the statutory deadline without compromising quality to an undue degree." *Id.* ¶ 82. The Bureau "is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule." *Id.* ¶ 91.

Since the onset of the COVID-19 pandemic, legislation has been introduced to modify the § 141(b) deadline for the 2020 Census. *See* H.R. 6800, 116th Cong. § 70201(a) (2020) (extending deadline for 2020 Census under § 141(b) from December 31, 2020 to April 30, 2021); H.R. 7974, 116th Cong., § 2 (2020) (same); H.R. 7034, 116th Cong., § 2 (2020) (same); S. 4048, 116th Cong., § 2 (2020) (same). None of those proposals has been enacted into law.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE POLITICAL QUESTION DOCTRINE

All of the harms Plaintiffs claim in this case rest on their view that the Bureau's efforts to comply with the statutory deadline in § 141 will lead to an incomplete or inaccurate census. *See, e.g.*, Compl. ¶¶ 1, 4, 245, 264, 271;[1] Mot. for Stay & Prelim. Inj., 26-32, 35, ECF No. 36 ("Mot.")

[1] Although Plaintiffs have amended their Complaint by adding new parties since filing their preliminary-injunction motion, *see* ECF No. 61, Plaintiffs have stipulated that they "will not rely on the New Parties, including any allegations of harm or injury to the New Parties, in briefing or at the hearing on the [m]otion," ECF No. 60. Accordingly, for simplicity, Defendants rely on Plaintiffs' initial Complaint for purposes of this response and argument.

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26-32, 35 (arguing that the count will be inaccurate and asking for an injunction that would extend the census schedule). The Court need not—and indeed cannot—entertain the merits of this view. Determining what timeline will ensure sufficient accuracy for the census is an inherently political question committed to the other branches, and not appropriate for judicial review.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). The Supreme Court has identified several defining hallmarks of non-justiciable political questions. *Id.* Foremost among these are "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving" the dispute. *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (internal citation omitted); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (finding partisan gerrymandering not justiciable for lack of discernible and administrable standards to apply). When it comes to evaluating the timing and design of census operations, these two factors are inseparable.

As a textual matter, the Enumeration Clause grants Congress the authority to conduct the required "actual Enumeration" "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. This language is remarkable in its breadth. As the Supreme Court has recognized, it "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19; *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (Congress has "broad authority over the census, as informed by long and consistent historical practice"); *see also NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 418 (D. Md. 2019) ("[T]he Founders clearly intended Congress to have paramount authority in both the design and execution of the census") *aff'd in part, rev'd on other grounds*, 945 F.3d 183 (4th Cir. 2019).

Congress has historically exercised this authority in a variety of ways from the earliest days of our Republic. *See, e.g.*, Census Act of 1790, 1 Stat. 101 (1790) (directing that the census would commence on August 2, 1790 and end on May 2, 1791); An Act Supplementary to the Act Entitled "An Act Providing for the Taking of the Seventh and Subsequent Censuses," 9 Stat. 445 (1850). And while the Census Act now delegates many aspects of Congress's "broad authority over the census to the Secretary," *Wisconsin*, 517 U.S. at 5, 19, Congress continues to exercise ultimate control over the census by, among other things, setting the level of funding available and the date by which the Secretary must report the results, so that it can reapportion House seats and provide redistricting information to the States. *See, e.g.*, 13 U.S.C. § 141(b); 2 U.S.C. § 2a; *see also* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (appropriating $3.5 billion to the Census Bureau for use through 2021). Congress's deliberations over whether to extend the § 141(b) deadline in light of the COVID-19 pandemic, confirm that Congress knows that the power to set a census deadline is its alone to wield. *See* H.R. 6800, § 70201(a) (extending deadline for 2020 Census under § 141(b) from December 31, 2020 to April 30, 2021); H.R. 7974, § 2 (same); H.R. 7034, § 2 (same); S. 4048, § 2 (same).[2]

How is a Court to evaluate whether Congress's decisions about time or funding limits are appropriate? There is no evident standard. In prior cases involving the census, courts entertained challenges to discrete statistical methodologies or data-collection decisions made by the Secretary. *See, e.g.*, *New York*, 139 S. Ct. 2551 (evaluating re-instatement of citizenship question on census form); *Utah v. Evans*, 536 U.S. 452, 452 (2002) (holding that "hot-deck imputation"—a process which imputes characteristics of households based upon the characteristics of neighbors—does not violate the Enumeration Clause); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (holding that statistical sampling violates the Census Act and declining to reach the

[2] As the Chairwoman of the House Committee on Oversight and Reform stated in a letter just this week, "it is more urgent than ever that the Senate act." *See* Letter from Carolyn B. Maloney to Mitch McConnell et al. (Sept. 2, 2020), available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2020-09-02.CBM%20to%20%20House%20and%20Senate%20Leadership%20re%20Census.pdf. That letter conspicuously did not chide the Bureau, but rather spurred Congress to take action: "Congress has a solemn responsibility under the Constitution to help ensure an accurate and complete count, and there is bipartisan support in the Senate for extending these deadlines." *Id.*

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Enumeration Clause claim); *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (holding that Secretary did not violate Enumeration Clause by declining to correct a census undercount with data from a post-enumeration survey); *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (confirming that allocating federal employees serving overseas to their home States did not violate Enumeration Clause). Each of those cases involved a discrete policy choice that could, at least, be compared against an alternative: *e.g.*, to omit a citizenship question, to decline the use of statistical sampling or adjustment, to allocate overseas personnel to their home states. And the legality of most of those policy choices could be resolved by looking to whether this or that statistical method constituted a person-by-person enumeration or an impermissible form of statistical estimate.[3] *See, e.g.*, *House of Representatives*, 525 U.S. at 343-44; *Franklin*, 505 U.S. at 806. Not so here.

Like funding decisions, a reporting deadline necessarily limits the possible range of the Bureau's operations—and requires the Bureau to perform careful and complex balancing of numerous considerations such as cost, testing, training, effectiveness, timing, informational need, and accuracy. These tradeoffs are quintessentially "policy choices and value determinations constitutionally committed for resolution to the halls of Congress [and] the confines of the Executive Branch." *Japan Whaling*, 478 U.S. at 230. A litigant could *always* posit, as Plaintiffs do here, that some alleged deficiency can be cured with more time, staff, money, or by a better design. Positing that, however, does not provide any vehicle by which a court (as opposed to Congress) can evaluate the myriad policy choices and tradeoffs that Congress has made to establish a deadline and the Bureau has made in designing a census to meet that deadline. Nor does it illuminate any constitutional floor or standard which a Court could deem to be violated. *Cf. Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992) (Plaintiffs seeking statistical adjustment "are asking [courts] to take sides in a dispute among statisticians, demographers, and

[3] Similarly, the Supreme Court has routinely decided cases involving congressional districting by States on the theory that the Constitution requires "equal representation for equal numbers of people." *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). And, based on those precedents, the Court has similarly decided that challenges to the way in which Congress allocates congressional seats are justiciable. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 459 (1992). But the nature of those controversies provided an easily administrable standard for courts to apply: the number of people in each congressional district. No such standard is available here.

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census officials concerning the desirability of making a statistical adjustment to the census headcount"). As a result, there is no rule or standard that a Court could apply to determine when census operations are too limited or too curtailed. Indeed, "you might as well turn [this case] over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Id.* at 1417-18.

Plaintiffs suggest that, pursuant to the Enumeration Clause, decisions about the census can be assessed to determine whether they further count accuracy. Mot. 25, 28. But the Supreme Court has recently rejected the idea that the Enumeration Clause commands accuracy, *New York*, 139 S. Ct. at 2565-66, and the argument is likewise nonsensical here.[4] Because no census is ever complete or perfect—and every census can, presumably, be made better with more time or resources—the setting of *any* deadline can be said to be inimical to Plaintiffs' purported standard, and thus improper. *See, e.g.*, *Wisconsin*, 517 U.S. at 6; *see also Karcher v. Daggett*, 462 U.S. 725, 732 (1983). Yet, as we noted above, Congress has long set deadlines by which a census should be completed, and Defendants are unaware of any case finding those deadlines improper. The Court should "decline [Plaintiffs'] invitation to measure the constitutionality" of a census plan "by a standard that would seem to render every census since 1790 unconstitutional." *New York*, 139 S. Ct. at 2567; *see also NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (noting that the Supreme Court has long adhered to James Madison's view that "a regular course of practice" may "liquidate & settle the meaning" of constitutional provisions).

Given the explicit textual commitment of the means of conducting the census to Congress and the lack of any discernible standards, this Court should not wade into the territory of evaluating the propriety of the Replan or the census deadline. Congress itself is considering the issue, but has so far declined to grant relief. *See* H.R. 6800, § 70201(a); H.R. 7974, § 2 (same); H.R. 7034, § 2 (same); S. 4048, § 2. Plaintiffs may well believe that completing the census before the end of the

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[4] The "reasonable relationship" test applied in *Wisconsin*, on which Plaintiffs rely, speaks only to the requirement that the census be performed via an actual person-by-person headcount, rather than by statistical sampling techniques. 517 U.S. at 20. Whether a method used by the Bureau constitutes a headcount is a justiciable question, with a readily-administrable standard—but that is not the question in this case where no one disputes that the Bureau is, in fact, conducting a headcount. The language in *Wisconsin* identifies no other administrable standard.

year will prove difficult; and they may further believe that § 141, which in its current form has governed the last four censuses, needs to change. But this is a request Plaintiffs should take to Congress. That Congress has declined to alter the deadline is not a basis to enlist the aid of an Article III court ill-equipped to resolve these policy disagreements. Plaintiffs' claims present issues barred by the political question doctrine, and their Motion should therefore be denied.

II. PLAINTIFFS LACK STANDING

Even if disputes about the timing of census operations were theoretically justiciable, Plaintiffs would still not be entitled to any remedy here, because they have failed to establish standing. The "irreducible constitutional minimum" of standing under Article III has three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants' 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. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs bear the burden of establishing each of these elements, *id.*, and the Court "may review evidence beyond the complaint" to determine whether Plaintiffs have carried that burden. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The standing inquiry is "'especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Yet Plaintiffs here fail to meet any of the required elements.

A. Plaintiffs' Alleged Injuries are Not Redressable by a Court Order

Plaintiffs must establish redressability by demonstrating "that some personal benefit will result from a remedy *that the court is prepared to give*." 13A Charles Alan Wright et al., *Federal Practice & Procedure* § 3531.6 (3d ed. Apr. 2018 update) (emphasis added). That is, a plaintiff must show that "the court has the power to right or to prevent the claimed injury." *Gonzalez v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). Where a plaintiff requests prospective relief in the form of an injunction, the plaintiff must show that "prospective relief will remove the harm" and the plaintiff "personally would benefit in a tangible way from the court's

intervention." *Warth v. Seldin,* 422 U.S. 490, 505, 508 (1975). If the court cannot order relief that would remedy the plaintiff's alleged injury, redressability—and thus Article III standing—are lacking. *See McConnell v. FEC*, 540 U.S. 93, 229 (2003) (no redressability because court "has no power to adjudicate a challenge to the [allegedly unconstitutional] FECA limits in this litigation"), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

Plaintiffs here have not mounted a challenge to § 141, the statutory deadline Congress has established. *See generally* Compl. ¶¶ 330-60; Mot. 2-3, 35. And wisely so. The "virtually unlimited discretion" that the Constitution vests in Congress to "conduct[] the decennial" census, *Wisconsin*, 517 U.S. at 19, includes the power to set a deadline for completion of the census. Indeed, setting such a deadline is part and parcel of establishing the "Manner" of conducting the census, which the Constitution grants Congress the power to "direct." U.S. Const. art. I, § 2, cl. 3.

It is beyond cavil that, "when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). Ignoring the statutory deadline, or granting relief that compels the Bureau to miss it, "would be an affront to our tradition of legislative supremacy and constitutionally separated powers." *Id.*; *see also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). *Carey v. Klutznick*, 637 F.2d 834, 837-38 (2d Cir. 1980)—a case Plaintiffs proffer for the proposition that the statutory deadline is somehow optional—shows as much. *See* Mot. 23, 34. In *Carey*, the Second Circuit affirmed a district court order—later made permanent—that required the Census Bureau to take actions "to compensate for [a] disproportionate undercount" and declared § 141(b)'s December 31 deadline "directory and not mandatory." 508 F. Supp. 420, 433 (S.D.N.Y. 1980). Within days, the Supreme Court reinstated the statutory deadline. It stayed that part of the district court order that precluded the Bureau "from certifying to the President the population totals for New York and the state-by-state census tabulations, on December 31, 1980, as mandated by 13 U.S.C. § 141(b)." *Klutznick v. Carey*, 449 U.S. 1068, 1068 (1980). Following the stay order, moreover, the district court's judgment was reversed on appeal. *Carey v. Klutznick*, 653 F.2d 732,

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736 (2d Cir. 1981). *Carey* thus illustrates that § 141(b)'s December 31 mandate is absolute, and cannot be overridden by a judicial remedy.

But given this statutory deadline, it is unclear how Plaintiffs' broad (albeit speculative) programmatic challenge to ongoing census operations could ever be redressable. For all their criticism of the Bureau's current plan, Plaintiffs have no alternative proposal—none—for how the Bureau is to complete a better census by the statutory deadline. In fact, they seem to categorically reject the idea. *See, e.g.*, Mot. 22. That alone should be dispositive. *Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 183 (D.C. Cir. 1996) (alleged enumeration injury not redressable where plaintiffs "do not even ask that [] alternative methodologies . . . be employed in a recount" and the court has no basis to find "that a commission of as-yet unnamed persons, using as-yet unidentified methodologies, will devise a better [] count that will redound to appellants' benefit"). Even were the Court to grant the requested relief and set aside the Replan, the statutory deadline would still exist, and the Bureau would need to meet it. Plaintiffs' injuries would thus persist, unremedied by the Court—indeed, they would be made worse because, if enjoined, the Bureau could not use what time remains to conduct the census in the manner it has deemed most accurate and efficient.

B. Plaintiffs' Alleged Injuries are Not Traceable to Defendants' Actions

For similar reasons, Plaintiffs fail to establish the requisite "causal connection between" their alleged injury and the Replan they challenge. *Defs. of Wildlife*, 504 U.S. at 560. To establish such a connection, Plaintiffs must show more than that their populations may be undercounted under the plan the Bureau has developed. They must establish that their populations will be "improperly undercounted by [a particular] methodology *as compared to a feasible, alternative methodology*," *Kantor*, 91 F.3d at 183 (emphasis in original)—and further, that the difference between the two methodologies is sufficiently large to produce some kind of harm, *id.* at 185-86. *See also Franklin*, 505 U.S. at 802 (plurality) (challengers to the allocation of overseas employees among states had "neither alleged nor shown . . . that [they] would have had an additional Representative if the allocation had been done using some other source of 'more accurate' data"

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and accordingly did not have standing "to challenge the accuracy of the data used in making that allocation"). Plaintiffs have not done so.

As noted above, Plaintiffs complain that the current census plan will result in an undercount of people in their communities, but they have identified *no* other feasible method by which the Bureau could meet the end-of-year deadline—much less one that can produce a supposedly more-accurate result. Absent such an alternative, Plaintiffs cannot meaningfully contend that any alleged undercount of their communities is, in fact, caused by the Bureau's plan, rather than by an independent factor, such as the COVID-19 pandemic, the statutory deadline, or both.

In fact, all of Plaintiffs' efforts to extol an alternative plan that *disregards* the statutory deadline only emphasize that their alleged injuries derive, first and foremost, from *Congress's* decision not to extend the census deadline, rather than from the Bureau's adoption of the Replan. That is fatal to their standing. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (Federal courts have jurisdiction only if the plaintiff's injury "fairly can be traced to the challenged [conduct] of the defendant, and [does] not … result[] from the independent action of some third party not before the court."). Since congressional inaction is the source of their injuries, Plaintiffs should petition Congress, not this Court. Plaintiffs cannot seek redress against the Bureau for choosing to follow the law.

C. Plaintiffs' Injuries are too Speculative to Confer Standing

Separate from redressability and causation, Article III also requires that Plaintiffs establish "injury in fact" by showing that they "ha[ve] sustained or [are] immediately in danger of sustaining a direct injury" as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016). The injury must be "concrete and particularized," *Defs. of Wildlife*, 504 U.S. at 560, and not "merely 'conjectural' or 'hypothetical' or otherwise speculative." *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009). An alleged future injury must be "*certainly impending*" and cannot rely on a "highly attenuated chain of possibilities"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Yet Plaintiffs' alleged injuries rest on exactly that kind of speculative chain.

As detailed in the Fontenot Declaration, the Replan was designed to provide "the best combination of" procedures to allow the Bureau "to meet the statutory deadline without compromising quality to an undue degree." Fontenot Decl. ¶¶ 82, 86-91. Among other things, the plan "intends to improve the speed of the [non response follow up] operations without sacrificing completeness." *Id.* ¶ 86. The Bureau "is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the" Replan. *Id.* ¶ 91. Plaintiffs appear to disagree with that assessment. But neither they nor their declarants have the same insight into the details and implementation of the Bureau's Replan that Mr. Fontenot and his colleagues in the Census Bureau do as a result of their development and execution of that Replan. The Bureau is in best position to speak to the likely effects of its operational choices, and generalized assertions to the contrary by Plaintiffs' declarants must be discounted accordingly.

But even crediting Plaintiffs' allegations, establishing the likelihood of an undercount would only be the beginning. The number of congressional seats for each geographical area is affected not only by that area's *own* total population, but also by the population of *every other* area in the country. *See* 2 U.S.C. § 2a(a); https://www.census.gov/population/apportionment/about/computing.html; *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992). Likewise, the allocation of federal funds is not directly proportional to population; instead, it is a function of multiple factors, often including the populations of *other* states. *See, e.g.*, 49 U.S.C. § 5305(d)(1) (certain transportation funding). An undercount may thus be immaterial if it is replicated elsewhere, or does not exceed a certain threshold. *See, e.g.*, *Kantor*, 91 F.3d at 183. Accordingly, to have standing, Plaintiffs must actually demonstrate that any alleged undercount will be so severe and disproportionate that it will cause them to lose legislative seats or funding. *Id.* at 185 (no standing because court could not determine "what effect any methodology for counting the homeless would have on the federal funding of any particular appellant," since "if a more accurate count would have enlarged some communities' shares, it likely would have reduced the shares of other communities"); *Ridge v. Verity*, 715 F. Supp. 1308, 1318 (W.D. Pa. 1989) (no standing because "none of the plaintiffs in this case can show which states would gain and which would lose representation in Congress"); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp.

564, 570 (D.D.C. 1980) (no standing because "none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" since plaintiffs "can do no more than speculate as to which states might gain and which might lose representation," which depends on "the interplay of all the other population factors which affect apportionment"); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (no standing to challenge apportionment method 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*" (emphasis added)).

Plaintiffs have made no such showing. To the contrary, they contend that the Replan will lead to "lower-quality data across the board," Mot. 27, implying that all jurisdictions, not just theirs, may be equally affected. And indeed, while Plaintiffs complain of potential undercount in Los Angeles and other cities with allegedly low rates of self-response, Mot. 26-27, Compl. ¶¶ 23-40, their own expert notes that self-response rates are *also* "disproportionately lower . . . in some rural areas." Decl. of John Thompson ¶ 20, ECF No. 36-2 ("Thompson Decl."); *see also* Decl. of D. Sunshine Hillygus ¶ 17, ECF No. 36-3 (noting that "[t]he majority of states, counties, cities, districts, tracts, and tribal lands [currently] have lower self-response rates . . . compared to 2010"). In fact, Plaintiffs' expert notes that (1) those rural areas have a response rate under 35 percent, Thompson Decl. ¶ 20, which is *substantially* lower than the 49.6 to 61 percent range that Plaintiffs identify in their constituent communities, Compl. ¶¶ 295-97, and (2) this exceedingly low response rate is "likely" to result in "increased undercounts" for these rural areas, Thompson Decl. ¶ 20. Yet Plaintiffs completely fail to consider how any potential undercount in such rural communities, or any other communities beyond theirs, could affect Plaintiffs' share of funding or apportionment of legislative seats. *See* Mot. 29-31 (contending that Plaintiffs' communities may be undercounted, but offering no evidence regarding how any such undercount may relate to counts in other jurisdictions). As a result, the Court would have to guess whether and how those undercounts could affect Plaintiffs. Such guesswork does not support jurisdiction, much less an injunction. *See Clapper*, 568 U.S. at 414 n.5 (no Article III standing exists if a plaintiff's theory of injury rests on an "attenuated chain of inferences necessary to find harm").

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To be sure, Plaintiffs contend that the possibility of *any* inaccuracy or undercount in the census is injurious because it (1) decreases the quality of data they use for various purposes, and (2) leads them to "expend additional resources in an attempt to mitigate the undercounting." Mot. 31; *see also* Compl. ¶¶ 319-29. But Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. And any suggestion that census inaccuracy is a *per se* harm must be rejected. Despite the constitutional significance of the census, "no census is recognized as having been wholly successful in achieving" accuracy. *Wisconsin*, 517 U.S. at 6; *see also Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (recognizing that "census data are not perfect," and that "population counts for particular localities are outdated long before they are completed"); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (census data "are inherently less than absolutely accurate"). "Despite consistent efforts to improve the quality of the count, errors persist." *Wisconsin*, 517 U.S. at 6. Indeed, "it is widely acknowledged that each decennial Census inevitably results in an 'undercount' of the American public." *NAACP v. Bureau of the Census*, 945 F.3d 183, 186 (4th Cir. 2019). Under Plaintiffs' theory, this systemic and persistent undercount would mean that any state, locality, or organization would *always* have standing to challenge the census and its procedures and design.

The Supreme Court has never endorsed such a framework. To the contrary, it has scrutinized claims of harm in census cases to ensure that prospective litigants have demonstrated that whatever methodology they challenge is material to an actual or likely injury. *See, e.g.*, *Utah*, 536 U.S. at 458 (noting that the challenged methodology indisputably changed which state received a Representative); *House of Representatives*, 525 U.S. at 330 (noting that plaintiffs produced evidence showing that under the challenged plan a state would lose a representative compared to the prior method).

The Supreme Court's recent decision in *New York* demonstrates that fact clearly. 139 S. Ct. at 2565. In evaluating whether the plaintiffs had standing to challenge the reinstatement of a citizenship question on the census form, the Supreme Court noted that evidence at trial showed that several state plaintiffs would "lose out on federal funds" "if noncitizen households [were]

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undercounted by as little as 2%," which was less than half of the undercount the district court estimated to result from inclusion of the question. *Id.* Here, by contrast, Plaintiffs present no such particulars and demonstrate no thresholds. *See* Mot. 30-32; Compl. ¶¶ 294-329. Instead, they make generalized allegations that they will be injured by an undercount—seemingly no matter how small. That falls far short of the requisite standard.

* * *

Plaintiffs are not entitled to a judicial remedy merely because they have generalized concerns about census accuracy. They are certainly not entitled to a remedy setting aside the Replan when their alleged injuries are not traceable to that plan, nor redressable if it were invalidated. Because they lack standing, Plaintiffs' request for an injunction should be rejected on threshold jurisdictional grounds.

III. PLAINTIFFS FAIL TO ESTABLISH A COGNIZABLE APA CLAIM

Even assuming Plaintiffs could overcome the threshold deficiencies of the political question doctrine and a lack of Article III standing, their claims are nonetheless unlikely to succeed on the merits. To start, their APA claims likewise suffer from threshold deficiencies, in that Plaintiffs have launched a wholesale programmatic attack on the Census Bureau's plans to complete the 2020 Census, which fails both the discreteness and finality requirements for judicial review under the APA. And there is furthermore no standard in the Census Act by which the Court could determine, for example, whether the decision to close field operations by September 30, as opposed to some other day, is contrary to law. Instead, Congress, which the Constitution entrusts with the "Manner" of carrying out the decennial census, has delegated to the Secretary the authority to 'take a decennial census of population . . . in such form and content as he may determine." 13 U.S.C. § 141(a). Regardless, even were the merits of Plaintiffs' claims reviewable, they do not show that the Replan fails the APA's arbitrary-and-capricious standard, particularly given the looming end-of-year deadline to complete the count and report results to the President.

A. The Replan is Not Final Agency Action and Therefore Is Not Reviewable.

"To maintain a cause of action under the APA, a plaintiff must challenge 'agency action' that is "final.'" *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *Norton*

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v. S. Utah Wilderness All. ("*SUWA*"), 542 U.S. 55, 61-62 (2004)). Congress defined "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). And "final" agency action within the meaning of § 704 of the APA, requires that two conditions be met: "First, the action must mark the 'consummation' of the agency's decision–making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be 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). The Replan is neither "agency action" nor, of necessity, "final agency action," and Plaintiffs' APA claims therefore fail at the outset.

1. The Replan is not "agency action" under the APA.

The Supreme Court has held that, to satisfy the "agency action" requirement, 5 U.S.C. § 551(13), the matter at issue must be a "circumscribed, discrete agency action[]" that exhibits a "characteristic of discreteness." *SUWA*, 542 U.S. at 62-63. This statutory limitation, the Court explained, "precludes [a] broad programmatic attack" on an agency's operations. *Id.* at 64. Thus, the APA does not permit a plaintiff to attack an agency program "consisting of . . . many individual actions" simply by characterizing it as "agency action" under the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 893 (1990). A plaintiff seeking improvement or changes to an agency program must seek it in "the halls of Congress, where programmatic improvements are normally made," rather than by "court decree." *Id.* at 891; *see also San Luis Unit Food Producers v. United States*, 709 F.3d 798, 808 (9th Cir. 2013) (holding that "a broad, programmatic challenge to [an agency's] operation and management of [a statutory obligation] . . . [is] not cognizable under the APA") .

That Plaintiffs have leveled an improper, programmatic attack on the Bureau's efforts to conduct the 2020 Census could not be more obvious. By Plaintiffs' own account, they challenge the Bureau's choices "in determining how to conduct the census," Mot. 3, and seek to have this Court dictate, according to Plaintiffs' preferences, how the Bureau carries out and completes the census, *see* Compl. ¶ 358 (demanding that Court enjoin Defendants from "unlawfully interfering with the COVID-19 Plan"). Like similar attempts to wrest operational control of the census away

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from the Bureau, Plaintiffs' requested emergency relief would undoubtedly entail "a sweeping overhaul to the [Replan], which exceeds the scope of reviewable 'agency action.'" *NAACP*, 399 F. Supp. 3d at 422 (D. Md.), *aff'd in part, rev'd in part on other grounds and remanded*, 945 F.3d 183 (4th Cir. 2019)

In attacking the Replan, Plaintiffs focus primarily on the alleged insufficiency of the timeline for completing field operations and non-response follow-up operations and data processing. Mot. 17-18. But Plaintiffs' challenge does not end there, as they further assail "reduced staffing," "increased reliance on administrative records," "increased use of imputation," "problems with data processing," and a "shortened processing timeline." Mot. 19-20. In short, Plaintiffs contend that it is both the totality of these asserted insufficiencies, and their interrelationship and "exacerbat[ion]" of one another, that, on the whole, "are likely to result in reduced quality in the census data and less accurate results." Mot. 20.

The Fourth Circuit recently rejected a strikingly similar challenge to the Census Bureau's operational plan for the 2020 Census because the challenged actions were not "'circumscribed' and 'discrete.'" *NAACP*, 945 F.3d at 190. The operational plans that the plaintiffs there sought to set aside were, the court concluded, not cognizable discrete agency actions because "the various 'design choices' being challenged expressly are tied to one another." *Id.* at 191. "'Setting aside' one or more of these 'choices' necessarily would impact the efficacy of the others, and inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations." *Id.* (citing *SUWA*, 542 U.S. at 66-67). That outcome, the court concluded, "is precisely the result that the 'discreteness' requirement of the APA is deigned to avoid." *Id.* (rejecting the "broad, sweeping nature of the allegations that the plaintiffs have elected to assert under the APA").

Precisely the same conclusion is warranted here, particularly where Plaintiffs make no effort to reconcile their broadside attack on the Replan with the "agency action" requirement. Entertaining Plaintiffs' challenge to the Replan would embroil the Court not only in difficult—indeed, unanswerable—questions concerning what operational and scheduling measures the law purportedly requires, but also in potential monitoring of the Bureau's efforts going forward. *See Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997) (denying relief "which would

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require reaching into an agency of the executive branch and dictating the details of its internal operations" (quotation omitted)). That is all the more so when Plaintiffs' action is treated, as it could be, as one to *compel* agency action, since Plaintiffs can point to no discrete requirements to conduct field operations or data processing for a certain duration, to maintain staffing at certain levels, or to rely to some specified degree of in-person enumeration rather than administrative records, proxies, or imputation—let alone any requirement to do all of these things. *NAACP*, 399 F. Supp. 3d at 423 (challenged actions by Census Bureau neither "discrete in character" not "required by law" and therefore not proper subjects of APA relief).

2. The Replan is not "final agency action" subject to judicial review

Even if all the various facets of the Replan could be considered an "agency action," it is not "final" agency action that is subject to judicial review under § 704. In *Franklin*, the Supreme Court held that the Secretary's transmission of a final census report to the President under 13 U.S.C. § 141—a report compiled after the execution of the overall census operational plan—is *itself* not final agency action. 505 U.S. at 798 ("[T]he 'decennial census' still presents a moving target, even after the Secretary reports to the President."). Given this holding, it would make no sense to find the Bureau's antecedent operations, which are still being implemented and will only lead to a report sometime in the future, to be judicially reviewable.

Indeed, the Replan is nothing more than an interlocutory announcement of how it intends to complete the count within the time remaining under the existing statutory deadline. Director Dillingham made clear in his August 3 statement that the Bureau was "announcing updates" and that it "continues to evaluate its operational plans." Huseny Decl., Ex. 1 at 1, ECF No. 37-1; *see id.*, Ex. 2 at 2, ECF No. 37-2 (Bureau noting that it is 'continually assess[ing] [its] operational plans" and that it remains "ready to adapt to challenges in the environment"). This is not, as Plaintiffs summarily put it, a final decisional statement that the elements of the Replan "would now govern," Mot. 15, but instead is an acknowledgment by the Bureau of the need for adaptability in the face of the unprecedented challenge of conducting a census during a pandemic when congressional relief from the deadline is not forthcoming. That announcement merely confirms how interlocutory the Bureau's operations are.

Similarly, Plaintiffs' claim that the Replan affects legal rights and obligations could not be more barebones. Mot. 16. (summarily contending that the Replan "directly affected rights and obligations"). Spanning two sentences, Plaintiffs advance two unconvincing reasons for this summary contention. Initially, they say that the Replan affects legal rights because the self-response options now close on September 30, 2020. Mot. 16; Fontenot Decl. ¶ 47 ("The total self-response period for the 2020 Census will be longer than the 2010 self-response period"). To begin, this argument concerns only the change in the close of field operations, and cannot be used to bootstrap finality for the Plaintiffs' more comprehensive attack on the entire Replan. Even then, the Bureau's determination that the existing congressional deadline necessitated closing self-response options on September 30 does not affect any legal right because a respondent has no individualized legal "right" to any particular timetable to respond to the census questionnaire, and Plaintiffs identify none. And insofar as Plaintiffs would resort to a more inchoate "right" to be counted—although their papers make no such mention—the Bureau fully intends to account for non-responding households through imputations, administrative records, or other methods, just as it would have done under an October 31 close of self-response. *See Confederacion de la Raza Unida v. Brown*, 345 F. Supp. 909, 910 (N.D. Cal. 1972) ("Plaintiffs do not contend, and correctly so, that they have an absolute right to be counted [in the census]."); *Nat'l Law Ctr. on Homelessness & Poverty v. Brown*, CIV. A. 92-2257-LFO, 1994 WL 521334, at *8 (D.D.C. Sept. 15, 1994) ("The Constitution does not provide individuals with a right to be counted . . . .").

Plaintiffs' only other claim to finality is in asserting that the Replan has legal consequences because, in Plaintiffs' speculative estimation, "the census *results* will affect apportionment, funding, and myriad other critical decisions." Mot. 16 (emphasis added). That claim to finality fails just as it did in *NAACP*. The *NAACP* plaintiffs argued that the Bureau's operational decisions violated the APA because the alleged shortcomings of those decisions, according to the plaintiffs, "would create a disproportional impact on undercounted communities." *NAACP*, 945 F.3d at 191. The court firmly rejected this argument on finality grounds, holding that such "attenuated allegations amount to little more than a 'best guess' regarding the consequences of cancelling the tests at issue." *Id.* Indeed, the Supreme Court has held that even the Secretary's census report to

the President "serves more like a tentative recommendation than a final and binding determination" and therefore "carries no direct consequences for the reapportionment." *Franklin*, 505 U.S. at 798. Finality is no more present in the Replan just because the 2020 Census, like any other, will have downstream effects on apportionment and federal funding.

In sum, the Replan sets protocols for the Census Bureau's own internal operations, and does not require anyone to do, or not do, anything. *See Wild Fish Conservancy*, 730 F.3d at 801 ("day-to-day operations that merely implement operational plans" are not final); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (action can be final if it "has the status of law or comparable legal force, and whether immediate compliance with its terms is expected"). Final agency action is lacking, and Plaintiffs cannot prevail on their APA claims.

B. The Bureau's Choices Regarding How to Meet The Statutory Deadline are Committed to Agency Discretion, and are Therefore Unreviewable

Even assuming a plaintiff has challenged final agency action, APA review is nonetheless unavailable when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). "An agency action is 'committed to [its] discretion by law' where a 'statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion'—*i.e.*, where it is 'drawn in such broad terms that in a given case there is no law to apply.'" *Pac. Nw. Generating Co-op. v. Bonneville Power Admin.*, 596 F.3d 1065, 1075 n.7 (9th Cir. 2010) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). This bar against judicial review applies, moreover, even when "the agency gives a 'reviewable' reason for otherwise unreviewable action." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987).

In the Census Act, Congress directed the Secretary to "take a decennial census of population . . . in such form and content as he may determine," 13 U.S.C. § 141(a), thereby providing the Secretary, and in turn the Census Bureau, with abundant discretion in how to carry out the census. As the Supreme Court has put it, "Congress has delegated its broad authority over the census to the Secretary," which entails Congress's "virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19 (quoting U.S. Const., art. I, § 2, cl. 3). Wholly absent from the Census Act or any other statute is a "meaningful standard' against

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which this Court could assess the legality of the multiple discretionary planning choices by the Census Bureau that Plaintiffs challenge here. Neither the Census Act nor any of the Census Bureau's or Commerce Department's regulations have anything to say about timetables for field operations, data processing requirements, staffing levels, or staff training requirements—and Plaintiffs tellingly fail to cite any such provision. It is difficult to imagine a statute that could more easily meet the test of being "'drawn in such broad terms that . . . there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

Courts considering challenges to the broad operations of census-taking agree. As the Seventh Circuit explained, "[i]t might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census[.] . . . There is nothing of that sort, and the inference is that these enactments do not create justiciable rights." *Tucker*, 958 F.2d at 1417. In fact, the court addressed Plaintiffs' design-of-the-census allegations, explaining that the census statutes simply "specify a timetable, and a procedure for translating fractional into whole seats" but "they say nothing about *how to conduct a census* or what to do about undercounts." *Id.* (emphasis added); *see id.* at 1419 (Ripple, J., concurring) (stating that the census decision at issue was "committed to agency discretion"). True, the Supreme Court in *New York* held the decision to add a citizenship question was *not* committed to agency discretion. 139 S. Ct. at 2568-69. But there, the Court relied on specific statutory provisions that spoke, for example, to limitations on the Secretary's power "to collect information through direct inquiries when administrative records are available." *Id.* at 2568 (citing 13 U.S.C. § 6(c)). Here, by contrast, there are no provisions that meaningfully constrain or direct the Census Bureau on the timing, staffing, or sequencing of census-taking, or the processing of data—except, that is, the deadline to deliver the final census report by December 31. Plaintiffs ask the Bureau to ignore that deadline, and there is no meaningful standard by which to review that request.

Even district courts that found census-related issues reviewable under the APA—like the accuracy of the final census count—have recognized that the mechanics of actually conducting the census are committed to agency discretion. *See City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 555 (S.D. Ga. 1983) (noting that the accuracy of the count is not committed to agency

discretion, but that "the grant of discretion in 13 U.S.C. § 141(a) appears to encompass the methods used by the defendants to compile the census"); *City of Phila. v. Klutznick,* 503 F. Supp. 663, 678 (E.D. Pa. 1980) (dismissing a claim that the Census Bureau failed to hire skilled enumerators as committed to agency discretion because "[r]eview of this allegation would involve the [c]ourt in second-guessing the managerial decisions of the Bureau").[5]

The Court should follow these cases and hold that Plaintiffs' APA claims are unreviewable because they are committed to agency discretion by law. As the district court in *NAACP* pointed out last year in a challenge to the Bureau's original Operational Plan, there has never been a lawsuit that "has resulted in the sweeping relief" of a judicially-enforceable directive to conduct the census in a particular manner, which "speaks volumes about the authority (not to mention ability) of courts to second-guess the Secretary's planning of the decennial census as it is taking place, or the standards under which they might attempt to do so." *NAACP v. Bureau of the Census*, 382 F. Supp. 3d 349, 373 (D. Md. 2019).

C. Even Assuming the Replan Were Reviewable, and That Meaningful Standards for Such Review Could Somehow be Ascertained, the Replan Does Not Violate the APA.

Were the Court to reject these threshold APA limitations on judicial review, emergency injunctive relief would nonetheless be improper because Plaintiffs are unlikely to prevail on the merits of their APA claims. None of their attacks on the Replan suffices to permit the Court to conclude that it is arbitrary and capricious, or that it was undertaken as a "pretext" for some ulterior goal.

At the outset, Plaintiffs appear to have conflated the Replan itself—a set of internal operating protocols for the Bureau to satisfy its statutory obligations under the Census Act—with

[5] Although other courts have concluded that the APA permits judicial review of certain census-related actions, none of those decisions involved the sweeping nature of Plaintiffs' request here—to dictate, through a judicial injunction, to the Census Bureau that it cannot exercise its discretion to plan and complete the 2020 Census. *See, e.g.*, *California v. Ross*, 362 F. Supp. 3d 727, 746 (N.D. Cal. 2018) (reviewing addition of citizenship question to 2020 census questionnaire); *State v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 796 (S.D.N.Y. 2018) (same); *Dist. of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1188 n.16 (1992) (reviewing decision to count as in-state residents inmates held in a prison in a different state).

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the Director's August 3 announcement. *See* Mot. 19 (criticizing Director's August 3 statement for "giv[ing] no hint" of how to meet various minute staffing matters); *id.* at 20-21 (contending that Defendants failed to consider various data processing issues "in the Rush Plan"). It has never been the case, even for reviewable actions under the APA, that the agency's announcement of a decision must provide a fulsome articulation of the agency's rationale. Instead, where it applies, the APA requires only that the "agency's path may reasonably be discerned," which the Fontenot Declaration is more than sufficient to satisfy.[6] *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004). That Plaintiffs cannot discern from the August 3 statement the answers to the particularized questions they have rushed to pose in this Court does not amount to a violation of the APA.

"Policy Change": Plaintiffs err in supposing that the Replan reflects a change in agency policy. The Census Bureau's policy remains the same as it was in 2018 when it issued its final operation plan, and just as it is for every decennial census: to "[e]nsure a complete and accurate count of all communities." Huseny Decl., Ex. 2 at 1; Fontenot Decl. ¶ 91 ("The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations."); *id.* ¶ 104. A modification of operational plans is nothing like the true policy reversals in the cases Plaintiffs cite. The Replan is not, for example, the reversal of a "decades-old" practice of treating automobile service advisors as exempt from FLSA coverage, *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2123 (2016), or an agency's authorization, for the first time, for States to kill otherwise protected sea lions based on increased predation by those animals, *see Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1044 (9th Cir. 2010).

Express reference to the statutory deadline: Plaintiffs also err in contending that the Bureau did not give any explanation for the Replan. Director Dillingham stated that the Replan measures would be taken in order to complete "data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of

[6] Because there is no "final agency action," there is no administrative record for the Replan. Defendants have, however, submitted the Fontenot Declaration to oppose Plaintiffs' requested relief, and the Court may rely upon it to the extent necessary to consider Plaintiffs' APA arguments.

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Commerce." Huseny Decl., Ex. 1 at 1. Indeed, the Director's statement removes any doubt that there was any "policy change." The Replan, he stated, "reflects our *continued commitment* to conduct a complete count, provide accurate apportionment data, and protect the health and safety of the public and our workforce." *Id.*[7]

Staffing and data processing: Plaintiffs are flatly incorrect that the Bureau failed to consider staffing concerns before issuing the Replan. Fontenot Decl. ¶¶ 82-85. And while Plaintiffs argue that not enough enumerators are on staff for the Bureau to complete its non-response follow-up operations, Mot. 18-19, they cite no legal requirement to have some minimum level of enumerators staffed for this purpose. Plaintiffs also speculate that the Replan will result in a reliance on "a higher level of proxy enumerations, increased reliance on administrative records, and an increased use of imputation," Mot. 20, but there is nothing unlawful about relying on these methods and resources, nor any maximum "level" of permissible reliance. These methods have been used in past censuses when in-person counting was not possible. *E.g.*, *Utah*, 536 U.S. at 477.

"Reliance interests": Plaintiffs also contend that the Bureau's statements earlier this year that census responses would be accepted until October 31, 2020 created "reliance interests." Mot. 21. But the Bureau did consider the public's expectations. Fontenot Decl. ¶¶ 82-85. And Plaintiffs cite no evidence of any census respondent who, in purported reliance on the October 31 timetable, has arranged their affairs such that it is no longer possible for that person to respond by September 30. And those who might have given self-responses after September 30 can always be accounted for by other methods; for that reason, a close of self-response is necessary in every census. While

[7] Plaintiffs mischaracterize the Secretary and the Director's joint statement of April 13, 2020 as stating that "a significant delay (and corresponding extension) in census operations was necessary to '[e]nsure a complete and accurate count of all communities.'" Mot. 17. Rather, the statement simply acknowledged that congressional relief was necessary to effectuate the COVID-19 Plan, and that the COVID-19 Plan would "ensure the completeness and accuracy of the 2020 Census." Huseny Decl., Ex. 3 at 2, ECF No. 37-3. The statement never said that an extension was "necessary" to complete the 2020 Census, much less that "a significant delay" was "necessary," as Plaintiffs erroneously contend, Mot. 17. In any event, any ambiguity is put to rest by Mr. Fontenot's statement that the Bureau "is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline." Fontenot Decl. ¶ 91.

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Plaintiffs rely on *Department of Homeland Security v. Regents of the University of California*, the purported reliance interests here pale in comparison to individuals "enroll[ing] in degree programs, embark[ing] on careers, start[ing] businesses, purchas[ing] homes, and even marr[ying] and ha[ving] children, all in reliance on the DACA program." 140 S. Ct. 1891, 1914 (2020). Indeed, as explained above, the timing of the close of self-response is not for the respondent's benefit, but for the Census Bureau's, so that it can analyze and compile data for apportionment purposes. Respondents have no substantive rights in connection with the timing of the decennial census that could conceivably underlie such reliance interests.

Statutory deadline: Plaintiffs advance the bizarre contention that honoring December 31, 2020 deadline set forth in § 141(b) amounts to a *per se* APA violation. Mot. 21-25. Perhaps unsurprisingly, Plaintiffs have no authority for the novel proposition that an agency somehow violates the APA by attempting to comply with the statutory requirements Congress has imposed on it. As Mr. Fontenot explains, that statutory deadline was the critical driver of the replanning efforts. Fontenot Decl. ¶¶ 81, 84, 91.

Plaintiffs' apparent argument is that the Census Bureau somehow unilaterally waived the statutory deadline when it announced a COVID-19 Plan. Mot. 22 (arguing that Defendants were "fully aware" of the deadline when the released the COIVD-19 Plan). But that makes little sense. As Plaintiffs acknowledge, the COVID-19 Plan was issued in connection with the Bureau's request for a deadline extension from Congress. Mot. 22. The Bureau was thus well aware that the COVID-19 Plan would be workable *only if* the extension were granted. *See* Fontenot Decl. ¶ 79 ("This schedule required Congress to provide legislative relief from the statutory deadlines . . . ."); Huseny Decl., Ex. 3 at 1 ("Under this plan, the Census Bureau *would* extend the window for field data collection and self-response to October 31, 2020 . . . ." (emphasis added)); *see also* Huseny Decl., Ex. 8 at 1, ECF NO. 37-8 (requested supplemental "funding *would* allow for supplemental hiring, pay incentives, additional outreach and advertising, and replenished contingency funding to provide needed flexibility as the Census Bureau conducts its largest component of the field operation, Nonresponse Follow-up" (emphasis added)). That the Bureau began to implement the COVID-19 Plan on an optimistic view that Congress might grant the extension request, does not

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mean that the deadline would no longer apply, or that the Bureau itself assumed authority to change the statutory deadline.[8] There is no authority for this novel view of the APA.

Plaintiffs' attempt to rehash this same argument under constitutional guise gets them no further. Mot. 22-23. As detailed *infra*, the Replan does not violate the Enumeration Clause as Plaintiffs summarily assume. And *Carey v. Klutznick*, on which Plaintiffs place great weight, not only does not authorize the Bureau to ignore the deadline as Plaintiffs demand, but culminated in the precise opposite outcome. 449 U.S. at 1068. The *Carey* plaintiffs moreover sought relief specific to one State which, in Plaintiffs' own words, "*might* have caused the Census Bureau to miss the December 31 deadline." Mot. 23 (emphasis added). By contrast, what Plaintiffs seek to compel is the wholesale forfeiture of the Census Bureau's duty to deliver the *entire* census by to the statutory deadline, and they further seek to enlist the Court to *mandate* that outcome. That would be an unprecedented step.[9]

"Pretext": Finally, Plaintiffs see something untoward—which in their view is apparently enough to violate the APA—in the "telling" timing of the President's July 21, 2020 Memorandum, Mot. 24, which requires the Secretary, to the extent feasible, to identify the numbers of illegal aliens counted in the census for potential exclusion from the apportionment base. 85 Fed. Reg. 44,679 (July 21, 2020). But there is nothing amiss with an Administration adopting a policy that it wishes to see implemented within the existing legal framework. That is the ordinary stuff of Government policymaking and the history of the census is replete with policy choices. And Plaintiffs' allegations of "political chicanery" notwithstanding, Mot. 25, the Bureau must meet a statutory deadline regardless of whether the President had issued the Memorandum. Plaintiffs may

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[8] The fact that the President said "I don't know that you even have to ask them [Congress]" is entirely irrelevant. Mot. 10. Even if the Court were to indulge Plaintiffs' interpretation of this remark as some sort of official view that an extension "request was unnecessary," Mot. 22, such a statement by the President is not sufficient to supersede a statute, as Plaintiffs are no doubt aware.

[9] Plaintiffs also mischaracterize *Franklin* when they contend it licenses treating the December 31 deadline as "non-final." Mot. 23. *Franklin* concerned not the Secretary's report to the President, but the actions of the President prior to transmitting the apportionment figures to Congress under 2 U.S.C. § 2a, a separate statutory provision with a separate deadline. 505 U.S. at 797-98. Nothing in *Franklin* remotely suggests that a Court can waive the deadline of § 141(b), as Plaintiffs here demand.

want the Census Bureau to flout the statutory deadline to leave room for the prospect, as Plaintiffs see it, "that the President will no longer be in office when data is provided." Mot. 24. That politically tinged view of the APA cannot prevail. Just because Plaintiffs dislike the President's policy announced in the Memorandum does not mean that the Census Bureau *must* ignore the December 31 deadline, as Plaintiffs' motion demands. Invalidating agency actions under the APA simply because they bear some connection to a policy advanced by a different Government entity or actor—in this case the President—is a theory of liability wholly untethered from the text of the APA or any of its judicial precedents.[10]

IV. PLAINTIFFS' ENUMERATION CLAUSE ARGUMENTS LACK MERIT

If the Court finds it justiciable, Plaintiffs are not likely to succeed on their Enumeration Clause claim either. The Constitution's reference to "actual Enumeration" is simple: population is to be determined through a person-by-person headcount, rather than through estimates or conjecture. The Replan endeavors to do just that, and spells out no intention to rely on prohibited estimates or guesswork. Plaintiffs tacitly acknowledge as much, and focus not on any alleged violation of the Constitution's "actual Enumeration" command, but on speculative claims that inadequate field operations will necessitate methodologies entailing the use of administrative records or imputation, which will in turn fall below some unspecified floor of constitutionally mandated accuracy. But no judicial decision has articulated a viable standard by which to assess the constitutional muster of various counting methodologies. Despite Plaintiffs' protestations that the Replan will "undercut" accuracy, Mot. 25, they fail to establish any meaningful metric governing such accuracy concerns that the Replan fails to meet. That Plaintiffs have subjectively prejudged the 2020 Census to be a failure is not sufficient to prevail on their Enumeration Clause claim.

Initially, Plaintiffs are wrong that the "reasonable relationship" standard applied in *Wisconsin* likewise applies here. The *Wisconsin* Court considered an Enumeration Clause challenge to the Secretary's decision not to make statistical adjustments following the 1990 census

[10] Plaintiffs also cannot tar the Census Bureau's Replan with a "pretextual" rationale simply by referring to a different decision, by Secretary Ross, more than two years ago to add a citizenship question to the questionnaire. Mot. 25.

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to rectify alleged differential undercounts. 517 U.S. at 10-11. The Court cited the "virtually unlimited discretion" the Constitution grants to Congress "in conducting the decennial 'actual Enumeration,'" and explained that Congress had in turn delegated its "broad authority" to the Secretary. *Id.* at 19. It then announced that the Secretary's decision not to adjust the census count "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 20. The Court observed that a similar standard had been applied in *Montana* and *Franklin*, both of which similarly involved Executive Branch decisions to adjust the census counts *after* the census had been conducted. *See Franklin*, 505 U.S. at 804 (reviewing the Secretary's decision to allocate overseas federal personnel to their home States); *Montana*, 503 U.S. at 460 (challenge to method used to apportion House seats among the States).

Last Term, the Court in *New York* confirmed the limited applicability of the "reasonable relationship" standard by clarifying that it is to be applied only in cases which "concern[] decisions about the population count itself." 139 S. Ct. at 2566. By "the population count itself" the Court referred to census data *already collected* by the Bureau. Were it otherwise, and the "reasonable relationship" standard applicable to questions of how the final census count is generated, that standard would have been applied in *Utah v. Evans*, which concerned the use of an imputation methodology, not to mention in *New York* itself. *See Utah*, 536 U.S. at 464 (foregoing the *Wisconsin* standard in determining the constitutionality of imputation); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring in part) (discussing the constitutionality of statistical sampling without reference to the *Wisconsin* reasonable-relationship standard); *id.* at 363 (Stevens, J., dissenting) (same).

Plaintiffs' Enumeration Clause claim here, by contrast, challenges detailed operational aspects of the Census Bureau's plans to actually *conduct* the census, well before "the population count itself" has been determined. Plaintiffs cite no case in which this type of pre-count claim was brought and the "reasonable relationship" standard applied. Plaintiffs' Enumeration Clause claim should instead be assessed against Congress's, and by delegation the Secretary's, "virtually

unlimited discretion" *Wisconsin*, 517 U.S. at 19, to conduct the census "in such Manner as they shall by Law direct," U.S. Const., art. 1, § 2, cl. 3.

Measured against that standard, Plaintiffs' claim is exceedingly unlikely to prevail. Choices over how, in the face of a pandemic, to allocate resources, conduct data processing, and manage timetables all in order to meet a statutory deadline are prototypical questions about the "Manner" in which an actual enumeration should be conducted and fall well within the scope of the Secretary's "broad authority over the census." *Wisconsin*, 517 U.S. at 17. Nowhere do Plaintiff allege, for example, that Defendants are conducting something other than an "actual Enumeration," such as an estimate or conjecture of the population.

Plaintiffs' constitutional argument is not that Defendants are failing to conduct an actual enumeration, but rather that Defendants aren't doing a good enough job of it. They argue, for example, that the Replan will produce "flawed counts" and, specifically, an undercount that "disproportionately impact[s] hard-to-count groups." Mot. 26 (asserting that the Replan will lead to "an exacerbated overcount of the White population"). But the possibility of flaws or an undercount exists in every census, and does not inherently violate the Enumeration Clause—the Constitution does not require perfection. *See Utah*, 536 U.S. at 504 (Thomas, J., concurring in part and dissenting in part) (canvassing the history of census undercounts, including the first Census in 1790); *Wisconsin*, 517 U.S. at 6 ("Although each [of the 20 past censuses] was designed with the goal of accomplishing an 'actual Enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal."); *Gaffney,* 412 U.S. at 745 (census data "are inherently less than absolutely accurate"). Moreover, Plaintiffs' declarants acknowledge that even differential undercounts are commonplace in the census. Thompson Decl. ¶ 21; Hillygus Decl. ¶ 11; *see City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1117 (2d Cir. 1994) ("This phenomenon, known as the 'differential undercount,' has skewed every census since at least 1940. The Census Bureau started measuring the differential undercount in that year."), *rev'd sub nom. Wisconsin*, 517 U.S. at 1. As long as the Secretary has established pre-census procedures for individually counting every resident of the United States, any undercount is the constitutionally

permissible result of attempting to enumerate upwards of 330 million people across 3.8 million square miles. *See* https://www.census.gov/popclock/.

No matter how much Plaintiffs take issue with the particulars of how Defendants intend to use certain methodologies, none of those methodologies—imputation, administrative records, or proxies—are themselves unlawful, and Plaintiffs rightly do not bother to argue as much. Plaintiffs have not plausibly established that any aspect of the Replan falls outside the bounds of the "Manner' in which the census is to be conducted, and their Enumeration Clause claim is unlikely to succeed.[11]

V. PLAINTIFFS FAIL TO SATISFY THE OTHER INJUNCTION FACTORS

The Supreme Court has made clear that the "extraordinary remedy" of a preliminary injunction may not be awarded when a plaintiff fails to demonstrate a likelihood of success on the merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 32-33 (2008); *see also see Munaf v. Geren*, 553 U.S. 674, 690 (2008) (likelihood of success requires far more than identifying "serious,

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[11] Notably, Plaintiffs' Enumeration Clause claim would fail even if the Court were to apply the *Wisconsin* standard to ask whether the Bureau's planned operations bear a "reasonable relationship to the accomplishment of an actual enumeration." 517 U.S. at 19. Notably, Defendants are aware of no decision finding a violation of that standard, and this should not be the first. *See NAACP v. Bureau of Census*, --- F. Supp. 3d ---, 2020 WL 1890531, at *6 (D. Md. Apr. 16, 2020) ("I have located no case where a court has found a violation of the *Wisconsin* reasonable relationship standard . . . .").

Plaintiffs principally target the "shortened non-response follow up period," Mot. 26, but the Bureau reasonably chose to divide what available time remains before the statutory deadline between completing field operations and necessary data processing to ameliorate any consequences of a differential undercount. Fontenot Decl. ¶ 82; Huseny Decl., Ex. 1 at 1 (commencing data processing after September 30 permits "the Census Bureau . . . to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities"). Plaintiffs also claim that the Replan risks "lower-quality data across the board," Mot. 27, but perfection is not the relevant metric for the decennial census, and in any event, a claim of reduced quality "across the board" cuts against Plaintiffs' simultaneous contention that they and their constituencies will suffer particularized differential harms. Finally, Plaintiffs' abstract attack on the perceived "legitimacy" of the Census is no more than speculation about the subjective reaction of unspecified third-parties to a census count that does not yet exist. Moreover, whether certain members of the public may harbor opinions about whether a particular census is "legitimate" or not says nothing about the question of whether a particular counting methodology reasonably relates to conducting the enumeration.

substantial, difficult, and doubtful" questions); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." (internal quotes and citations omitted; emphasis in original)). Accordingly, Plaintiffs' failure to establish a cognizable APA or Enumeration Clause claim—to say nothing of justiciability or jurisdiction—is a basis to deny the injunction request outright. *See, e.g.*, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris,* 729 F.3d 937, 944 (9th Cir. 2013) (when "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* elements]" (quotation omitted).

And Plaintiffs' position grows only more tenuous if the Court proceeds further. Because Plaintiffs are seeking an injunction that would compel the Census Bureau to re-configure and extend its operations, Mot. 35, theirs would be a mandatory injunction. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (injunction is a mandatory one if it requires defendant "to take affirmative action"). Such injunctions are "particularly disfavored," and require Plaintiffs to meet the "doubly demanding" burden of showing that "the law and facts *clearly favor* [their] position." *Id.* (emphasis in original); *see also Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust,* 636 F.3d 1150, 1160 (9th Cir. 2011) (mandatory injunctions should not issue in "doubtful cases"). Just as they fail to establish a likelihood of success on the merits, Plaintiffs cannot satisfy this demanding standard with respect to the remaining injunction factors: irreparable injury, balance of harms, and the public interest. *See Winter*, 555 U.S. at 20.

A. Plaintiffs Cannot Establish Any Imminent and Irreparable Harm

Most significantly, Plaintiffs fail to establish that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Plaintiffs cannot "demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted). Because a preliminary injunction "is one of the most drastic

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tools in the arsenal of judicial remedies," *id.*, Plaintiffs' burden to show irreparable harm is necessarily higher than what is required to establish standing. *See, e.g.*, *Mazurek*, 520 U.S. at 972.

Here, Plaintiffs fail this test for all the same reasons that they fail to establish standing: they cannot show that they stand to suffer any imminent and certain injury. As explained above, Plaintiffs' assertions that their communities are likely to be undercounted as a result of the Replan are speculative. They are also inconsistent with the evidence presented by Mr. Fontenot. *See* Fontenot Decl. ¶ 91 ("[T]he Census Bureau is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following" the Replan).

Even more significant, however, is Plaintiffs' failure to connect any alleged undercount in their communities to potential undercounts in other jurisdictions. Because Plaintiffs are competing for dollars and legislative seats with other communities in their states and across the country, they can only be injured by inaccuracies that affect their members disproportionately. Unlike in the other cases they cite, there is no evidence in the record here to establish (1) what the undercount in Plaintiffs' communities will be; (2) how that undercount compares with undercounts in other communities; and (3) how that comparison will result in some appreciable funding or representational loss for Plaintiffs. Absent this evidence, Plaintiffs cannot be said to establish anything more than the abstract "possibility of irreparable injury." *Nken v. Holder*, 556 U.S. 418, 434 (2009). But, as the Supreme Court has emphasized, the "'possibility' standard is too lenient" a basis upon which to issue the drastic remedy of a preliminary injunction. *Winter*, 555 U.S. at 22. Given that irreparable harm is an indispensable element for a preliminary injunction, *id.*, Plaintiffs' failure to establish anything more than the theoretical possibility of harm is sufficient basis to deny the injunction they seek.

Once again, Plaintiffs appear to suggest that *any* inaccuracy in the census could cause them injury by decreasing the quality of the data they plan to use for various purposes. *See* Mot. 28-32. But, as noted above, such a *per se* rule, which would grant standing to anyone who asks for it, is inconsistent with the Supreme Court's census precedents. And it is doubly inappropriate in the context of a preliminary injunction, which is reserved for use only as an "extraordinary remedy." *Winter*, 555 U.S. at 376. Simply put, adopting Plaintiffs' argument would enable any locality or

organization who comes to Court complaining of census operations and the mere prospect of an inaccurate undercount, to obtain an injunction as a matter of course. That is not—and cannot be—the standard.

B. The Remaining Factors Weigh Against an Injunction

On the other side of the ledger, the harm to the government and to the public interest from an injunction would be great, and immediate. *See Nken*, 556 U.S. at 435 (explaining that harm to opposing party and weighing the public interest "merge" when relief is sought against the government). As a legal matter, a judicial injunction would intrude on Congress's and the Executive's discretion over the census. *See supra* Section I. And as a practical matter, the requested injunction may make it *more* difficult to execute the census. Fontenot Decl. ¶¶ 93-101.

There is no denying that the end-of-year statutory deadline for completing the census presents a number of challenges. However, were the Court to set aside the Replan, the Bureau would have to generate a *new* plan to comply with § 141(b)'s deadline or, if the Court somehow deems that statutory provision null, whatever new timelines the Court may choose to impose. *See id.* This would require re-planning yet again the timing of various operations and staffing allocations of a nationwide census whose field operations are nearing completion. *See id.* And all of that would presumably have to be done in a matter of a few weeks, if not days, with the congressional clock ticking away without relief in sight.

Even if the Court were to waive or disregard § 141(b)'s deadline, there is no certainty that a compulsory replan would be any better than the Replan at reducing undercount or achieving some abstract notion of better accuracy. Indeed, by the logic Plaintiffs apply in this very matter, such a plan would be worse. Plaintiffs complain that the Replan was developed too quickly, without sufficient input from stakeholders, and did not account for a variety of factors such as whether the plan is feasible. *See* Mot. 18-21. What would Plaintiffs and their experts make of a plan compiled in *less* time, subject to *more* funding constraints, and focused on achieving compliance with a Court decree rather than the Bureau's longstanding standards and practices? The Court should not order the Bureau to find the answer.

With "the decennial census [ ] again generat[ing] a number of [ ] controversies," *Franklin*, 505 U.S. at 790, and the extraordinary disruption caused by the COVID-19 pandemic, the public interest favors allowing the Bureau to complete the census under its current plan—the only plan that complies with the congressional deadline. The Bureau is confident that this plan will produce the best possible census under the circumstances. Plaintiffs can ask for, and obtain, no more from this Court.

CONCLUSION

For these reasons, the Court should deny the Motion for Stay or Preliminary Injunction.

DATED: September 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ M. Andrew Zee
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

WILBUR L. ROSS, JR., *et al.*,

Defendants.

Case No. 5:20-cv-05799-LHK

DECLARATION OF ALBERT E. FONTENOT, JR.

BC-DOC-0000028573

I, Albert E. Fontenot, Jr., make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Executive Summary

1. I am the Associate Director for Decennial Census Programs at the U.S. Census Bureau, and I submit this declaration to:

- Explain the magnitude, complexity, and planning involved in the 2020 decennial census, including the tightly integrated nature of census operations and processing;
- Detail the changes made to the original design in light of the COVID-19 pandemic; and
- Discuss the impacts of extending field operations past their current end date of September 30, 2020.

II. Qualifications

2. I am the Associate Director for Decennial Census Programs, in which capacity I serve as adviser to the Director and Deputy Director of the Census Bureau on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial census programs; provide executive and professional leadership to the divisions and central offices of the Decennial Census Programs Directorate; and participate with other executives in the formulation and implementation of broad policies that govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.

3. I began my career with the Census Bureau after retiring from a successful 40-year career as a senior executive in the private sector with midsize manufacturing companies where I was responsible for providing visionary leadership, developing innovative corporate growth and development strategies. I served as Vice President of Marketing, Vice President of Research and Development, and, for the last 14 years, as President and Chief Executive Officer.

4. In addition to a successful corporate career I served as Adjunct Professor in the MBA program in the Keller Graduate School of Management from 2005–2013 where I taught Leadership and Organizational Development, Marketing Management, Corporate Finance, Statistics, and Marketing. I earned a BA in management and MBA in management and finance

from DePaul University and Doctor of Ministry in pastoral ministry from Bethel Theological Seminary

5. I served as a as a commissioned officer in U. S. Army and was decorated in combat in Vietnam. After leaving active service, I remained in the US Army reserve attaining the rank of Major.

6. After retirement from private sector corporate management, I began my career with the Census Bureau in 2009 as a Field Operations Supervisor in Southern California for the 2010 Census. I quickly rose through the ranks and managed the Non-response follow-up operations for the 2010 Census as Area Manager responsible for census activities in Los Angeles County, the State of Hawaii, San Bernardino County and Riverside County California. After 2010, I served in positions of increasing responsibility as Survey Supervisor, Senior Supervisory Survey Statistician, Assistant Regional Director for the Los Angeles Region, and Regional Director for the Chicago Region. I moved from the field to the Census Bureau headquarters to assume the position as Chief of the Field Division and subsequently Assistant Director of Field Operations, Assistant Director for Decennial Census Operations, then Associate Director for the Decennial Census.

7. From 2012–2016, I represented the Field Directorate on the team that developed and wrote the Operations plan for the 2020 Decennial Census.

8. I have in-depth firsthand knowledge about the planning, management, and execution of Census Bureau field operations and effective mission-oriented leadership. I serve as the Chairman of the Census Crisis Management Team; I served as a member of the 2020 Census Design Executive Guidance Group; I am a member of the Census Data Quality Executive Guidance Group; and I chair the 2020 Census Operations Planning Group. Additionally, I represent the Decennial Census Program in our engagement with two of the three committees that advise the Census Bureau: the Census Scientific Advisory Committee and the National Advisory Committee.

III. A Complex Design and Budget for the 2020 Census

9. The Census Bureau goes to extraordinary lengths to count everyone living in the country once, only once, and in the right place, including those in hard-to-count populations. This is the core mandate of the Census Bureau, and has been the most significant factor informing every decision made in designing, planning, testing, and executing the decennial Census.

10. The Census Bureau's mandate in conducting the decennial census is to count everyone living in the United States, including the 50 states, the District of Columbia, and the territories of Puerto Rico, American Samoa, Commonwealth of the Northern Mariana Islands, Guam, and U.S. Virgin Islands. To that end, we expend significant funds, efforts, and resources in capturing an accurate enumeration of the population, including those who are hard to count. In particular, the 2020 Census operational design considers population groups that have historically been hard to count, as well as population groups that may emerge as hard to count.

11. The planning, research, design, development, and execution of a decennial census is a massive undertaking. The 2020 decennial census consists of 35 operations utilizing 52 separate systems. Monitoring the status and progress of the 2020 Census—the operations and systems—is managed in large part using a master schedule, which has over 27,000 separate lines of census activities. Thousands of staff at Census Bureau headquarters and across the country support the development and execution of the 2020 census operational design, systems, and procedures. In addition, the 2020 Census requires the hiring and management of hundreds of thousands of field staff across the country to manage operations and collect data in support of the decennial census.

12. The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations. Almost every major operation in the 2020 Census contains components designed to reach hard-to-count populations. This includes: census outreach, census content and forms design, finding addresses for enumeration, field infrastructure, multiple modes for self-response, Non-Response Follow-Up (NRFU) operations that enumerate households that did not self-respond to the census, and other operations designed specifically for the enumeration of population groups that have been historically hard to count. The best explanation of the many integrated operations designed to reach these populations is set forth in Appendix B to Version 4.0

of the 2020 Census Operation Plan, available at https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/operational-plan.html. Examples include:

- Verifying address lists using address data provided by community organizations, satellite technology, and in-person address listers checking addresses in communities nationwide;
- In-person enumeration using paper questionnaires in areas such as Remote Alaska;
- Hand-delivering 2020 Census materials to areas impacted by natural disasters, such as those impacted by Hurricane Michael in Florida;
- Conducting a special operation to count persons in "Group Quarters." Group Quarters include places such as college or university student housing, nursing homes, and corrections facilities;
- Working with local partners to identify locations, like shelters and soup kitchens, to best count people experiencing homelessness; and
- Creating culturally relevant advertisements targeting hard-to-count communities.

13. The Census Bureau obtained approval under the Paperwork Reduction Act from the Office of Management and Budget for the data collections involved in the 2020 Census. The Operational Plan is a project management document and, as in prior censuses, we did not obtain clearance for it. We presented information about our plans as we developed them in quarterly public Project Management Reviews, and we obtained input on our plans from both our Census Scientific Advisory Committee and National Advisory Committee. We consulted with other agencies throughout the decade about data security, postal delivery, acquisition of records, and the like, though we did not ask other agencies to review or approve our project management plans.

14. We allocate vast resources to ensure as complete and accurate a count as possible. Research and testing, in addition to the Census Bureau's collective knowledge and experiences, has resulted in an effective approach to reach all population groups.

15. The complexity and inter-related nature of census operations is echoed in the budget for the 2020 Census. The overall budget estimate for the 2020 Census—covering fiscal

years 2012 to 2023—is $15.6 billion. This represents enough funding to successfully complete the 2020 Census in virtually all possible scenarios, including the current challenging circumstances. In fact, the Government Accountability Office (GAO) recently reviewed this budget estimate1 and determined, as of January 2020, that the estimate substantially or fully met GAO's standards and best practices for a reliable cost estimate in terms of credibility, accuracy, completeness, and documentation quality. It is rare for civilian agencies to be so designated, and we are proud that the Census Bureau has achieved this status.

16. As of this writing, the Census Bureau has been appropriated in aggregate just under $14 billion to use for the 2020 Census, covering fiscal years 2012 through 2020. This is $4.4 billion greater in appropriated dollars than the $9.6 billion actually expended from fiscal years 2002 to 2010 for the 2010 Census.

17. Combined, prior to the COVID-19 pandemic operational adjustments, there remain just over $2 billion in contingency funds that have been appropriated, but which we have not needed to use. With only minimal exceptions, Congress appropriated these funds to allow us to flexibly and quickly respond to any and all risks to the 2020 Census that might be realized and have an impact on the operations.

18. That is exactly what the Census Bureau has done in these challenging times. We have always planned to exhaust any resources necessary to fulfill the Census Bureau's mission in counting everyone living in the United States once, only once, and in the right place. In all scenarios, the focus of our resources includes the hard-to-count. We have designed and implemented the 2020 Census to enumerate the most willing and able to respond in our most efficient and cost effective manner, thereby freeing the majority of our resources to reach hard-to-count communities using a bevy of in-person techniques specifically tailored to reach them.

IV. Census Step 1: Locating Every Household in the United States

19. The first operational step in conducting the 2020 Census was to create a Master Address File (MAF) that represents the universe of addresses and locations to be counted in the

[1] This is known as the 2020 Census Life Cycle Cost Estimate (LCCE) Version 2.0. An executive summary of that estimate is publicly available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/life-cycle-cost-estimate_v2.pdf.

2020 Census. This operation constitutes a significant part of the 2020 Census, and our plans to enumerate every resident once, only once, and in the right place.

20. A national repository of geographic data—including addresses, address point locations, streets, boundaries, and imagery—is stored within the Census Bureau's Master Address File/Topologically Integrated Geographic Encoding and Referencing (MAF/TIGER) System. The MAF/TIGER System provides the foundation for the Census Bureau's data collection, tabulation, and dissemination activities. It is used to generate the universe of addresses that will be included in a decennial census. Those addresses are then invited to respond, typically through an invitation in the mail. The MAF/TIGER System is used to control responses as they are returned to the Census Bureau and to generate a list of nonresponding addresses that will be visited in person. Finally, the MAF/TIGER System is used to ensure that each person is tabulated to the correct geographic location as the final 2020 Census population and housing counts are prepared.

21. For all of these reasons, the Census Bureau implemented a continuous process for address list development in preparation for the 2020 Census. There are two primary components to address list development—in-office development and in-field development. In-office development involves the regular, on-going acquisition and processing of address information from authoritative sources, such as the U.S. Postal Service (responsible for delivering mail to addresses on a daily basis), and tribal, state, and local governments (responsible for assignment of addresses to housing units), while in-field address list development involves individuals traversing a specified geographic area and validating or updating the address list based on their observations and, if possible, interaction with residents of the housing units visited.

22. Between 2013 and 2019, the Census Bureau accepted nearly 107 million address records from government partners. Over 99.5 percent of those records matched to addresses already contained in the MAF, many of which were obtained from the U.S. Postal Services' Delivery Sequence File (DSF). The remaining 0.5 percent of address records from partner governments represented new addresses and were used to update the MAF. In addition, partners submitted over 75 million address points that were either new or enhanced existing address point

locations in TIGER. Over 257,000 miles of roads were added to TIGER using data submitted by partners.

23. For the third decade, as mandated by the Census Address List Improvement Act of 1994, the Census Bureau implemented the Local Update of Census Addresses (LUCA) Program to provide tribal, state, and local governments an opportunity to review and update the Census Bureau's address list for their respective jurisdictions. In 2018, participants from over 8,300 entities provided 22 million addresses, of which 17.8 million (81 percent) matched to addresses already in the MAF. The Census Bureau added 3.4 million new addresses to the MAF, nationwide, as a result of LUCA.

24. Between September 2015 and June 2017, the Census Bureau conducted a 100 percent in-office review of every census block in the nation (11,155,486 blocks), using two different vintages of imagery (one from 2009, which was contemporary with the timing of address list development and Address Canvassing for the 2010 Census, and one concurrent with the day on which in-office review occurred) and housing unit counts from the MAF. The 2009-vintage imagery was acquired from a variety of sources, including the National Agricultural Imagery Program as well as publicly available imagery from state and local governments. Current imagery was acquired through the National Geospatial Intelligence Agency's Enhanced View Program, through which federal agencies can access imagery of sufficiently high quality and resolution to detect individual housing units and other structures, driveways, roads, and other features on the landscape.

25. During the in-office review, clerical staff had access to publicly available street-level images through Google Street View and Bing StreetSide, which provided the ability to see the fronts of structures, as if standing on the sidewalk. The technicians categorized blocks as passive, active, or on-hold. Passive blocks represented stability, meaning the technician verified the currency and accuracy of housing data in the office. Active blocks represented evidence of change and/or coverage issues in the MAF. On-hold blocks represented a lack of clear imagery. In these latter two instances, In-Field Address Canvassing was required. At the end of the initial

review in June 2017, 71 percent of blocks were classified as passive, suggesting a need for in-field review of only 29 percent of blocks.

26. However, since the 2020 Census was still several years away when In-Office Address Canvassing completed its initial review of the nation, the Census Bureau continued the in-office review to ensure the MAF was keeping up with changes on the ground. The Census Bureau used information from the U.S. Postal Services' DSF and partner governments to identify areas experiencing recent change and triggered these areas for re-review. Between July 2017 and March 2019, the additional review resulted in the categorization of nearly 87.9 percent of the 11.1 million census blocks as passive, indicating a need for in-field review of only 12.1 percent of census blocks.

27. In-Field Address Canvassing occurred between August 2019 and October 2019. Of the 50,038,437 addresses in the universe, fieldwork validated 44,129,419 addresses (88.2 percent). The remainder were removed from the universe as deletes, duplicates, or non-residential addresses. There were 2,685,190 new addresses identified during fieldwork, of which 1,553,275 matched addresses already in the MAF as a result of contemporaneous in-office update processes. In other words, even the hardest to count areas that required fieldwork to verify the addresses, resulted in only a small percentage of additions to the existing MAF.

28. The design for address list development in the decade leading up to the 2020 Census was the most comprehensive in history. Extensive partnerships with tribal, federal, state, and local governments provided multiple opportunities to validate and update the MAF using the most authoritative sources available. This process of continual assessment and update using partner-provided data created a strong foundation on which to implement the use of satellite imagery to validate existing addresses or detect change during In-Office Address Canvassing. This suite of in-office methods allowed the Census Bureau to focus In-Field Address Canvassing resources in the hardest to validate census blocks.

29. The MAF/TIGER System created the foundation for the 2020 Census. The Census Bureau believes that the Census Bureau's MAF/TIGER System is the most complete and accurate in history.

V. Census Step 2: Encouraging Self-response Throughout the 2020 Census

30. In order to encourage everyone in the United States to self-respond, the Census Bureau designed, tested, and implemented and Integrated Communications Program, the IPC. The two major components of this program are the ICC, the Integrated Communications Contract, and the IPP, the Integrated Partnership Program.

A. Advertising and Media

31. The ICC is the major contract that supports all components of the communications campaign for the 2020 Census. For the 2020 Census, the push to educate people and motivate response to the 2020 Census represented the largest advertising campaign in U.S. government history.

32. The budget for the 2020 Integrated Communications Contract is currently funded at a higher level than in the 2010 Census, adjusted for both inflation and population growth. The cost of the 2010 Census Integrated Communications Contract, in 2020 constant dollars, would be $456 million, while the Census Bureau currently plans to spend approximately $695 million on the 2020 Census Integrated Communications Contract. The $695 million spent on the communications program will mean an 18% increase in per-person spending over the 2010 amount.

33. To run the ICC in connection with the Census Bureau, a contract was awarded to VMLY&R, a major legacy-advertising firm with over 80 years of experience. Known as Team Y&R, or TYR, by the Census Bureau, the contracting team includes 13 subcontractors. TYR includes firms with expertise in reaching and working with the major audiences that will receive advertising through the media outlets directed toward their population groups, including the Black/African American, Hispanic/Latino, Asian, American Indian and Alaska Native, and Native Hawaiian and Other Pacific Islander populations. By relying on firms with these individual skill sets, the Census Bureau was able to better tailor the media and messaging toward individual groups and gauge the response before going live with the advertising. It also allowed for more creative risk-taking, and less of a one-size-fits-all approach.

34. Every part of the 2020 Census communications program was grounded in research. Based on the commitment to being a data driven campaign, beginning in 2018, we extensively researched how people perceived the census and what would motivate them to complete it. Models were developed to predict areas and audiences of low response across the country. These models were then translated into "low response scores" that help the Census Bureau anticipate respondent behavior so that messaging, media, and other communications activities could be deployed to maximize impact.

35. As a result of that research, we mounted a media campaign with stories in news media across the country in print, social, and digital media. The campaign was tested in over 120 focus groups across the country, and driven by efforts to reach historically undercounted audiences. More than 1,000 advertisements, in English and 43 other languages, were developed to communicate the importance of responding to the 2020 Census. This compares to roughly 400 separate creative pieces created in 2010. A sample of these creative pieces can be seen on the Census Bureau's YouTube channel website.

36. On March 29, 2019, the Census Bureau launched 2020census.gov—a key information hub about the census, how to complete it, and how it will affect communities across the country. Three days later, on April 1, 2019, we held a press conference to unveil the campaign platform: "Shape Your Future. START HERE." On January 14, 2020, we unveiled highlights of the public education and outreach campaign. That same day, we began airing ads to reach 99 percent of the nation's 140 million households, including historically undercounted audiences and those that are considered hard to reach.

37. The massive multimedia campaign sought to engage stakeholders and partners, support recruitment efforts and the Statistics in Schools program, and communicate the importance of the census through paid advertising, public relations, social media content, and the new web site. This was the first census where we made a significant investment in digital advertising, and spending time and resources targeting online sites including Facebook, Instagram, paid search engines, display ads, and programmatic advertising.

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38. The push to have a greater digital presence allowed the Census Bureau to reach a mobile audience, tailor messages, micro-target, and shift campaign ads and messages as needed. Online media, particularly search engines and social networking sites, made up a significant portion of digital connections. Nearly every person living in the United States was reached an average of 40 times throughout the campaign, from television, radio, newspaper and online ads, as well as outdoor locations such as billboards and bus stops.

39. The Census Bureau adapted its outreach strategies in response to delayed census operations due to COVID-19, increasing advertising and outreach to specific areas of the country with lower response rates. We quickly adjusted our messaging, pivoting from our original campaign to encourage people to respond online from the safety of their own homes. The use of micro-targeting allowed the Census Bureau to tailor its messaging, including directing appropriate messages to hard-to-reach communities and those who distrust government, both of which have been traditionally undercounted. This targeting continues through NRFU as we encourage the public to cooperate with enumerators. This targeting has allowed us to make each dollar spent on the advertising campaign more effective than in any previous census.

B. Partnerships with Community Organizations

40. The second major element of the Integrated Communications Program is partnerships. There are two prongs to the Partnership Program, the National Partnership Program that works from Census Bureau headquarters mobilizing national organizations, and the Community Partnership and Engagement Program, that works through the regions at the local level to reach organizations that directly touch their communities. The National Partnership Program and Community Partnership and Engagement Program are more integrated than ever before, and numbers involved for both programs significantly exceed the totals reached in prior censuses.

41. Census partners include national organizations like the National Urban League, the Mexican American Legal Defense Fund, the National Association of Latino Elected Officials (NALEO), the National Association for the Advancement of Colored People (NAACP), and the U.S. Chambers of Commerce. Major corporations also become census partners. At the local level,

partners can be churches, synagogues and mosques, legal aid clinics, grocery stores, universities, colleges, and schools.

42. Partners are the trusted voices in their communities; they have a profound impact on those who listen when they say the census is important and safe. We depend on our partners to seal the deal with communities that may be fearful or distrustful of the government. Even with all the Census Bureau's innovation and improvements to the self-response system, we have learned—and confirmed through research—that when communities and leaders recognize the importance of participating in the census, this message is better conveyed to households within those communities. The best, most trusted information comes from a person of trust.

VI. Census Step 3: Self-Response

43. The design of the 2020 Census depends on self-response from the American public. In an effort to ensure the most efficient process to enumerate households, the Census Bureau assigns every block in the United States to one specific type of enumeration area (TEA). The TEA reflects the methodology used to enumerate the households within the block. There are two TEAs where self-response is the primary enumeration methodology: TEA 1 (Self-Response) and TEA 6 (Update Leave).

44. TEA 1 uses a stratified self-response contact strategy to inform and invite the public to respond to the census, and to remind nonresponding housing units to respond. Invitations, reminders, and questionnaires will be delivered on a flow basis unless a household responds. These mailings are divided into two panels, Internet First and Internet Choice. Internet First emphasizes online response as the primary self-response option. Mailings to the Internet First panel begin with an invitation letter that alerts the housing unit to the beginning of the 2020 Census and provides the Census ID,[2] the URL for the online questionnaire, and information for responding by phone.

45. Internet Choice is targeted to areas of the nation that we believe are least likely to respond online. Historical response rates from other Census Bureau surveys, internet access and

[2] A Census ID is a unique identifier assigned to each address in a decennial census; the Census ID is used to track whether an address has self-responded or to track the address through nonresponse data collection and, ultimately through response processing and data tabulation.

penetration, and demographics are used to determine those areas least likely to respond online. Mailings to the Internet Choice panel begin with an invitation letter that alerts the housing unit to the beginning of the 2020 Census and provides the Census ID and the URL for the online questionnaire, information for responding by phone, and also a paper questionnaire. Housing units in Internet Choice areas have the *choice* to respond on paper beginning with the initial contact. All nonresponding housing units, regardless of panel, receive a paper questionnaire after the initial mailing and two separate reminder mailings.

46. Update Leave (TEA 6) is conducted in areas where the majority of the housing units do not have mail delivery to the physical location of the housing unit, or the mail delivery information for the housing unit cannot be verified. The purpose of Update Leave is to update the address list and feature data, and to leave a 2020 Census Internet Choice package at every housing unit. The major difference from TEA 1 is that a Census Bureau employee, rather than a postal carrier, delivers the 2020 Census invitation to respond, along with a paper questionnaire. Housing units also have the option to respond online or by phone.

47. Self-response began in March 2020 and will continue until the end of data collection. The total self-response period for the 2020 Census will be longer than the 2010 self-response period.

VII. Census Step 4: Nonresponse Followup (NRFU)

48. NRFU is the field operation designed to complete enumeration of nonresponding housing unit addresses. The primary purpose of NRFU is to conduct in-person contact attempts at each and every housing unit that did not self-respond to the decennial census questionnaire.

49. After giving everyone an opportunity to self-respond to the census, census field staff (known as enumerators), attempt to contact nonresponding addresses to determine whether each address is vacant, occupied, or does not exist, and when occupied, to collect census response data. Multiple contact attempts to nonresponding addresses may be needed to determine the housing unit status and to collect decennial census response data.

50. The 2020 Census NRFU operation is similar to the 2010 Census NRFU operation, but improved. In both the 2010 Census and the 2020 Census, cases in the NRFU workload are

subject to six contact attempts. In both the 2010 and 2020 NRFU, the first contact attempt is primarily an in-person attempt. In the 2010 Census, these six contact attempts could be conducted as three in-person attempts and three attempts by telephone. By comparison, each contact attempt in the 2020 Census NRFU will be either a telephone or an in-person contact attempt (however the vast majority of attempts will be in-person).

51. In both the 2010 Census and 2020 Census NRFU, if upon the first contact attempt an enumerator determines an address is occupied and the enumerator is able to obtain a response for the housing unit, then the housing unit has been counted, and no follow-up is needed.

52. If upon the first contact attempt, the enumerator is not able to obtain a response, the enumerator is trained to assess whether the location is vacant or unoccupied. Enumerators will use clues such as empty buildings with no visible furnishings, or vacant lots, to identify an address as vacant or non-existent.

53. In both the 2010 and 2020 Census, a single determination of a vacant or nonexistent status was not sufficient to remove that address from the NRFU workload; a second confirmation is needed. If a knowledgeable person can confirm the enumerator's assessment, the address will be considered vacant or non-existent and no additional contact attempts are needed. A knowledgeable person is someone who knows about the address as it existed on census day or about the persons living at an address on census day. A knowledgeable person could be someone such as a neighbor, a realtor, a rental agent, or a building manager. This knowledgeable person is known as a proxy respondent.

54. If a knowledgeable person cannot be found to confirm the status of vacant or non-existent, use of administrative records may provide confirmation of the enumerator's assessment. The Census Bureau does not rely on a single administrative records source to determine an address is vacant or non-existent. Rather, multiple sources are necessary to provide the confidence and corroboration before administrative records are considered for use. When used in combination with an enumerator's assessment of vacant or non-existent, corroborated administrative records provide the second confirmation that a nonresponding address is vacant or non-existent.

55. If, upon the first in-person contact attempt, the enumerator believes the address is occupied, but no knowledgeable person is available to complete the enumeration, the Census Bureau will use consistent and high-quality administrative records from trusted sources as the response for the household and no further contact will be attempted. We consider administrative records to be of high quality if they are corroborated with multiple sources. Examples of high-quality administrative records include Internal Revenue Service Individual Tax Returns, Internal Revenue Service Information Returns, Center for Medicare and Medicaid Statistics Enrollment Database, Social Security Number Identification File, and 2010 Census data.

56. Regardless of whether administrative records are used as a confirmation of vacancy or non-existent status or for the purposes of enumerating an occupied housing unit, the Census Bureau will, as a final backstop, send a final mailing encouraging occupants, should there be any, to self-respond to the 2020 Census.

57. The vast majority of nonresponding addresses in the NRFU workload will require the full battery of in-person contact attempts to determine the status of the nonresponding address (vacant, occupied, does not exist) and to collect 2020 Census response data. The full battery of in-person contact attempts also includes the ability to collect information about persons living in a nonresponding housing unit from a proxy respondent. Nonresponding units become eligible for a proxy response after a pre-determined number of unsuccessful attempts to find residents of a nonresponding address.

58. The operational design for NRFU evolved over the course of the decade. Use of administrative records, field management structures, systems, procedures, data collection tools and techniques were proven in tests occurring in 2013, 2014, 2015, 2016, and 2018.

VIII. Census Step 5: Quality Control

59. The Census Bureau is committed to a quality NRFU operation and has in place several programs to monitor and promote quality, such as the NRFU Reinterview Program, the Decennial Field Quality Monitoring Operation, and the Coverage Improvement Operation.

60. The NRFU Reinterview Program involves contacting a small number of households to conduct another interview—to help us ensure that enumerators are conducting their jobs

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correctly and are not falsifying responses. We have streamlined this operation, using information collected from the mobile devices used by enumerators. The data from these mobile devices tell us where the enumerators were physically located while they were conducting the interviews, how long they spent on each question in the interview, time of day of the interview, and other detail data about the interview process. Having this information—which is new for the 2020 Census—provides management with information on how the census takers are doing their jobs, and allows us to select reinterview cases in a targeted fashion.

61. A second quality check program, new for the 2020 Census, is the Decennial Field Quality Monitoring operation. This operation monitors overall adherence to field procedures in order to identify unusual patterns. We used this near real-time data analysis successfully during the Address Canvassing operation in 2019, and it is currently active in the NRFU operation. The goal of the program is to identify and investigate potential quality issues. In this program we examine data from individual field representatives and larger scale data, scanning for the possibility of both individual and systemic data quality problems. The program monitors outlier metrics, and produces reports that we analyze on a daily basis. Management staff use these reports to investigate suspicious activities and follow up as needed.

62. Another quality check operation, the Coverage Improvement Operation, seeks to resolve erroneous enumerations (people who were counted in the wrong place or counted more than once) and omissions (people who were missed) from all housing unit data. Coverage Improvement will attempt to resolve potential coverages issues identified in responses from the Internet Self-Response, Census Questionnaire Assistance, and NRFU operations, as well as from the paper questionnaires.

63. The Census Bureau believes that these quality programs (Reinterview, Decennial Field Quality Monitoring, and Coverage Improvement), taken together, provide a robust quality check for our data collection operations. We believe that our quality program remains an effective deterrent to poor performance, and an appropriate method to identify enumerators who fail to follow procedures. None of these programs, to date, reveals a pattern of substandard data collection.

64. The Census Bureau has also formed a Data Quality Executive Guidance Group that brings together the Census Bureau's experts in the fields of census operations, statistical methodology, acquisition and utilization of administrative records, and in the social, economic and housing subject areas. The group's mission is to provide direction and approvals about quality assessments of changes to the operational plans and of the 2020 Census data during and post data collection. We plan to release Demographic Analysis estimates of the population in December, prior to the release of the apportionment counts, as previously planned.

65. Finally, as noted by the Director in his August 3, 2020 statement, the Census Bureau intends to meet a similar level of household responses as in prior censuses, meaning that we will resolve 99% of the cases in each state. In short, the Census Bureau has robust programs in place to monitor data quality and has no indication that its NRFU operation is collecting "substandard" data.

IX. Census Step 6: Post-data Collection Processing

66. The next major step in the census, after the completion of data collection operations, is post processing. Post processing refers to the Census Bureau's procedures to summarize the individual and household data that we collect into usable, high quality tabulated data products. Our post processing procedures and systems are meticulously designed, tested and proven to achieve standardized, thoroughly vetted, high quality data products that we can stand behind.

67. Post data collection processing is a particularly complex operation, and the steps of the operation must generally be performed consecutively. It is not possible, e.g., to establish the final collection geography for the nation prior to processing housing units and group quarters that are added or corrected during NRFU. Similarly, it is not possible to unduplicate responses prior to processing all non-ID responses. In this sense, the post data collection activities are like building a house – one cannot apply dry wall before erecting the walls, any more than one could lay floor tile before the floor is constructed. There is an order of steps that must be maintained.

68. As part of developing the Replan Schedule, we looked at the possibility of starting the post data collection processing activities on a flow basis and reaffirmed that there is no opportunity to begin the post data collection processing until data collection operations close

everywhere. For example, we cannot begin processing in one region of the country while another region is still collecting data. This is true because the first post processing step is geographic processing, which cannot begin until the entire universe is determined. Geographic processing is key because we must tabulate census results at the block level and then build to higher levels of geography such as block groups, tracts, counties, and states.

69. The information below provides additional detail about the post data collection activities under the Replan Schedule.

A. Incorporate address updates from the field data collection operations into MAF/TIGER

Original Dates: February 10 – August 10, 2020

Replan Dates: February 6– September 24, 2020

During the data collection operations, the census field staff can update address and physical location information and add addresses. These updates are incorporated into our address and geo-spatial MAF/TIGER databases. Once updated, each address must be associated to the correct state, county, tract, block group and block. Since it is critical to associate each address to the correct geography, we verify that the address and geo-spatial updates are incorporated correctly.

B. Produce the Final Collection Geography MAF/TIGER Benchmark

Original Dates: August 14 – September 1, 2020

Replan Dates: September 5 – 25, 2020

In preparation for the producing the final collection geography data files needed for producing the apportionment counts and redistricting data products, we create a benchmark of MAF/TIGER, which is a snapshot of the databases.

C. Produce the Final Collection Address Data Products from MAF/TIGER

Original Dates: September 2 – 14, 2020

Replan Dates: September 26 – Oct 14, 2020

Once the benchmark has been created, the final collection geographic data files are produced and verified.

D. Produce and review the Decennial Response File 1 (DRF1)

Original Dates: September 15 – October 14, 2020

Replan Dates: October 14– November 8, 2020

The verified final collection geography data are integrated with the response data. Integration of these data is also verified to ensure accuracy. The next set of activities involves the standardization of the collected information.

- First we determine the final classification of each address as either a housing units or a group quarters facility. Addresses can change from a housing unit to group quarters and vice versa. Initial status is set at the start of the data collection operations as either a housing unit or group quarters. During the enumeration operations, we collect information that informs us on the classification. For a small number of addresses the classification may change, for example a housing unit may have been turned into a small group home. Based on the information collected we determine the status of every address as either a housing unit of group quarters.
- Next, we identify each unique person on the housing unit returns.
- As part of NRFU operation, we conduct a reinterview of a sample of cases to ensure quality. We incorporate the results of the reinterview.
- As part of the Internet self-response option and telephone operation, respondents can provide their data without their Census Identification Number (ID). These cases are assigned an ID which associates them to the final collection geography.
- Some group quarters will provide the information electronically. These files can contain duplicate records, so we need to remove the duplicates.
- We also determine the population count for all group quarters.

- We collect data in many ways, for example on-line, over the phone, on a paper questionnaire, electronic administrative files, and in person using an electronic questionnaire. As a result, we need to standardize the responses across the modes of collection.
- Finally, for the operations that collect data on a paper questionnaire, some housing units have more people than can fit on one paper questionnaire. The census field staff will use multiple paper questionnaires to enumerate the house. These continuation forms are electronically linked to form one electronic form.

E. Produce and review the Decennial Response File 2 (DRF2)

Original Dates: October 14 – November 4, 2020

Replan Dates: November 9 – 30, 2020

Once the previous step has been verified, we incorporate the results from the Self-Response Quality Assurance operation. As part of the group quarters operations, we enumerate domestic violence shelters. Their locations and data are high sensitive and are handled with special procedures both in the field and in processing. Their data are incorporated at this point in the process. Finally, for a small number of addresses we receive multiple returns, for example where one person in a house completes the form on-line, and other completes the paper questionnaire. For these cases, we select a form that will be used as the enumeration of record.

F. Produce and review the Census Unedited File (CUF)

Original Dates: November 4 – 30, 2020

Replan Dates: December 1 – 14, 2020

Once the previous step has been verified, we incorporate administrative records data as the response data for housing units were we do not have an enumeration and have high quality administrative records data. Next we determine the status

for every housing unit as occupied, vacant or non-existent. Non-existent units are removed from future processing. For every occupied housing unit, the population count is determined. For each person with write-in responses to the race and Hispanic origin questions, we merge in the information from automated and clerical coding operations. The coding operations assign a numerical value to the write-in responses. At this point in the post-data collection activities, for every housing unit and group quarter their location (state, county, tract, block group and block) is assigned, their status (occupied, vacant or non-existent) is determined, and in occupied addresses the number of persons is known. In addition, at the person level the demographic information (relationship, age, date of birth, sex, race and Hispanic origin along with write-in code values) and at the housing unit level housing information (tenure) is determined. For the majority of these items, the respondent provided the information. However, for a small number of people and addresses the information may be missing or inconsistent with other provided information, for example the Person 1's spouse is five years old. The result of these processes is a file that contains records for every housing unit and group quarters along with person records for the people associated with the addresses. Note that some of the demographic information and response to the tenure question may be missing.

G. Produce, review and release the Apportionment Counts

Original Dates: December 1 – 28, 2020

Replan Dates: Dec 15- 31, 2020

Once the CUF has been verified, the process goes down two paths. The first path is to determine the apportionment counts. Since every housing unit and group quarters has a population count and linked to a state, we can tabulation the state level population counts. In addition, we merge in the count of the Federally Affiliated Overseas population and the results of the Enumeration of Transitory Locations for each state. To ensure accuracy in the apportionment numbers, the

state counts including the overseas population and apportionment numbers are verified by multiple independent ways. The results of the independent verifications are compared and reconciled, if necessary.

X. Census Step 0: Research and Testing of the 2020 Census Design

70. The operational design of the 2020 Census, discussed above, has been subjected to repeated and rigorous testing. Given the immense effort required to conduct the census, the importance of the results, and the decade of work by thousands of people that goes into planning and conducting the decennial census, the Census Bureau expends a significant amount of effort to evaluate its planning and design to ensure that its operations will be effective in coming as close as possible to a complete count of everyone living in the United States. Design and testing of the 2020 Census was an iterative process: after each test, we revised our plans and assumptions as necessary.

71. Below are eight significant tests conducted prior to the 2020 Census. Seven of the tests listed below directly contributed to the support of the NRFU operational design or the infrastructure needed to support it. The eighth test pertained to In-Field Address Canvassing.

A. **2013 Census Test.** The 2013 Census Test explored methods for using administrative records and third-party data to reduce the NRFU workload. Key objectives of the 2013 Census Test included:

i. Evaluate the use of administrative records and third-party data to identify vacant housing units and remove them from the NRFU workload;

ii. Evaluate the use of administrative records and third-party data to enumerate nonresponding occupied housing units to reduce the NRFU workload;

iii. Test an adaptive design approach for cases not enumerated with administrative records and third-party data; and

iv. Test methods for reducing the number of enumeration contact attempts as compared with the 2010 Census.

B. **2014 Census Test.** The 2014 Census Test built upon the results from the 2013 Census Test specific to administrative records and third-party data usage to reduce the NRFU workload. Key objectives of the 2014 Census Test included:

i. Testing various self-response modes, including the Internet, telephone, and paper, and response without a preassigned census identifier;

ii. Testing the use of mobile devices for NRFU enumeration in the field;

iii. Continuing to evaluate the use of administrative records and third-party data to remove cases (vacant and nonresponding occupied housing units) from the NRFU workload;

iv. Testing the effectiveness of applying adaptive design methodologies in managing the way field enumerators are assigned their work; and

v. Examining reactions to the alternate contacts, response options, administrative record use, and privacy or confidentiality concerns (including how the Census Bureau might address these concerns through micro- or macro-messaging) through focus groups.

C. 2014 Human-in-the-Loop Simulation Experiment (SIMEX). Key findings included:

i. Determination that the field management structure could be streamlined and the supervisor-to-enumerator ratios increased;

ii. Messaging and alerts within the operational control system provided real-time and consistent communication; and

iii. Smartphones were usable by all people—even those with little technology experience were able to adjust and adapt.

D. **2015 Optimizing Self-Response Test.** The objectives of this test included:

i. Determining use of digital and target advertising, promotion, and outreach to engage and motivate respondents;

ii. Offering an opportunity to respond without a Census ID (Non-ID Processing) and determine operational feasibility and potential workloads around real-time Non-ID Processing; and

iii. Determining self-response and Internet response rates.

E. **2015 Census Test.** The 2015 Census Test explored reengineering of the roles, responsibilities, and infrastructure for conducting field data collection. IT also tested the feasibility of fully utilizing the advantages of planned automation and available real-time data to transform the efficiency and effectiveness of data collection operations. The test continued to explore the use of administrative records and third-party data to reduce the NRFU workload. Key objectives included:

i. Continue testing of fully utilized field operations management system that leverages planned automation and available real-time data, as well as data households have already provided to the government, to transform the efficiency and effectiveness of data collection operations;

ii. Begin examining how regional offices can remotely manage local office operations in an automated environment, the extent to which enumerator and manager interactions can occur without daily face-to-face meetings, and revised field staffing ratios;

iii. Reduce NRFU workload and increase productivity with the use of administrative records and third-party data, field reengineering, and adaptive design; and

iv. Explore reactions to the NRFU contact methods, administrative records and third-party data use, and privacy or confidentiality concerns.

F. **2016 Census Test.** The 2016 Census Test tested different supervisor-to-enumerator staffing ratios and incremental improvements and updates to the

field data collection software that guided an enumerator through interviews. The 2016 Census Test also allowed the continued evaluation of the use of administrative records to reduce the NRFU workload. Key NRFU objectives included:

i. Refining the reengineered field operations;

ii. Refining the field management staffing structure;

iii. Testing enhancements to the Operational Control System and field data collection application; and

iv. Testing scalability of Internet and Non-ID Processing during self-response using enterprise solutions.

Objectives related to self-response included:

i. Testing provision of language support to Limited English Proficient populations through partnerships and bilingual questionnaires;

ii. Testing the ability to reach demographically diverse populations;

iii. Testing deployment of non-English data collection instruments and contact strategies; and

iv. Refining Real-Time Non-ID processing methods, including respondent validation.

G. **2018 End-to-End Census Test.** The 2018 End-to-End Census Test focused on the system and operational integration needed to support the NRFU operation. Nearly all 2020 system solutions supporting the NRFU operation were deployed. The test also allowed continued evaluation of the NRFU contact strategy. The objectives of this test included:

i. Testing and validating 2020 Census operations, procedures, systems, and field infrastructure together to ensure proper integration and conformance with functional and nonfunctional requirements.

H. Address Canvassing Test (conducted in the fall of 2016). The Address Canvassing Test examined the effectiveness of the In-Office Address

Canvassing through the results of the In-Field Address Canvassing. The objectives of the test included:

i. Implementing all In-Office Address Canvassing processes;

ii. Evaluating the effectiveness of online training for field staff;

iii. Measuring the effectiveness of In-Office Address Canvassing through In-Field Address Canvassing; and

iv. Integrating multiple information technology applications to create one seamless operational data collection, control, and management system.

XI. Current Status of 2020 Census Operations

72. As of September 2, 2020, over 96 million households, 65 percent of all households in the Nation, have self-responded to the 2020 Census. Combining the households that self-responded with those that field staff have enumerated under NRFU reveals that as of September 1, 2020 the Census Bureau has enumerated 84 percent of the nation's housing units.

73. The Census Bureau is now roughly 3 ½ weeks into the 7 ½ week schedule for conducting the NRFU operation. Under the Replan Schedule, NRFU is scheduled to last 7 ½ weeks, not 6 weeks as some of Plaintiffs' declarations state. As of September 1, 2020, we have completed roughly 60% of the NRFU workload. We were helped in achieving this result by the fact that we got a "head start" on data collection by beginning NRFU at select offices in July at a "soft launch." When we began NRFU in all areas on August 9 we had already enumerated over 3 million households. Additionally, over 80% of the households in 40 states have been enumerated

74. While the number of enumerators hired and deployed has not been at the level anticipated, current progress indicates that we will nonetheless be able to complete NRFU before September 30. We currently have over 235,000 enumerators actively deployed, and we are conducting continuous replacement training sessions to increase that number.

75. The productivity rate for our enumerators thus far is substantially above the planned rate. Our plans assumed a productivity rate of 1.55 cases/hour, and 19 hours/week average hours

worked, whereas as of September 1, 2020 we have experienced a productivity rate of approximately 2.32 cases/hour, and 20.1 hours/week averaged work hours.

76. In sum, at our current rate we anticipate being able to conclude NRFU data collection no later than September 30, 2020.

XII. Replanning the Census – Multiple Times

77. The Census Bureau's planning for the 2020 Census was, in my professional opinion, excellent. Our plan was comprehensive and thoroughly tested. In March 2020, however, it became clear that COVID-19 was a serious health issue, and we were forced to change our plans around the time we began our self-response operation.

78. On March 18, 2020 the Census Bureau initially announced a two-week suspension of field operations to protect the health and safety of our employees and the American public because of the COVID-19 Pandemic. Self-response continued during this period through Internet, telephone and paper questionnaires. On March 28, 2020 the Census Bureau announced an additional two week suspension, until April 15, 2020.

79. At that time the career professional staff at the Census Bureau undertook the project of replanning each of the field operations based on our best predictions of when we could safely begin sending staff into the field to interact with the public. On April 13, 2020 staff finalized the plan to adjust field operations, and I presented the plan to the Secretary of Commerce and Department of Commerce management. The plan involved delaying our key high personal contact operations by 90 days. Update Leave, which had started on March 15 and been stopped because of COVID-19 on March 17, would resume pursuant to a new schedule beginning on June 13 and concluding on July 9. In-person Group Quarters operations which had been scheduled from April 2 – June 5 would be rescheduled from July 1 – September 3, and our largest field operation, NRFU, which was scheduled from May 13- July 31, would be moved to August 11- October 31. We rescheduled self-response to conclude with the end of Field Operations so instead of ending on July 31 as indicated in the original plan, it was extended to October 31. This schedule required Congress to provide legislative relief from the statutory deadlines of December 31, 2020, for the submission of the Apportionment counts to the President, and March 31, 2021, for the delivery of

redistricting data to the states. A request statutory relief from Congress was made for 120 days to enable us to complete the field operations and post enumeration processing.

80. On April 13, 2020, the Secretary of Commerce and the Director jointly announced the new Census Schedule and stated that they would seek statutory relief from Congress of 120 additional calendar days. This new schedule set a completion date for field data collection and self-response of October 31, 2020. For clarity, I will refer to this as "the COVID Schedule." The COVID Schedule assumed Congressional action and called for the delivery of apportionment counts to the President by April 30, 2021 (120 days after the statutory deadline) and redistricting data files to the states no later than July 31, 2021.

81. Once it became apparent that Congress was not likely to grant the requested statutory relief, in late July the career professional staff of the Census Bureau began to replan the Census operations to enable Census to deliver the apportionment counts by the Statutory deadline of December 31, 2020. On July 29, the Deputy Director informed us that the Secretary had directed us, in light of the absence of an extension to the statutory deadline, to present a plan at our next weekly meeting on Monday, August 3, 2020 to accelerate the remaining operations in order to meet the statutory apportionment deadline. I gathered all the senior career Census Bureau managers responsible for the 2020 Census at 8:00 a.m. on Thursday, July 30 and instructed them to begin to formalize a plan to meet the statutory deadline. At that time I consulted with the Associate Director of Communications and we directed that the COVID Schedule be removed from our website while we replanned. We divided into various teams to brainstorm how we might assemble the elements of this plan, and held a series of meetings from Thursday to Sunday. We developed a proposed replan that I presented to the Secretary on Monday August 3.

82. In developing the proposed replan we considered a variety of options and evaluated risk for each suggested time-saving measure. We evaluated the risks and quality implications of each suggested time-saving measure and selected those that we believed presented the best combination of changes to allow us to meet the statutory deadline without compromising quality to an undue degree. The challenge was to shorten the field data collection operation by 30 days, and to conclude the post processing operation in only 3 months, as opposed to 5 months in prior

schedules. We began with a review of the status of all field outreach operations, and assessed the impacts of possible revisions on the Census Bureau's ability to complete those operations within the compressed timeline. The six million housing units in the Update Leave Operation (which provides Census invitations to housing units that do not receive regular US mail) had been completed in early July, and we had received over two million self-responses and the remaining housing units would be moved into the NRFU operation to be visited by enumerators for personal interviewing. The Group Quarters enumeration operation which had begun on July 1st was on track to be completed on schedule by September 3, 2020 and would not be negatively affected by compressing the balance of the Field Schedule. The enumeration of persons staying in transitory locations (Campgrounds, RV parks, marinas and hotels without a home elsewhere) was scheduled to be conducted from September 3 – September 28. That operation could be conducted as planned within the replan schedule timeline.

83. The COVID-19 pandemic had precluded the Census Bureau from sending staff to conduct our Service Based Enumeration (SBE) operation. SBE is conducted at emergency and transitional shelters, soup kitchens and regularly scheduled food vans and targeted non-sheltered outdoor locations (TNSOL), and is designed to insure that people experiencing homelessness are counted); it was originally scheduled to be conducted March 30-April 2. We had conducted an extensive consultation in May and early June with a panel of 67 national service providers, federal and state agencies to determine the best time frame to conduct this operation to best replicate the weather, migratory behaviors and other factors affecting this population. The overwhelming consensus of the stakeholders, and the input from Census experts, was that the best time to conduct this operation would be mid-late September. Based on that stakeholder consultation we selected September 22-24 to conduct the SBE and TNSOL operations with appointments made with service providers in early September. A review of this operation indicated that we could conducted it in the replan as currently scheduled without disruption.

84. We also reviewed NRFU, our largest and most critical operation. The Census Bureau had conducted soft launches of all our major operations (during a soft launch a small portion of the operation starts early to insure that all the planned and tested systems work as

designed under real field conditions with real respondents and actual newly hired temporary employees). The NRFU Soft Launch was planned with six offices that could be safely started based on COVID risk profiles (developed using CDC, HHS, State and Local health guidance), availability of staff, and provisioning of Personal Protective Equipment. The original plan was to begin the operation in one office from each of our six regions starting on July 16th (Cycle 1a) and to follow on July 23rd (Cycle 1b - one week later) with six additional offices picked from coastal areas that would be prone to Hurricane risk. As the plan developed we were unable to take offices from all of the areas in the original plan because of high COVID risk and state and local stay at home orders, however we were able to select 6 offices for each cycle and these offices commenced NRFU field operations without incident on the planned dates. In early to mid July, as the pandemic controls began to be lifted, and our concerns grew over lack of action on a waiver of the December 31, 2020 apportionment statutory deadline, we decided to expand NRFU operations to all offices that could meet the safety, health, and staffing requirements – to start those offices in advance of the initial planned start date of August 11, 2020. We deployed NRFU operations in 35 additional offices on July 30, 2020 and 39 additional offices on August 6, 2020. We then made the decision to pull forward all remaining offices from August 11 to August 9. All ACOs had begun NRFU operations by August 9 and we had enumerated over 7.4 million housing units before the Replan Schedule's official start date of August 11.

85. Concurrent with the early start of NRFU operations, we observed higher levels of overall staff productivity resulting from the efficiency of the Optimizer (a software program that both schedules work for our enumerators and then routes them in the most effective routing). The increased productivity that we observed during the soft launch period was a factor in our ability to design the replanned field operations to end by September 30, 2020. The bonus plan to increase hours also contributed to our ability to create a replan to meet this deadline. We presented the Replan Schedule to the Secretary on August 3, he accepted it, and the Director announced it that same afternoon. For clarity, I will refer to this schedule as "the Replan Schedule."

86. The Replan Schedule intends to improve the speed of the NRFU operations without sacrificing completeness. Under the Replan Schedule, the Census Bureau has responded to the

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shortened calendar period for NRFU operations by taking steps to increase the ability of its employees in the field to work as efficiently as possible. This involves increased hours of work per enumerator, spread across the total workforce, to get the same work hours as would have been done under the original time frame. We incentivize this behavior by providing monetary bonuses to enumerators in who maximize hours worked, and retention bonuses to those who continue on staff for multiple successive weeks. Successful completion of NRFU is dependent on hours worked, not days worked.

87. We have aimed to improve the effectiveness of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, and keeping phone and tablet computer devices for enumeration in use for the maximum time possible, thereby decreasing the inefficiency created by training new enumerators.

88. The Census Bureau was able to adopt the Replan Schedule because the design of the 2020 Census allows a more efficient and accurate data collection operation in a shorter timeframe than was possible in the 2010 Census. Improvements that make this possible include use of our route and case optimization software, use of handheld devices, and streamlined processing. Additionally, it is worth noting that largely because of the schedule delays, the self-response period for the 2020 Census will be longer than the self-response period for the 2010 Census.

89. The Replan Schedule also necessitated some changes to the content and timing of our post processing operation. These changes include:

- We shortened address processing from 33 to 20 days. This required eliminating 13 days of processing activities that will be deferred until the creation of the redistricting data products.
- We cancelled the internal independent review of the final list of addresses that will be used to tabulate 2020 Census data (what we call "the MAF Extract").
- We eliminated redundant quality control steps, and the multiple file deliveries that supported those steps, in order to enable a state-by-state flow of deliveries for processing.

(Previous procedures delivered data to the next step only when the entire country had been reviewed by multiple teams).

- We optimized employee assignments to ensure maximum staff resource usage during this shortened production period – i.e., implemented a seven-day/week production schedule.
- We compressed the time allotted for subject matter expert review and software error remediation, cutting 21 days from the schedule.

90. These changes increase the risk the Census Bureau will not identify errors during post processing in time to fix them.

91. Nevertheless, the Census Bureau is confident that it can achieve a complete and accurate census and report apportionment counts by the statutory deadline following the Replan Schedule. The 2020 Census operational design is tailored to enumerate all persons, including hard-to-count populations.

92. The Census Bureau has kept the Office of Management and Budget informed about schedule developments for both the COVID Schedule and the Replan Schedule, and has filed nonsubstantive changes that have been published in the Federal Register. OMB was not required to approve the changes to the operational plan, nor did it. As with the 2018 Operational Plan, we did we not ask other agencies to review or approve either the COVID Schedule or Replan Schedule.

XIII. Impacts of Granting a Preliminary Injunction

93. If the Court grants an injunction, the Census Bureau will need to replan the remaining census operations again. We cannot speculate at this point exactly how we will replan the remainder of the census, as the specific actions we take will depend on when the Court rules and the specifics of the ordered actions.

94. The timing of any Court order changing the schedule is particularly important, as stated in our filing on Wednesday, September 2, 2020, where we explained that the Census Bureau has already taken steps to conclude field operations. As I will explain further, the fact that we are concluding field operations in ACOs that have completed their workload is a normal part of the NRFU operation, and is not specific to the Replan Schedule.

95. The Census Bureau manages its nonresponse follow up operation (NRFU) out of "Census Field Supervisor areas" or "CFS areas" within each of the nation's 248 ACOs. As of September 3, 2020, roughly 11% of CFS areas nationwide are eligible for what we call "the closeout phase," over 1,220 are actually in the closeout phase, and roughly 50 have actually reached conclusion. The closeout phase refers to the process of focusing our best enumerators to resolve the remaining cases in that area. CFS areas are eligible for closeout procedures when they cross the 85% completion mark. All CFS areas become eligible for closeout procedures on September 11. This does not mean that all CFS areas will be moved to closeout procedures on that date, only that regional directors can make this decision. Prior to that date no CFS area can be moved into closeout procedures until it reaches 85% completion. **The Census Bureau is continuing to work across the nation to obtain responses from all housing units, and has not begun closeout procedures for any CFS area with under 85% completion.**

96. It is a normal and planned part of the NRFU operation for an ACO to move into the closeout phase and complete operations. We used closeout procedures in NRFU in the 2010 Census and always planned to do the same for the 2020 Census. If we have not wound down in some areas, it is because we are still counting. Some ACOs have greater initial workload, and some started earlier than others –therefore, moving to completion varies by ACO and is a reflection of workload and local conditions and results in the allocation of enumerator resources from areas that are complete to areas that require more work.

97. We are currently finished with over 64% of the NRFU field work and over 85% of the total enumeration of all housing units in the nation and those numbers increase daily. More than 13 states have over 90% of their housing unit enumeration completed, and in 18 additional states we have completed over 85% of the housing units in those states. As we complete areas, staff are offered an opportunity to assist by enumerating in other areas that are not yet complete. Some staff elect that option, others choose not to go outside of their home area, and as their area is completed, they are released. As we complete more field work, the number of staff that are still active declines, and our ability to ramp up is severely hampered.

98. Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

99. Were the Court to enjoin us, we would evaluate all of the changes we made for the Replan Schedule and determine which to reverse or modify. For example, we notified participants of the cancellation of the Count Review 2 operation, originally scheduled for September 15. If our schedule were extended, we would evaluate whether to re-schedule this operation. We would go through each and every aspect of remaining operations and determine how best to use the remaining time to maximize the accuracy and completeness of the census results.

100. Finally, we wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021. The post processing deadlines for the Replan Schedule are tight, and extending the data collection deadline would, of necessity, cause the Census Bureau to fail to be able to process the response data in time to meet its statutory obligations. We have already compressed the post processing schedule from 5 months to only 3 months. We previously planned and tested our post processing systems assuming that we would follow a traditional, sequential processing sequence, and the 3-month schedule necessary for the Replan Schedule has already increased risk. We simply cannot shorten post processing beyond the already shortened 3-month period.

101. As I have tried to make clear in this Declaration, the decennial census is a massive, complex, and interrelated endeavor. Particularly troubling is the prospect of continual, conflicting, and evolving court orders from this this and other courts, including appellate courts. While Census Bureau staff have demonstrated considerable resilience and flexibility during this difficult year,

some certainty as to the amount of time available to conclude data collection and post processing will increase the likelihood of a successful outcome.

XIV. Commitment to Transparency and High Quality Enumeration

102. In my role as Associate Director, I remain committed to transparency about 2020 Census operations. The Census Bureau has been posting detailed information on its website about both self-response and NRFU completion progress:

https://2020census.gov/en/response-rates/self-response.html

https://2020census.gov/en/response-rates/nrfu-completion.html

https://2020census.gov/en/response-rates/nrfu.html

103. The 2020 Census is the first to post NRFU workload information, which is now available at the state and ACO level and may be seen at https://2020census.gov/en/response-rates/nrfu-completion.html. I have briefed staff for House and Senate leadership every Friday since April (except for August 7), and I have provided a transcribed briefing to Congress. We produce a massive amount of documents and other information to the Office of the Inspector General and the General Accounting Office every week, and these organizations interview Census Bureau staff on almost a daily basis.

104. In my role as the Associate Director, I remain committed to conducting a high-quality field data collection operation as explained above, and the ultimate goal of a complete and accurate census.

I have read the foregoing and it is all true and correct.

DATED this ___ day of September, 2020

Albert E Fontenot

Digitally signed by Albert E Fontenot
Date: 2020.09.05 00:14:42 -04'00'

Albert E. Fontenot, Jr.

Associate Director for Decennial Census Programs

United States Bureau of the Census

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Sent: 9/10/2020 5:42:54 PM
To: Kelley, Karen (Federal) [KKelley@doc.gov]; Risko, Daniel (Federal) [DRisko@doc.gov]; Burris, Meghan (Federal) [MBurris@doc.gov]
CC: Keller, Catherine (Federal) [CKeller@doc.gov]
Subject: Fwd: SDNY Opinion/Order from 3-judge court
Attachments: Census (SDNY) - Opinion and Order.pdf; 165 - Court's Final Judgment and Injunction - NY v. Trump (10 Sept 2020).pdf

PRIVILEGED

From: Keller, Catherine (Federal) <CKeller@doc.gov>
Sent: Thursday, September 10, 2020 5:41:12 PM
To: Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: FW: SDNY Opinion/Order from 3-judge court

FYI

b(5) - AC/WP

From: Kelleher, Diane (CIV) b(6)
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To: Joshi, Sopan (CIV) b(6) Heller, Megan (Federal) <MHeller@doc.gov>; Rosenberg, Brad (CIV) b(6); Sverdlov, Alexander V. b(6) Ehrlich, Stephen (CIV) b(6) Morrell, David M. (CIV) b(6) Haas, Alex (CIV) b(6) Freeman, Mark (CIV) b(6) Sharma, Sapna (Federal) <SSharma@doc.gov>; Zee, M. Andrew (CIV) b(6) Cannon, Michael (Federal) <MCannon@doc.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>; DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>; Kourkoumelis, Aristidis (Federal) <AKourkoumelis@doc.gov>; Stern, Mark (CIV) b(6) Hinshelwood, Bradley A. (CIV) b(6); Meredith, Ethan (Federal) <EMeredith@doc.gov>; Keller, Catherine (Federal) <CKeller@doc.gov>; Frazer Reaves, Nicole (OSG) b(6) Lucas, Brinton (OSG) b(6) Davis, Elliott M. (CIV) b(6) Mauler, Dan (CIV) b(6)
Subject: SDNY Opinion/Order from 3-judge court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,	:	
Plaintiffs,	:	20-CV-5770 (RCW) (PWH) (JMF)
-v-	:	OPINION AND ORDER
DONALD J. TRUMP, *in his official capacity as President of the United States*, et al.,	:	
Defendants.	:	

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

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PER CURIAM.

The Constitution 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. To enable that apportionment, it mandates that an "actual Enumeration" be conducted "every . . . ten Years, in such Manner as [Congress] shall by Law direct," an effort commonly known as the decennial census. *Id.* art. I, § 2, cl. 3. Congress has delegated the task of conducting the census to the Secretary of Commerce, who is required to

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report "[t]he tabulation of total population by States" to the President. 13 U.S.C. § 141(a)-(b). The President, in turn, is required to transmit to Congress "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" using a mathematical formula "known as the method of equal proportions." 2 U.S.C. § 2a(a). Throughout the Nation's history, the figures used to determine the apportionment of Congress — in the language of the current statutes, the "total population" and the "whole number of persons" in each State — have included every person residing in the United States at the time of the census, whether citizen or non-citizen and whether living here with legal status or without.

On July 21, 2020, however, the President announced that this long-standing practice will no longer be the case. In a Presidential Memorandum issued on that date (and entered into the Federal Register two days later), the President declared that, "[f]or the purpose of the reapportionment of Representatives following the 2020 census" — which, as of today, is still ongoing — "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (ECF No. 1-1) (the "Presidential Memorandum").[1] To implement this new policy, the President ordered the Secretary of Commerce (the "Secretary") to provide him two sets of numbers for each State: first, the total population as determined in the 2020 census and, second, the total population as determined in the 2020 census minus the number of "aliens who are not in a lawful immigration status." *Id.* The President left it to the Secretary of Commerce to figure out how to calculate the number of "aliens who are not in a lawful immigration status" in each State. But one thing is

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[1] Unless otherwise noted, all docket references are to 20-CV-5770.

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clear: that number would not come from the census itself, as the 2020 census is not collecting information regarding citizenship status, let alone legal immigration status in this country, and the 2020 census will count illegal aliens according to where they reside.

In these consolidated cases, filed only three days after the Presidential Memorandum, two sets of Plaintiffs — one, a coalition of twenty-two States and the District of Columbia, fifteen cities and counties, and the United States Conference of Mayors (the "Governmental Plaintiffs") and the other, a coalition of non-governmental organizations (the "NGO Plaintiffs") — challenge the decision to exclude illegal aliens from the apportionment base for Congress on the ground that it violates the Constitution, statutes governing the census and apportionment, and other laws. On August 7, 2020, they filed a motion for summary judgment or, in the alternative, a preliminary injunction. Plaintiffs allege that the Presidential Memorandum will cause, or is already causing, two forms of irreparable harm. First, noting that the Presidential Memorandum itself identifies a State — believed to be California — that would stand to lose two or three seats in the House of Representatives if illegal aliens are excluded from the apportionment base, they argue that the Memorandum will result in the loss of seats in the House. Second, they argue that the Presidential Memorandum is having an immediate impact on the census count — which is still ongoing — and that that, in turn, is resulting, and will result, in various forms of injury. Defendants — the President, Secretary of Commerce Wilber L. Ross, Jr., Director of the U.S. Census Bureau Steven Dillingham (the "Director"), the United States Department of Commerce (the "Department"), and the Bureau of the Census (the "Census Bureau") — oppose Plaintiffs' motion and filed a cross-motion to dismiss, arguing that the Court lacks jurisdiction to entertain Plaintiffs' claims and that the exclusion of illegal aliens from the apportionment base is a lawful

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exercise of the President's discretion with respect to the conduct of the census and apportionment.

For the reasons that follow, Plaintiffs are entitled to summary judgment. The Presidential Memorandum violates the statutes governing the census and apportionment in two clear respects. First, pursuant to the virtually automatic scheme established by these interlocking statutes, the Secretary is mandated to report a single set of numbers — "[t]he tabulation of total population by States" under the decennial census — to the President, and the President, in turn, is required to use the same set of numbers in connection with apportionment. By directing the Secretary to provide two sets of numbers, one derived from the decennial census and one not, and announcing that it is the policy of the United States to use the latter in connection with apportionment, the Presidential Memorandum deviates from, and thus violates, the statutory scheme. Second, the Presidential Memorandum violates the statute governing apportionment because, so long as they reside in the United States, illegal aliens qualify as "persons in" a "State" as Congress used those words.

On those bases, we declare the Presidential Memorandum to be an unlawful exercise of the authority granted to the President by statute and enjoin Defendants — but not the President himself — from including in the Secretary's report to the President any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Because the President exceeded the authority granted to him by Congress by statute, we need not, and do not, reach the overlapping, albeit distinct, question of whether the Presidential Memorandum constitutes a violation of the Constitution itself.

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The merits of the parties' dispute are not particularly close or complicated. Before getting to the merits, however, we must confront a question that is closer: whether we have jurisdiction to even consider the merits.

It is axiomatic that federal courts are courts of limited jurisdiction and may consider the merits of a case only if the case is of the sort traditionally amenable to, and resolvable by, the judicial process. That requires a plaintiff seeking relief in federal court to demonstrate that it has "standing" to bring suit and that its claims are ripe for decision. Here, if the sole harm that Plaintiffs alleged were the harm to their apportionment interests, they might not satisfy the requirements of standing and ripeness, as the Secretary has not yet taken any public action in response to the Presidential Memorandum and could conceivably conclude that it is not feasible (or lawful) to exclude illegal aliens from the apportionment base. But Plaintiffs allege — and have proved — that they are suffering, and will suffer, more immediate and certain injuries by virtue of the harm that the Presidential Memorandum is causing to the accuracy of the census count itself. In light of those injuries, we conclude that we have jurisdiction to grant Plaintiffs the relief they are seeking.

BACKGROUND

The following background facts, drawn from the admissible materials submitted by the parties and materials of which the Court may take judicial notice, are undisputed except where noted. *See, e.g.*, *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).[2]

A. The Constitutional and Statutory Scheme

Article I of the Constitution requires that an "actual Enumeration" of the population, known as the decennial census, be conducted "every . . . ten Years, in such Manner as [Congress]

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[2] We discuss facts relevant to the issues of standing and ripeness below.

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shall by Law direct." U.S. Const. art I, § 2, cl. 3. The primary purpose of this enumeration was to apportion congressional representatives among the States "according to their respective Numbers." *Id.* The number of Representatives apportioned to each State determines, in turn, that State's share of electors in the Electoral College. *See id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3. For the first eighty years of the Nation's history, the States' "respective Numbers" were calculated according to the formula set forth in the Constitution's infamous "Three-Fifths Clause," which provided that the "actual Enumeration" established by the census would be arrived at by "adding to the whole Number of free Persons . . . , and excluding Indians not taxed, three fifths of all other Persons" — "all other Persons" being people then held as slaves. U.S. Const. art I, § 2, cl. 3. In 1868, that provision was modified by the Fourteenth Amendment, which 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 (emphasis added).[3]

The modern census is governed by the Census Act, which Congress most recently amended in 1976. *See* Act. of Oct. 17, 1976 (the "Census Act" or the "Act"), Pub. L. No. 94-521, 90 Stat. 2459 (codified in scattered sections of 13 U.S.C.). Section 141(a) of the Act broadly delegates to the Secretary the duty to "take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine." 13 U.S.C. § 141(a). The Act then mandates that "[t]he 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" — in this

[3] For practical purposes, the "Indians not taxed" proviso was rendered moot by the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)), which declared that all Native Americans born in the United States are citizens.

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case, January 1, 2021 — "and reported by the Secretary to the President of the United States." *Id.* § 141(b). Within a short time thereafter — in this case, between January 3 and January 10, 2021 — "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 . . . 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). The Clerk of the House of Representatives must, in turn, "send to the executive of each State a certificate of the number of Representatives to which such State is entitled" within fifteen days of the President's statement. *Id.* § 2a(b). With limited exceptions not relevant here, the Census Act strictly prohibits disclosure — even to other federal agencies — of any data or information concerning individual respondents to the census. *See* 13 U.S.C. §§ 8-9; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 523 (S.D.N.Y.), *aff'd*, 139 S. Ct. 2551 (2019).

B. The Use of Census Data

Although the "initial" — and core — "constitutional purpose" of the census was to "provide a basis for apportioning representatives among the states in the Congress" (and, in turn, allocating members of the Electoral College), the census has long "fulfill[ed] many important and valuable functions for the benefit of the country." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982). As the Supreme Court has observed, it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (internal quotation marks and citation omitted). Indeed, "[t]oday, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit

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organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 519 (citation omitted). Among other things, the data are now used not only for apportionment, but also "for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige*, 455 U.S. at 353 n.9.

In *New York v. Department of Commerce*, the court described many of the varied uses beyond congressional apportionment to which the federal, state, and local governments put census data, which Plaintiffs reiterate in this case. *See* 351 F. Supp. 3d at 596-99, 610-13. To provide a few examples here:

- The federal government relies on census data to allocate vast sums of money among and within States. In fiscal year 2016, for example, at least 320 such programs allocated about $900 billion using census-derived data. *See id.* at 596.

- State governments — including those among the Governmental Plaintiffs here — mandate the use of census data to draw intrastate political districts. *See id.* at 594-95, 612; *House of Representatives*, 525 U.S. at 333 n.4, 334; *see also, e.g.*, ECF No. 76-11 ("Brower Decl."), ¶ 16-18 (Minnesota); ECF No. 76-37 ("Rapoza Decl."), ¶ 5 (Rhode Island).

- State law requires the use of census data for various purposes, ranging from the allocation of governmental resources and imposition of expenses among local governments to the setting of utility fees and official salaries. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 612-13 (citing various state statutes).

- State and local governments — including those among the Governmental Plaintiffs here — rely on census data, including granular local-level "characteristic data," to perform essential government functions. New York City, for example, makes important decisions about how to allocate public services in reliance on demographic data derived from the census, as when its Department of Education redraws school zone boundary lines, ECF No. 76-21, ("Salvo Decl."), ¶ 15; when its Department of Health deploys resources based on its best understanding of the age, race, and Hispanic origin characteristics within particular communities, *id.* ¶ 14; and when its Population Division uses age data to target services for aged individuals, *id.* ¶ 16.

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Thus, inaccuracies in federal census data would affect state and local governments — and, by extension, their residents — in many ways, only some of which would be measurable. Critically, in many instances, that would be true even if the total population counts were not materially affected — because of the importance of accuracy at the local or subgroup level.[4]

C. The Citizenship Question Litigation and Its Aftermath

This is not the first time issues relating to the 2020 census have been brought in this District. On March 22, 2018, the Secretary announced that he had decided to include "a question about citizenship on the 2020 decennial census questionnaire," claiming "that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019). Shortly thereafter, two groups of plaintiffs — including most, if not all, Plaintiffs here — filed suit in this District, alleging that the decision to include the citizenship question violated the Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* On January 15, 2019, after an eight-day bench trial, Judge Furman issued detailed findings of fact and conclusions of law, holding that the Secretary's decision was arbitrary and capricious, contrary to law, and pretextual. *New York v. Dep't of*

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[4] Although less relevant here, accurate census data is also critical to others, including scholars and private-sector businesses. *See, e.g.*, Br. of *Amici Curiae* 16 Businesses & Business Organizations at 3, ECF No. 103-1 ("Businesses Amicus") ("The Census provides critical data that informs decision-making in both the private and public sectors. . . . Consequently, government action that threatens the accuracy of Census data directly harms the businesses nationwide that rely on that data."); MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 260-61 (2d ed. 2015) (describing how "[s]ocial scientists in university settings, in businesses, or in stand-alone research organization [have become] the market" for census data in the modern era). For instance, businesses rely on census data "to make a variety of decisions, including where to put new brick-and-mortar locations, how to market their products, and how to predict which products will be successful in a given market. . . . All of these things depend on the availability of accurate Census data." Businesses Amicus 2.

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Commerce, 351 F. Supp. 3d at 516; *see id.* at 635-64. He vacated the Secretary's decision and enjoined its implementation. *See id.* at 671-80. The defendants filed a notice of appeal and a petition for certiorari before judgment in the Supreme Court. The Supreme Court granted their petition and then affirmed on the ground that the Secretary's stated rationale was pretextual. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2573-76. Thereafter, on consent, Judge Furman entered a permanent injunction barring the Secretary from asking persons about citizenship status as part of the 2020 decennial census. *See* Order at 2, ECF No. 653, *New York*, No. 18-CV-2921 (JMF) (S.D.N.Y. Aug. 7, 2019).

Shortly after the Supreme Court affirmed Judge Furman's judgment, the President responded with an Executive Order aimed at "compil[ing]" citizenship data "by other means." Collecting Information About Citizenship Status in Connection With the Decennial Census, Exec. Order No. 13,880 § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order directed "all executive departments and agencies" to provide to the Department "the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records." *Id.* § 3 at 33,824. The Executive Order explained that data identifying citizens would, among other things, "help . . . generate a more reliable count of the unauthorized alien population in the country," which "would," in turn, "be useful . . . in evaluating many policy proposals." *Id.* § 1 at 33,823. Noting that the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), had "left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population,'" the Executive Order also explained that citizenship data could be used by states "to design State and local legislative districts based on the population of voter-eligible citizens." *Id.* § 1 at 33,823-24. The Executive

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Order said nothing about using citizenship data for purposes of congressional apportionment. Similarly, in remarks he made when announcing the Executive Order, the President made no mention of using citizenship data in connection with congressional apportionment. *See* Remarks on Citizenship and the Census, 2019 DAILY COMP. PRES. DOC. 465 (July 11, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900465/pdf/DCPD-201900465.pdf.

D. The 2020 Census

On February 8, 2018 the Census Bureau promulgated the "Residence Rule" establishing the residence criteria for the 2020 census. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018) (the "Residence Rule" or the "Rule"). "The residence criteria are used to determine where people are counted during each decennial census." *Id.* at 5526. "[G]uided by the constitutional and statutory mandates to count all residents of the several states," the Rule explains, "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of 'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time. . . . This concept of 'usual residence' is grounded in the law providing for the first census, the Act of March 1, 1790, expressly specifying that persons be enumerated at their 'usual place of abode.'" *Id.* Applying these criteria, the Rule explains that all "[c]itizens of foreign countries living in the United States" are to be "[c]ounted at the U.S. residence where they live and sleep most of the time," with the exception of "[c]itizens of foreign countries living in the United States who are members of the diplomatic community" (who are counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live) and "[c]itizens of foreign countries visiting the United States, such as on a vacation or business trip" (who are not counted at all). *Id.* at 5533. Notably, during the notice-and-comment process, the

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Census Bureau considered a comment "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 the Census Bureau decided to "retain the proposed residence situation guidance for foreign citizens in the United States," reiterating that "[f]oreign citizens are considered to be 'living' in the United States if, at the time of the census, *they are living and sleeping most of the time at a residence in the United States*." *Id.* (emphasis added).

The Census Bureau relies on various means to obtain census data, beginning with a questionnaire to which households are asked to self-respond and ending with a set of procedures known as "Non-Response Follow-Up" operations. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 521. The 2020 census count "officially began in the rural Alaskan village of Toksook Bay" on January 21, 2020. U.S. Census Bureau, *Important Dates*, U.S. CENSUS 2020, https://2020census.gov/en/important-dates.html (last visited September 7, 2020). Census operations were in full swing by mid-March, when the Census Bureau was confronted with the unprecedented challenge of the COVID-19 pandemic. On April 13, 2020, the Secretary and the Director announced that, due to the pandemic, the Census Bureau would temporarily suspend field data collection activities; seek a 120-day extension from Congress of the deadline "to deliver final apportionment counts"; and "extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021." *U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19*, U.S. CENSUS BUREAU (Apr. 13, 2020), https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html. In the following months, representatives of

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the Census Bureau reiterated on multiple occasions that additional time was required to complete the apportionment count and deliver it to the President.[5]

The Census Bureau resumed field operations in May 2020. *See* U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19* ("*Census Operations Adjustments*"), U.S. CENSUS 2020, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited Sept. 9, 2020). Despite the Census Bureau's earlier statements indicating the need for more time to complete the census, Director Dillingham announced on August 3, 2020, that the Census Bureau would end field operations on September 30, 2020, a month earlier than the previously announced deadline of October 31, 2020. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, U.S. CENSUS BUREAU (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html; *see also* ECF No. 62 ("NGO Pls. Compl."), ¶¶ 10 & n.3, 114, 174 n.69. As of today, therefore, the census is still ongoing — with enumerators conducting in-person Non-Response Follow-Up work to ensure that any household that did not self-respond to the census is nonetheless counted as part of the "actual Enumeration." *See Census Operations Adjustments*; *see also* ECF No. 34 ("Gov't Pls.' Compl."), ¶ 130 & n.20. In fact, there is some doubt about the date on which these efforts will end and the counting will

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[5] *See, e.g.*, U.S. CENSUS BUREAU, OPERATIONAL PRESS BRIEFING – 2020 CENSUS UPDATE 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf (statement of Albert Fontenot, Assoc. Dir. for Decennial Census Programs) (explaining that the Bureau was "past the window of being able" to produce the apportionment count by December 31, 2020); *see also, e.g.*, 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 (statement of Tim Olson, Assoc. Dir. For Field Operations) (explaining that "[w]e have passed the point where [the Bureau] could even meet the current legislative requirement of December 31. We can't do that anymore. We've passed that for quite a while now.").

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stop. On September 5, 2020, the Honorable Lucy H. Koh, United States District Judge for the Northern District of California, entered a temporary restraining order enjoining the Census Bureau from "implementing the August 3, 2020 [plan] or allowing to be implemented any actions as a result of the shortened timelines in the August 3, 2020 [plan]." *Nat'l Urban League v. Ross*, No. 20-CV-5799 (LHK), 2020 WL 5291452, at *4 (N.D. Cal. Sept. 5, 2020). A preliminary injunction hearing is scheduled in that case for September 17, 2020. *See id.*

E. The Presidential Memorandum

In the meantime — that is, with the census count still being conducted — on July 21, 2020, the President issued the Presidential Memorandum, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." Presidential Memorandum, 85 Fed. Reg. at 44,679. In it, the President declared 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 . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* at 44,680. "Excluding these illegal aliens from the apportionment base," the President posited, "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." *Id.* Additionally, the President asserted 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 encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the

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immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." *Id.* Referring to one State with "more than 2.2 million illegal aliens" — apparently California, *see* ECF No. 75 ("Pls.' Rule 56.1 Statement"), ¶ 4 — the Presidential Memorandum noted 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." Presidential Memorandum, 85 Fed. Reg. at 44,680.

To implement this new "policy of the United States," the President directed the Secretary to provide him with two sets of data. First, the Presidential Memorandum mandates that, "[i]n 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." *Id.* Second, "[t]he 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)." *Id.* (emphasis added). In other words, to the extent "feasible" or "practicable," the Secretary is now required to include *two* sets of numbers for each State in his report to the President under Section 141(b) of the Census Act: first, the total population as determined in accordance with the Residence Rule, which includes citizens of foreign countries "living in the United States," without regard for the legal status of such persons in this country, Residence Rule, 83 Fed. Reg. at 5533; and second, the total population *minus* the number of "aliens who are not in a lawful immigration status." Presidential Memorandum, 85 Fed. Reg. at 44,680.

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F. This Litigation

On July 24, 2020 — only three days after the Presidential Memorandum — both the Governmental Plaintiffs and the NGO Plaintiffs filed their initial complaints. *See* ECF No. 1; 20-CV-5781, ECF No. 1.[6] In their now-amended Complaints, Plaintiffs contend that the Presidential Memorandum violates the Constitution's Enumeration Clause, as modified by the Fourteenth Amendment; is motivated by discriminatory animus toward Hispanics and immigrant communities of color, in violation of the equal protection component of the Fifth Amendment's Due Process Clause; coerces state and local governments and denigrates the equal sovereignty of the States in violation of the Tenth Amendment; violates the constitutional separation of powers by usurping the authority Congress delegated to the Secretary; constitutes an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141; violates the APA; and violates the Census Act's prohibition on the use of statistical sampling for purposes of congressional apportionment, *see* 13 U.S.C. §§ 141, 195. They seek a declaration that the Presidential Memorandum is unlawful, an injunction prohibiting Defendants from taking any action to implement or further the Memorandum, and writs of mandamus compelling the Secretary and the President to transmit figures that do not exclude illegal aliens based on immigration status.

The cases were initially assigned to Judge Furman alone, who consolidated them pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure. ECF No. 43, at 1. On August 5, 2020, Judge Furman held an initial pretrial conference by telephone. During the conference,

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[6] At least six other cases in four other Districts have been filed challenging the Presidential Memorandum. *See* Compl., *Common Cause v. Trump*, No. 20-CV-2023 (D.D.C. July 23, 2020); Compl., *Haitian-Ams. United, Inc. v. Trump*, No. 20-CV-11421 (D. Mass. July 27, 2020); Compl., *City of San Jose v. Trump*, No. 20-CV-5167 (N.D. Cal. July 27, 2020); Compl., *California v. Trump*, No. 20-CV-5169 (N.D. Cal. July 28, 2020); Compl., *Useche v. Trump*, No. 20-CV-2225 (D. Md. July 31, 2020); Second Am. Compl., *La Union Del Pueblo Entero v. Trump*, No. 19-CV-2710 (D. Md. Aug. 13, 2020).

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Plaintiffs advised that they intended to immediately file a motion for summary judgment (or, in the alternative, a preliminary injunction), and Defendants advised that they intended to file a motion to dismiss. ECF No. 79 ("Aug. 5, 2020 Tr."), at 11, 27, 36-38; *see also* ECF No. 37 ("Joint Pre-Conference Ltr."), at 6. Noting that Plaintiffs disclaimed the need for any discovery in connection with their motion for summary judgment or a preliminary injunction, Judge Furman set an expedited schedule and cautioned that, "[i]f defendants believe[d]" upon seeing Plaintiffs' motion papers "that there is any need for discovery," they were required "to confer" with Plaintiffs "immediately and then submit a joint letter." Aug. 5, 2020 Tr. at 46.

At Plaintiffs' request, and without objection from Defendants, Judge Furman filed a formal request on August 7, 2020, for the appointment of a three-judge district court pursuant to 28 U.S.C. § 2284(b). *See* ECF No. 68; *see also* ECF Nos. 58, 65. On August 10, 2020, the Honorable Robert A. Katzmann, then the Chief Judge of the Second Circuit, designated Judges Wesley and Hall to serve as the other members of a three-judge panel to hear these cases. *See* ECF No. 82. Thereafter, the panel adopted the scheduling order previously entered by Judge Furman alone. *See* ECF No. 86.

Pursuant to that scheduling order, Plaintiffs filed their motion on August 7, 2020. *See* ECF No. 74. Plaintiffs seek summary judgment (or, in the alternative, a preliminary injunction) on only some of their claims, namely that the Presidential Memorandum violates the Enumeration Clause and Fourteenth Amendment and constitutes an *ultra vires* violation of the statutes governing the census and apportionment. *See* ECF No. 77 ("Pls.' Mem."), at 10-40. Plaintiffs' motion is supported by declarations of both fact and expert witnesses. *See* ECF No. 76 ("Colangelo Decl."); ECF No. 149 ("Goldstein Decl.").

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In response, Defendants did not ask to depose Plaintiffs' declarants or request discovery of any kind; nor did they seek a hearing. Instead, on August 19, 2020, they filed their opposition to Plaintiffs' motion and a cross-motion to dismiss. *See* ECF No. 117. To the extent relevant here, they argue that the Court lacks jurisdiction to hear Plaintiffs' claims because they are unripe and Plaintiffs lack standing; that the Enumeration Clause and *ultra vires* claims fail because the decision to exclude illegal aliens from the apportionment base is a lawful exercise of the President's discretion with respect to the census and apportionment; that Plaintiffs are not entitled to injunctive relief because they cannot show irreparable harm; and that the President is not a proper defendant. *See* ECF No. 118 ("Defs.' Mem."). On August 28, 2020, the motions became fully briefed, *see* ECF No. 154 ("Defs.' Reply"), and on September 3, 2020, the Court held oral argument by telephone.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the admissible evidence and pleadings demonstrate "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); *see also Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (per curiam). A dispute over an issue of material fact qualifies as genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The initial burden of establishing that no genuine factual dispute exists rests upon the party seeking summary judgment. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994). If the moving party shows a *prima facie* entitlement to summary judgment,

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"the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006).

In ruling on a motion for summary judgment, a court must view all evidence "in the light most favorable to the non-moving party," *Overton v. N.Y. State Div. of Mil. & Naval Affs.*, 373 F.3d 83, 89 (2d Cir. 2004), and must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought," *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004). To defeat a motion for summary judgment, the non-moving party must advance more than a "scintilla of evidence," *Anderson*, 477 U.S. at 252, and demonstrate more than "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party "cannot defeat the motion by relying on the allegations in [its] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (internal citation omitted).

STANDING AND RIPENESS

As noted, Plaintiffs move for summary judgment on two grounds: that Defendants' decision to exclude illegal aliens from the apportionment base violates the Enumeration Clause and the Fourteenth Amendment of the Constitution; and that it exceeds the authority granted by Congress in the statutes that govern the census and congressional apportionment. *See* Pls.' Mem. 10-40. Before reaching the merits of either argument, however, we must address Defendants' contention that we lack jurisdiction. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

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83, 88-89 (1998) (noting that subject-matter jurisdiction cannot be assumed and is a "threshold question that must be resolved . . . before proceeding to the merits").

Defendants argue and move to dismiss on the ground that we lack jurisdiction for two reasons: because Plaintiffs fail to establish that they have standing to sue and because their claims are not yet ripe. Where, as here, the question is whether a plaintiff's injury is sufficiently "real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (citation omitted); *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). Thus, courts often address them together under the single umbrella term of "standing," *see, e.g.*, *Susan B. Anthony List*, 573 U.S. at 157 n.5; *Nat'l Org. for Marriage*, 714 F.3d at 689 n.6, and we will do the same here. But there is a second, arguably distinct form of ripeness doctrine that Defendants invoke: prudential ripeness, which concerns whether a case that might qualify as a bona fide case or controversy is nevertheless better decided later. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." (internal quotation marks and citation omitted)). We will begin with the issue of standing — the toughest issue in this case — and then turn briefly to prudential ripeness.

A. The Law of Standing

Article III of the Constitution limits the "judicial Power" of the United States to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2. This means that all suits filed in federal court must be "cases and controversies of the sort traditionally amenable to, and resolved by, the

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judicial process." *Steel Co.*, 523 U.S. at 102. One way courts implement that requirement is by ensuring that "at least one plaintiff" in any federal case has "standing." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565; *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (noting that, in a case with multiple plaintiffs, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"). Standing, in turn, is measured by a "familiar three-part test," which requires a plaintiff to show (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The plaintiff must make this showing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To prevail on a motion for summary judgment, therefore, "mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability . . . ." *House of Representatives*, 525 U.S. at 329; *see Lujan*, 504 U.S. at 561 (stating that, on summary judgment, a plaintiff "can no longer rest on such 'mere allegations,'" as at the pleading stage, "but must 'set forth' by affidavit or other evidence 'specific facts'" that demonstrate standing. (quoting Fed. R. Civ. P. 56(e)).

Injury in fact is "the first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks, alterations, and citation omitted). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks and citation omitted). Significantly, an injury "need not be actualized"

to satisfy Article III. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Instead, a "future injury" can suffice, so long as it is "certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 157 (internal quotation marks and citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (noting that plaintiffs need not "demonstrate that it is literally certain that the harms they identify will come about"); *House of Representatives*, 525 U.S. at 332-33 (finding standing "on the basis of the expected effects . . . on intrastate redistricting" — namely, that certain jurisdictions were "substantially likely . . . [to] suffer vote dilution"). Ultimately, the injury-in-fact requirement is meant to "ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks and citation omitted).

The second element requires proof that the plaintiff's injury is "fairly traceable" to the defendant's challenged conduct. Put differently, "there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks, alterations, and citation omitted). Importantly, "[p]roximate causation is *not* a requirement of Article III standing, which requires only that the plaintiff's injury be *fairly traceable* to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) (emphases added); *see also Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) ("[T]he 'fairly traceable' standard is lower than that of proximate cause."). Accordingly, "Article III 'requires no more than *de facto* causality.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Relatedly, for an injury to be "fairly traceable" to a defendant's conduct, that conduct need not be "the very last step in the chain of

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causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). Indeed, as the Supreme Court explained in finding that the plaintiffs challenging the decision to add a citizenship question to the census had standing, when a "theory of standing" relies "on the predictable effect of Government action on the decisions of third parties," traceability is satisfied. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566. This may be so "even when the decisions are illogical or unnecessary." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 59 (2d Cir. 2020).

Third and finally, a plaintiff's injury must be "redressable" by the relief sought — that is, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). "[T]he very essence of the redressability requirement" is that a request for "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107. But if there is "a likelihood that the requested relief will redress the [plaintiff's] injury," the requirement is satisfied. *Id.* at 103; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) ("[F]or a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."). Notably, the redressability requirement does not require a plaintiff to show that the relief sought will remedy all injuries alleged. Instead, "'the relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' In other words, a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (citations omitted) (quoting

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Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)). Nor need the plaintiff prove that judicial relief will remedy an injury entirely. It is enough that the "risk [of the alleged harm] would be reduced to some extent if [the plaintiffs] received the relief they seek." *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) ("Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the [injury], a court does have power to effectuate a partial remedy.").

B. Facts Relevant to Standing

Plaintiffs press two categories of harm: (1) "harms stemming from the exclusion of undocumented immigrants in the apportionment count"; and (2) "harms caused by the Memorandum's deterrent effect on census participation." Pls.' Reply 29. With respect to the first category, the Presidential Memorandum's express goal is to stop "[a]ffording congressional representation, and therefore formal political influence, to States on account of" their illegal alien population. Presidential Memorandum, 85 Fed. Reg. at 44,680. In particular, the Memorandum itself anticipates that excluding illegal aliens from the apportionment count could reduce the number of representatives in States with large immigrant populations, noting explicitly that in "one State . . . home to more than 2.2 million illegal aliens," *id.* — apparently, California, *see* Pls.' Rule 56.1 Statement ¶¶ 3-4 — the inclusion of illegal aliens could "result in the allocation of two or three more congressional seats than would otherwise be allocated," Presidential Memorandum, 85 Fed. Reg. at 44,680. In addition to the Memorandum itself, Plaintiffs proffer an expert analysis that concludes that the wholesale exclusion of illegal aliens from the apportionment base "is likely to have substantial effects on the population counts of each state" and, more specifically, "will almost certainly lead Texas to lose a seat in Congress"; would "likely . . . lead California and New Jersey to lose a congressional seat"; and "could lead other

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states, such as Arizona, Florida, New York, or Illinois, to lose seats." ECF No. 76-58 ("Warshaw Decl."), ¶ 11.

With respect to the second category of harm, Plaintiffs submit a number of declarations — uncontested by Defendants — demonstrating the Presidential Memorandum's deterrent effect on participation in the decennial census, particularly among noncitizens, immigrants, and their family members, and, in turn, the adverse consequences that are likely to flow from that deterrent effect.[7] The Presidential Memorandum deters census participation for at least two distinct reasons. First, the Presidential Memorandum engenders fear and distrust among illegal aliens

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[7] Although Defendants do not dispute the facts in Plaintiffs' declarations, they argue that the declarations are "impermissibly conjectural, conclusory, and hearsay." Defs.' Mem. 12. Defendants are correct to point out that we "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue," but "may not rely on conclusory or hearsay statements contained in the affidavits." *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (internal quotation marks omitted). But Plaintiffs' declarations are not conclusory insofar as they describe with concrete detail the specific experience of various non-governmental and governmental entities. By way of example, several NGO Plaintiffs give specific and concrete evidence of the ways in which their operations have shifted to respond to the Memorandum. *See, e.g.*, ECF No. 76-18 ("Espinosa Decl."), ¶ 14; ECF No. 76-14 ("Choi Decl."), ¶¶ 17, 20-21; ECF No. 76-26 ("Khalaf Decl."), ¶ 15; ECF No. 76-36 ("Oshiro Decl."), ¶ 12; ECF No. 76-47 ("Torres Decl."), ¶¶ 22-23.

Furthermore, although the declarations do contain some inadmissible hearsay (e.g., where they report information secondhand), Defendants are incorrect in suggesting that, without it, the declarations are insufficient to support a showing that "the Presidential Memorandum would have an appreciable effect on the participation of illegal aliens" in the census. Defs.' Mem. 14-15. Many of the statements in Plaintiffs' declarations recount comments made by immigrants in response to the Presidential Memorandum, *see, e.g.*, ECF No. 76-17 ("Cullinane Decl."), ¶ 8; ECF No. 149-3 ("Espinosa Supp. Decl."), ¶ 5, which are admissible to prove state of mind, *see* Fed. R. Evid. 803(3). Additionally, references in the declarations to third-party statements are admissible to demonstrate the effect that these statements had on others — for example, that NGO Plaintiffs diverted resources in response to deterred census participation. *See, e.g.*, *United States v. Reed*, 639 F.2d 896, 907 (2d Cir. 1981). Finally, the declarations also contain information about the general atmosphere of fear, confusion, and apathy towards the census in various communities, information that is based on declarants' personal experiences working with and in those communities; this information is not a "statement" and, thus, not hearsay. *See* Fed. R. Evid. 801(a). In the discussion that follows, we rely on the declarations only to the extent they are admissible.

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and their families (and, more broadly, all noncitizens and their families), and deters these groups from participating in the census out of fear of providing the federal government with information by which their citizenship status may be ascertained (and any resulting adverse consequences). Second, because the Presidential Memorandum announces that it is United States policy "to exclude from the apportionment base aliens who are not in a lawful immigration status," Presidential Memorandum, 85 Fed. Reg. at 44,680 — the "primary purpose of the census," *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 561 — illegal aliens may decide not to participate in the census on the theory that they do not count for any purpose or on the theory that there is little upside to being counted.

Several agency and non-profit organization leaders in charge of census outreach programs attest that many illegal aliens have expressed concern over, or outright refused to participate in, the census as a result of the Presidential Memorandum, both because they are apprehensive that the data will be used in immigration enforcement and because they perceive their participation as ultimately futile in light of the President's explicit exclusion of illegal aliens for the purposes of apportionment. *See, e.g.*, ECF No. 76-4 ("Baldwin Decl."), ¶ 8; ECF No. 76-5 ("Banerji Decl."), ¶ 5; Brower Decl. ¶ 11; Cullinane Decl. ¶ 8. Other immigrant respondents have expressed concern that "the Trump Administration would punish undocumented persons who filled out the Census by tracking and deporting them." *See, e.g.*, ECF No. 76-30 ("Matos Decl."), ¶¶ 9-13 (describing Delaware-based census advocacy program's increased need to quell community fears that, in light of the Presidential Memorandum, responding to the census will result in deportation or bar Latinos from obtaining citizenship).

Notably, Plaintiffs' evidence indicates that the effects of the Presidential Memorandum are likely to be felt beyond the *illegal* alien population. "Excluding undocumented immigrants

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from the apportionment base will deter Census participation among the broader immigrant community, including family and household members of undocumented immigrants who are actually citizens or non-citizens with legal status." Espinosa Decl. ¶ 11; *see also* Khalaf Decl. ¶ 12 ("[S]ignificant fear and increased distrust about the Census . . . [is] not limited to undocumented immigrants or other non-citizens, but also to family, household members, friends, and community members of non-citizens, people for whom the new policy articulated in the Memorandum has generated fear about responding at all . . . ."). Of particular concern is the response in "mixed status households" — that is, households consisting of illegal aliens and residents with lawful status — where concerns about the security of identifying information being shared with the federal government are prevalent. *See, e.g.*, Espinosa Decl. ¶ 12 (describing a fear among individuals from mixed status households that "the Presidential Memorandum's exclusion of people 'not in lawful immigration status' from the census base count indicates that the Administration will use information from the census to attempt to identify undocumented immigrants for deportation or other adverse consequences"). "Even U.S.-born citizen Puerto Rican residents are confused" by the Presidential Memorandum. ECF No. 76-16 ("Colón Decl."), ¶ 11.

In addition to this extensive — and undisputed — record of fact witness testimony, Plaintiffs provide expert analyses describing the fear and confusion generated by the Presidential Memorandum among hard-to-count communities and the resultant chilling effect on census participation. *See* ECF No. 76-56 ("Barreto Decl."), ¶ 14 (surveying research on the impact of media messages on immigrant communities' trust in government and the impact of those communities' trust on census response rates and concluding that "the July 21 [Presidential Memorandum] will reduce participation in the 2020 census, and ultimately will reduce the

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accuracy of the 2020 census"); ECF No. 76-57 ("Thompson Decl."), ¶ 3 (concluding that the Presidential Memorandum "will significantly increase the risk of larger total and differential undercounts, relative to previous censuses, for the hard-to-count populations, including immigrant communities").[8]

In short, the record supports a conclusion that the Presidential Memorandum has created, and is likely to create, widespread confusion among illegal aliens and others as to whether they should participate in the census, a confusion which has obvious deleterious effects on their participation rate. *See* ECF No. 76-1 ("Alvarez Decl."), ¶ 10 (reporting "an increase in confusion amongst immigrant communities after" Memorandum was issued); *see also* Baldwin Decl. ¶ 8; ECF No. 76-9 ("Bird Decl."), ¶ 9. As John Thompson, the former Director of the Census Bureau, predicts, "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*." Thompson Decl. ¶ 23 (emphasis added); *see also* Barreto Decl. ¶ 29. And the Census Bureau's own advertising

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[8] Defendants fault Dr. Barreto for failing to consider a 2019 study conducted by the Census Bureau, ELIZABETH A. POEHLER ET AL., U.S. CENSUS BUREAU, 2019 CENSUS TEST REPORT: A NEW DESIGN FOR THE 21ST CENTURY (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf ("2019 Census Test Report"), which found "no statistically significant difference in overall self-response rates" resulting from the inclusion of a citizenship question on the census questionnaire. *Id.* at ix; *see* Defs.' Mem. 13. But that study, which is not directly relevant to the issues before us, is less useful for Defendants than their arguments suggest, as there are findings that both sides can and do point to in support of their positions. In fact, the same study did find statistically significant drops in response rates "in some areas and for some subgroups," including "[t]racts with greater than 4.9 percent noncitizens," "[t]racts with greater than 49.1 percent Hispanic residents," "[t]racts with between 5.0-20.0 percent Asian residents," and "[h]ousing units within the Los Angeles Regional Census Center and New York Regional Census Center boundaries." *Id.* at ix-x. Furthermore, "the results of this [study] [we]re limited to the self-response timeframe prior to the start of" Non-Response Follow-Up operations, *id.* at 12, and there is reason to believe that each of Non-Response Follow-Up's steps would replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households, *see New York v. Dep't of Commerce*, 351 F. Supp. 3d at 583.

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initiatives will struggle to ward off these effects even with "messag[ing] that respondent information is confidential" and that "[t]he Census Bureau will not share it with any outside entities, including law and immigration enforcement." Thompson Decl. ¶ 21.

These deterrent effects have far-reaching ramifications, including increasing costs for census outreach programs run by NGOs and governments. Indeed, the NGO Plaintiffs have already diverted resources from their other important programs to shore up their census engagement efforts. For example, Plaintiff FIEL "has recently had to refocus its programming and commit additional resources to its Census work," and "expects that it will need to interact with its constituents multiple times to answer questions and try to convince them to participate in the 2020 Census." Espinosa Decl. ¶ 14; *see also* ECF No. 76-44, ("Sivongxay Decl."), ¶ 18 ("[A]dditional one-on-one conversations and relational outreach are necessary to maintain trust among communities and census partners to ensure confidence that census information will remain confidential and that there are still important benefits to responding to the census, such as ensuring receipt of critical federal funding."). Because the Presidential Memorandum "dilutes the efficacy" of the efforts by Plaintiff New York Immigration Coalition ("NYIC") to ensure immigrants are counted in the census, NYIC will have "to divert resources from other programmatic areas to conduct additional education and outreach to get the same number of people to respond to the Census questionnaire." Choi Decl. ¶ 17. Specifically, NYIC has had to "make new materials"; "conduct new outreach"; "engage[] in member updates, press releases, [and] press briefings"; "develop[] messaging and social media campaigns"; and "respond to inquiries from local media . . . to assure people" that every person should respond to the Census. *Id.* In other words, "NYIC expects that it will need to interact with its constituents more times than previously planned to try to convince them to participate in the 2020 census" as a result of

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the Presidential Memorandum. *Id.* ¶ 20. It estimates that the organization "will have to increase staff time and spending devoted to its Census education and outreach efforts by approximately 20% percent over previously anticipated levels." *Id.* ¶ 21.

Plaintiffs American-Arab Anti-Discrimination Committee ("ADC") and ADC Research Institute ("ADRCI") have also had to divert resources away from other programmatic areas, including critical programs responding to COVID-19 issues. Khalaf Decl. ¶ 15. In response to the Presidential Memorandum's messaging, ADC and ADRCI will "increase staff time and spending devoted [to] its Census education and outreach efforts by approximately 25[] percent over current levels," *id.* ¶ 14, while the national president of both organizations reports that he "personally spent at least 35 hours on Census-related work since the release of the [Presidential] Memorandum" that he would have otherwise spent on other tasks related to the operation and mission of both organizations, *id.* ¶ 15. Plaintiff Ahri similarly will increase staff time and spending devoted to census education and outreach by approximately fifteen percent in response to the chilling effects of the Presidential Memorandum. ECF No. 76-43 ("Seon Decl."), ¶ 17. According to Theo Oshiro, Deputy Director at the non-profit Make the Road New York ("MRNY), the Presidential Memorandum also "dilutes the efficacy of [MRNY's] existing materials and programming, which requires MRNY to divert resources from other programmatic areas to strategize around how to make [its] education and outreach effective and to get the same number of people to respond to the Census questionnaire" as they would have absent the Memorandum. Oshiro Decl. ¶ 12. Finally, Plaintiff CASA also has had to "devote additional resources to addressing the confusion and fear that have resulted" from the Presidential Memorandum, including having "to reorganize its communication team, reassign staff to Census outreach and education, and revise and redistribute messaging materials." Torres Decl. ¶¶ 22-23.

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The Governmental Plaintiffs have also had to divert resources from other programs to mitigate the confusion caused by the Presidential Memorandum. Plaintiff Illinois, for example, has already had to spend funds on digital ads specifically designed to address misinformation about the census, has created printed materials to be distributed, and has produced social media videos and other digital communications to reassure the immigrant community about the importance of the census. Alvarez Decl. ¶ 12. Plaintiff Vermont, through its 2020 Complete Count Committee, has — in direct response to the Presidential Memorandum — provided "mini-grants" to increase outreach to hard-to-count communities, conducted additional open educational meetings, provided additional multilingual public service announcements, and otherwise promoted census participation. ECF No. 76-10 ("Broughton Decl."), ¶ 7. Plaintiff Monterey County will "have to dedicate significant resources to ensure participation without fear" so that the County receives its proper census-based funding. ECF No. 76-28 ("Lopez Decl."), ¶ 18; *see also* ECF No. 76-12 ("Bysiewicz Decl."), ¶ 11 (describing efforts by Plaintiff Connecticut to encourage full census participation after the Presidential Memorandum caused "confusion").

The Memorandum's chilling effect on census participation will likely also degrade the census data, harming state and local governments that rely on the data to carry out their public functions. As Dr. Joseph Salvo, Chief Demographer of New York City, explained, "the July 21, 2020 Presidential memorandum is likely to make the Census Bureau resort to less-reliable methods, including statistical imputation, more frequently in immigrant communities than it otherwise would." Salvo Decl. ¶ 12. Specifically, when individuals fail to participate in the census themselves, the Census Bureau will sometimes rely on "proxy respondents," like neighbors, landlords, and postal workers. *See* GLENN WOLFGANG ET AL., U.S. CENSUS BUREAU,

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ANALYSIS OF PROXY DATA IN THE ACCURACY AND COVERAGE EVALUATION 1 (2003), https://www.census.gov/pred/www/rpts/O.5.PDF. Reliance on proxy responses "degrade[s] the quality of the data" and its usability, since proxy respondents often leave some questions unanswered and report information less accurately than household respondents. Brower Decl. ¶¶ 12-13 (discussing, for example, the phenomenon of "age heaping" where data on the age of individuals tends to be reported in numbers ending in 5 or 0 when a proxy is the respondent because the proxy merely estimates the age of the individual). Further, if census data are not available through proxy responses, demographers are forced to resort to data imputation, which itself is reliable only when calculated using a sufficiently high self-response rate. *See* ECF No. 76-21 ("Hardcastle Decl."), ¶ 5. Lower response rates also increase the margins of error in statistical calculations, degrading the utility of census response data and restricting Plaintiffs' ability to rely on the data for, *inter alia*, governmental planning purposes. *See* ECF No. 76-25 ("Kaneff Decl."), ¶¶ 3-5.

Indeed, degraded census data jeopardizes various sovereign interests in allocating funds and administering public works through programs that rely on quality census data. Connecticut, for example, relies on accurate characteristic data, meaning data on subgroups within the population, for a wide variety of purposes, including deciding where to locate COVID-19 testing sites, the evaluation of requests for school construction funds, the promulgation of affirmative action plans for state agencies using data-driven goals and benchmarks, effective forecasting for public transit planning, and others. *See* ECF No. 76-31 ("McCaw Decl.") ¶¶ 4-7. Similarly, Dr. Salvo explains that "[t]he decennial census is the statistical backbone of our country" and that, like Connecticut, New York City relies on accurate characteristic data about subgroups to make

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decisions about public health programs and education investments, as well as emergency preparedness planning and provision of targeted services for the elderly. Salvo Decl. ¶¶ 13-17.

Other examples abound in the record. In Monterey County, California, for example, the Department of Social Services is responsible for administering cash and non-cash programs that, among other things, provide supplemental food assistance, California's Medicaid program, foster care, adoption and aging assistance, and temporary assistance to needy families. ECF No. 76-32 ("Medina Decl."), ¶ 2. That department relies on accurate census data in making its funding allocation decisions. *Id.* ¶ 4. Any undercounting of undocumented immigrants caused by the Presidential Memorandum will not only "impact the formulas used for funding allocations" for these basic living assistance programs, but will also result in the loss of federal funding, "which, in turn, will add extra financial burden on local governments, resulting in even fewer available resources to assist families with food, housing, health, and other support and safety net services." *Id.*; *see also, e.g.*, ECF No. 76-33 ("Mohammed Decl."), ¶¶ 5-6 (describing how the census directly impacts funding for the City of Pittsburgh and "provides the most reliable and complete data for research, decision making and planning in City government"); ECF No. 76-39 ("Rodriguez Decl."), ¶ 3 (describing how Illinois's Workforce Innovation and Opportunity Act Program, which provides services to help certain populations overcome barriers to employment, depends on accurate census data to identify the targeted population levels); ECF No. 76-46 ("Sternesky Decl."), ¶ 5 ("Census data deeply influences the way that [the New Jersey Housing and Mortgage Finance Agency] designs and plans for the allocation of housing funds across the state. For example, the Agency uses income, poverty, employment, housing density, and housing vacancy data from the Census to direct its annual $20 million to $25 million allocation of federal 9% Low-Income Housing Tax Credits (LIHTC). These credits are then used to

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leverage roughly a ten-fold influx of private investment into equity for development costs to both high-opportunity and high-need areas of New Jersey."); ECF No. 76-50 ("Wortman Decl."), ¶¶ 3, 6 (describing how Illinois determines funding for each county based on an "index of need" and how "[u]nderrepresentation of areas with a higher percentage of immigrants will result in disproportionate levels of funding being allocated to counties with less demographic diversity").

Plaintiff Washington State will also be negatively impacted if it is forced to use inaccurate census data. Washington allocates $200 million "of state shared revenues . . . to counties and cities on a per capita basis annually" and uses decennial census data for its demographic estimates and annual population forecasts. Baldwin Decl. ¶¶ 14, 17. "[B]ad data will certainly lead to inaccurate distribution of funding within Washington, impacting all levels of government for a decade." *Id.* ¶ 15. "Poor quality census data will [also] harm Washington's ability to carry out the population data functions required by law both in the short term and the long term." *Id.* ¶ 28. In particular, Washington annually creates a *thirty*-year population forecast, meaning that the 2020 census data will be used in forecasting until at least the 2050 census data is available, if not longer. *See id.* ¶ 25. Because "many estimate and forecast models rely on information about changes in trends over time," "[a]n inaccurate census this year will change the relationships in the data between censuses and make all future estimates and forecasts based on these trends less accurate." *Id.*

Finally, the undisputed facts in the record also reflect that judicial relief invalidating the Presidential Memorandum would likely reduce the confusion felt by immigrant communities and therefore alleviate some of the injuries being felt by Plaintiffs. For example, Plaintiff FIEL anticipates that "a court order that stops the exclusion of undocumented immigrants from the census would make [its] efforts to encourage census participation easier by allowing [FIEL] to

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clarify the confusion and help ease the fear caused by" the Presidential Memorandum, and that "it would take FIEL less time and fewer resources to convince" the community "to participate in the census." Espinosa Supp. Decl. ¶ 3. Relief would also help Plaintiff MRNY "conduct more efficient and effective census outreach" because MRNY could clarify to community members that everyone should, in fact, be counted. ECF No. 194-4 ("Oshiro Supp. Decl."), ¶ 5. And relief from this Court would also allow Plaintiff Ahri to "publicize the Court's order to encourage [its] community to open their doors to census outreach workers, rather than hiding out of confusion or fear and avoiding the census completely." ECF No. 194-5 ("Seon Supp. Decl."), ¶¶ 6-7.

C. Standing Analysis

As noted, Plaintiffs allege two types of harm: apportionment harms stemming directly from the exclusion of illegal aliens from the apportionment base and harms caused by the deterrent effect on census participation. We have considerable doubt that the former suffices to establish jurisdiction. To be sure, if any Plaintiff could show that, as a result of the Presidential Memorandum, it was likely to lose one or more seats in the House of Representatives, it would surely have standing. *See, e.g.*, *House of Representatives*, 525 U.S. at 331 (holding that the loss of a seat or seats in the House of Representatives "undoubtedly satisfies the injury-in-fact requirement of Article III standing"). But as of today, it is not known whether that harm will come to pass, as the Secretary has not yet determined how he will calculate the number of illegal aliens in each State or even whether it is "feasible" to do so at all. Oral Arg. Tr. 35-37. In the absence of that information, Plaintiffs' first theory of harm is likely "too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (internal quotation marks omitted). Nor, for these purposes, would there be any harm in waiting until January 2021, when the impact, if any, of the

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Presidential Memorandum would be known, as the Supreme Court has held that an illegal apportionment can be remedied even after the apportionment process has taken place. *See Utah v. Evans*, 536 U.S. 452, 462-63 (2002).

Ultimately, however, we need not, and do not, decide the issue because we conclude that Plaintiffs' second theory of harm — that the Presidential Memorandum will have and, indeed, is already having, an effect on the census count itself — suffices to establish standing. Critically, this theory of harm does not depend on what, if anything, the Secretary does *in the future* to implement the President's mandate in the Presidential Memorandum. Instead, it is based on Plaintiffs' undisputed evidence that the Presidential Memorandum is affecting the census count *in the present*. That is, while the apportionment harms may well be too remote and hypothetical to support standing, the harms to the census count are "certainly impending" and do not depend on "a highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. Notably, Defendants do not argue otherwise. Instead, they contend that Plaintiffs' second theory of harm is too "speculative" in a different sense: because Plaintiffs' evidence is inadequate to prove that the Presidential Memorandum has caused (or will cause) anyone to opt out of participating in the census or that judicial relief would redress that harm. *See* Defs.' Mem. 11-19. In defense counsel's view, Plaintiffs should be required "to identify some subset of people who would not have been chilled . . . from answering the census between April 1st and July 21st, then became chilled on July 21st after the memorandum was issued, and then will be unchilled in [the time remaining before the census ends] by an order of this Court." Oral Arg. Tr. 38; *see also* Defs.' Mem. 52 (citing lack of "rigorous survey[s] or statistical stud[ies] measuring whether [the Presidential Memorandum] . . . has any effect on response rates within immigrant communities").

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Defendants' vastly overstate Plaintiffs' burden. The law does not require Plaintiffs to submit a randomized control trial or other rigorous statistical analysis demonstrating beyond peradventure that there are people who would have participated in the census but for the Presidential Memorandum and who would participate again if we were to grant Plaintiffs the relief they seek. Nor do Plaintiffs need to submit declarations specifically identifying such people, let alone submit declarations from such people. Instead, Plaintiffs need only demonstrate that "there is no genuine dispute as to any" fact material to the standing analysis. Fed. R. Civ. P. 56(a). Notably, in determining whether this standard has been met, we may rely not only on the declarations submitted by Plaintiffs in support of their motion, but also on common sense, basic economics, and reasonable inferences. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 183-85 (determining that "sworn statements . . . adequately documented injury in fact" where the proposition they were offered for was "entirely reasonable"); *Citizens for Responsibility & Ethics in Wash. v. Trump (CREW)*, 953 F.3d 178, 198 (2d Cir. 2019) (noting that a court may rely on "common sense and basic economics" in evaluating standing (internal quotation marks omitted)); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104-05 (2d Cir. 2018) (relying on the defendant agency's "own pronouncements," as well as "[c]ommon sense and basic economics," to find standing (internal quotation marks omitted)); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.) ("When performing that inherently imprecise task of predicting or speculating about causal effects [in standing analysis], common sense can be a useful tool."); *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (finding that Texas had established the necessary causal connection between the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and a future injury because DAPA would have "enable[d]" third parties "to apply for driver's licenses" and

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there was "little doubt that many would do so"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

Requiring Plaintiffs to do more would be particularly inappropriate here for two reasons. First, "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 be flawed." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 517; *see* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 ("1998 Appropriations Act"), § 209(a)(8), Pub. L. No. 105-119, 111 Stat. 2440, 2480-81 (1997) ("Congress finds that . . . the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted."). Second, Defendants' *own conduct* has forced Plaintiffs' hands. That is, for reasons that are unclear, the President waited until July 21, 2020, when the census was in full swing, to issue his Presidential Memorandum. Compounding matters, Defendants announced less than two weeks later that they were ending the census earlier than previously planned. The combination of the two meant that Plaintiffs had to rush to court and seek immediate relief; had they waited to develop more rigorous proof of their standing, their arguments about harms to the census count itself would have become moot. Between the sheer enormity of what is at stake and the fact that Defendants' own conduct gave Plaintiffs only a narrow window in which to seek effective relief, it would be the height of unfairness to hold Plaintiffs to the heightened burden of proof that Defendants endorse.

In light of the undisputed facts in the record, common sense, and basic economics, we are

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satisfied that — with their second theory of harm — Plaintiffs adequately show injury in fact, traceability, and redressability and that we have before us an actual case or controversy "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. Moreover, Defendants "have failed to set forth any specific facts showing that there is a genuine issue of standing for trial." *House of Representatives*, 525 U.S. at 330.

1. Injury in Fact

To begin, Plaintiffs have proved that, in the wake of the Presidential Memorandum, some number of people will not participate in, and thus not be counted in, the census. As of August 3, 2020 — the day the Census Bureau announced that field operations would end a month earlier than previously planned, and approximately two weeks after the Presidential Memorandum was issued — the Census Bureau had counted only about sixty-three percent of households in the 2020 census. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, U.S. CENSUS BUREAU (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. Many of those not counted are undoubtedly in the "hard to count" population, which includes immigrant and Hispanic populations as well as illegal aliens. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 577. The record in the citizenship question litigation and the declarations here make clear that this population is even "harder" to count during this census due to widespread concerns, fueled by the policies and rhetoric of this Administration, that census data will be used for immigration enforcement purposes. *See id.* at 562, 579-83; Colón Decl. ¶ 11; Oshiro Decl. ¶¶ 12, 14; Seon Decl. ¶ 16; Barreto Decl. ¶¶ 60-62. Plaintiffs' uncontested declarations and common sense indicate that the Presidential Memorandum has compounded, and will compound, these concerns, and that some number of people in these communities will choose not to

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participate in the census and take steps to avoid being counted. *See, e.g.*, Cullinane Decl. ¶ 8; Espinosa Supp. Decl. ¶ 5. To be sure, on the present record, the Court cannot calculate with precision the number of people that will be so affected. But there is no doubt that that number is greater than zero, and there is a substantial likelihood that an appreciable number of people will be dissuaded from participating in the census. *See* Barreto Decl. ¶¶ 60-65.

From these ongoing and direct effects on the census flow several forms of injury to Plaintiffs and their members or citizens. First, insofar as Plaintiffs include or represent high concentrations of immigrant and Hispanic populations, the effects on the census undoubtedly create a risk of a net differential undercount that could result in the loss of political power and federal funds, two classic forms of Article III injury. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 607-08; *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam); Barreto Decl. ¶¶ 70-71; Thompson Decl. ¶¶ 13-17. Given the time sensitivities inherent in their claims of census-related injuries — there were little more than two months remaining for census operations when the President issued the Presidential Memorandum and, less than two weeks later, Defendants shortened that period by a full month — Plaintiffs have obviously not had an opportunity to perform any sort of empirical study on the size of the likely effects on the census that would reveal the likelihood of such injuries. In any event, the likelihood of two other forms of injury are more certain on the current record: degradation of the quality of, and ability to have confidence in, census data and diversion by the NGO Plaintiffs of organizational resources.

a. Degradation of Census Data

First, if a portion of the population does not participate in the census count, it will inevitably degrade the quality and accuracy of census data, even if only at the subgroup or local level. Salvo Decl. ¶¶ 8-12. That is particularly true if, as is the case here, the people who are not

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counted are not evenly distributed across the population, but are concentrated, either geographically or demographically. *See* Barreto Decl. ¶ 83; Thompson Decl. ¶¶ 15-17, 23. The degradation of census data, in turn, harms the Governmental Plaintiffs' ability to allocate resources, such as educational and public health resources, efficiently and effectively. *See* McCaw Decl. ¶¶ 3-6; Medina Decl. ¶¶ 2-4; Baldwin Decl. ¶¶ 15-28. Separate and apart from that, it harms confidence in the census data. *See* Kaneff Decl. ¶ 5 ("The lower the response rate, the larger the margin of error in the demographic characteristics."). Crucially, these harms will occur *whether or not there is a net differential undercount* — meaning that this theory of injury does not depend on connecting the deterrent effect of the Presidential Memorandum on immigrant households and the like to a net differential undercount of people who live in such households. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 610-11; Salvo Decl. ¶¶ 14-18.

As explained in *New York v. Department of Commerce*, the degradation of census data is a legally cognizable form of injury sufficient to support standing. *See* 351 F. Supp. 3d at 610-15. In particular, a State or local government that relies on the information provided by the federal government under an existing statutory arrangement suffers a sufficiently "concrete" and "particularized" injury for purposes of Article III when the federal government degrades the quality of that information. States are sovereign entities with sovereign interests in the making and enforcement of their own laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (concluding that Maryland suffered an injury to its "law enforcement and public safety interests" from a lower-court order preventing the State from utilizing DNA samples for law enforcement purposes pursuant to a state statute). But they frequently do so in collaboration

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with, or in reliance on, the federal government — such is the genius of the federal system, which has historically embraced various creative models of "cooperative federalism." *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167-69 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-89 (1981). States have long relied on federal decennial census data for countless sovereign purposes, and indeed many of the State Plaintiffs here even *require* the use of such data by law; in some instances, it is written into their state constitutions. *See, e.g.*, Rapoza Decl. ¶ 5 (explaining that the Rhode Island Constitution mandates using census data to establish the House and Senate districts); Brower Decl. ¶¶ 17, 22-23 (explaining that Minnesota law requires the use of census data to determine funding for roads and education).

Meanwhile, by virtue of the Constitution and the Census Act, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data. *See* U.S. Const. art. I, § 2, cl. 3; *see also Evans*, 536 U.S. at 478 (explaining that the Framers had a "strong constitutional interest in [the] accuracy" of the census); *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (holding that the conduct of the census must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," namely, obtaining an accurate count of the population in each State); 1998 Appropriations Act, Pub. L. No. 105-119, § 209(a)(6), 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States . . . ."). When the federal government degrades the quality of that data, it therefore inflicts a cognizable injury on the sovereign interests of reliant States.[9]

[9] That does not mean that, in every case, a State will have a "right" to such data — or a right to data of a certain quality — sufficient to support a valid cause of action to obtain it. But it

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An example may be helpful in illustrating the point. Suppose a State were to premise certain of its policies on a person's lawful presence in the United States — for example, suppose that it chose to deny certain benefits to undocumented immigrants or required its law-enforcement officials to inquire into the immigration status of any person detained in state custody for any reason. "The accepted way" for States "to perform [such] status checks" — and surely the most reliable — is to contact the DHS's Immigration and Customs Enforcement ("ICE"), the federal agency that accepts and responds to such inquiries from interested States. *Arizona v. United States*, 567 U.S. 387, 411 (2012). Now suppose that ICE were to degrade the quality of its data set, thereby undermining its usefulness to the State as a tool for implementing its policy priorities. If this hypothetical State were to challenge the decisions causing the degradation in immigration-status data, the federal agency could certainly defend its actions on the grounds that they were lawful. But could it seriously deny that the State had suffered a cognizable injury for purposes of standing? Surely not.

Indeed, ample case law supports the proposition that a State has a strong sovereign interest in conducting its own policy, the burdening of which causes an injury in fact for Article III purposes. One such sovereign interest is a State's "exercise of sovereign power over individuals and entities within [its] jurisdiction — this involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son*, 458 U.S. at 601. Another such sovereign interest — which, in light of the frequent prohibition on *parens patriae* suits against the federal government, *see Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), is "distinct from . . . the general well-being of its residents" — is a State's "interest in securing observance

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does mean that a State suffers a concrete and particularized injury when the federal government degrades important tools of sovereignty — or takes those tools away altogether.

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of the terms under which it participates in the federal system," *Alfred L. Snapp & Son*, 458 U.S. at 607-08; *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes."); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . in defending the standards embodied in that code.").

The Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134, is instructive on this front. In that case, Texas led a coalition of States in a challenge to the Obama Administration's DAPA program. The Court held that the States had suffered a cognizable injury for purposes of standing because DAPA would have entitled its recipients to obtain driver's licenses under existing state law and providing those licenses would have come at a financial cost to Texas. *See id.* at 155-56. In denying a stay of the district court's preliminary injunction pending appeal, the Fifth Circuit cited *Alfred L. Snapp & Son*, explained that Texas possessed a sovereign interest in the maintenance of its own legal code, and held that "Texas's forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and Texas did not enact them merely to create standing." *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015). The court reasoned that "if pressure to change state law in some substantial way were not injury, States would have no standing to challenge *bona fide* harms because they could offset most financial losses by raising taxes or fees." *Id.* Several months later, the Fifth Circuit affirmed the preliminary injunction on the merits, reiterating and confirming its conclusions as to standing. The court held that "states may have standing based on . . . federal interference with the enforcement of state law, at least where the state statute at issue regulates behavior or provides for the administration of a state program and does not simply purport to immunize state citizens from federal law." *Texas*, 809 F.3d at

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153 (alterations, footnotes, and internal quotation marks omitted). Such "intrusions," the court explained, "are analogous to pressure to change state law." *Id.*

Like the state plaintiffs in *Texas*, many Governmental Plaintiffs here have enacted their reliance on federal census data into law — in some cases, as noted, even into their constitutions. Moreover, as in *Texas*, "there is no allegation," let alone proof, that those jurisdictions enacted their laws or ratified their constitutions "to manufacture standing" in these cases. *Id.* at 159. If the census data is degraded (or even perceived to be degraded), these Plaintiffs will be subjected to a forced choice: They can use the degraded data, resulting in worse policy; they can spend money to compensate for the damage; or they can change their laws to relieve themselves of the legal obligation to use federal census data in making and enforcing their laws (which would presumably necessitate the expenditure of additional resources to collect data of their own anyway). Such "pressure[] to change state law constitutes an injury" within the meaning of Article III. *Texas*, 787 F.3d at 749; *see Texas*, 809 F.3d at 153. Accordingly, most, if not all, of the Governmental Plaintiffs have proved an imminent injury to their sovereign interests due to the degradation in quality of census data.

b. Diversion of Resources

Additionally, the risk that some hard to count population will not participate in census results in another form of injury: the diversion of resources. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), the Supreme Court held that an organization can establish Article III injury in fact by proving "concrete and demonstrable injury to [its] activities — with the consequent drain on [its] resources." *See also id.* at 379 n.21 (holding that an organization that proves it "has indeed suffered impairment" in its activities has proved an Article III injury); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011); *Ragin v. Harry Macklowe Real Estate Co.*, 6

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F.3d 898, 904-06 (2d Cir. 1993). In particular, "a nonprofit organization establishes an injury-in-fact if . . . it establishes that it spent money to combat activity that harms its organization's core activities." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) (internal quotation marks omitted). "An organization need only show a 'perceptible impairment' of its activities in order to establish injury in fact." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (quoting *Ragin*, 6 F.3d 898 at 905).

As they did in *New York v. U.S. Department of Commerce*, Defendants appear to suggest that *Havens Realty* recognizes Article III injuries arising from organizational expenditures only where those expenditures are made in response to injuries that are themselves sufficiently imminent and impending to satisfy Article III. *See* Defs.' Reply 3; Oral Arg. Tr. 42-43; *see also New York v. Dep't of Commerce*, 351 F. Supp. 3d at 616. Organizations asserting standing based on the diversion-of-resources theory do indeed need to "show that both the anticipated expenditures and ensuing harm to their organizations' activities are 'certainly impending,'" *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 389 (2d Cir. 2015) (quoting *Clapper*, 568 U.S. at 409), lest these plaintiffs be permitted to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm," *Clapper*, 568 U.S. at 416. But that standard does not mean that a plaintiff must allege a second form of independently adequate injury in fact, which "would render the category of plaintiffs that could establish standing under a *Havens Realty* theory a null set" and make *Havens Realty* a dead letter. *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 616. Instead, however "inexact" the standard may be, "courts are inclined to find standing if it can be said that there is no better time to resolve the issues raised by the parties — that is, when they will be in no better position later than now." *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 237 (E.D.N.Y. 2019) (internal quotation marks omitted).

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Plaintiffs satisfy these standards. First, Defendants do not dispute, and the Court has little trouble concluding, that the impairment alleged by NGO Plaintiffs goes to their core activities. *See, e.g.*, *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019) ("The Organizations in this case have shown that Act 442's effect on their work goes far beyond 'business as usual.' They have done so through concrete evidence showing that Act 442 is already disrupting their operations . . . ."); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) ("The undisputed summary-judgment evidence established that [the plaintiff's] primary mission is voter outreach and civic education, particularly 'getting out the vote' among its members."). Each of the NGO Plaintiffs is primarily dedicated to serving and advocating for communities that have traditionally been undercounted by the census, and each is dedicated to promoting census participation in these communities. *See* Choi Decl. ¶¶ 3-6; Oshiro Decl. ¶¶ 2-5; Espinosa Decl. ¶¶ 2, 5-7; Khalaf Decl. ¶¶ 4-8; Seon Decl. ¶¶ 2-6; Torres Decl. ¶¶ 1, 5-11. In fact, several NGO Plaintiffs partner with the Census Bureau and/or state and local governments to promote census participation within these communicates. *See, e.g.*, Torres Decl. ¶ 11; Espinosa Supp. Decl. ¶ 6.

Second, Plaintiffs' uncontested declarations demonstrate that the NGO Plaintiffs have diverted resources in response to the Presidential Memorandum's chilling effects on participation in the census and the risks that poses for their members and their core activities. *See* Choi Decl. ¶¶ 14-27; Espinosa Decl. ¶¶ 14-17; Khalaf Decl. ¶¶ 8-16; Oshiro Decl. ¶¶ 15-17; Seon Decl. ¶¶ 17-19; Torres Decl. ¶¶ 2, 21-23; ECF No. 149-1 ("Awadeh Decl."), ¶¶ 4-5; Espinosa Supp. Decl. ¶¶ 7-8; Oshiro Supp. Decl. ¶¶ 2, 4; Seon Supp. Decl. ¶ 4.[10] For example, Steven Choi, the

[10] Plaintiffs provide evidence of similar resource diversions by similarly situated organizations, albeit not Plaintiffs here. *See* Banerji Decl. ¶¶ 5-6; Matos Decl. ¶¶ 9-14; Sivongxay Decl. ¶¶ 16-20, 23-24; ECF No. 76-51 ("Aranda-Yanoc Decl."), ¶ 8.

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executive director of Plaintiff New York Immigration Coalition ("NYIC"), states that his organization had to develop new messaging and social media campaigns, and issue new member updates and press releases, to counter the Presidential Memorandum's contradiction of themes that had previously been core to NYIC's census outreach efforts. Choi Decl. ¶ 17. NYIC expects to increase staff time and spending by twenty percent over previously anticipated levels to achieve its census outreach and advocacy goals. *See id.* ¶ 21. Similarly, Plaintiff Ahri had to develop entirely new outreach materials, train staffers with new scripts, and respond to media inquiries; it expects to increase staff time and spending devoted to these efforts by fifteen percent as a result of the Presidential Memorandum. *See* Seon Decl. ¶¶ 17-19. Meanwhile, Plaintiffs ADC and ADRCI anticipate increasing staff time and spending devoted to Census efforts by approximately twenty-five percent as a result of the Memorandum, *see* Khalaf Decl. ¶ 14, and Plaintiff FIEL "anticipates having to divert approximately $5,000 from other mission critical programs and services to the 2020 Census education and outreach as a result of the Presidential Memorandum," Espinosa Decl. ¶ 15.

These resource diversions may not be large in absolute terms, but they constitute a "perceptible impairment" of the NGO Plaintiffs' activities and thus qualify as injuries in fact. *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (internal quotation marks omitted); *see OCA-Greater Hous.*, 867 F.3d at 612 ("[T]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." (internal quotation marks omitted)). In short, the NGO Plaintiffs "are dedicated to providing an array of legal and social services to non-citizens and they have expended significant resources to mitigate the [Presidential Memorandum's] impact on those they serve. In so doing, they have diverted resources that would otherwise have been available for other programming, a perceptible

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opportunity cost that suffices to confer standing." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (internal quotation marks omitted); *see also Common Cause Ind.*, 937 F.3d at 952 ("According to the evidence put forward by the Organizations, Act 442 has created a culture of voter confusion, and it has already inflicted costs on them."); *OCA-Greater Hous.*, 867 F.3d at 612 ("[The plaintiff] went out of its way to counteract the effect of Texas's allegedly unlawful voter-interpreter restriction . . . with a view toward . . . mitigating its real-world impact on [the plaintiff's] members and the public . . . an undertaking that consumed its time and resources in a way they would not have been spent absent the Texas law. Hence, the Texas statutes at issue 'perceptibly impaired' OCA's ability to 'get out the vote' among its members.").

2. Traceability

Next, we have little trouble finding that these injuries in fact are fairly traceable to the Presidential Memorandum. Once again, the uncontested record and common sense satisfy Plaintiffs' burden. Plaintiffs demonstrate that the Presidential Memorandum's chilling effect on immigrant census participation is at least partially responsible for a degradation in the quality of census data. *See, e.g.*, ECF No. 76-24 ("Jimenez Decl."), ¶¶ 3-5 (explaining that the Memorandum's deterrence effect on immigrant household census participation will cause an undercount and a subsequent reduction in federal healthcare, infrastructure, and education funding for Plaintiff Monterey County); Salvo Decl. ¶ 12 (noting that the Presidential Memorandum "is likely to make the Census Bureau resort to less-reliable methods, including statistical imputation, more frequently in immigrant communities than it otherwise would" which will "result[] in poorer quality (less accurate) data both in terms of demographic characteristics as well as the actual count of persons"). NGO Plaintiffs have also made clear that the Presidential Memorandum is responsible for their diversion of resources; in other words, they are

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expending resources they would not otherwise precisely because of the Presidential Memorandum. *See, e.g.*, Choi Decl. ¶¶ 20-21; Khalaf Decl. ¶¶ 14-15; Seon Decl. ¶ 17; Oshiro Supp. Decl. ¶¶ 3-4; Torres Decl. ¶¶ 22-23; Espinosa Supp. Decl. ¶ 4. This undisputed evidence satisfies Plaintiffs' burden to demonstrate the "*de facto* causality" that Article III demands. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (internal quotation marks omitted).

In arguing otherwise, Defendants point out that Plaintiffs' theory of causation relies in part on the intervening actions of third-party actors, such as Spanish-language media disseminating information about the Presidential Memorandum. *See* Defs.' Mem. 16. "It makes little sense," they argue, "for Plaintiffs to attribute whatever harm is caused by those independent actors to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the risk of individuals' information being linked to immigration records and those individuals facing immigration enforcement." *Id.* (internal quotation marks and alterations omitted). More broadly, they assert that Plaintiffs' injuries are traceable to the "macro environment" of fear in the immigrant and Hispanic communities that predated the Presidential Memorandum, not to the Memorandum itself. *Id.* at 15-19.

These arguments are unpersuasive. For one thing, they ignore entirely Plaintiffs' evidence that the Presidential Memorandum has deterred, and will continue to deter, people from participating in the census because they conclude "that they don't see a benefit in filling out the census form if they will not be counted." Pls.' Mem. 43 (internal quotation marks and alterations omitted); *see, e.g.*, Choi Decl. ¶ 17; Cullinane Decl. ¶ 9; Matos Decl. ¶¶ 11, 13; Oshiro Decl. ¶¶ 10-12; ECF No. 76-38 ("Roche Decl."), ¶ 9; Torres Decl. ¶ 19; Espinosa Supp. Decl. ¶¶ 5-6. For such people, the chain of causation between the Presidential Memorandum and non-participation has only a single link. Thus, Plaintiffs need not and do not rely on the

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dissemination of information by third parties to establish that certain illegal aliens will plausibly — even rationally — decide not to participate based *directly* on a correct understanding of the Presidential Memorandum's import.

Second, as noted above, the Supreme Court has long made clear that the defendant's conduct need not be "the very last step in the chain of causation." *Bennett*, 520 U.S. at 169. Indeed, the traceability requirement may be met even where several steps on the causal chain stand between the defendant's conduct and the plaintiff's injury. *Davis v. Federal Election Commission*, 554 U.S. 724, for example, involved a challenge to a campaign finance law that increased campaign contribution limits for any candidate whose opponent's personal campaign expenditures exceeded his own by a certain amount. At the time of filing, the plaintiff was at least three steps away from suffering any concrete harm: He had to spend a sufficient amount of his own money; his opponent had to refrain from a comparable level of self-funding; and his opponent had to then take advantage of the law by accepting heightened contributions. Even so, the Court found that the plaintiff faced a "real, immediate, and direct [injury] . . . when he filed suit." *Id.* at 734. Notably, the Court deemed that assumption valid based on little more than evidence that "*most* candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 735 (emphasis added). Moreover, the Court did not require proof that the government conduct had a coercive effect on the third party's action; evidence that allowed the Court to predict how the third party would likely act in response to the government action was sufficient. *See id.*; *see also Lujan*, 504 U.S. at 562 (noting that, when injury depends on the conduct of third parties, it is sufficient to show "choices have been or *will be* made in such manner as to produce causation and permit redressability" (emphasis added)); *Nat. Res. Def. Council*, 894 F.3d at 104-05 (finding "the agency's own pronouncements," as well as "[c]ommon

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sense and basic economics," supported a conclusion that an "increased penalty has the potential to affect [third parties'] business decisions and compliance approaches" in a manner that would result in harm to the petitioners (internal quotation marks omitted)).

In light of these principles and cases, Defendants' arguments are unpersuasive. At the end of the day, they are little more than a rehash of Defendants' arguments in the citizenship question litigation, which were rejected. There, like here, Defendants argued that Plaintiffs' injuries were not "fairly traceable" to their conduct because the injuries depended on the intervening acts of third parties influenced by misinformation — namely, that the federal government could use their census answers for law enforcement and immigration enforcement purposes. *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 623-24. There, like here, Defendants argued that Plaintiffs' injuries were not "fairly traceable" to their conduct because the injuries were attributable to an independently existing macro environment of fear permeating the immigrant and Hispanic communities. *Id.* at 621-22. Yet the Supreme Court rejected those arguments. As that Court reaffirmed, "Article III requires no more than *de facto* causality," a standard that is met where Government action has a "predictable effect . . . on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (internal quotation marks omitted). Here, as in the citizenship question litigation, Plaintiffs have proved that their injuries arise from the predictable effects of Government action, however rational or reasonable those effects may be.

3. Redressability

Finally, we conclude that Plaintiffs satisfy the redressability requirement as well. To be sure, Plaintiffs have not proved — and perhaps could not prove — that a favorable ruling would lead everyone who has decided, or will decide, not to participate in the census as a result of the

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Presidential Memorandum to change course. But Plaintiffs' burden is not to show that a favorable court ruling would fully remedy the injuries that they have suffered or will suffer. Instead, they need show only that the "risk [of harm] would be reduced *to some extent* if [they] receive[] the relief they seek." *Massachusetts v. E.P.A.*, 549 U.S. at 526 (emphasis added); *see also CREW*, 953 F.3d at 194 (finding the redressability requirement satisfied because "it logically follows that relief would redress [the plaintiffs'] injury — at least to some extent"); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 716 (6th Cir. 2015) ("[I]t need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement.").

The Supreme Court's decision in *Massachusetts v. E.P.A.* is instructive. There, Massachusetts and other States challenged the EPA's decision not to regulate four greenhouse gases within the United States. On appeal, the Supreme Court held that the States had standing to challenge the EPA's decision based on their showing, through "unchallenged affidavits," that climate change was caused by greenhouse gases and caused various harms. 549 U.S. at 522. The Court did so despite the EPA's contention that there was no "realistic possibility" that the relief sought "would mitigate global climate change and remedy their injuries," particularly "because predicted increases in greenhouse gas emissions from developing nations" were "likely to offset any marginal domestic decrease." *Id.* at 523-24. The Court explained:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed . . . is essentially irrelevant. Nor is it dispositive that developing countries . . . are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Id. at 525-26 (citation and footnote omitted). Notably, the Court did not demand empirical proof that the remedy sought would have any marginal effect on global warming. The causal

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connection between greenhouse gases and climate change, combined with the EPA's "ardent support for various voluntary emission-reduction programs" (with which the "EPA would presumably not bother . . . if it thought emissions reductions would have no discernable impact on future global warming"), was enough. *Id.* at 526 (internal quotation marks omitted). Because the relief sought would reduce the risk of injury "to some extent," the States had standing. *Id.*

Here too, Plaintiffs' uncontested affidavits show that the relief they seek — a declaration that the Presidential Memorandum is unlawful and an injunction barring any effort to implement it — would reduce "to some extent" their risk of suffering injuries relating to the census. If anything, the record here provides even more support for a finding of redressability than the record in *Massachusetts v. E.P.A.* did. First, as discussed above, Plaintiffs have provided proof that there are likely people who have decided, or will decide, not to participate in the census for the simple reason that, under the Presidential Memorandum, they will not count for apportionment purposes. A court order invalidating the Presidential Memorandum would redress that harm in a straightforward manner. *See, e.g.*, *Carpenters Indus. Council*, 854 F.3d at 6 n.1 (Kavanaugh, J.) ("[I]f a government action causes an injury, enjoining the action usually will redress that injury."). Second, Plaintiffs' uncontested declarations provide evidence supporting a finding of redressability. Plaintiff Ahri, for example, explains that the injunction barring the citizenship question was useful in quelling concerns in the community it serves and that an order granting relief in this case would similarly make its census outreach efforts more efficient and effective. Seon Supp. Decl. ¶¶ 4-7; *see also* Oshiro Supp. Decl. ¶ 5; Espinosa Supp. Decl. ¶ 8. And Plaintiffs submit an expert report noting that injunctions barring implementation of other immigration-related executive actions have had "measurable consequences on promoting trust among immigrant communities and influencing behavioral interactions with various aspects of

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government." *See* Barreto Decl. ¶¶ 66-69. In short, we find that Plaintiffs' requested relief would "likely . . . at least diminish further instance of" Plaintiffs' census-related harms. *CREW*, 953 F.3d at 194. Indeed, "[b]ecause Plaintiffs have successfully alleged" that these harms are "ongoing, it logically follows that relief would redress their injury — at least to some extent, which is all that Article III requires." *Id.*

Only two of Defendants' counterarguments warrant further discussion. First, Defendants maintain that Plaintiffs' census-related injuries would not be remedied by a ruling in Plaintiffs' favor because the alleged "'macro environment' of mistrust around immigration" would remain. Defs.' Mem. 19. But that is akin to the argument the EPA made, and the Supreme Court rejected, in *Massachusetts v. E.P.A.*: that granting relief would not remedy the States' injuries because there were other, independent causes for those injuries — namely, the emissions of developing nations — that would persist. *See* 549 U.S. at 524. Put differently, the mere fact that the Presidential Memorandum causes only incremental harms, and that there are other causes of those same harms, does not defeat a finding of redressability. *See id.* ("EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.").

Second, Defendants suggest that Plaintiffs cannot show redressability because "appellate review would likely last well past the end of the conduct of the census." Defs.' Reply 4. Conspicuously, however, Defendants cite no authority for the novel proposition that the availability of higher court review and the possibility of reversal can render a dispute nonjusticiable. Taken to its logical conclusion, that argument would suggest that a plaintiff could never obtain emergency relief in the face of a looming deadline. Far from rejecting such claims, courts routinely hear them on an expedited basis (as we have done here). *See, e.g.*,

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League of Women Voters of N. Carolina v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (noting that in the election context, "once the election occurs, there can be no do-over and no redress" making "injur[ies] to . . . voters real and completely irreparable if nothing is done"). Finally, it bears mentioning that it is *Defendants' own conduct* that has put Plaintiffs in such a precarious position. The President could have issued his Presidential Memorandum well before the census began, in which case Plaintiffs would have had ample time to obtain a definitive ruling on their claims to preempt any chilling effect. Or he could have waited until census operations were over, in which case there would have been no risk of the census-related harms that Plaintiffs seek to remedy. Instead, for unknown reasons, the President waited more than a year after the Supreme Court rejected the citizenship question to issue his Presidential Memorandum, at which point the census was (and still is) in full swing. It would be perverse to conclude that, through their own conduct, Defendants could prevent Plaintiffs from even obtaining a hearing on their claims.

4. Conclusion

In the final analysis, "the gist of the question of standing" (and constitutional ripeness) "is whether [the plaintiffs] have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. E.P.A.*, 549 U.S. at 517 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). That is, the standing requirement "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* (quoting *Lujan*,

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504 U.S. at 581 (Kennedy, J., concurring). Based on our thorough review of the record — including the uncontested declarations submitted in support of Plaintiffs' motion — and the well-established standards for determining whether a plaintiff has standing, we are confident we have jurisdiction to proceed.[11]

D. Prudential Ripeness

As noted, Defendants also invoke the prudential ripeness doctrine. *See* Defs.' Mem. 6-10; Defs.' Reply 1-2. Unlike standing and constitutional ripeness, prudential ripeness does not relate to the Court's jurisdiction. Instead, "when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay." *Simmonds*, 326 F.3d at 357. The "ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry*

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[11] Defendants do not argue that we should engage in a zone-of-interests analysis, which the Supreme Court has sometimes described as a component of "prudential standing." *Lexmark Int'l*, 572 U.S. at 127 n.3. Accordingly, they have waived the argument. *See Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 128 (2d Cir. 2020) (holding, after *Lexmark*, that the zone-of-interests test is not jurisdictional); *see also, e.g.*, *Young v. Conway*, 698 F.3d 69, 85 (2d Cir. 2012) ("It is well-settled that non-jurisdictional arguments and defenses may be waived . . . ."). In any event, in light of *Lexmark*'s observation that "the zone-of-interests analysis . . . asks whether this particular class of persons has a right to sue under this substantive statute" and "whether a *legislatively conferred* cause of action encompasses a particular plaintiff's claim," 572 U.S. at 127 (emphasis added) (alterations, citations, and internal quotation marks omitted), we doubt that it has any application here, as the claims on which Plaintiffs move are constitutional and equitable in nature. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 700-02 (9th Cir. 2019).

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Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); *see Nat'l Org. for Marriage*, 714 F.3d at 691.[12]

"To determine whether to abstain from a case on prudential ripeness grounds, we proceed with a two-step inquiry," evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Nat'l Org. for Marriage*, 714 F.3d at 691 (internal quotation marks omitted). The first step of the inquiry "is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008) (internal quotation marks and alterations omitted). "In assessing th[e] possibility of hardship, we ask whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* at 134 (internal quotation marks omitted). The two-step inquiry requires consideration, in turn, of three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n*, 523 U.S. at 733.

Considering these factors here, we conclude that the test for prudential ripeness is "easily satisfied." *Susan B. Anthony List*, 573 U.S. at 167. First, given that Plaintiffs' alleged census-related harms are occurring now, and can be remedied only if we rule on their claims before census operations conclude in a matter of days or weeks, delaying review would cause Plaintiffs

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[12] In recent years, the Supreme Court has cast doubt on the "continuing vitality of the prudential ripeness doctrine," on that ground that it "'is in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List*, 573 U.S. at 167 (internal quotation marks omitted). But because neither the Supreme Court nor the Second Circuit has abandoned the doctrine yet, we are bound to consider Defendants' arguments here.

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grave hardship. *See Chamber of Commerce of U.S. v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam) (finding a challenge to an Executive Order announcing a policy of the executive branch ripe where "the injury alleged . . . [is that] the mere existence of the Order alters the balance of bargaining power between employers and employees by creating a disincentive for employers to hire replacement workers"). Justice delayed would indeed be justice denied. Moreover, because there are no do-overs for the census, the adverse consequences of that delay could resonate for a decade, until the next decennial census. Second, although Defendants assert in conclusory fashion that judicial intervention "would inappropriately interfere with the Bureau's ongoing process by hindering agency efforts to refine its policies and to apply its expertise," Defs.' Reply 2 (internal quotation marks omitted), that assertion borders on frivolous. On its face, the Presidential Memorandum does not purport to regulate the actual conduct of the census, *see* Presidential Memorandum, 85 Fed. Reg. at 44,679 ("Excluding Illegal Aliens From the Apportionment Base *Following* the 2020 Census" (emphasis added)), and Defendants themselves concede that it "does *not* affect how the Census Bureau is conducting its remaining enumeration operations," Defs.' Mem. 12. Moreover, as discussed below, relief can be crafted to minimize, if not eliminate, interference with administrative action. And finally, although the standing-related question of whether or to what extent Plaintiffs would suffer apportionment-related harms would benefit from further factual development, the gravamen of Plaintiffs' claims — that the President lacks the authority to exclude illegal aliens from the apportionment base — "presents an issue that is 'purely legal, and will not be clarified by further factual development.'" *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Thomas,* 473 U.S. at 581).

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Thus, we conclude there is no basis to defer consideration of Plaintiffs' claims on ripeness ground. The fact that the Presidential Memorandum contains something akin to a "savings clause" — namely, that it is "the policy of the United States to exclude" illegal aliens from the apportionment base "*to the maximum extent feasible and consistent with the discretion delegated to the executive branch*," Presidential Memorandum, 85 Fed. Reg. at 44,680 (emphasis added) — does not alter that conclusion. Where, as here, the President's proclamation "unambiguously commands action" such that "there is more than a 'mere possibility that some agency might make a legally suspect decision,'" such a "savings clause does not and cannot override" the proclamation's "meaning." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018) (quoting *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002)). Indeed, savings clauses must be "read in their context, and they cannot be given effect when the Court, by rescuing the . . . measure, would override clear and specific language." *Id.* at 1239. In this case, the President explicitly declares that "it is the policy of the United States to exclude" illegal aliens "from the apportionment base," an unambiguous directive that, as discussed above, is having immediate and ongoing effects. Moreover, the Presidential Memorandum mandates that this policy be effected "*to the maximum extent*" feasible and consistent with law. Presidential Memorandum, 85 Fed. Reg. at 44,680 (emphasis added). Given that "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), we must and do presume that the Secretary and the Census Bureau will abide by the President's directives and work diligently to help exclude illegal aliens from the apportionment base to the maximum extent possible. Whether doing so would be a lawful exercise of the President's authority is a pure legal question that can be addressed now.

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THE MERITS

In their motion, Plaintiffs seek relief on two grounds: first, they argue that the Presidential Memorandum violates Article I and the Fourteenth Amendment to the Constitution; and second, they contend that it constitutes an *ultra vires* violation of the laws governing the census and apportionment. Pls.' Mem. 1-2. On the latter front, Plaintiffs insist that the Presidential Memorandum exceeds the powers delegated by Congress in 13 U.S.C. § 141 and 2 U.S.C. § 2a in at least two ways: (1) because it contemplates calculating apportionment using tabulations other than those produced by the census and (2) because it seeks to exclude illegal aliens from the apportionment base regardless of whether they are "persons in" a "State" as those terms are used in Section 2a(a). *Id.* at 27-36.

Although Plaintiffs urge us to decide both their constitutional claims and their statutory claims, and the parties focus mostly on the constitutional issues, courts have long been admonished not to "pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *accord Slack v. McDaniel*, 529 U.S. 473, 485 (2000); *House of Representatives*, 525 U.S. at 343-44. Accordingly, we begin — and, as it turns out, end — with Plaintiffs' statutory claims. In doing so, of course, "we start with the text of the statute." *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020). "Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal quotation marks omitted). We may look to legislative history and other tools of statutory construction if the statutory terms are ambiguous or "to corroborate and fortify our

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understanding of the text." *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring).

A. Apportionment Must Be Based on the Results of the Census Alone

Plaintiffs' first argument is that the Presidential Memorandum violates the statutes governing the census and apportionment by producing apportionment figures that are not based solely on the decennial census. This argument relies on the interplay between Section 141 and Section 2a. Subsection (a) of the former requires the Secretary to conduct the "decennial census of population." 13 U.S.C. § 141(a). Subsection (b) then requires the Secretary to report to the President "[t]he tabulation of total population by States under subsection (a) of this section" — that is, *under* the "decennial census" — "as required for the apportionment of Representatives in Congress." *Id.* § 141(b). Section 2a(a), in turn, requires the President to transmit to Congress "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 . . . by the method known as the method of equal proportions . . . ." 2 U.S.C. § 2a(a). By its terms, therefore, Section 141 calls for the Secretary to report a single set of numbers — "[t]he tabulation of total population by States" under the "decennial census" — to the President. And Section 2a, in turn, "expressly require[s] the President to use . . . the data from the 'decennial census'" in determining apportionment. *Franklin*, 505 U.S. at 797. That is, once the final decennial census data is in hand, the President's role is purely "ministerial." *Id.* at 799.

Legislative history and the longstanding understanding of the Executive Branch itself confirm that the Secretary's "tabulation," and the President's apportionment calculations, must be based on decennial census data alone. Significantly, the statutes first took their current form

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in 1929, after a decade-long stalemate over the method for calculating the reapportionment following the 1920 census. *See id.* at 791-92. Congress responded to this problem by creating an "automatic reapportionment" scheme that would be "virtually self-executing." *Id.* at 792. In particular, the scheme created an "automatic connection between the census and the reapportionment"; indeed, that was "*the* key innovation of the Act." *Id.* at 809 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). The Senate Report accompanying the bill explained in reference to the next census:

> The census would be taken in November, 1929. One year later, *with these figures in hand*, the President would report *the census figures*, together with a table showing how, *under these figures*, the House would be apportioned . . . pursuant to a purely ministerial and mathematical formula . . . . Precisely the same process would protect reapportionment in each subsequent decennium.

S. Rep. No. 71-2, at 4 (1929). Along similar lines, the House Report explained that, under the bill, "the House is reapportioned in accordance with the tabulation transmitted by the Secretary of Commerce . . . ; the tabulations transmitted to Congress are on the basis of the 1930 census . . . ." H. Rep. No. 70-2010, at 4 (1929); *see also id.* at 7 (explaining that the Secretary, to whom the bill also originally assigned the task of reapportionment later assigned to the President, "is left with no discretionary power. He must use absolutely, without deviation, the population of each State *as gathered and reported by the Director of the Census*." (emphasis added)).[13]

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[13] Although we are wary of relying too heavily on floor statements by members of Congress, it is worth noting that Senator Vandenberg of Michigan, the principal sponsor the bill, reaffirmed that the legislation required the President "to report the result of a census" and to apply the reapportionment formula to "the result of the census." 71 Cong. Rec. 1613 (1929) (statement of Sen. Vandenberg). Elsewhere, he and Senator Walsh of Montana confirmed in a colloquy with Senator Swanson of Virginia "that the President is bound and has no discretion" but "to make the apportionment *according to the census*." *Id.* at 1845 (statement of Sen. Swanson) (emphasis added).

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Similarly, its position in this litigation notwithstanding, the Department of Justice (the "Justice Department" or "DOJ") has long adhered to the view that the President's statement to Congress regarding apportionment has to be based solely on the tabulation of total population produced by the census. As the Justice Department explained more than forty years ago in *Federation for American Immigration Reform (FAIR) v. Klutznick*, "every inhabitant of a state the Census counts is included in the apportionment base. . . . The total resident population of the states is the apportionment base." Defs.' Reply Mem. & Opp'n at 11, 486 F. Supp. 564 (D.D.C. 1980) (No. 79-CV-3269), 1980 WL 683642, at *7 (citing H.R. Rep. No. 91-1314 (1970)).[14] Along similar lines, the Government acknowledged during oral argument in *Franklin v. Massachusetts* that "[t]he law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives" and that "[i]t would be unlawful . . . just to say, these are the figures, they are right, but I am going to submit a different statement." Oral Arg. Tr. at 12, *Franklin v. Massachusetts*, 505 U.S. 788 (No. 91-1502). "I think under the law he is supposed to base his calculation on the figures submitted by the Secretary." *Id.* at 13; *see also*, Reply Br. Appellants, *Franklin*, 505 U.S. 788 (No. 91-1502), 1992 WL 672612, at *15 (Apr. 20, 1992) ("[T]he method of equal proportions calls for application of a set mathematical formula to the state population totals *produced by the census*." (emphasis added)).

In short, this history confirms our reading of the statutes' plain terms: The Secretary is required to report a single set of figures to the President — namely, "[t]he tabulation of total

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[14] The House Report to which DOJ cited noted unambiguously that "the enumerated decennial census population is the basis for the apportioning of [the House] among the several States." H.R. Rep. No. 91-1314, at 3 (1970). Elsewhere, it summarized the three "elements" of the President's statement under Section 2a(a): "(1) The population of each State *as determined by the decennial census*; (2) The existing total number of Representatives (435); and (3) The apportionment which results from using a mathematical method known as the method of equal proportions." *Id.* at 2 (emphasis added).

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population by States" under the "decennial census" — and the President is then required to use those same figures to determine apportionment using the method of equal proportions.

The Presidential Memorandum deviates from, and thus violates, these statutory requirements. Whereas the statute calls for the Secretary to include only the census figures in his report to the President, the Presidential Memorandum mandates that the Secretary provide a second set of figures as well: namely, the population of each State "exclud[ing]" illegal aliens. Presidential Memorandum, 85 Fed. Reg. at 44,680. The Presidential Memorandum leaves it to the Secretary how to come up with those figures, but they will necessarily be derived from something other than the census itself, as the 2020 census is not gathering information concerning citizenship or immigration status, and the 2020 census itself is counting illegal aliens. *See* Order at 1-2, *New York v. Dep't of Commerce*, 18-CV-2921 (JMF), ECF No. 653 (permanently enjoining the inclusion of a citizenship question on the 2020 census questionnaire); *see also* Presidential Memorandum, 85 Fed. Reg. at 44,680 (noting that "data on illegal aliens . . . relevant for the purpose of conducting the apportionment" may be available as a result of Executive Order 13880, which directed executive agencies "to share information with the Department of Commerce" regarding "the number of citizens, non-citizens, and illegal aliens in the country"). By doing so, the Presidential Memorandum violates Congress's mandate to use the results of the census — and only the results of the census — in connection with the apportionment process and the counting of them in the census pursuant the Residence Rule.

In arguing otherwise, Defendants rely almost exclusively on the Supreme Court's decision in *Franklin*, *see* Defs.' Mem. 40-42; Oral Arg. Tr. 48-54, but that reliance is misplaced. In *Franklin*, the plaintiffs brought two discrete challenges, one a constitutional challenge to the formula used in connection with reapportionment and one a challenge under the Constitution and

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the APA to the conduct of the census — specifically, to the Census Bureau's decision to count federal employees serving overseas as residents of the State listed as their home of record in their personnel files. *See Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233 (D. Mass. 1992). A three-judge district court rejected the first challenge, but agreed with the second. *See id.* at 267-68. On appeal from the latter ruling alone, the Supreme Court reversed. With respect to the plaintiffs' constitutional claim, the Court held that the Secretary's judgment "that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress" was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 505 U.S. at 806. With respect to the plaintiffs' APA claim, the Court held that the decision could not be challenged because the only final action affecting the States was the President's Section 2a(a) statement and the President does not qualify as an "agency" for purposes of the APA. *See id.* at 796-801. The Secretary's Section 141(b) report, the Court explained, "carries no direct consequences for the reapportionment" and, thus, "serves more like a tentative recommendation than a final and binding determination." *Id.* at 798.

While addressing the question of whether the plaintiffs could bring a claim under the APA, the Court described the interplay between Section 2a and Section 141:

> After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a). 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." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. For potential litigants, therefore, the "decennial census" still presents a moving target, even after the Secretary reports to the President. . . . Moreover, there is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him. It is not until the President submits the information to Congress

> that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives.

505 U.S. at 797-98. The Court acknowledged that the President's role under Section 2a was "admittedly ministerial," but that "d[id] not answer the question whether the apportionment is foreordained by the time the Secretary gives her report to the President." *Id.* at 799. Put simply, the Court concluded, "§ 2a does not curtail the President's authority" — pursuant to "his accustomed supervisory powers over his executive officers" — "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." *Id.* at 799-800.

Defendants seize on this language to argue that the President has discretion to define who should be considered inhabitants — or "persons in each State," 2 U.S.C. § 2a(a); *see* U.S. Const. Art. I § 2, cl. 3 — for purposes of the census. Presidential Memorandum, 85 Fed. Reg. at 44,679; *see* Defs.' Mem. 40-42; Def. Reply 9-10; Oral Arg. Tr. 47. That may or may not be true — we address it below — but it is beside the point for present purposes. *Franklin* does not suggest, let alone hold, that the President has authority to use something other than the census when calculating the reapportionment; indeed, the Court did not even consider the plaintiffs' challenge to the apportionment. At most, *Franklin* establishes that the President retains his "usual superintendent role" with respect to the conduct of the census — and can direct the Secretary to make "policy judgments *that result in 'the decennial census.*'" *Id.* at 799-800 (emphasis added); *see also id.* at 797-98 (referring to "amendment of the 'decennial census' itself" and "instruction by the President to the Secretary to reform the census").[15] But by

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[15] Thus, defense counsel is wrong in suggesting that the *Franklin* Court blessed the use of a tabulation that was based on both the census and "separate records outside the census." Oral Arg. Tr. 52. The overseas personnel were counted as part of the census itself, resulting in a single "tabulation of total population by States" under the "decennial census." 13 U.S.C. § 141(a)-(b). That they were counted using administrative records rather than a questionnaire is

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Defendants' own admission, that is not what the President did here. *See, e.g.*, Joint Pre-Conference Ltr. 5 ("Plaintiffs are not challenging some procedure that will be used in the actual census, but an apportionment number that will be chosen by the President after the census is complete."); Defs.' Mem. 12 ("[T]he Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations . . . ."); ECF No. 120 (Decl. of Albert E. Fontenot, Jr.) ¶ 12 ("The Presidential Memorandum . . . has had no impact on . . . the Census Bureau's commitment to count each person in their usual place of residence, as defined in the [Residence Rule].").

In short, contrary to Defendants' arguments, the statutory scheme enacted by Congress does not give the President authority to "choose" any set of numbers he wants "to plug into the 'method of equal proportions.'" Defs.' Mem. 42. Instead, Congress mandated that the President use a specific set of numbers — those produced by the decennial census itself — for purposes of the reapportionment. By deviating from that mandate, the Presidential Memorandum exceeds the authority of the President and constitutes an *ultra vires* violation of the statutes.

B. The Apportionment Base Cannot Exclude Illegal Aliens Who Reside in a State

The Presidential Memorandum also deviates from Section 2a(a) in defining "the whole number of persons in each State" to categorically exclude illegal aliens residing in each State. Once again, we begin with the plain language of the statute. Defendants do not dispute — in the Presidential Memorandum or in their briefs — that illegal aliens are "persons" within the meaning of the Section 2a(a), and for good reason. The ordinary meaning of the word "person" is "human" or "individual" and surely includes citizens and non-citizens alike. *See Plyler v.*

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of no moment, as Section 141(a) broadly delegates to the Secretary the authority to conduct the census "in such form . . . as he may determine." *Id.* § 141(a).

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Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."). Moreover, the U.S. Code is filled with other statutes that use terms that plainly exclude illegal aliens, such as "citizen" or "alien lawfully admitted." *E.g.*, 5 U.S.C. § 552a(a)(2). "Congress thus distinguishes between a 'citizen' and 'any person' when it wishes to do so." *O'Rourke v. U.S. Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that the phrase "any person" in the Freedom of Information Act, 5 U.S.C. §§ 551 *et seq.*, includes non-citizens); *accord Stone v. Exp.-Imp. Bank of U. S.*, 552 F.2d 132, 136 (5th Cir. 1977); *see also, e.g.*, *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 729 (9th Cir. 2011) (holding that "any person" in the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*, "means any person, including foreign citizens").

Instead, Defendants hang their hats on the four-word phrase "persons in each State." Presidential Memorandum, 85 Fed. Reg. at 44,679; *see* Defs.' Mem. 2, 29-30; Defs.' Reply 11. That phrase, they argue, has been construed to mean "inhabitants" or to turn on "usual residence," terms that are not self-defining and call for "the exercise of judgment." Presidential Memorandum, 85 Fed. Reg. at 44,679. That is true enough. *See Franklin*, 505 U.S. at 803-05 (noting that, since 1790, Congress and the Census Bureau have used words such as "inhabitant" and "[u]sual residence" to "describe the required tie to the State" and that defining the metes and bounds of these terms are not always clear). But it does not follow that illegal aliens — a category defined by legal status, not residence — can be excluded from the phrase. To the contrary, the ordinary definition of the term "inhabitant" is "one that occupies a particular place regularly, routinely, or for a period of time." *See* MERRIAM-WEBSTER'S COLLEGE DICTIONARY 601 (10th ed. 1997). And however ambiguous the term may be on the margins, it surely

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encompasses illegal aliens who live in the United States — as millions of illegal aliens indisputably do, some for many years or even decades.[16]

The Presidential Memorandum provides two examples to support its conclusion that "[t]he 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," Presidential Memorandum, 85 Fed. Reg. at 44,679, but neither is remotely convincing. First, the Memorandum notes that "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." *Id.* True enough, but that is not based on their legal status. Instead, it is based on the fact that the United States is not their "usual residence." (Indeed, that is reflected in the Residence Rule.) Second, the Memorandum points to the fact that "overseas Federal personnel have, at various times, been included in" the apportionment base. *Id.* Once again, true enough. (Indeed, that was the issue in *Franklin*.) But that is based on the fact that the terms "usual residence" and "inhabitant" have "been used

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[16] Defendants argue that it is Plaintiffs' burden to show "that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment," Defs.' Mem. 39, and suggest that Plaintiffs cannot meet that burden because some categories of illegal aliens (e.g., aliens residing in a detention facility after being arrested while crossing the border) can be lawfully excluded, *see id.* at 27. But the examples Defendants proffer are arguably excluded (or excludable) based on their "usual residence," not their legal status. In any event, Defendants cite no authority for applying the standards for facial challenges to the constitutionality of statutes to claims, like those here, that the President has exceeded the authority granted to him by Congress. Indeed, that arguably gets it backwards: If the President goes outside the bounds of the authority granted to him by Congress, a court's power to grant relief should not depend on how far outside the bounds he went. Notably, courts considering similar claims have not approached them in the manner Defendants propose. *See, e.g.*, *Hawaii v. Trump*, 878 F.3d 662, 690-92 (9th Cir. 2017) (concluding that a presidential proclamation exceeded the President's delegated authority under the Immigration and Nationality Act), *rev'd and remanded on other grounds*, 138 S. Ct. 2392 (2018); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1324, 1337-39 (D.C. Cir. 1996) (concluding that an executive order announcing a "policy of the executive branch" was *ultra vires* and invalid).

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broadly enough to include some element of allegiance or enduring tie to a place" and to "include 'persons absent occasionally for a considerable time on public or private business.'" *Franklin*, 505 U.S. at 804-05 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 217 (Max Farrand ed., rev. ed. 1966) (statement of James Madison)). It is simply a non sequitur to suggest, as the Presidential Memorandum does, that just because the phrase "persons in each State" can be construed to *include* people who are "temporarily stationed abroad" but "retain[] their ties to the States," *id.* at 806, it can also be construed to *exclude* people who indisputably inhabit or reside in a State.

Defendants are on no firmer ground in arguing that illegal aliens can be excluded from "the whole number of persons in each State," as that phrase is used in Section 2a, because they "may be removed from the country at any time." Defs.' Mem. 39. A person living in a State but facing future removal is no less a "person[] in that State," Defs.' Reply 4 (internal quotation marks and alteration omitted), than someone living in the State without the prospect of removal. Moreover, many people in immigration custody or removal proceedings actually have *lawful* immigration status, *see, e.g.*, *Ragbir v. Homan*, 923 F.3d 53, 57-58 (2d Cir. 2019), and their placement in custody or removal proceedings does not necessarily render them unlawfully present. Notably, data reveal that immigration judges ultimately allow many aliens in custody or removal proceedings to remain in the United States. *See Immigration Judges Decide 57 Percent Entitled to Remain in U.S.*, TRAC IMMIGRATION (Aug. 17, 2016), https://trac.syr.edu/immigration/reports/435/. And many people initially designated as "undocumented" — including many intercepted at the border — ultimately obtain lawful status, such as asylum. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK FISCAL

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YEAR 2018, at 27 (2019), https://www.justice.gov/eoir/file/1198896/download. Nothing in Section 2a turns on such fluctuations and nuances in legal status.

Once again, legislative history and settled practice confirm our conclusion that "persons in each State" turns solely on residency, without regard for legal status. In looking to legislative history, we look not to the history surrounding the framing of the Constitution or the Reconstruction Amendments, even though the words in the statute mirror those in Article I and the Fourteenth Amendment. Instead, we look to 1929, when Section 2a was enacted and the words "whole number of persons in each State" entered the statutory lexicon. *See* Act of June 18, 1929, Pub. L. No. 71-13 § 22, 46 Stat. 21, 26. That is because our task is to interpret the statute itself, and we do so "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). That is not to say that the constitutional language is irrelevant to our task: The drafters of Section 2a used the same words as those in the Constitution, so their understanding of the constitutional language sheds light on their understanding — and the "ordinary public meaning" — of the statutory text "at the time of its enactment." *Id.* But it is their *understanding* of the constitutional language, *not* whether their understanding was correct (on which we need and do not opine), that matters. *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) ("It is a commonplace of statutory interpretation that Congress legislates against the backdrop of existing law." (internal quotation marks omitted)).[17]

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[17] For this reason, we need not and do not delve into the meaning of the terms "inhabitant" and "usual residence" at the time of the Founding or of the Reconstruction Amendments, or consider whether the concept of unlawful status was known to the Framers of Article I or the Fourteenth Amendment. There is no dispute that the concept of "illegal aliens" existed in 1929, when Section 2a was enacted. *See* Defs.' Mem. 36.

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Notably, in enacting the 1929 Act that used the phrase "whole number of persons in each State," the Senate and the House both considered and rejected amendments that would have excluded non-citizens from the apportionment base. *See* 71 Cong. Rec. 1907 (1929) (Sen. Sackett proposes amending S.B. 312 to require the President's statement to Congress to show "the whole number of persons in each State, exclusive of aliens and excluding Indians not taxed"); *id.* at 2065 (vote on amendment by Sen. Sackett fails); *id.* at 2360-63 (House adopts alienage exclusion as amendment to the apportionment bill); *id.* at 2448-2455 (House adopts amendment of Rep. Tilson to remove the previously adopted alienage exclusion). What is more, opposition to these amendments was based not only on a view that "the whole number of persons in each State" should include every resident of each State, without regard to legal status; it was based also on a view that the Constitution mandated inclusion of illegal aliens residing in the United States. Senator David Reed, for instance, voiced support for an amendment excluding illegal aliens from the apportionment base as a matter of policy but opposed it on grounds of constitutionality and consistent practice. "Every Congress that acted on that part of Article I of the original Constitution and every apportionment that was made in reliance upon that article," he explained, "included all free persons literally. It excluded Indians not taxed and it excluded slaves, but every apportionment inhabitant[] who" was not a "citizen[] w[as] included." *Id.* at 1958. "That construction," he noted then, "has been continuous and consistent." *Id.*

Further evidence of the understanding of the phrase "whole number of persons in each State" in Section 2a is revealed by the opinion of the Senate's legislative counsel on the issue. "That the fourteenth amendment was framed with the intention of including aliens," he wrote, "is indicated by the rejection by the Congress of proposals to base representation on the number of

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citizens and on the number of voters." *Id.* at 1822. Consistent with that understanding, Congress had always included aliens in the apportionment base:

> The practical construction of the constitutional provision by Congress in its apportionment legislation has been uniformly in favor of inclusion of aliens. No exception of noncitizens from the enumeration has been made under any past apportionment. The term "persons" necessarily either includes or excludes aliens; its constitutional meaning can not be changed by Congress; and the fact that it has from the beginning been construed to include aliens should be conclusive if the meaning was open to dispute.

Id. It was "therefore the opinion of [the legislative counsel's] office that there is no constitutional authority for the enactment of legislation excluding aliens from enumeration for the purposes of apportionment of Representatives among the States." *Id.* This prevailing view makes plain that when Congress directed the President to report the "whole number of persons in each State," it understood the phrase to include all who lived in each State, without regard for legal status, and that it did not grant to the President discretion to do by Memorandum what it could not do by statute.[18]

Not for nothing, until the Presidential Memorandum, the Executive Branch had also always taken the view that the 1929 Act, if not the Constitution, prohibited exclusion of illegal aliens from the apportionment base due to legal status alone. In defending against a 1980 challenge to *including* illegal aliens in the apportionment base, for example, the Department of Justice argued that "[t]he plain language of [the Act] maintains the Constitutional requirement of counting all inhabitants of the states, legal and illegal, for purposes of apportionment. . . .

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[18] For what it's worth, later Congresses took similar views. *See FAIR v. Klutznick*, 486 F. Supp. at 576-77 (three-judge court) (describing congressional debates); Stacy Robyn Harold, Note, *The Right to Representation and the Census*, 53 WAYNE L. REV. 921, 923 & n.15 (2007) (collecting congressional debates); *see also, e.g.*, *1980 Census: Counting Illegal Aliens: Hearing on S. 2366 Before the Subcomm. on Energy, Nuclear Proliferation & Fed. Servs. of the S. Comm. on Governmental Affairs*, 96th Cong. 12 (1980) (Senator Javits stating that the Constitution requires "the aggregate number of inhabitants, which includes aliens, legal and illegal").

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Moreover, the long-established practice of both Congress and the Census Bureau of reading the Constitution to require the counting of illegal aliens for apportionment purposes ratifies this construction." Defs.' Reply Mem. & Opp. Pls.' Mot. Summ. J. 11, *FAIR*, 486 F. Supp. 564 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1967)). In 1988, the Justice Department took the position in a letter to Congress that excluding illegal aliens from the census and apportionment base would be unconstitutional, *see* Letter from Thomas M. Boyd, Acting Assistant Attorney Gen., to Rep. William D. Ford (June 29, 1988) (reprinted in U.S. GOV'T PRINTING OFFICE, 1990 CENSUS PROCEDURES AND DEMOGRAPHIC IMPACT ON THE STATE OF MICHIGAN, 240-44 (1988)), a position it reaffirmed one year later, *see* Letter from Carol T. Crawford, Assistant Attorney Gen., to Sen. Jeff Bingaman (Sept. 22, 1989) (reprinted in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989)). And the Census Bureau itself has long "interpreted its constitutional charge *and its statutory mandate* to require counting every person [irrespective of citizenship status] who has a usual residence in any State." *Census Equity Act: Hearing on H.R. 2661 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv.*, 101st Cong. 68 (1989) (statement of Michael R. Darby, Under Sec'y of Commerce for Econ. Affairs) (emphasis added); *accord* Letter from Robert A. Mosbacher, Sec'y of Commerce, to Sen. Jeff Bingaman (Sept. 25, 1989) (reprinted in 135 Cong. Rec. S22,522 (daily ed. Sept. 29, 1989)).

In fact, since 1929 (if not before), the consistent view of both political branches has been that Section 2a, if not the Constitution, requires the inclusion of all residents in the apportionment base, without regard for their legal status. When pressed at oral argument to cite "any instance, any support . . . in the historical record" for the proposition that the President has discretion under Section 2a to exclude illegal aliens from the apportionment base, defense

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counsel came up empty. Oral Arg. Tr. 46 ("We have not been able to identify any."). With admirable candor, albeit some understatement, he was compelled to concede that "[P]laintiffs' best argument is history, and that cuts the other way." *Id.* at 47.

With neither text nor history on their side, the only thing Defendants have remaining is their assertion that excluding illegal aliens from the apportionment base is "more consonant with the principles of representative democracy underpinning our system of Government." Presidential Memorandum, 85 Fed. Reg. at 44,680. That is certainly a defensible (though contestable) proposition. But it is also irrelevant. The Constitution gives to Congress the authority to regulate the census and to reapportion the House. In exercising that authority, and delegating responsibility to the Executive Branch, Congress adopted a different theory of Government, in which the House of Representatives represents the whole population, not a subset of the population, and there is "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964). The President is not free to substitute his own view of what is most "consonant with the principles of representative democracy" for the view that Congress already chose.

The statutory command to use the "whole number of persons in each State" as the apportionment base does not give the President discretion to exclude illegal aliens on the basis of their legal status, without regard for their residency. In declaring that "it is the policy of the United States" to do so, and commanding the Secretary to take steps to carry out that policy, the Presidential Memorandum deviates from, and thus violates, Section 2a.

C. Conclusion

In sum, the Presidential Memorandum deviates from, and thus violates, the statutory scheme in two independent ways: first, by requiring the Secretary to include in his Section

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141(b) report a set of numbers other than "[t]he tabulation of total population by States" under the "decennial census" and contemplating reapportionment based on a set of numbers other than "the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population"; and second, by excluding illegal aliens from the "whole number of persons in each State" that Section 2a(a) requires to be used as the apportionment base.

As Defendants implicitly concede, it follows that Plaintiffs are entitled to summary judgment on their statutory claims pursuant to the *ultra vires* doctrine, a cause of action that "is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The doctrine provides that "[w]hen an executive acts *ultra vires*," as is the case here, "courts are normally available to reestablish the limits on his authority." *Reich*, 74 F.3d at 1328; *see also Stark v. Wickard*, 321 U.S. 288, 309-10 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all [executive branch] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("Courts remain obligated to determine whether statutory restrictions have been violated."). In light of that conclusion, we need not and do not reach Plaintiffs' constitutional claims, let alone the Plaintiffs' claims that did not form the basis

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for their motion. Thus, Defendants' motion to dismiss those claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure is moot.

REMEDIES

Having granted Plaintiffs summary judgment on their statutory claims, we turn to the issue of remedies. Plaintiffs seek a permanent injunction prohibiting all Defendants — including the President himself — from implementing the Presidential Memorandum and a declaratory judgment that the Presidential Memorandum is unlawful. *See* Gov't Pls.' Compl. 44-45; NGO Pls.' Compl. 88-89.

A. Injunctive Relief

It is well established that plaintiffs "seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Specifically, they must show: (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiffs and defendants, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See id.* But because "the government's interest is the public interest," where, as here, the government is a party, the last two factors merge. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *accord Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs easily satisfy each factor and, thus, are entitled to an injunction. First and foremost, as discussed above, the census-related harms that Plaintiffs have demonstrated would be irreparable absent an injunction. That is, because there are no census do-overs, there would be no way to remedy them after the fact. And even if there were a way to correct for them after the fact, the harms, by their nature, are difficult, if not impossible, to measure. *See, e.g.*, *Salinger*

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v. Colting, 607 F.3d 68, 81 (2d Cir. 2010) ("Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure . . . ."). Making matters worse, the harms caused by an inaccurate census would be felt for at least a decade, until the 2030 decennial census — if not longer. *See, e.g.*, Baldwin Decl. ¶ 25 (explaining that because the State of Washington relies on thirty-year population forecasts, which requires "an indicator that goes back in time as far as you are forecasting forward in time," the "2020 census data will be used in forecasting until at least the 2050 census data is available, and probably longer"). For much the same reason, the remedies available at law would plainly be inadequate. *See, e.g.*, *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing an injunction and finding that "the degradation of information . . . would be irreparable, without any adequate remedy at law").

Finally, the balance of the hardships and the public interest both favor an injunction. Indeed, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal quotation marks and citation omitted). Moreover, both the Supreme Court's decision in *Department of Commerce v. House of Representatives* — affirming the Eastern District of Virginia's permanent injunction against the use of statistical sampling to enumerate the population in the 2000 census — and the Second Circuit's holding in *Carey* — affirming a preliminary injunction requiring the Census Bureau to process certain forms and to compare its list of New York City residents against other government records — confirm that the public interest favors an injunction in these cases. *See House of Representatives*, 525 U.S. at 344; *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980).

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As the Second Circuit noted in *Carey*, "the public interest . . . requires obedience . . . to the requirement that Congress be fairly apportioned, based on accurate census figures. Furthermore, it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data." *Id.*

Defendants' sole claim of hardship is that an injunction would "interfere with the Bureau's ongoing process by hindering agency efforts to refine its policies and to apply its expertise." Defs.' Reply 2 (internal quotation marks and alterations omitted).[19] They do not elaborate further, but it is plain that they are not referring to the operations of the census itself because, as noted above, they repeatedly concede that the Presidential Memorandum does "not in any way affect the conduct of the actual census." *Id.* Thus, Defendants must be referring to the Census Bureau's ongoing efforts to figure out how, if at all, to implement the President's directive in the Presidential Memorandum in time to meet the statutory deadline for the Secretary's report to the President. *See* 13 U.S.C. § 141(b). But it is against the public interest to comply with an unlawful directive. And any suggestion that, in the event our decision is reversed on appeal, granting an injunction would hinder the Census Bureau's efforts to comply with the Presidential Memorandum by the deadline are undermined by Defendants' repeated

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[19] Referencing a point they made in passing in a footnote in their opening brief, Defendants also argue for the first time in their reply that an injunction prohibiting the Secretary from transmitting information would violate the Opinions Clause of the Constitution, *see* Defs.' Reply 11 (citing Defs.' Mem. 42 n.17), which empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. 2, § 2, cl. 1. A party may not raise an argument in a footnote or for the first time in reply, so we deem the argument to be waived. *See, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived . . . ."); *Levine v. Lawrence*, No. 03-CV-1694 (DRH) (ETB), 2005 WL 1412143, at *5 (E.D.N.Y. June 15, 2005) ("[F]ailure to adequately brief an argument constitutes waiver of that argument . . . ."). In any event, ensuring that the Secretary complies with the mandates of Section 141(b) — and, by extension, that the President complies with the mandates of Section 2a(a) — does not run afoul of the Opinions Clause.

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assertions that "an erroneous or invalid apportionment number can be remedied after the fact." Defs.' Mem. 48. Finally, any such hardship to Defendants can be mitigated, if not eliminated, by crafting the injunction — as we do below — to bar only the inclusion in the Secretary's Section 141 report of data concerning the number of illegal aliens in each State and to allow the Census Bureau to continue its research efforts.

Thus, a permanent injunction is warranted. In an exercise of our discretion, however, we grant injunctive relief against all Defendants other than the President. The parties vigorously dispute whether and under what circumstances a federal court can grant injunctive relief against the President. *Compare* Defs.' Mem. 44-45, *and* Defs.' Reply 14-15, *with* Pls.' Reply 27 & n.13. At a minimum, however, it is plain that the "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows." *Franklin*, 505 U.S. at 802. Thus, "[a]s a matter of comity," if nothing else, "courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President." *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc) (per curiam). That is particularly true where the court can grant complete relief without enjoining the President, as is the case here. *See, e.g.*, *Franklin*, 505 U.S. at 802 ("[W]e need not decide whether injunctive relief against the President [i]s appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."); *accord Evans*, 536 U.S. at 463-64. In fact, if anything, the need to enjoin the President himself is even weaker here than it was in *Franklin* and *Evans*, which were litigated *after* the President had transmitted his apportionment statement to Congress. For the plaintiffs in those cases to obtain meaningful relief, therefore, the President himself would have needed to calculate a new apportionment figure and to then submit a new report to Congress. Here, by contrast, enjoining Defendants

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other than the President (and granting a declaratory judgment, as discussed below) would provide Plaintiffs with complete relief, as the President cannot exclude illegal aliens from his apportionment calculations in his statement to Congress unless the Secretary gives him the relevant information in the Section 141 report.

Accordingly, the Court enjoins all Defendants other than the President from including in the Secretary's report to the President pursuant to Section 141(b) any "information permitting the President . . . to exercise the President's discretion to carry out the policy set forth in section 2" of the Presidential Memorandum — that is, any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Instead, consistent with the Census Act, the Secretary's Section 141(b) report shall include only "[t]he tabulation of total population by States under" Section 141(a) "as required for the apportionment of Representatives in Congress among the several States," 13 U.S.C. § 141(b) — that is, "information tabulated according to the methodology set forth in [the Residence Rule]," Presidential Memorandum, 85 Fed. Reg. at 44,680.[20] To be clear, as an exercise of its discretion, the Court does *not* enjoin Defendants from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State. That ensures that in the event that a higher court disagrees

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[20] Separately, there is an active debate over the propriety of "nationwide" or "universal" injunctions. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring); *see also* Memorandum from the Attorney General to Heads of Civil Litigating Components & United States Attorneys, U.S. Dep't of Justice, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download. That debate has no relevance to this case, for many of the same reasons that it had no relevance in the citizenship question litigation. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 677-78. Not surprisingly, therefore, Defendants do not even raise the issue.

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with our ruling (prior to the Section 141(b) deadline), the Secretary will be able to comply with the Presidential Memorandum in a timely fashion.

B. Declaratory Relief

In addition, we grant Plaintiffs' request for declaratory relief. The Declaratory Judgment Act vests federal courts with discretion to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). In exercising that discretion, courts must consider (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether a judgment would finalize the controversy and offer relief from uncertainty; (3) whether the proposed remedy is being used merely for procedural fencing or a race to *res judicata*; (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (5) whether there is a better or more effective remedy. *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359-60 (2d Cir. 2003). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate," Fed. R. Civ. P. 57, and we may grant declaratory relief "whether or not further relief is or could be sought," 28 U.S.C. § 2201(a); *see also Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("[A] request for declaratory relief may be considered independently of whether other forms of relief are appropriate.").

In our view, a declaration that the Presidential Memorandum is unlawful "would serve a useful purpose here, settle the legal issues involved, finalize the controversy, and offer [Plaintiffs] relief from uncertainty." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 105 (2d Cir. 2012). Indeed, an unambiguous declaration

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that the Presidential Memorandum is unlawful because the President does not have the authority to exclude illegal aliens from the apportionment base would serve the further useful purpose of "reasurr[ing] people they will be counted for the purpose of determining . . . congressional seats and electoral votes," Espinosa Supp. Decl. ¶ 8, thereby directly addressing the chilling effect on census participation that the Memorandum has caused. *Cf. Foretich v. United States*, 351 F.3d 1198, 1215 (D.C. Cir. 2003) ("[A] declaration will remove the imprimatur of government authority from [the illegal a]ct . . . ."). Such a declaration is particularly useful given that, for the reasons we discussed above, we decline to enjoin Defendants from taking steps to research whether or how the Presidential Memorandum could be implemented. That is, an unambiguous judicial declaration that the Presidential Memorandum is unlawful would help ensure that the chilling effects on participation in the census are mitigated to the maximum extent possible.

CONCLUSION

There is no dispute that the President has "accustomed supervisory powers over his executive officers," *Franklin*, 505 U.S. at 800, and thus retains some discretion in the conduct of the decennial census and resulting apportionment calculation. Nevertheless, where the authority of the President (or other members of the Executive Branch) to act is derived from statutes passed by Congress, the President must act in accordance with, and within the boundaries of, the authority that Congress has granted. For the reasons discussed above, we conclude that the President did not do so here and that the Presidential Memorandum is an *ultra vires* violation of Congress's delegation of its constitutional responsibility to count the whole number of persons in each State and to apportion members of the House of Representatives among the States according to their respective numbers under 2 U.S.C. § 2a and 13 U.S.C. § 141. Accordingly, Plaintiffs' motion for summary judgment with respect to their statutory *ultra vires* claims is

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GRANTED, Defendants (other than the President) are ENJOINED as set forth above, and the Presidential Memorandum is DECLARED unlawful. We need not and do not reach the merits of Plaintiffs' other claims and need not address their request, in the alternative, for a preliminary injunction. Finally, Defendants' motion to dismiss for lack of jurisdiction is DENIED and their motion to dismiss for failure to state a claim is DENIED as moot.[21]

The Clerk of Court is directed to terminate ECF Nos. 74 and 117 and to close this case.

SO ORDERED.

Dated: September 10, 2020
New York, New York

/s/
RICHARD C. WESLEY
United States Circuit Judge

/s/
PETER W. HALL
United States Circuit Judge

/s/
JESSE M. FURMAN
United States District Judge

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[21] We believe that this matter was properly heard by a three-judge panel for the reasons set forth in Judge Furman's request to then-Chief Judge Katzmann for the appointment of such a panel. *See* ECF No. 68. Nevertheless, mindful that the issue is not clear-cut and that the Second Circuit has determined that it is jurisdictional, *see Kalson v. Paterson*, 542 F.3d 281, 286-87 (2d Cir. 2008), we follow the lead of prior three-judge panels by certifying that Judge Furman, to whom these cases were originally assigned, individually arrived at the same conclusions that we have reached collectively. *See Swift & Co. v. Wickham*, 382 U.S. 111, 114 n.4 (1965) (noting with approval that "[t]his procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear has been used before" (citing *Query v. United States*, 316 U.S. 486 (1942))); *FAIR v. Klutznick*, 486 F. Supp. at 578 (three-judge court) ("District Judge Gasch additionally certifies that he individually arrived at the same conclusion that we collectively reached . . . out of abundant caution, so that in the event we are mistaken, an appeal can still be expeditiously taken in the appropriate forum." (internal quotation marks and citation omitted)); *cf. Massachusetts v. Mosbacher*, 785 F. Supp. 230, 238 n.6 (D. Mass.) (three-judge court) ("Because the author of this opinion is the single district judge to whom this case was initially assigned, this opinion stands as certification that the author has individually arrived at the conclusions expressed collectively in the opinion and the judgment of this three-judge court."), *rev'd on other grounds sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992).

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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 (RCW) (PWH) (JMF)
NEW YORK IMMIGRANT COALITION, et al., Plaintiffs, -v- DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (RCW) (PWH) (JMF) (Consolidated) FINAL JUDGMENT AND PERMANENT INJUNCTION

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

Pursuant to the Court's Opinion and Order of September 10, 2020, it is ORDERED, ADJUDGED, and DECREED as follows:

FINAL JUDGMENT

Final judgment is entered for Plaintiffs and against Defendants on Plaintiffs' claims arising from an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141 (namely, the Fifth Claim for Relief in the Governmental Plaintiffs' Amended Complaint and Count Two in the NGO Plaintiffs' Amended Complaint).

DECLARATION AND PERMANENT INJUNCTION

The July 21, 2020 Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (the "Presidential Memorandum"), announcing that it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status, is DECLARED unlawful as an *ultra vires* violation of Congress's delegation of authority to conduct the decennial census and apportionment calculation pursuant to 2 U.S.C. § 2a and 13 U.S.C. § 141.

The Secretary of Commerce in his official capacity, the Director of the Census Bureau in his official capacity, the U.S. Department of Commerce, and the U.S. Census Bureau, and any successors to those offices, together with their agents, servants, employees, attorneys, and other persons who are in active concert or participation with the foregoing, *see* Fed. R. Civ. P. 65(d)(2), are PERMANENTLY ENJOINED from including in the Secretary's report to the President pursuant to Section 141(b) any information permitting the President to exercise the President's discretion to carry out the policy set forth in section 2 of the Presidential Memorandum — that is, any information concerning the number of aliens in each State who are not in a lawful immigration status under the Immigration and Nationality Act.

SO ORDERED.

Dated: September 10, 2020
New York, New York

/s/
RICHARD C. WESLEY
United States Circuit Judge

/s/
PETER W. HALL
United States Circuit Judge

/s/
JESSE M. FURMAN
United States District Judge

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From: MWalsh@doc.gov [MWalsh@doc.gov]
Sent: 9/10/2020 5:41:00 PM
To: Wilbur Ross b(6)
Subject: Fwd: SDNY Opinion/Order from 3-judge court
Attachments: Census (SDNY) - Opinion and Order.pdf; ATT00001.htm; 165 - Court's Final Judgment and Injunction - NY v. Trump (10 Sept 2020).pdf; ATT00002.htm

PRIVILEGED

b(5) - AC/WP

Sent from my iPhone

Begin forwarded message:

From: "Kelleher, Diane (CIV)" b(6)
Date: September 10, 2020 at 5:34:21 PM EDT
To: "Joshi, Sopan (CIV)" b(6) "Heller, Megan (Federal)" <MHeller@doc.gov>, "Rosenberg, Brad (CIV)" b(6) "Sverdlov, Alexander V." b(6) "Ehrlich, Stephen (CIV)" b(6) "Morrell, David M. (CIV)" b(6) "Haas, Alex (CIV)" b(6) "Freeman, Mark (CIV)" b(6) "Sharma, Sapna (Federal)" <SSharma@doc.gov>, "Zee, M. Andrew (CIV)" b(6) "Cannon, Michael (Federal)" <MCannon@doc.gov>, "Walsh, Michael (Federal)" <MWalsh@doc.gov>, "DiGiacomo, Brian (Federal)" <bDiGiaco@doc.gov>, "Kourkoumelis, Aristidis (Federal)" <AKourkoumelis@doc.gov>, "Stern, Mark (CIV)" b(6) "Hinshelwood, Bradley A. (CIV)" b(6) "Meredith, Ethan (Federal)" b(6) "Keller, Catherine (Federal)" <CKeller@doc.gov>, "Frazer Reaves, Nicole (OSG)" b(6) "Lucas, Brinton (OSG)" b(6) "Davis, Elliott M. (CIV)" b(6) "Mauler, Dan (CIV)" b(6)
Subject: SDNY Opinion/Order from 3-judge court

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 (RCW) (PWH) (JMF) OPINION AND ORDER

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

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PER CURIAM.

The Constitution 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. To enable that apportionment, it mandates that an "actual Enumeration" be conducted "every . . . ten Years, in such Manner as [Congress] shall by Law direct," an effort commonly known as the decennial census. *Id.* art. I, § 2, cl. 3. Congress has delegated the task of conducting the census to the Secretary of Commerce, who is required to

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report "[t]he tabulation of total population by States" to the President. 13 U.S.C. § 141(a)-(b). The President, in turn, is required to transmit to Congress "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" using a mathematical formula "known as the method of equal proportions." 2 U.S.C. § 2a(a). Throughout the Nation's history, the figures used to determine the apportionment of Congress — in the language of the current statutes, the "total population" and the "whole number of persons" in each State — have included every person residing in the United States at the time of the census, whether citizen or non-citizen and whether living here with legal status or without.

On July 21, 2020, however, the President announced that this long-standing practice will no longer be the case. In a Presidential Memorandum issued on that date (and entered into the Federal Register two days later), the President declared that, "[f]or the purpose of the reapportionment of Representatives following the 2020 census" — which, as of today, is still ongoing — "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (ECF No. 1-1) (the "Presidential Memorandum").[1] To implement this new policy, the President ordered the Secretary of Commerce (the "Secretary") to provide him two sets of numbers for each State: first, the total population as determined in the 2020 census and, second, the total population as determined in the 2020 census minus the number of "aliens who are not in a lawful immigration status." *Id.* The President left it to the Secretary of Commerce to figure out how to calculate the number of "aliens who are not in a lawful immigration status" in each State. But one thing is

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[1] Unless otherwise noted, all docket references are to 20-CV-5770.

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clear: that number would not come from the census itself, as the 2020 census is not collecting information regarding citizenship status, let alone legal immigration status in this country, and the 2020 census will count illegal aliens according to where they reside.

In these consolidated cases, filed only three days after the Presidential Memorandum, two sets of Plaintiffs — one, a coalition of twenty-two States and the District of Columbia, fifteen cities and counties, and the United States Conference of Mayors (the "Governmental Plaintiffs") and the other, a coalition of non-governmental organizations (the "NGO Plaintiffs") — challenge the decision to exclude illegal aliens from the apportionment base for Congress on the ground that it violates the Constitution, statutes governing the census and apportionment, and other laws. On August 7, 2020, they filed a motion for summary judgment or, in the alternative, a preliminary injunction. Plaintiffs allege that the Presidential Memorandum will cause, or is already causing, two forms of irreparable harm. First, noting that the Presidential Memorandum itself identifies a State — believed to be California — that would stand to lose two or three seats in the House of Representatives if illegal aliens are excluded from the apportionment base, they argue that the Memorandum will result in the loss of seats in the House. Second, they argue that the Presidential Memorandum is having an immediate impact on the census count — which is still ongoing — and that that, in turn, is resulting, and will result, in various forms of injury. Defendants — the President, Secretary of Commerce Wilber L. Ross, Jr., Director of the U.S. Census Bureau Steven Dillingham (the "Director"), the United States Department of Commerce (the "Department"), and the Bureau of the Census (the "Census Bureau") — oppose Plaintiffs' motion and filed a cross-motion to dismiss, arguing that the Court lacks jurisdiction to entertain Plaintiffs' claims and that the exclusion of illegal aliens from the apportionment base is a lawful

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exercise of the President's discretion with respect to the conduct of the census and apportionment.

For the reasons that follow, Plaintiffs are entitled to summary judgment. The Presidential Memorandum violates the statutes governing the census and apportionment in two clear respects. First, pursuant to the virtually automatic scheme established by these interlocking statutes, the Secretary is mandated to report a single set of numbers — "[t]he tabulation of total population by States" under the decennial census — to the President, and the President, in turn, is required to use the same set of numbers in connection with apportionment. By directing the Secretary to provide two sets of numbers, one derived from the decennial census and one not, and announcing that it is the policy of the United States to use the latter in connection with apportionment, the Presidential Memorandum deviates from, and thus violates, the statutory scheme. Second, the Presidential Memorandum violates the statute governing apportionment because, so long as they reside in the United States, illegal aliens qualify as "persons in" a "State" as Congress used those words.

On those bases, we declare the Presidential Memorandum to be an unlawful exercise of the authority granted to the President by statute and enjoin Defendants — but not the President himself — from including in the Secretary's report to the President any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Because the President exceeded the authority granted to him by Congress by statute, we need not, and do not, reach the overlapping, albeit distinct, question of whether the Presidential Memorandum constitutes a violation of the Constitution itself.

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The merits of the parties' dispute are not particularly close or complicated. Before getting to the merits, however, we must confront a question that is closer: whether we have jurisdiction to even consider the merits.

It is axiomatic that federal courts are courts of limited jurisdiction and may consider the merits of a case only if the case is of the sort traditionally amenable to, and resolvable by, the judicial process. That requires a plaintiff seeking relief in federal court to demonstrate that it has "standing" to bring suit and that its claims are ripe for decision. Here, if the sole harm that Plaintiffs alleged were the harm to their apportionment interests, they might not satisfy the requirements of standing and ripeness, as the Secretary has not yet taken any public action in response to the Presidential Memorandum and could conceivably conclude that it is not feasible (or lawful) to exclude illegal aliens from the apportionment base. But Plaintiffs allege — and have proved — that they are suffering, and will suffer, more immediate and certain injuries by virtue of the harm that the Presidential Memorandum is causing to the accuracy of the census count itself. In light of those injuries, we conclude that we have jurisdiction to grant Plaintiffs the relief they are seeking.

BACKGROUND

The following background facts, drawn from the admissible materials submitted by the parties and materials of which the Court may take judicial notice, are undisputed except where noted. *See, e.g.*, *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).[2]

A. The Constitutional and Statutory Scheme

Article I of the Constitution requires that an "actual Enumeration" of the population, known as the decennial census, be conducted "every . . . ten Years, in such Manner as [Congress]

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[2] We discuss facts relevant to the issues of standing and ripeness below.

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shall by Law direct." U.S. Const. art I, § 2, cl. 3. The primary purpose of this enumeration was to apportion congressional representatives among the States "according to their respective Numbers." *Id.* The number of Representatives apportioned to each State determines, in turn, that State's share of electors in the Electoral College. *See id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3. For the first eighty years of the Nation's history, the States' "respective Numbers" were calculated according to the formula set forth in the Constitution's infamous "Three-Fifths Clause," which provided that the "actual Enumeration" established by the census would be arrived at by "adding to the whole Number of free Persons . . . , and excluding Indians not taxed, three fifths of all other Persons" — "all other Persons" being people then held as slaves. U.S. Const. art I, § 2, cl. 3. In 1868, that provision was modified by the Fourteenth Amendment, which 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 (emphasis added).[3]

The modern census is governed by the Census Act, which Congress most recently amended in 1976. *See* Act. of Oct. 17, 1976 (the "Census Act" or the "Act"), Pub. L. No. 94-521, 90 Stat. 2459 (codified in scattered sections of 13 U.S.C.). Section 141(a) of the Act broadly delegates to the Secretary the duty to "take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine." 13 U.S.C. § 141(a). The Act then mandates that "[t]he 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" — in this

[3] For practical purposes, the "Indians not taxed" proviso was rendered moot by the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)), which declared that all Native Americans born in the United States are citizens.

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case, January 1, 2021 — "and reported by the Secretary to the President of the United States." *Id.* § 141(b). Within a short time thereafter — in this case, between January 3 and January 10, 2021 — "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 . . . 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). The Clerk of the House of Representatives must, in turn, "send to the executive of each State a certificate of the number of Representatives to which such State is entitled" within fifteen days of the President's statement. *Id.* § 2a(b). With limited exceptions not relevant here, the Census Act strictly prohibits disclosure — even to other federal agencies — of any data or information concerning individual respondents to the census. *See* 13 U.S.C. §§ 8-9; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 523 (S.D.N.Y.), *aff'd*, 139 S. Ct. 2551 (2019).

B. The Use of Census Data

Although the "initial" — and core — "constitutional purpose" of the census was to "provide a basis for apportioning representatives among the states in the Congress" (and, in turn, allocating members of the Electoral College), the census has long "fulfill[ed] many important and valuable functions for the benefit of the country." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982). As the Supreme Court has observed, it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (internal quotation marks and citation omitted). Indeed, "[t]oday, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit

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organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 519 (citation omitted). Among other things, the data are now used not only for apportionment, but also "for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige*, 455 U.S. at 353 n.9.

In *New York v. Department of Commerce*, the court described many of the varied uses beyond congressional apportionment to which the federal, state, and local governments put census data, which Plaintiffs reiterate in this case. *See* 351 F. Supp. 3d at 596-99, 610-13. To provide a few examples here:

- The federal government relies on census data to allocate vast sums of money among and within States. In fiscal year 2016, for example, at least 320 such programs allocated about $900 billion using census-derived data. *See id.* at 596.

- State governments — including those among the Governmental Plaintiffs here — mandate the use of census data to draw intrastate political districts. *See id.* at 594-95, 612; *House of Representatives*, 525 U.S. at 333 n.4, 334; *see also, e.g.*, ECF No. 76-11 ("Brower Decl."), ¶ 16-18 (Minnesota); ECF No. 76-37 ("Rapoza Decl."), ¶ 5 (Rhode Island).

- State law requires the use of census data for various purposes, ranging from the allocation of governmental resources and imposition of expenses among local governments to the setting of utility fees and official salaries. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 612-13 (citing various state statutes).

- State and local governments — including those among the Governmental Plaintiffs here — rely on census data, including granular local-level "characteristic data," to perform essential government functions. New York City, for example, makes important decisions about how to allocate public services in reliance on demographic data derived from the census, as when its Department of Education redraws school zone boundary lines, ECF No. 76-21, ("Salvo Decl."), ¶ 15; when its Department of Health deploys resources based on its best understanding of the age, race, and Hispanic origin characteristics within particular communities, *id.* ¶ 14; and when its Population Division uses age data to target services for aged individuals, *id.* ¶ 16.

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Thus, inaccuracies in federal census data would affect state and local governments — and, by extension, their residents — in many ways, only some of which would be measurable. Critically, in many instances, that would be true even if the total population counts were not materially affected — because of the importance of accuracy at the local or subgroup level.[4]

C. The Citizenship Question Litigation and Its Aftermath

This is not the first time issues relating to the 2020 census have been brought in this District. On March 22, 2018, the Secretary announced that he had decided to include "a question about citizenship on the 2020 decennial census questionnaire," claiming "that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019). Shortly thereafter, two groups of plaintiffs — including most, if not all, Plaintiffs here — filed suit in this District, alleging that the decision to include the citizenship question violated the Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* On January 15, 2019, after an eight-day bench trial, Judge Furman issued detailed findings of fact and conclusions of law, holding that the Secretary's decision was arbitrary and capricious, contrary to law, and pretextual. *New York v. Dep't of*

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[4] Although less relevant here, accurate census data is also critical to others, including scholars and private-sector businesses. *See, e.g.*, Br. of *Amici Curiae* 16 Businesses & Business Organizations at 3, ECF No. 103-1 ("Businesses Amicus") ("The Census provides critical data that informs decision-making in both the private and public sectors. . . . Consequently, government action that threatens the accuracy of Census data directly harms the businesses nationwide that rely on that data."); MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 260-61 (2d ed. 2015) (describing how "[s]ocial scientists in university settings, in businesses, or in stand-alone research organization [have become] the market" for census data in the modern era). For instance, businesses rely on census data "to make a variety of decisions, including where to put new brick-and-mortar locations, how to market their products, and how to predict which products will be successful in a given market. . . . All of these things depend on the availability of accurate Census data." Businesses Amicus 2.

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Commerce, 351 F. Supp. 3d at 516; *see id.* at 635-64. He vacated the Secretary's decision and enjoined its implementation. *See id.* at 671-80. The defendants filed a notice of appeal and a petition for certiorari before judgment in the Supreme Court. The Supreme Court granted their petition and then affirmed on the ground that the Secretary's stated rationale was pretextual. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2573-76. Thereafter, on consent, Judge Furman entered a permanent injunction barring the Secretary from asking persons about citizenship status as part of the 2020 decennial census. *See* Order at 2, ECF No. 653, *New York*, No. 18-CV-2921 (JMF) (S.D.N.Y. Aug. 7, 2019).

Shortly after the Supreme Court affirmed Judge Furman's judgment, the President responded with an Executive Order aimed at "compil[ing]" citizenship data "by other means." Collecting Information About Citizenship Status in Connection With the Decennial Census, Exec. Order No. 13,880 § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order directed "all executive departments and agencies" to provide to the Department "the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records." *Id.* § 3 at 33,824. The Executive Order explained that data identifying citizens would, among other things, "help . . . generate a more reliable count of the unauthorized alien population in the country," which "would," in turn, "be useful . . . in evaluating many policy proposals." *Id.* § 1 at 33,823. Noting that the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), had "left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population,'" the Executive Order also explained that citizenship data could be used by states "to design State and local legislative districts based on the population of voter-eligible citizens." *Id.* § 1 at 33,823-24. The Executive

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Order said nothing about using citizenship data for purposes of congressional apportionment. Similarly, in remarks he made when announcing the Executive Order, the President made no mention of using citizenship data in connection with congressional apportionment. *See* Remarks on Citizenship and the Census, 2019 DAILY COMP. PRES. DOC. 465 (July 11, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900465/pdf/DCPD-201900465.pdf.

D. The 2020 Census

On February 8, 2018 the Census Bureau promulgated the "Residence Rule" establishing the residence criteria for the 2020 census. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018) (the "Residence Rule" or the "Rule"). "The residence criteria are used to determine where people are counted during each decennial census." *Id.* at 5526. "[G]uided by the constitutional and statutory mandates to count all residents of the several states," the Rule explains, "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of 'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time. . . . This concept of 'usual residence' is grounded in the law providing for the first census, the Act of March 1, 1790, expressly specifying that persons be enumerated at their 'usual place of abode.'" *Id.* Applying these criteria, the Rule explains that all "[c]itizens of foreign countries living in the United States" are to be "[c]ounted at the U.S. residence where they live and sleep most of the time," with the exception of "[c]itizens of foreign countries living in the United States who are members of the diplomatic community" (who are counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live) and "[c]itizens of foreign countries visiting the United States, such as on a vacation or business trip" (who are not counted at all). *Id.* at 5533. Notably, during the notice-and-comment process, the

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Census Bureau considered a comment "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 the Census Bureau decided to "retain the proposed residence situation guidance for foreign citizens in the United States," reiterating that "[f]oreign citizens are considered to be 'living' in the United States if, at the time of the census, *they are living and sleeping most of the time at a residence in the United States*." *Id.* (emphasis added).

The Census Bureau relies on various means to obtain census data, beginning with a questionnaire to which households are asked to self-respond and ending with a set of procedures known as "Non-Response Follow-Up" operations. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 521. The 2020 census count "officially began in the rural Alaskan village of Toksook Bay" on January 21, 2020. U.S. Census Bureau, *Important Dates*, U.S. CENSUS 2020, https://2020census.gov/en/important-dates.html (last visited September 7, 2020). Census operations were in full swing by mid-March, when the Census Bureau was confronted with the unprecedented challenge of the COVID-19 pandemic. On April 13, 2020, the Secretary and the Director announced that, due to the pandemic, the Census Bureau would temporarily suspend field data collection activities; seek a 120-day extension from Congress of the deadline "to deliver final apportionment counts"; and "extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021." *U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19*, U.S. CENSUS BUREAU (Apr. 13, 2020), https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html. In the following months, representatives of

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the Census Bureau reiterated on multiple occasions that additional time was required to complete the apportionment count and deliver it to the President.[5]

The Census Bureau resumed field operations in May 2020. *See* U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19* ("*Census Operations Adjustments*"), U.S. CENSUS 2020, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited Sept. 9, 2020). Despite the Census Bureau's earlier statements indicating the need for more time to complete the census, Director Dillingham announced on August 3, 2020, that the Census Bureau would end field operations on September 30, 2020, a month earlier than the previously announced deadline of October 31, 2020. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, U.S. CENSUS BUREAU (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html; *see also* ECF No. 62 ("NGO Pls. Compl."), ¶¶ 10 & n.3, 114, 174 n.69. As of today, therefore, the census is still ongoing — with enumerators conducting in-person Non-Response Follow-Up work to ensure that any household that did not self-respond to the census is nonetheless counted as part of the "actual Enumeration." *See Census Operations Adjustments*; *see also* ECF No. 34 ("Gov't Pls.' Compl."), ¶ 130 & n.20. In fact, there is some doubt about the date on which these efforts will end and the counting will

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[5] *See, e.g.*, U.S. CENSUS BUREAU, OPERATIONAL PRESS BRIEFING – 2020 CENSUS UPDATE 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf (statement of Albert Fontenot, Assoc. Dir. for Decennial Census Programs) (explaining that the Bureau was "past the window of being able" to produce the apportionment count by December 31, 2020); *see also, e.g.*, 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 (statement of Tim Olson, Assoc. Dir. For Field Operations) (explaining that "[w]e have passed the point where [the Bureau] could even meet the current legislative requirement of December 31. We can't do that anymore. We've passed that for quite a while now.").

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stop. On September 5, 2020, the Honorable Lucy H. Koh, United States District Judge for the Northern District of California, entered a temporary restraining order enjoining the Census Bureau from "implementing the August 3, 2020 [plan] or allowing to be implemented any actions as a result of the shortened timelines in the August 3, 2020 [plan]." *Nat'l Urban League v. Ross*, No. 20-CV-5799 (LHK), 2020 WL 5291452, at *4 (N.D. Cal. Sept. 5, 2020). A preliminary injunction hearing is scheduled in that case for September 17, 2020. *See id.*

E. The Presidential Memorandum

In the meantime — that is, with the census count still being conducted — on July 21, 2020, the President issued the Presidential Memorandum, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." Presidential Memorandum, 85 Fed. Reg. at 44,679. In it, the President declared 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 . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* at 44,680. "Excluding these illegal aliens from the apportionment base," the President posited, "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." *Id.* Additionally, the President asserted 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 encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the

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immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." *Id.* Referring to one State with "more than 2.2 million illegal aliens" — apparently California, *see* ECF No. 75 ("Pls.' Rule 56.1 Statement"), ¶ 4 — the Presidential Memorandum noted 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." Presidential Memorandum, 85 Fed. Reg. at 44,680.

To implement this new "policy of the United States," the President directed the Secretary to provide him with two sets of data. First, the Presidential Memorandum mandates that, "[i]n 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." *Id.* Second, "[t]he 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)." *Id.* (emphasis added). In other words, to the extent "feasible" or "practicable," the Secretary is now required to include *two* sets of numbers for each State in his report to the President under Section 141(b) of the Census Act: first, the total population as determined in accordance with the Residence Rule, which includes citizens of foreign countries "living in the United States," without regard for the legal status of such persons in this country, Residence Rule, 83 Fed. Reg. at 5533; and second, the total population *minus* the number of "aliens who are not in a lawful immigration status." Presidential Memorandum, 85 Fed. Reg. at 44,680.

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F. This Litigation

On July 24, 2020 — only three days after the Presidential Memorandum — both the Governmental Plaintiffs and the NGO Plaintiffs filed their initial complaints. *See* ECF No. 1; 20-CV-5781, ECF No. 1.[6] In their now-amended Complaints, Plaintiffs contend that the Presidential Memorandum violates the Constitution's Enumeration Clause, as modified by the Fourteenth Amendment; is motivated by discriminatory animus toward Hispanics and immigrant communities of color, in violation of the equal protection component of the Fifth Amendment's Due Process Clause; coerces state and local governments and denigrates the equal sovereignty of the States in violation of the Tenth Amendment; violates the constitutional separation of powers by usurping the authority Congress delegated to the Secretary; constitutes an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141; violates the APA; and violates the Census Act's prohibition on the use of statistical sampling for purposes of congressional apportionment, *see* 13 U.S.C. §§ 141, 195. They seek a declaration that the Presidential Memorandum is unlawful, an injunction prohibiting Defendants from taking any action to implement or further the Memorandum, and writs of mandamus compelling the Secretary and the President to transmit figures that do not exclude illegal aliens based on immigration status.

The cases were initially assigned to Judge Furman alone, who consolidated them pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure. ECF No. 43, at 1. On August 5, 2020, Judge Furman held an initial pretrial conference by telephone. During the conference,

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[6] At least six other cases in four other Districts have been filed challenging the Presidential Memorandum. *See* Compl., *Common Cause v. Trump*, No. 20-CV-2023 (D.D.C. July 23, 2020); Compl., *Haitian-Ams. United, Inc. v. Trump*, No. 20-CV-11421 (D. Mass. July 27, 2020); Compl., *City of San Jose v. Trump*, No. 20-CV-5167 (N.D. Cal. July 27, 2020); Compl., *California v. Trump*, No. 20-CV-5169 (N.D. Cal. July 28, 2020); Compl., *Useche v. Trump*, No. 20-CV-2225 (D. Md. July 31, 2020); Second Am. Compl., *La Union Del Pueblo Entero v. Trump*, No. 19-CV-2710 (D. Md. Aug. 13, 2020).

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Plaintiffs advised that they intended to immediately file a motion for summary judgment (or, in the alternative, a preliminary injunction), and Defendants advised that they intended to file a motion to dismiss. ECF No. 79 ("Aug. 5, 2020 Tr."), at 11, 27, 36-38; *see also* ECF No. 37 ("Joint Pre-Conference Ltr."), at 6. Noting that Plaintiffs disclaimed the need for any discovery in connection with their motion for summary judgment or a preliminary injunction, Judge Furman set an expedited schedule and cautioned that, "[i]f defendants believe[d]" upon seeing Plaintiffs' motion papers "that there is any need for discovery," they were required "to confer" with Plaintiffs "immediately and then submit a joint letter." Aug. 5, 2020 Tr. at 46.

At Plaintiffs' request, and without objection from Defendants, Judge Furman filed a formal request on August 7, 2020, for the appointment of a three-judge district court pursuant to 28 U.S.C. § 2284(b). *See* ECF No. 68; *see also* ECF Nos. 58, 65. On August 10, 2020, the Honorable Robert A. Katzmann, then the Chief Judge of the Second Circuit, designated Judges Wesley and Hall to serve as the other members of a three-judge panel to hear these cases. *See* ECF No. 82. Thereafter, the panel adopted the scheduling order previously entered by Judge Furman alone. *See* ECF No. 86.

Pursuant to that scheduling order, Plaintiffs filed their motion on August 7, 2020. *See* ECF No. 74. Plaintiffs seek summary judgment (or, in the alternative, a preliminary injunction) on only some of their claims, namely that the Presidential Memorandum violates the Enumeration Clause and Fourteenth Amendment and constitutes an *ultra vires* violation of the statutes governing the census and apportionment. *See* ECF No. 77 ("Pls.' Mem."), at 10-40. Plaintiffs' motion is supported by declarations of both fact and expert witnesses. *See* ECF No. 76 ("Colangelo Decl."); ECF No. 149 ("Goldstein Decl.").

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In response, Defendants did not ask to depose Plaintiffs' declarants or request discovery of any kind; nor did they seek a hearing. Instead, on August 19, 2020, they filed their opposition to Plaintiffs' motion and a cross-motion to dismiss. *See* ECF No. 117. To the extent relevant here, they argue that the Court lacks jurisdiction to hear Plaintiffs' claims because they are unripe and Plaintiffs lack standing; that the Enumeration Clause and *ultra vires* claims fail because the decision to exclude illegal aliens from the apportionment base is a lawful exercise of the President's discretion with respect to the census and apportionment; that Plaintiffs are not entitled to injunctive relief because they cannot show irreparable harm; and that the President is not a proper defendant. *See* ECF No. 118 ("Defs.' Mem."). On August 28, 2020, the motions became fully briefed, *see* ECF No. 154 ("Defs.' Reply"), and on September 3, 2020, the Court held oral argument by telephone.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the admissible evidence and pleadings demonstrate "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); *see also Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (per curiam). A dispute over an issue of material fact qualifies as genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The initial burden of establishing that no genuine factual dispute exists rests upon the party seeking summary judgment. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994). If the moving party shows a *prima facie* entitlement to summary judgment,

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"the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006).

In ruling on a motion for summary judgment, a court must view all evidence "in the light most favorable to the non-moving party," *Overton v. N.Y. State Div. of Mil. & Naval Affs.*, 373 F.3d 83, 89 (2d Cir. 2004), and must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought," *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004). To defeat a motion for summary judgment, the non-moving party must advance more than a "scintilla of evidence," *Anderson*, 477 U.S. at 252, and demonstrate more than "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party "cannot defeat the motion by relying on the allegations in [its] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (internal citation omitted).

STANDING AND RIPENESS

As noted, Plaintiffs move for summary judgment on two grounds: that Defendants' decision to exclude illegal aliens from the apportionment base violates the Enumeration Clause and the Fourteenth Amendment of the Constitution; and that it exceeds the authority granted by Congress in the statutes that govern the census and congressional apportionment. *See* Pls.' Mem. 10-40. Before reaching the merits of either argument, however, we must address Defendants' contention that we lack jurisdiction. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

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83, 88-89 (1998) (noting that subject-matter jurisdiction cannot be assumed and is a "threshold question that must be resolved . . . before proceeding to the merits").

Defendants argue and move to dismiss on the ground that we lack jurisdiction for two reasons: because Plaintiffs fail to establish that they have standing to sue and because their claims are not yet ripe. Where, as here, the question is whether a plaintiff's injury is sufficiently "real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (citation omitted); *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). Thus, courts often address them together under the single umbrella term of "standing," *see, e.g.*, *Susan B. Anthony List*, 573 U.S. at 157 n.5; *Nat'l Org. for Marriage*, 714 F.3d at 689 n.6, and we will do the same here. But there is a second, arguably distinct form of ripeness doctrine that Defendants invoke: prudential ripeness, which concerns whether a case that might qualify as a bona fide case or controversy is nevertheless better decided later. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." (internal quotation marks and citation omitted)). We will begin with the issue of standing — the toughest issue in this case — and then turn briefly to prudential ripeness.

A. The Law of Standing

Article III of the Constitution limits the "judicial Power" of the United States to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2. This means that all suits filed in federal court must be "cases and controversies of the sort traditionally amenable to, and resolved by, the

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judicial process." *Steel Co.*, 523 U.S. at 102. One way courts implement that requirement is by ensuring that "at least one plaintiff" in any federal case has "standing." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565; *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (noting that, in a case with multiple plaintiffs, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"). Standing, in turn, is measured by a "familiar three-part test," which requires a plaintiff to show (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The plaintiff must make this showing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To prevail on a motion for summary judgment, therefore, "mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability . . . ." *House of Representatives*, 525 U.S. at 329; *see Lujan*, 504 U.S. at 561 (stating that, on summary judgment, a plaintiff "can no longer rest on such 'mere allegations,'" as at the pleading stage, "but must 'set forth' by affidavit or other evidence 'specific facts'" that demonstrate standing. (quoting Fed. R. Civ. P. 56(e)).

Injury in fact is "the first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks, alterations, and citation omitted). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks and citation omitted). Significantly, an injury "need not be actualized"

to satisfy Article III. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Instead, a "future injury" can suffice, so long as it is "certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 157 (internal quotation marks and citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (noting that plaintiffs need not "demonstrate that it is literally certain that the harms they identify will come about"); *House of Representatives*, 525 U.S. at 332-33 (finding standing "on the basis of the expected effects . . . on intrastate redistricting" — namely, that certain jurisdictions were "substantially likely . . . [to] suffer vote dilution"). Ultimately, the injury-in-fact requirement is meant to "ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks and citation omitted).

The second element requires proof that the plaintiff's injury is "fairly traceable" to the defendant's challenged conduct. Put differently, "there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks, alterations, and citation omitted). Importantly, "[p]roximate causation is *not* a requirement of Article III standing, which requires only that the plaintiff's injury be *fairly traceable* to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) (emphases added); *see also Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) ("[T]he 'fairly traceable' standard is lower than that of proximate cause."). Accordingly, "Article III 'requires no more than *de facto* causality.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Relatedly, for an injury to be "fairly traceable" to a defendant's conduct, that conduct need not be "the very last step in the chain of

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causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). Indeed, as the Supreme Court explained in finding that the plaintiffs challenging the decision to add a citizenship question to the census had standing, when a "theory of standing" relies "on the predictable effect of Government action on the decisions of third parties," traceability is satisfied. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566. This may be so "even when the decisions are illogical or unnecessary." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 59 (2d Cir. 2020).

Third and finally, a plaintiff's injury must be "redressable" by the relief sought — that is, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). "[T]he very essence of the redressability requirement" is that a request for "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107. But if there is "a likelihood that the requested relief will redress the [plaintiff's] injury," the requirement is satisfied. *Id.* at 103; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) ("[F]or a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."). Notably, the redressability requirement does not require a plaintiff to show that the relief sought will remedy all injuries alleged. Instead, "'the relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' In other words, a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (citations omitted) (quoting

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Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)). Nor need the plaintiff prove that judicial relief will remedy an injury entirely. It is enough that the "risk [of the alleged harm] would be reduced to some extent if [the plaintiffs] received the relief they seek." *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) ("Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the [injury], a court does have power to effectuate a partial remedy.").

B. Facts Relevant to Standing

Plaintiffs press two categories of harm: (1) "harms stemming from the exclusion of undocumented immigrants in the apportionment count"; and (2) "harms caused by the Memorandum's deterrent effect on census participation." Pls.' Reply 29. With respect to the first category, the Presidential Memorandum's express goal is to stop "[a]ffording congressional representation, and therefore formal political influence, to States on account of" their illegal alien population. Presidential Memorandum, 85 Fed. Reg. at 44,680. In particular, the Memorandum itself anticipates that excluding illegal aliens from the apportionment count could reduce the number of representatives in States with large immigrant populations, noting explicitly that in "one State . . . home to more than 2.2 million illegal aliens," *id.* — apparently, California, *see* Pls.' Rule 56.1 Statement ¶¶ 3-4 — the inclusion of illegal aliens could "result in the allocation of two or three more congressional seats than would otherwise be allocated," Presidential Memorandum, 85 Fed. Reg. at 44,680. In addition to the Memorandum itself, Plaintiffs proffer an expert analysis that concludes that the wholesale exclusion of illegal aliens from the apportionment base "is likely to have substantial effects on the population counts of each state" and, more specifically, "will almost certainly lead Texas to lose a seat in Congress"; would "likely . . . lead California and New Jersey to lose a congressional seat"; and "could lead other

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states, such as Arizona, Florida, New York, or Illinois, to lose seats." ECF No. 76-58 ("Warshaw Decl."), ¶ 11.

With respect to the second category of harm, Plaintiffs submit a number of declarations — uncontested by Defendants — demonstrating the Presidential Memorandum's deterrent effect on participation in the decennial census, particularly among noncitizens, immigrants, and their family members, and, in turn, the adverse consequences that are likely to flow from that deterrent effect.[7] The Presidential Memorandum deters census participation for at least two distinct reasons. First, the Presidential Memorandum engenders fear and distrust among illegal aliens

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[7] Although Defendants do not dispute the facts in Plaintiffs' declarations, they argue that the declarations are "impermissibly conjectural, conclusory, and hearsay." Defs.' Mem. 12. Defendants are correct to point out that we "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue," but "may not rely on conclusory or hearsay statements contained in the affidavits." *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (internal quotation marks omitted). But Plaintiffs' declarations are not conclusory insofar as they describe with concrete detail the specific experience of various non-governmental and governmental entities. By way of example, several NGO Plaintiffs give specific and concrete evidence of the ways in which their operations have shifted to respond to the Memorandum. *See, e.g.*, ECF No. 76-18 ("Espinosa Decl."), ¶ 14; ECF No. 76-14 ("Choi Decl."), ¶¶ 17, 20-21; ECF No. 76-26 ("Khalaf Decl."), ¶ 15; ECF No. 76-36 ("Oshiro Decl."), ¶ 12; ECF No. 76-47 ("Torres Decl."), ¶¶ 22-23.

Furthermore, although the declarations do contain some inadmissible hearsay (e.g., where they report information secondhand), Defendants are incorrect in suggesting that, without it, the declarations are insufficient to support a showing that "the Presidential Memorandum would have an appreciable effect on the participation of illegal aliens" in the census. Defs.' Mem. 14-15. Many of the statements in Plaintiffs' declarations recount comments made by immigrants in response to the Presidential Memorandum, *see, e.g.*, ECF No. 76-17 ("Cullinane Decl."), ¶ 8; ECF No. 149-3 ("Espinosa Supp. Decl."), ¶ 5, which are admissible to prove state of mind, *see* Fed. R. Evid. 803(3). Additionally, references in the declarations to third-party statements are admissible to demonstrate the effect that these statements had on others — for example, that NGO Plaintiffs diverted resources in response to deterred census participation. *See, e.g.*, *United States v. Reed*, 639 F.2d 896, 907 (2d Cir. 1981). Finally, the declarations also contain information about the general atmosphere of fear, confusion, and apathy towards the census in various communities, information that is based on declarants' personal experiences working with and in those communities; this information is not a "statement" and, thus, not hearsay. *See* Fed. R. Evid. 801(a). In the discussion that follows, we rely on the declarations only to the extent they are admissible.

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and their families (and, more broadly, all noncitizens and their families), and deters these groups from participating in the census out of fear of providing the federal government with information by which their citizenship status may be ascertained (and any resulting adverse consequences). Second, because the Presidential Memorandum announces that it is United States policy "to exclude from the apportionment base aliens who are not in a lawful immigration status," Presidential Memorandum, 85 Fed. Reg. at 44,680 — the "primary purpose of the census," *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 561 — illegal aliens may decide not to participate in the census on the theory that they do not count for any purpose or on the theory that there is little upside to being counted.

Several agency and non-profit organization leaders in charge of census outreach programs attest that many illegal aliens have expressed concern over, or outright refused to participate in, the census as a result of the Presidential Memorandum, both because they are apprehensive that the data will be used in immigration enforcement and because they perceive their participation as ultimately futile in light of the President's explicit exclusion of illegal aliens for the purposes of apportionment. *See, e.g.*, ECF No. 76-4 ("Baldwin Decl."), ¶ 8; ECF No. 76-5 ("Banerji Decl."), ¶ 5; Brower Decl. ¶ 11; Cullinane Decl. ¶ 8. Other immigrant respondents have expressed concern that "the Trump Administration would punish undocumented persons who filled out the Census by tracking and deporting them." *See, e.g.*, ECF No. 76-30 ("Matos Decl."), ¶¶ 9-13 (describing Delaware-based census advocacy program's increased need to quell community fears that, in light of the Presidential Memorandum, responding to the census will result in deportation or bar Latinos from obtaining citizenship).

Notably, Plaintiffs' evidence indicates that the effects of the Presidential Memorandum are likely to be felt beyond the *illegal* alien population. "Excluding undocumented immigrants

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from the apportionment base will deter Census participation among the broader immigrant community, including family and household members of undocumented immigrants who are actually citizens or non-citizens with legal status." Espinosa Decl. ¶ 11; *see also* Khalaf Decl. ¶ 12 ("[S]ignificant fear and increased distrust about the Census . . . [is] not limited to undocumented immigrants or other non-citizens, but also to family, household members, friends, and community members of non-citizens, people for whom the new policy articulated in the Memorandum has generated fear about responding at all . . . ."). Of particular concern is the response in "mixed status households" — that is, households consisting of illegal aliens and residents with lawful status — where concerns about the security of identifying information being shared with the federal government are prevalent. *See, e.g.*, Espinosa Decl. ¶ 12 (describing a fear among individuals from mixed status households that "the Presidential Memorandum's exclusion of people 'not in lawful immigration status' from the census base count indicates that the Administration will use information from the census to attempt to identify undocumented immigrants for deportation or other adverse consequences"). "Even U.S.-born citizen Puerto Rican residents are confused" by the Presidential Memorandum. ECF No. 76-16 ("Colón Decl."), ¶ 11.

In addition to this extensive — and undisputed — record of fact witness testimony, Plaintiffs provide expert analyses describing the fear and confusion generated by the Presidential Memorandum among hard-to-count communities and the resultant chilling effect on census participation. *See* ECF No. 76-56 ("Barreto Decl."), ¶ 14 (surveying research on the impact of media messages on immigrant communities' trust in government and the impact of those communities' trust on census response rates and concluding that "the July 21 [Presidential Memorandum] will reduce participation in the 2020 census, and ultimately will reduce the

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accuracy of the 2020 census"); ECF No. 76-57 ("Thompson Decl."), ¶ 3 (concluding that the Presidential Memorandum "will significantly increase the risk of larger total and differential undercounts, relative to previous censuses, for the hard-to-count populations, including immigrant communities").[8]

In short, the record supports a conclusion that the Presidential Memorandum has created, and is likely to create, widespread confusion among illegal aliens and others as to whether they should participate in the census, a confusion which has obvious deleterious effects on their participation rate. *See* ECF No. 76-1 ("Alvarez Decl."), ¶ 10 (reporting "an increase in confusion amongst immigrant communities after" Memorandum was issued); *see also* Baldwin Decl. ¶ 8; ECF No. 76-9 ("Bird Decl."), ¶ 9. As John Thompson, the former Director of the Census Bureau, predicts, "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*." Thompson Decl. ¶ 23 (emphasis added); *see also* Barreto Decl. ¶ 29. And the Census Bureau's own advertising

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[8] Defendants fault Dr. Barreto for failing to consider a 2019 study conducted by the Census Bureau, ELIZABETH A. POEHLER ET AL., U.S. CENSUS BUREAU, 2019 CENSUS TEST REPORT: A NEW DESIGN FOR THE 21ST CENTURY (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf ("2019 Census Test Report"), which found "no statistically significant difference in overall self-response rates" resulting from the inclusion of a citizenship question on the census questionnaire. *Id.* at ix; *see* Defs.' Mem. 13. But that study, which is not directly relevant to the issues before us, is less useful for Defendants than their arguments suggest, as there are findings that both sides can and do point to in support of their positions. In fact, the same study did find statistically significant drops in response rates "in some areas and for some subgroups," including "[t]racts with greater than 4.9 percent noncitizens," "[t]racts with greater than 49.1 percent Hispanic residents," "[t]racts with between 5.0-20.0 percent Asian residents," and "[h]ousing units within the Los Angeles Regional Census Center and New York Regional Census Center boundaries." *Id.* at ix-x. Furthermore, "the results of this [study] [we]re limited to the self-response timeframe prior to the start of" Non-Response Follow-Up operations, *id.* at 12, and there is reason to believe that each of Non-Response Follow-Up's steps would replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households, *see New York v. Dep't of Commerce*, 351 F. Supp. 3d at 583.

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initiatives will struggle to ward off these effects even with "messag[ing] that respondent information is confidential" and that "[t]he Census Bureau will not share it with any outside entities, including law and immigration enforcement." Thompson Decl. ¶ 21.

These deterrent effects have far-reaching ramifications, including increasing costs for census outreach programs run by NGOs and governments. Indeed, the NGO Plaintiffs have already diverted resources from their other important programs to shore up their census engagement efforts. For example, Plaintiff FIEL "has recently had to refocus its programming and commit additional resources to its Census work," and "expects that it will need to interact with its constituents multiple times to answer questions and try to convince them to participate in the 2020 Census." Espinosa Decl. ¶ 14; *see also* ECF No. 76-44, ("Sivongxay Decl."), ¶ 18 ("[A]dditional one-on-one conversations and relational outreach are necessary to maintain trust among communities and census partners to ensure confidence that census information will remain confidential and that there are still important benefits to responding to the census, such as ensuring receipt of critical federal funding."). Because the Presidential Memorandum "dilutes the efficacy" of the efforts by Plaintiff New York Immigration Coalition ("NYIC") to ensure immigrants are counted in the census, NYIC will have "to divert resources from other programmatic areas to conduct additional education and outreach to get the same number of people to respond to the Census questionnaire." Choi Decl. ¶ 17. Specifically, NYIC has had to "make new materials"; "conduct new outreach"; "engage[] in member updates, press releases, [and] press briefings"; "develop[] messaging and social media campaigns"; and "respond to inquiries from local media . . . to assure people" that every person should respond to the Census. *Id.* In other words, "NYIC expects that it will need to interact with its constituents more times than previously planned to try to convince them to participate in the 2020 census" as a result of

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the Presidential Memorandum. *Id.* ¶ 20. It estimates that the organization "will have to increase staff time and spending devoted to its Census education and outreach efforts by approximately 20% percent over previously anticipated levels." *Id.* ¶ 21.

Plaintiffs American-Arab Anti-Discrimination Committee ("ADC") and ADC Research Institute ("ADRCI") have also had to divert resources away from other programmatic areas, including critical programs responding to COVID-19 issues. Khalaf Decl. ¶ 15. In response to the Presidential Memorandum's messaging, ADC and ADRCI will "increase staff time and spending devoted [to] its Census education and outreach efforts by approximately 25[] percent over current levels," *id.* ¶ 14, while the national president of both organizations reports that he "personally spent at least 35 hours on Census-related work since the release of the [Presidential] Memorandum" that he would have otherwise spent on other tasks related to the operation and mission of both organizations, *id.* ¶ 15. Plaintiff Ahri similarly will increase staff time and spending devoted to census education and outreach by approximately fifteen percent in response to the chilling effects of the Presidential Memorandum. ECF No. 76-43 ("Seon Decl."), ¶ 17. According to Theo Oshiro, Deputy Director at the non-profit Make the Road New York ("MRNY), the Presidential Memorandum also "dilutes the efficacy of [MRNY's] existing materials and programming, which requires MRNY to divert resources from other programmatic areas to strategize around how to make [its] education and outreach effective and to get the same number of people to respond to the Census questionnaire" as they would have absent the Memorandum. Oshiro Decl. ¶ 12. Finally, Plaintiff CASA also has had to "devote additional resources to addressing the confusion and fear that have resulted" from the Presidential Memorandum, including having "to reorganize its communication team, reassign staff to Census outreach and education, and revise and redistribute messaging materials." Torres Decl. ¶¶ 22-23.

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The Governmental Plaintiffs have also had to divert resources from other programs to mitigate the confusion caused by the Presidential Memorandum. Plaintiff Illinois, for example, has already had to spend funds on digital ads specifically designed to address misinformation about the census, has created printed materials to be distributed, and has produced social media videos and other digital communications to reassure the immigrant community about the importance of the census. Alvarez Decl. ¶ 12. Plaintiff Vermont, through its 2020 Complete Count Committee, has — in direct response to the Presidential Memorandum — provided "mini-grants" to increase outreach to hard-to-count communities, conducted additional open educational meetings, provided additional multilingual public service announcements, and otherwise promoted census participation. ECF No. 76-10 ("Broughton Decl."), ¶ 7. Plaintiff Monterey County will "have to dedicate significant resources to ensure participation without fear" so that the County receives its proper census-based funding. ECF No. 76-28 ("Lopez Decl."), ¶ 18; *see also* ECF No. 76-12 ("Bysiewicz Decl."), ¶ 11 (describing efforts by Plaintiff Connecticut to encourage full census participation after the Presidential Memorandum caused "confusion").

The Memorandum's chilling effect on census participation will likely also degrade the census data, harming state and local governments that rely on the data to carry out their public functions. As Dr. Joseph Salvo, Chief Demographer of New York City, explained, "the July 21, 2020 Presidential memorandum is likely to make the Census Bureau resort to less-reliable methods, including statistical imputation, more frequently in immigrant communities than it otherwise would." Salvo Decl. ¶ 12. Specifically, when individuals fail to participate in the census themselves, the Census Bureau will sometimes rely on "proxy respondents," like neighbors, landlords, and postal workers. *See* GLENN WOLFGANG ET AL., U.S. CENSUS BUREAU,

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ANALYSIS OF PROXY DATA IN THE ACCURACY AND COVERAGE EVALUATION 1 (2003), https://www.census.gov/pred/www/rpts/O.5.PDF. Reliance on proxy responses "degrade[s] the quality of the data" and its usability, since proxy respondents often leave some questions unanswered and report information less accurately than household respondents. Brower Decl. ¶¶ 12-13 (discussing, for example, the phenomenon of "age heaping" where data on the age of individuals tends to be reported in numbers ending in 5 or 0 when a proxy is the respondent because the proxy merely estimates the age of the individual). Further, if census data are not available through proxy responses, demographers are forced to resort to data imputation, which itself is reliable only when calculated using a sufficiently high self-response rate. *See* ECF No. 76-21 ("Hardcastle Decl."), ¶ 5. Lower response rates also increase the margins of error in statistical calculations, degrading the utility of census response data and restricting Plaintiffs' ability to rely on the data for, *inter alia*, governmental planning purposes. *See* ECF No. 76-25 ("Kaneff Decl."), ¶¶ 3-5.

Indeed, degraded census data jeopardizes various sovereign interests in allocating funds and administering public works through programs that rely on quality census data. Connecticut, for example, relies on accurate characteristic data, meaning data on subgroups within the population, for a wide variety of purposes, including deciding where to locate COVID-19 testing sites, the evaluation of requests for school construction funds, the promulgation of affirmative action plans for state agencies using data-driven goals and benchmarks, effective forecasting for public transit planning, and others. *See* ECF No. 76-31 ("McCaw Decl.") ¶¶ 4-7. Similarly, Dr. Salvo explains that "[t]he decennial census is the statistical backbone of our country" and that, like Connecticut, New York City relies on accurate characteristic data about subgroups to make

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decisions about public health programs and education investments, as well as emergency preparedness planning and provision of targeted services for the elderly. Salvo Decl. ¶¶ 13-17.

Other examples abound in the record. In Monterey County, California, for example, the Department of Social Services is responsible for administering cash and non-cash programs that, among other things, provide supplemental food assistance, California's Medicaid program, foster care, adoption and aging assistance, and temporary assistance to needy families. ECF No. 76-32 ("Medina Decl."), ¶ 2. That department relies on accurate census data in making its funding allocation decisions. *Id.* ¶ 4. Any undercounting of undocumented immigrants caused by the Presidential Memorandum will not only "impact the formulas used for funding allocations" for these basic living assistance programs, but will also result in the loss of federal funding, "which, in turn, will add extra financial burden on local governments, resulting in even fewer available resources to assist families with food, housing, health, and other support and safety net services." *Id.*; *see also, e.g.*, ECF No. 76-33 ("Mohammed Decl."), ¶¶ 5-6 (describing how the census directly impacts funding for the City of Pittsburgh and "provides the most reliable and complete data for research, decision making and planning in City government"); ECF No. 76-39 ("Rodriguez Decl."), ¶ 3 (describing how Illinois's Workforce Innovation and Opportunity Act Program, which provides services to help certain populations overcome barriers to employment, depends on accurate census data to identify the targeted population levels); ECF No. 76-46 ("Sternesky Decl."), ¶ 5 ("Census data deeply influences the way that [the New Jersey Housing and Mortgage Finance Agency] designs and plans for the allocation of housing funds across the state. For example, the Agency uses income, poverty, employment, housing density, and housing vacancy data from the Census to direct its annual $20 million to $25 million allocation of federal 9% Low-Income Housing Tax Credits (LIHTC). These credits are then used to

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leverage roughly a ten-fold influx of private investment into equity for development costs to both high-opportunity and high-need areas of New Jersey."); ECF No. 76-50 ("Wortman Decl."), ¶¶ 3, 6 (describing how Illinois determines funding for each county based on an "index of need" and how "[u]nderrepresentation of areas with a higher percentage of immigrants will result in disproportionate levels of funding being allocated to counties with less demographic diversity").

Plaintiff Washington State will also be negatively impacted if it is forced to use inaccurate census data. Washington allocates $200 million "of state shared revenues . . . to counties and cities on a per capita basis annually" and uses decennial census data for its demographic estimates and annual population forecasts. Baldwin Decl. ¶¶ 14, 17. "[B]ad data will certainly lead to inaccurate distribution of funding within Washington, impacting all levels of government for a decade." *Id.* ¶ 15. "Poor quality census data will [also] harm Washington's ability to carry out the population data functions required by law both in the short term and the long term." *Id.* ¶ 28. In particular, Washington annually creates a *thirty*-year population forecast, meaning that the 2020 census data will be used in forecasting until at least the 2050 census data is available, if not longer. *See id.* ¶ 25. Because "many estimate and forecast models rely on information about changes in trends over time," "[a]n inaccurate census this year will change the relationships in the data between censuses and make all future estimates and forecasts based on these trends less accurate." *Id.*

Finally, the undisputed facts in the record also reflect that judicial relief invalidating the Presidential Memorandum would likely reduce the confusion felt by immigrant communities and therefore alleviate some of the injuries being felt by Plaintiffs. For example, Plaintiff FIEL anticipates that "a court order that stops the exclusion of undocumented immigrants from the census would make [its] efforts to encourage census participation easier by allowing [FIEL] to

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clarify the confusion and help ease the fear caused by" the Presidential Memorandum, and that "it would take FIEL less time and fewer resources to convince" the community "to participate in the census." Espinosa Supp. Decl. ¶ 3. Relief would also help Plaintiff MRNY "conduct more efficient and effective census outreach" because MRNY could clarify to community members that everyone should, in fact, be counted. ECF No. 194-4 ("Oshiro Supp. Decl."), ¶ 5. And relief from this Court would also allow Plaintiff Ahri to "publicize the Court's order to encourage [its] community to open their doors to census outreach workers, rather than hiding out of confusion or fear and avoiding the census completely." ECF No. 194-5 ("Seon Supp. Decl."), ¶¶ 6-7.

C. Standing Analysis

As noted, Plaintiffs allege two types of harm: apportionment harms stemming directly from the exclusion of illegal aliens from the apportionment base and harms caused by the deterrent effect on census participation. We have considerable doubt that the former suffices to establish jurisdiction. To be sure, if any Plaintiff could show that, as a result of the Presidential Memorandum, it was likely to lose one or more seats in the House of Representatives, it would surely have standing. *See, e.g.*, *House of Representatives*, 525 U.S. at 331 (holding that the loss of a seat or seats in the House of Representatives "undoubtedly satisfies the injury-in-fact requirement of Article III standing"). But as of today, it is not known whether that harm will come to pass, as the Secretary has not yet determined how he will calculate the number of illegal aliens in each State or even whether it is "feasible" to do so at all. Oral Arg. Tr. 35-37. In the absence of that information, Plaintiffs' first theory of harm is likely "too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (internal quotation marks omitted). Nor, for these purposes, would there be any harm in waiting until January 2021, when the impact, if any, of the

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Presidential Memorandum would be known, as the Supreme Court has held that an illegal apportionment can be remedied even after the apportionment process has taken place. *See Utah v. Evans*, 536 U.S. 452, 462-63 (2002).

Ultimately, however, we need not, and do not, decide the issue because we conclude that Plaintiffs' second theory of harm — that the Presidential Memorandum will have and, indeed, is already having, an effect on the census count itself — suffices to establish standing. Critically, this theory of harm does not depend on what, if anything, the Secretary does *in the future* to implement the President's mandate in the Presidential Memorandum. Instead, it is based on Plaintiffs' undisputed evidence that the Presidential Memorandum is affecting the census count *in the present*. That is, while the apportionment harms may well be too remote and hypothetical to support standing, the harms to the census count are "certainly impending" and do not depend on "a highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. Notably, Defendants do not argue otherwise. Instead, they contend that Plaintiffs' second theory of harm is too "speculative" in a different sense: because Plaintiffs' evidence is inadequate to prove that the Presidential Memorandum has caused (or will cause) anyone to opt out of participating in the census or that judicial relief would redress that harm. *See* Defs.' Mem. 11-19. In defense counsel's view, Plaintiffs should be required "to identify some subset of people who would not have been chilled . . . from answering the census between April 1st and July 21st, then became chilled on July 21st after the memorandum was issued, and then will be unchilled in [the time remaining before the census ends] by an order of this Court." Oral Arg. Tr. 38; *see also* Defs.' Mem. 52 (citing lack of "rigorous survey[s] or statistical stud[ies] measuring whether [the Presidential Memorandum] . . . has any effect on response rates within immigrant communities").

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Defendants' vastly overstate Plaintiffs' burden. The law does not require Plaintiffs to submit a randomized control trial or other rigorous statistical analysis demonstrating beyond peradventure that there are people who would have participated in the census but for the Presidential Memorandum and who would participate again if we were to grant Plaintiffs the relief they seek. Nor do Plaintiffs need to submit declarations specifically identifying such people, let alone submit declarations from such people. Instead, Plaintiffs need only demonstrate that "there is no genuine dispute as to any" fact material to the standing analysis. Fed. R. Civ. P. 56(a). Notably, in determining whether this standard has been met, we may rely not only on the declarations submitted by Plaintiffs in support of their motion, but also on common sense, basic economics, and reasonable inferences. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 183-85 (determining that "sworn statements . . . adequately documented injury in fact" where the proposition they were offered for was "entirely reasonable"); *Citizens for Responsibility & Ethics in Wash. v. Trump (CREW)*, 953 F.3d 178, 198 (2d Cir. 2019) (noting that a court may rely on "common sense and basic economics" in evaluating standing (internal quotation marks omitted)); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104-05 (2d Cir. 2018) (relying on the defendant agency's "own pronouncements," as well as "[c]ommon sense and basic economics," to find standing (internal quotation marks omitted)); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.) ("When performing that inherently imprecise task of predicting or speculating about causal effects [in standing analysis], common sense can be a useful tool."); *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (finding that Texas had established the necessary causal connection between the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and a future injury because DAPA would have "enable[d]" third parties "to apply for driver's licenses" and

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there was "little doubt that many would do so"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

Requiring Plaintiffs to do more would be particularly inappropriate here for two reasons. First, "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 be flawed." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 517; *see* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 ("1998 Appropriations Act"), § 209(a)(8), Pub. L. No. 105-119, 111 Stat. 2440, 2480-81 (1997) ("Congress finds that . . . the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted."). Second, Defendants' *own conduct* has forced Plaintiffs' hands. That is, for reasons that are unclear, the President waited until July 21, 2020, when the census was in full swing, to issue his Presidential Memorandum. Compounding matters, Defendants announced less than two weeks later that they were ending the census earlier than previously planned. The combination of the two meant that Plaintiffs had to rush to court and seek immediate relief; had they waited to develop more rigorous proof of their standing, their arguments about harms to the census count itself would have become moot. Between the sheer enormity of what is at stake and the fact that Defendants' own conduct gave Plaintiffs only a narrow window in which to seek effective relief, it would be the height of unfairness to hold Plaintiffs to the heightened burden of proof that Defendants endorse.

In light of the undisputed facts in the record, common sense, and basic economics, we are

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satisfied that — with their second theory of harm — Plaintiffs adequately show injury in fact, traceability, and redressability and that we have before us an actual case or controversy "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. Moreover, Defendants "have failed to set forth any specific facts showing that there is a genuine issue of standing for trial." *House of Representatives*, 525 U.S. at 330.

1. Injury in Fact

To begin, Plaintiffs have proved that, in the wake of the Presidential Memorandum, some number of people will not participate in, and thus not be counted in, the census. As of August 3, 2020 — the day the Census Bureau announced that field operations would end a month earlier than previously planned, and approximately two weeks after the Presidential Memorandum was issued — the Census Bureau had counted only about sixty-three percent of households in the 2020 census. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, U.S. CENSUS BUREAU (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. Many of those not counted are undoubtedly in the "hard to count" population, which includes immigrant and Hispanic populations as well as illegal aliens. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 577. The record in the citizenship question litigation and the declarations here make clear that this population is even "harder" to count during this census due to widespread concerns, fueled by the policies and rhetoric of this Administration, that census data will be used for immigration enforcement purposes. *See id.* at 562, 579-83; Colón Decl. ¶ 11; Oshiro Decl. ¶¶ 12, 14; Seon Decl. ¶ 16; Barreto Decl. ¶¶ 60-62. Plaintiffs' uncontested declarations and common sense indicate that the Presidential Memorandum has compounded, and will compound, these concerns, and that some number of people in these communities will choose not to

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participate in the census and take steps to avoid being counted. *See, e.g.*, Cullinane Decl. ¶ 8; Espinosa Supp. Decl. ¶ 5. To be sure, on the present record, the Court cannot calculate with precision the number of people that will be so affected. But there is no doubt that that number is greater than zero, and there is a substantial likelihood that an appreciable number of people will be dissuaded from participating in the census. *See* Barreto Decl. ¶¶ 60-65.

From these ongoing and direct effects on the census flow several forms of injury to Plaintiffs and their members or citizens. First, insofar as Plaintiffs include or represent high concentrations of immigrant and Hispanic populations, the effects on the census undoubtedly create a risk of a net differential undercount that could result in the loss of political power and federal funds, two classic forms of Article III injury. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 607-08; *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam); Barreto Decl. ¶¶ 70-71; Thompson Decl. ¶¶ 13-17. Given the time sensitivities inherent in their claims of census-related injuries — there were little more than two months remaining for census operations when the President issued the Presidential Memorandum and, less than two weeks later, Defendants shortened that period by a full month — Plaintiffs have obviously not had an opportunity to perform any sort of empirical study on the size of the likely effects on the census that would reveal the likelihood of such injuries. In any event, the likelihood of two other forms of injury are more certain on the current record: degradation of the quality of, and ability to have confidence in, census data and diversion by the NGO Plaintiffs of organizational resources.

a. Degradation of Census Data

First, if a portion of the population does not participate in the census count, it will inevitably degrade the quality and accuracy of census data, even if only at the subgroup or local level. Salvo Decl. ¶¶ 8-12. That is particularly true if, as is the case here, the people who are not

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counted are not evenly distributed across the population, but are concentrated, either geographically or demographically. *See* Barreto Decl. ¶ 83; Thompson Decl. ¶¶ 15-17, 23. The degradation of census data, in turn, harms the Governmental Plaintiffs' ability to allocate resources, such as educational and public health resources, efficiently and effectively. *See* McCaw Decl. ¶¶ 3-6; Medina Decl. ¶¶ 2-4; Baldwin Decl. ¶¶ 15-28. Separate and apart from that, it harms confidence in the census data. *See* Kaneff Decl. ¶ 5 ("The lower the response rate, the larger the margin of error in the demographic characteristics."). Crucially, these harms will occur *whether or not there is a net differential undercount* — meaning that this theory of injury does not depend on connecting the deterrent effect of the Presidential Memorandum on immigrant households and the like to a net differential undercount of people who live in such households. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 610-11; Salvo Decl. ¶¶ 14-18.

As explained in *New York v. Department of Commerce*, the degradation of census data is a legally cognizable form of injury sufficient to support standing. *See* 351 F. Supp. 3d at 610-15. In particular, a State or local government that relies on the information provided by the federal government under an existing statutory arrangement suffers a sufficiently "concrete" and "particularized" injury for purposes of Article III when the federal government degrades the quality of that information. States are sovereign entities with sovereign interests in the making and enforcement of their own laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (concluding that Maryland suffered an injury to its "law enforcement and public safety interests" from a lower-court order preventing the State from utilizing DNA samples for law enforcement purposes pursuant to a state statute). But they frequently do so in collaboration

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with, or in reliance on, the federal government — such is the genius of the federal system, which has historically embraced various creative models of "cooperative federalism." *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167-69 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-89 (1981). States have long relied on federal decennial census data for countless sovereign purposes, and indeed many of the State Plaintiffs here even *require* the use of such data by law; in some instances, it is written into their state constitutions. *See, e.g.*, Rapoza Decl. ¶ 5 (explaining that the Rhode Island Constitution mandates using census data to establish the House and Senate districts); Brower Decl. ¶¶ 17, 22-23 (explaining that Minnesota law requires the use of census data to determine funding for roads and education).

Meanwhile, by virtue of the Constitution and the Census Act, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data. *See* U.S. Const. art. I, § 2, cl. 3; *see also Evans*, 536 U.S. at 478 (explaining that the Framers had a "strong constitutional interest in [the] accuracy" of the census); *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (holding that the conduct of the census must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," namely, obtaining an accurate count of the population in each State); 1998 Appropriations Act, Pub. L. No. 105-119, § 209(a)(6), 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States . . . ."). When the federal government degrades the quality of that data, it therefore inflicts a cognizable injury on the sovereign interests of reliant States.[9]

[9] That does not mean that, in every case, a State will have a "right" to such data — or a right to data of a certain quality — sufficient to support a valid cause of action to obtain it. But it

An example may be helpful in illustrating the point. Suppose a State were to premise certain of its policies on a person's lawful presence in the United States — for example, suppose that it chose to deny certain benefits to undocumented immigrants or required its law-enforcement officials to inquire into the immigration status of any person detained in state custody for any reason. "The accepted way" for States "to perform [such] status checks" — and surely the most reliable — is to contact the DHS's Immigration and Customs Enforcement ("ICE"), the federal agency that accepts and responds to such inquiries from interested States. *Arizona v. United States*, 567 U.S. 387, 411 (2012). Now suppose that ICE were to degrade the quality of its data set, thereby undermining its usefulness to the State as a tool for implementing its policy priorities. If this hypothetical State were to challenge the decisions causing the degradation in immigration-status data, the federal agency could certainly defend its actions on the grounds that they were lawful. But could it seriously deny that the State had suffered a cognizable injury for purposes of standing? Surely not.

Indeed, ample case law supports the proposition that a State has a strong sovereign interest in conducting its own policy, the burdening of which causes an injury in fact for Article III purposes. One such sovereign interest is a State's "exercise of sovereign power over individuals and entities within [its] jurisdiction — this involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son*, 458 U.S. at 601. Another such sovereign interest — which, in light of the frequent prohibition on *parens patriae* suits against the federal government, *see Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), is "distinct from . . . the general well-being of its residents" — is a State's "interest in securing observance

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does mean that a State suffers a concrete and particularized injury when the federal government degrades important tools of sovereignty — or takes those tools away altogether.

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of the terms under which it participates in the federal system," *Alfred L. Snapp & Son*, 458 U.S. at 607-08; *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes."); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . in defending the standards embodied in that code.").

The Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134, is instructive on this front. In that case, Texas led a coalition of States in a challenge to the Obama Administration's DAPA program. The Court held that the States had suffered a cognizable injury for purposes of standing because DAPA would have entitled its recipients to obtain driver's licenses under existing state law and providing those licenses would have come at a financial cost to Texas. *See id.* at 155-56. In denying a stay of the district court's preliminary injunction pending appeal, the Fifth Circuit cited *Alfred L. Snapp & Son*, explained that Texas possessed a sovereign interest in the maintenance of its own legal code, and held that "Texas's forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and Texas did not enact them merely to create standing." *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015). The court reasoned that "if pressure to change state law in some substantial way were not injury, States would have no standing to challenge *bona fide* harms because they could offset most financial losses by raising taxes or fees." *Id.* Several months later, the Fifth Circuit affirmed the preliminary injunction on the merits, reiterating and confirming its conclusions as to standing. The court held that "states may have standing based on . . . federal interference with the enforcement of state law, at least where the state statute at issue regulates behavior or provides for the administration of a state program and does not simply purport to immunize state citizens from federal law." *Texas*, 809 F.3d at

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153 (alterations, footnotes, and internal quotation marks omitted). Such "intrusions," the court explained, "are analogous to pressure to change state law." *Id.*

Like the state plaintiffs in *Texas*, many Governmental Plaintiffs here have enacted their reliance on federal census data into law — in some cases, as noted, even into their constitutions. Moreover, as in *Texas*, "there is no allegation," let alone proof, that those jurisdictions enacted their laws or ratified their constitutions "to manufacture standing" in these cases. *Id.* at 159. If the census data is degraded (or even perceived to be degraded), these Plaintiffs will be subjected to a forced choice: They can use the degraded data, resulting in worse policy; they can spend money to compensate for the damage; or they can change their laws to relieve themselves of the legal obligation to use federal census data in making and enforcing their laws (which would presumably necessitate the expenditure of additional resources to collect data of their own anyway). Such "pressure[] to change state law constitutes an injury" within the meaning of Article III. *Texas*, 787 F.3d at 749; *see Texas*, 809 F.3d at 153. Accordingly, most, if not all, of the Governmental Plaintiffs have proved an imminent injury to their sovereign interests due to the degradation in quality of census data.

b. Diversion of Resources

Additionally, the risk that some hard to count population will not participate in census results in another form of injury: the diversion of resources. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), the Supreme Court held that an organization can establish Article III injury in fact by proving "concrete and demonstrable injury to [its] activities — with the consequent drain on [its] resources." *See also id.* at 379 n.21 (holding that an organization that proves it "has indeed suffered impairment" in its activities has proved an Article III injury); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011); *Ragin v. Harry Macklowe Real Estate Co.*, 6

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F.3d 898, 904-06 (2d Cir. 1993). In particular, "a nonprofit organization establishes an injury-in-fact if . . . it establishes that it spent money to combat activity that harms its organization's core activities." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) (internal quotation marks omitted). "An organization need only show a 'perceptible impairment' of its activities in order to establish injury in fact." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (quoting *Ragin*, 6 F.3d 898 at 905).

As they did in *New York v. U.S. Department of Commerce*, Defendants appear to suggest that *Havens Realty* recognizes Article III injuries arising from organizational expenditures only where those expenditures are made in response to injuries that are themselves sufficiently imminent and impending to satisfy Article III. *See* Defs.' Reply 3; Oral Arg. Tr. 42-43; *see also New York v. Dep't of Commerce*, 351 F. Supp. 3d at 616. Organizations asserting standing based on the diversion-of-resources theory do indeed need to "show that both the anticipated expenditures and ensuing harm to their organizations' activities are 'certainly impending,'" *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 389 (2d Cir. 2015) (quoting *Clapper*, 568 U.S. at 409), lest these plaintiffs be permitted to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm," *Clapper*, 568 U.S. at 416. But that standard does not mean that a plaintiff must allege a second form of independently adequate injury in fact, which "would render the category of plaintiffs that could establish standing under a *Havens Realty* theory a null set" and make *Havens Realty* a dead letter. *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 616. Instead, however "inexact" the standard may be, "courts are inclined to find standing if it can be said that there is no better time to resolve the issues raised by the parties — that is, when they will be in no better position later than now." *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 237 (E.D.N.Y. 2019) (internal quotation marks omitted).

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Plaintiffs satisfy these standards. First, Defendants do not dispute, and the Court has little trouble concluding, that the impairment alleged by NGO Plaintiffs goes to their core activities. *See, e.g.*, *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019) ("The Organizations in this case have shown that Act 442's effect on their work goes far beyond 'business as usual.' They have done so through concrete evidence showing that Act 442 is already disrupting their operations . . . ."); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) ("The undisputed summary-judgment evidence established that [the plaintiff's] primary mission is voter outreach and civic education, particularly 'getting out the vote' among its members."). Each of the NGO Plaintiffs is primarily dedicated to serving and advocating for communities that have traditionally been undercounted by the census, and each is dedicated to promoting census participation in these communities. *See* Choi Decl. ¶¶ 3-6; Oshiro Decl. ¶¶ 2-5; Espinosa Decl. ¶¶ 2, 5-7; Khalaf Decl. ¶¶ 4-8; Seon Decl. ¶¶ 2-6; Torres Decl. ¶¶ 1, 5-11. In fact, several NGO Plaintiffs partner with the Census Bureau and/or state and local governments to promote census participation within these communicates. *See, e.g.*, Torres Decl. ¶ 11; Espinosa Supp. Decl. ¶ 6.

Second, Plaintiffs' uncontested declarations demonstrate that the NGO Plaintiffs have diverted resources in response to the Presidential Memorandum's chilling effects on participation in the census and the risks that poses for their members and their core activities. *See* Choi Decl. ¶¶ 14-27; Espinosa Decl. ¶¶ 14-17; Khalaf Decl. ¶¶ 8-16; Oshiro Decl. ¶¶ 15-17; Seon Decl. ¶¶ 17-19; Torres Decl. ¶¶ 2, 21-23; ECF No. 149-1 ("Awadeh Decl."), ¶¶ 4-5; Espinosa Supp. Decl. ¶¶ 7-8; Oshiro Supp. Decl. ¶¶ 2, 4; Seon Supp. Decl. ¶ 4.[10] For example, Steven Choi, the

[10] Plaintiffs provide evidence of similar resource diversions by similarly situated organizations, albeit not Plaintiffs here. *See* Banerji Decl. ¶¶ 5-6; Matos Decl. ¶¶ 9-14; Sivongxay Decl. ¶¶ 16-20, 23-24; ECF No. 76-51 ("Aranda-Yanoc Decl."), ¶ 8.

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executive director of Plaintiff New York Immigration Coalition ("NYIC"), states that his organization had to develop new messaging and social media campaigns, and issue new member updates and press releases, to counter the Presidential Memorandum's contradiction of themes that had previously been core to NYIC's census outreach efforts. Choi Decl. ¶ 17. NYIC expects to increase staff time and spending by twenty percent over previously anticipated levels to achieve its census outreach and advocacy goals. *See id.* ¶ 21. Similarly, Plaintiff Ahri had to develop entirely new outreach materials, train staffers with new scripts, and respond to media inquiries; it expects to increase staff time and spending devoted to these efforts by fifteen percent as a result of the Presidential Memorandum. *See* Seon Decl. ¶¶ 17-19. Meanwhile, Plaintiffs ADC and ADRCI anticipate increasing staff time and spending devoted to Census efforts by approximately twenty-five percent as a result of the Memorandum, *see* Khalaf Decl. ¶ 14, and Plaintiff FIEL "anticipates having to divert approximately $5,000 from other mission critical programs and services to the 2020 Census education and outreach as a result of the Presidential Memorandum," Espinosa Decl. ¶ 15.

These resource diversions may not be large in absolute terms, but they constitute a "perceptible impairment" of the NGO Plaintiffs' activities and thus qualify as injuries in fact. *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (internal quotation marks omitted); *see OCA-Greater Hous.*, 867 F.3d at 612 ("[T]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." (internal quotation marks omitted)). In short, the NGO Plaintiffs "are dedicated to providing an array of legal and social services to non-citizens and they have expended significant resources to mitigate the [Presidential Memorandum's] impact on those they serve. In so doing, they have diverted resources that would otherwise have been available for other programming, a perceptible

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opportunity cost that suffices to confer standing." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (internal quotation marks omitted); *see also Common Cause Ind.*, 937 F.3d at 952 ("According to the evidence put forward by the Organizations, Act 442 has created a culture of voter confusion, and it has already inflicted costs on them."); *OCA-Greater Hous.*, 867 F.3d at 612 ("[The plaintiff] went out of its way to counteract the effect of Texas's allegedly unlawful voter-interpreter restriction . . . with a view toward . . . mitigating its real-world impact on [the plaintiff's] members and the public . . . an undertaking that consumed its time and resources in a way they would not have been spent absent the Texas law. Hence, the Texas statutes at issue 'perceptibly impaired' OCA's ability to 'get out the vote' among its members.").

2. Traceability

Next, we have little trouble finding that these injuries in fact are fairly traceable to the Presidential Memorandum. Once again, the uncontested record and common sense satisfy Plaintiffs' burden. Plaintiffs demonstrate that the Presidential Memorandum's chilling effect on immigrant census participation is at least partially responsible for a degradation in the quality of census data. *See, e.g.*, ECF No. 76-24 ("Jimenez Decl."), ¶¶ 3-5 (explaining that the Memorandum's deterrence effect on immigrant household census participation will cause an undercount and a subsequent reduction in federal healthcare, infrastructure, and education funding for Plaintiff Monterey County); Salvo Decl. ¶ 12 (noting that the Presidential Memorandum "is likely to make the Census Bureau resort to less-reliable methods, including statistical imputation, more frequently in immigrant communities than it otherwise would" which will "result[] in poorer quality (less accurate) data both in terms of demographic characteristics as well as the actual count of persons"). NGO Plaintiffs have also made clear that the Presidential Memorandum is responsible for their diversion of resources; in other words, they are

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expending resources they would not otherwise precisely because of the Presidential Memorandum. *See, e.g.*, Choi Decl. ¶¶ 20-21; Khalaf Decl. ¶¶ 14-15; Seon Decl. ¶ 17; Oshiro Supp. Decl. ¶¶ 3-4; Torres Decl. ¶¶ 22-23; Espinosa Supp. Decl. ¶ 4. This undisputed evidence satisfies Plaintiffs' burden to demonstrate the "*de facto* causality" that Article III demands. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (internal quotation marks omitted).

In arguing otherwise, Defendants point out that Plaintiffs' theory of causation relies in part on the intervening actions of third-party actors, such as Spanish-language media disseminating information about the Presidential Memorandum. *See* Defs.' Mem. 16. "It makes little sense," they argue, "for Plaintiffs to attribute whatever harm is caused by those independent actors to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the risk of individuals' information being linked to immigration records and those individuals facing immigration enforcement." *Id.* (internal quotation marks and alterations omitted). More broadly, they assert that Plaintiffs' injuries are traceable to the "macro environment" of fear in the immigrant and Hispanic communities that predated the Presidential Memorandum, not to the Memorandum itself. *Id.* at 15-19.

These arguments are unpersuasive. For one thing, they ignore entirely Plaintiffs' evidence that the Presidential Memorandum has deterred, and will continue to deter, people from participating in the census because they conclude "that they don't see a benefit in filling out the census form if they will not be counted." Pls.' Mem. 43 (internal quotation marks and alterations omitted); *see, e.g.*, Choi Decl. ¶ 17; Cullinane Decl. ¶ 9; Matos Decl. ¶¶ 11, 13; Oshiro Decl. ¶¶ 10-12; ECF No. 76-38 ("Roche Decl."), ¶ 9; Torres Decl. ¶ 19; Espinosa Supp. Decl. ¶¶ 5-6. For such people, the chain of causation between the Presidential Memorandum and non-participation has only a single link. Thus, Plaintiffs need not and do not rely on the

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dissemination of information by third parties to establish that certain illegal aliens will plausibly — even rationally — decide not to participate based *directly* on a correct understanding of the Presidential Memorandum's import.

Second, as noted above, the Supreme Court has long made clear that the defendant's conduct need not be "the very last step in the chain of causation." *Bennett*, 520 U.S. at 169. Indeed, the traceability requirement may be met even where several steps on the causal chain stand between the defendant's conduct and the plaintiff's injury. *Davis v. Federal Election Commission*, 554 U.S. 724, for example, involved a challenge to a campaign finance law that increased campaign contribution limits for any candidate whose opponent's personal campaign expenditures exceeded his own by a certain amount. At the time of filing, the plaintiff was at least three steps away from suffering any concrete harm: He had to spend a sufficient amount of his own money; his opponent had to refrain from a comparable level of self-funding; and his opponent had to then take advantage of the law by accepting heightened contributions. Even so, the Court found that the plaintiff faced a "real, immediate, and direct [injury] . . . when he filed suit." *Id.* at 734. Notably, the Court deemed that assumption valid based on little more than evidence that "*most* candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 735 (emphasis added). Moreover, the Court did not require proof that the government conduct had a coercive effect on the third party's action; evidence that allowed the Court to predict how the third party would likely act in response to the government action was sufficient. *See id.*; *see also Lujan*, 504 U.S. at 562 (noting that, when injury depends on the conduct of third parties, it is sufficient to show "choices have been or *will be* made in such manner as to produce causation and permit redressability" (emphasis added)); *Nat. Res. Def. Council*, 894 F.3d at 104-05 (finding "the agency's own pronouncements," as well as "[c]ommon

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sense and basic economics," supported a conclusion that an "increased penalty has the potential to affect [third parties'] business decisions and compliance approaches" in a manner that would result in harm to the petitioners (internal quotation marks omitted)).

In light of these principles and cases, Defendants' arguments are unpersuasive. At the end of the day, they are little more than a rehash of Defendants' arguments in the citizenship question litigation, which were rejected. There, like here, Defendants argued that Plaintiffs' injuries were not "fairly traceable" to their conduct because the injuries depended on the intervening acts of third parties influenced by misinformation — namely, that the federal government could use their census answers for law enforcement and immigration enforcement purposes. *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 623-24. There, like here, Defendants argued that Plaintiffs' injuries were not "fairly traceable" to their conduct because the injuries were attributable to an independently existing macro environment of fear permeating the immigrant and Hispanic communities. *Id.* at 621-22. Yet the Supreme Court rejected those arguments. As that Court reaffirmed, "Article III requires no more than *de facto* causality," a standard that is met where Government action has a "predictable effect . . . on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (internal quotation marks omitted). Here, as in the citizenship question litigation, Plaintiffs have proved that their injuries arise from the predictable effects of Government action, however rational or reasonable those effects may be.

3. Redressability

Finally, we conclude that Plaintiffs satisfy the redressability requirement as well. To be sure, Plaintiffs have not proved — and perhaps could not prove — that a favorable ruling would lead everyone who has decided, or will decide, not to participate in the census as a result of the

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Presidential Memorandum to change course. But Plaintiffs' burden is not to show that a favorable court ruling would fully remedy the injuries that they have suffered or will suffer. Instead, they need show only that the "risk [of harm] would be reduced *to some extent* if [they] receive[] the relief they seek." *Massachusetts v. E.P.A.*, 549 U.S. at 526 (emphasis added); *see also CREW*, 953 F.3d at 194 (finding the redressability requirement satisfied because "it logically follows that relief would redress [the plaintiffs'] injury — at least to some extent"); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 716 (6th Cir. 2015) ("[I]t need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement.").

The Supreme Court's decision in *Massachusetts v. E.P.A.* is instructive. There, Massachusetts and other States challenged the EPA's decision not to regulate four greenhouse gases within the United States. On appeal, the Supreme Court held that the States had standing to challenge the EPA's decision based on their showing, through "unchallenged affidavits," that climate change was caused by greenhouse gases and caused various harms. 549 U.S. at 522. The Court did so despite the EPA's contention that there was no "realistic possibility" that the relief sought "would mitigate global climate change and remedy their injuries," particularly "because predicted increases in greenhouse gas emissions from developing nations" were "likely to offset any marginal domestic decrease." *Id.* at 523-24. The Court explained:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed . . . is essentially irrelevant. Nor is it dispositive that developing countries . . . are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Id. at 525-26 (citation and footnote omitted). Notably, the Court did not demand empirical proof that the remedy sought would have any marginal effect on global warming. The causal

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connection between greenhouse gases and climate change, combined with the EPA's "ardent support for various voluntary emission-reduction programs" (with which the "EPA would presumably not bother . . . if it thought emissions reductions would have no discernable impact on future global warming"), was enough. *Id.* at 526 (internal quotation marks omitted). Because the relief sought would reduce the risk of injury "to some extent," the States had standing. *Id.*

Here too, Plaintiffs' uncontested affidavits show that the relief they seek — a declaration that the Presidential Memorandum is unlawful and an injunction barring any effort to implement it — would reduce "to some extent" their risk of suffering injuries relating to the census. If anything, the record here provides even more support for a finding of redressability than the record in *Massachusetts v. E.P.A.* did. First, as discussed above, Plaintiffs have provided proof that there are likely people who have decided, or will decide, not to participate in the census for the simple reason that, under the Presidential Memorandum, they will not count for apportionment purposes. A court order invalidating the Presidential Memorandum would redress that harm in a straightforward manner. *See, e.g.*, *Carpenters Indus. Council*, 854 F.3d at 6 n.1 (Kavanaugh, J.) ("[I]f a government action causes an injury, enjoining the action usually will redress that injury."). Second, Plaintiffs' uncontested declarations provide evidence supporting a finding of redressability. Plaintiff Ahri, for example, explains that the injunction barring the citizenship question was useful in quelling concerns in the community it serves and that an order granting relief in this case would similarly make its census outreach efforts more efficient and effective. Seon Supp. Decl. ¶¶ 4-7; *see also* Oshiro Supp. Decl. ¶ 5; Espinosa Supp. Decl. ¶ 8. And Plaintiffs submit an expert report noting that injunctions barring implementation of other immigration-related executive actions have had "measurable consequences on promoting trust among immigrant communities and influencing behavioral interactions with various aspects of

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government." *See* Barreto Decl. ¶¶ 66-69. In short, we find that Plaintiffs' requested relief would "likely . . . at least diminish further instance of" Plaintiffs' census-related harms. *CREW*, 953 F.3d at 194. Indeed, "[b]ecause Plaintiffs have successfully alleged" that these harms are "ongoing, it logically follows that relief would redress their injury — at least to some extent, which is all that Article III requires." *Id.*

Only two of Defendants' counterarguments warrant further discussion. First, Defendants maintain that Plaintiffs' census-related injuries would not be remedied by a ruling in Plaintiffs' favor because the alleged "'macro environment' of mistrust around immigration" would remain. Defs.' Mem. 19. But that is akin to the argument the EPA made, and the Supreme Court rejected, in *Massachusetts v. E.P.A.*: that granting relief would not remedy the States' injuries because there were other, independent causes for those injuries — namely, the emissions of developing nations — that would persist. *See* 549 U.S. at 524. Put differently, the mere fact that the Presidential Memorandum causes only incremental harms, and that there are other causes of those same harms, does not defeat a finding of redressability. *See id.* ("EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.").

Second, Defendants suggest that Plaintiffs cannot show redressability because "appellate review would likely last well past the end of the conduct of the census." Defs.' Reply 4. Conspicuously, however, Defendants cite no authority for the novel proposition that the availability of higher court review and the possibility of reversal can render a dispute nonjusticiable. Taken to its logical conclusion, that argument would suggest that a plaintiff could never obtain emergency relief in the face of a looming deadline. Far from rejecting such claims, courts routinely hear them on an expedited basis (as we have done here). *See, e.g.*,

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League of Women Voters of N. Carolina v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (noting that in the election context, "once the election occurs, there can be no do-over and no redress" making "injur[ies] to . . . voters real and completely irreparable if nothing is done"). Finally, it bears mentioning that it is *Defendants' own conduct* that has put Plaintiffs in such a precarious position. The President could have issued his Presidential Memorandum well before the census began, in which case Plaintiffs would have had ample time to obtain a definitive ruling on their claims to preempt any chilling effect. Or he could have waited until census operations were over, in which case there would have been no risk of the census-related harms that Plaintiffs seek to remedy. Instead, for unknown reasons, the President waited more than a year after the Supreme Court rejected the citizenship question to issue his Presidential Memorandum, at which point the census was (and still is) in full swing. It would be perverse to conclude that, through their own conduct, Defendants could prevent Plaintiffs from even obtaining a hearing on their claims.

4. Conclusion

In the final analysis, "the gist of the question of standing" (and constitutional ripeness) "is whether [the plaintiffs] have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. E.P.A.*, 549 U.S. at 517 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). That is, the standing requirement "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* (quoting *Lujan*,

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504 U.S. at 581 (Kennedy, J., concurring). Based on our thorough review of the record — including the uncontested declarations submitted in support of Plaintiffs' motion — and the well-established standards for determining whether a plaintiff has standing, we are confident we have jurisdiction to proceed.[11]

D. Prudential Ripeness

As noted, Defendants also invoke the prudential ripeness doctrine. *See* Defs.' Mem. 6-10; Defs.' Reply 1-2. Unlike standing and constitutional ripeness, prudential ripeness does not relate to the Court's jurisdiction. Instead, "when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay." *Simmonds*, 326 F.3d at 357. The "ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry*

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[11] Defendants do not argue that we should engage in a zone-of-interests analysis, which the Supreme Court has sometimes described as a component of "prudential standing." *Lexmark Int'l*, 572 U.S. at 127 n.3. Accordingly, they have waived the argument. *See Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 128 (2d Cir. 2020) (holding, after *Lexmark*, that the zone-of-interests test is not jurisdictional); *see also, e.g.*, *Young v. Conway*, 698 F.3d 69, 85 (2d Cir. 2012) ("It is well-settled that non-jurisdictional arguments and defenses may be waived . . . ."). In any event, in light of *Lexmark*'s observation that "the zone-of-interests analysis . . . asks whether this particular class of persons has a right to sue under this substantive statute" and "whether a *legislatively conferred* cause of action encompasses a particular plaintiff's claim," 572 U.S. at 127 (emphasis added) (alterations, citations, and internal quotation marks omitted), we doubt that it has any application here, as the claims on which Plaintiffs move are constitutional and equitable in nature. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 700-02 (9th Cir. 2019).

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Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); *see Nat'l Org. for Marriage*, 714 F.3d at 691.[12]

"To determine whether to abstain from a case on prudential ripeness grounds, we proceed with a two-step inquiry," evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Nat'l Org. for Marriage*, 714 F.3d at 691 (internal quotation marks omitted). The first step of the inquiry "is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008) (internal quotation marks and alterations omitted). "In assessing th[e] possibility of hardship, we ask whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* at 134 (internal quotation marks omitted). The two-step inquiry requires consideration, in turn, of three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n*, 523 U.S. at 733.

Considering these factors here, we conclude that the test for prudential ripeness is "easily satisfied." *Susan B. Anthony List*, 573 U.S. at 167. First, given that Plaintiffs' alleged census-related harms are occurring now, and can be remedied only if we rule on their claims before census operations conclude in a matter of days or weeks, delaying review would cause Plaintiffs

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[12] In recent years, the Supreme Court has cast doubt on the "continuing vitality of the prudential ripeness doctrine," on that ground that it "'is in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List*, 573 U.S. at 167 (internal quotation marks omitted). But because neither the Supreme Court nor the Second Circuit has abandoned the doctrine yet, we are bound to consider Defendants' arguments here.

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grave hardship. *See Chamber of Commerce of U.S. v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam) (finding a challenge to an Executive Order announcing a policy of the executive branch ripe where "the injury alleged . . . [is that] the mere existence of the Order alters the balance of bargaining power between employers and employees by creating a disincentive for employers to hire replacement workers"). Justice delayed would indeed be justice denied. Moreover, because there are no do-overs for the census, the adverse consequences of that delay could resonate for a decade, until the next decennial census. Second, although Defendants assert in conclusory fashion that judicial intervention "would inappropriately interfere with the Bureau's ongoing process by hindering agency efforts to refine its policies and to apply its expertise," Defs.' Reply 2 (internal quotation marks omitted), that assertion borders on frivolous. On its face, the Presidential Memorandum does not purport to regulate the actual conduct of the census, *see* Presidential Memorandum, 85 Fed. Reg. at 44,679 ("Excluding Illegal Aliens From the Apportionment Base *Following* the 2020 Census" (emphasis added)), and Defendants themselves concede that it "does *not* affect how the Census Bureau is conducting its remaining enumeration operations," Defs.' Mem. 12. Moreover, as discussed below, relief can be crafted to minimize, if not eliminate, interference with administrative action. And finally, although the standing-related question of whether or to what extent Plaintiffs would suffer apportionment-related harms would benefit from further factual development, the gravamen of Plaintiffs' claims — that the President lacks the authority to exclude illegal aliens from the apportionment base — "presents an issue that is 'purely legal, and will not be clarified by further factual development.'" *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Thomas,* 473 U.S. at 581).

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Thus, we conclude there is no basis to defer consideration of Plaintiffs' claims on ripeness ground. The fact that the Presidential Memorandum contains something akin to a "savings clause" — namely, that it is "the policy of the United States to exclude" illegal aliens from the apportionment base "*to the maximum extent feasible and consistent with the discretion delegated to the executive branch*," Presidential Memorandum, 85 Fed. Reg. at 44,680 (emphasis added) — does not alter that conclusion. Where, as here, the President's proclamation "unambiguously commands action" such that "there is more than a 'mere possibility that some agency might make a legally suspect decision,'" such a "savings clause does not and cannot override" the proclamation's "meaning." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018) (quoting *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002)). Indeed, savings clauses must be "read in their context, and they cannot be given effect when the Court, by rescuing the . . . measure, would override clear and specific language." *Id.* at 1239. In this case, the President explicitly declares that "it is the policy of the United States to exclude" illegal aliens "from the apportionment base," an unambiguous directive that, as discussed above, is having immediate and ongoing effects. Moreover, the Presidential Memorandum mandates that this policy be effected "*to the maximum extent*" feasible and consistent with law. Presidential Memorandum, 85 Fed. Reg. at 44,680 (emphasis added). Given that "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), we must and do presume that the Secretary and the Census Bureau will abide by the President's directives and work diligently to help exclude illegal aliens from the apportionment base to the maximum extent possible. Whether doing so would be a lawful exercise of the President's authority is a pure legal question that can be addressed now.

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THE MERITS

In their motion, Plaintiffs seek relief on two grounds: first, they argue that the Presidential Memorandum violates Article I and the Fourteenth Amendment to the Constitution; and second, they contend that it constitutes an *ultra vires* violation of the laws governing the census and apportionment. Pls.' Mem. 1-2. On the latter front, Plaintiffs insist that the Presidential Memorandum exceeds the powers delegated by Congress in 13 U.S.C. § 141 and 2 U.S.C. § 2a in at least two ways: (1) because it contemplates calculating apportionment using tabulations other than those produced by the census and (2) because it seeks to exclude illegal aliens from the apportionment base regardless of whether they are "persons in" a "State" as those terms are used in Section 2a(a). *Id.* at 27-36.

Although Plaintiffs urge us to decide both their constitutional claims and their statutory claims, and the parties focus mostly on the constitutional issues, courts have long been admonished not to "pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *accord Slack v. McDaniel*, 529 U.S. 473, 485 (2000); *House of Representatives*, 525 U.S. at 343-44. Accordingly, we begin — and, as it turns out, end — with Plaintiffs' statutory claims. In doing so, of course, "we start with the text of the statute." *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020). "Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal quotation marks omitted). We may look to legislative history and other tools of statutory construction if the statutory terms are ambiguous or "to corroborate and fortify our

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understanding of the text." *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring).

A. Apportionment Must Be Based on the Results of the Census Alone

Plaintiffs' first argument is that the Presidential Memorandum violates the statutes governing the census and apportionment by producing apportionment figures that are not based solely on the decennial census. This argument relies on the interplay between Section 141 and Section 2a. Subsection (a) of the former requires the Secretary to conduct the "decennial census of population." 13 U.S.C. § 141(a). Subsection (b) then requires the Secretary to report to the President "[t]he tabulation of total population by States under subsection (a) of this section" — that is, *under* the "decennial census" — "as required for the apportionment of Representatives in Congress." *Id.* § 141(b). Section 2a(a), in turn, requires the President to transmit to Congress "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 . . . by the method known as the method of equal proportions . . . ." 2 U.S.C. § 2a(a). By its terms, therefore, Section 141 calls for the Secretary to report a single set of numbers — "[t]he tabulation of total population by States" under the "decennial census" — to the President. And Section 2a, in turn, "expressly require[s] the President to use . . . the data from the 'decennial census'" in determining apportionment. *Franklin*, 505 U.S. at 797. That is, once the final decennial census data is in hand, the President's role is purely "ministerial." *Id.* at 799.

Legislative history and the longstanding understanding of the Executive Branch itself confirm that the Secretary's "tabulation," and the President's apportionment calculations, must be based on decennial census data alone. Significantly, the statutes first took their current form

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in 1929, after a decade-long stalemate over the method for calculating the reapportionment following the 1920 census. *See id.* at 791-92. Congress responded to this problem by creating an "automatic reapportionment" scheme that would be "virtually self-executing." *Id.* at 792. In particular, the scheme created an "automatic connection between the census and the reapportionment"; indeed, that was "*the* key innovation of the Act." *Id.* at 809 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). The Senate Report accompanying the bill explained in reference to the next census:

> The census would be taken in November, 1929. One year later, *with these figures in hand*, the President would report *the census figures*, together with a table showing how, *under these figures*, the House would be apportioned . . . pursuant to a purely ministerial and mathematical formula . . . . Precisely the same process would protect reapportionment in each subsequent decennium.

S. Rep. No. 71-2, at 4 (1929). Along similar lines, the House Report explained that, under the bill, "the House is reapportioned in accordance with the tabulation transmitted by the Secretary of Commerce . . . ; the tabulations transmitted to Congress are on the basis of the 1930 census . . . ." H. Rep. No. 70-2010, at 4 (1929); *see also id.* at 7 (explaining that the Secretary, to whom the bill also originally assigned the task of reapportionment later assigned to the President, "is left with no discretionary power. He must use absolutely, without deviation, the population of each State *as gathered and reported by the Director of the Census*." (emphasis added)).[13]

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[13] Although we are wary of relying too heavily on floor statements by members of Congress, it is worth noting that Senator Vandenberg of Michigan, the principal sponsor the bill, reaffirmed that the legislation required the President "to report the result of a census" and to apply the reapportionment formula to "the result of the census." 71 Cong. Rec. 1613 (1929) (statement of Sen. Vandenberg). Elsewhere, he and Senator Walsh of Montana confirmed in a colloquy with Senator Swanson of Virginia "that the President is bound and has no discretion" but "to make the apportionment *according to the census*." *Id.* at 1845 (statement of Sen. Swanson) (emphasis added).

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Similarly, its position in this litigation notwithstanding, the Department of Justice (the "Justice Department" or "DOJ") has long adhered to the view that the President's statement to Congress regarding apportionment has to be based solely on the tabulation of total population produced by the census. As the Justice Department explained more than forty years ago in *Federation for American Immigration Reform (FAIR) v. Klutznick*, "every inhabitant of a state the Census counts is included in the apportionment base. . . . The total resident population of the states is the apportionment base." Defs.' Reply Mem. & Opp'n at 11, 486 F. Supp. 564 (D.D.C. 1980) (No. 79-CV-3269), 1980 WL 683642, at *7 (citing H.R. Rep. No. 91-1314 (1970)).[14] Along similar lines, the Government acknowledged during oral argument in *Franklin v. Massachusetts* that "[t]he law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives" and that "[i]t would be unlawful . . . just to say, these are the figures, they are right, but I am going to submit a different statement." Oral Arg. Tr. at 12, *Franklin v. Massachusetts*, 505 U.S. 788 (No. 91-1502). "I think under the law he is supposed to base his calculation on the figures submitted by the Secretary." *Id.* at 13; *see also*, Reply Br. Appellants, *Franklin*, 505 U.S. 788 (No. 91-1502), 1992 WL 672612, at *15 (Apr. 20, 1992) ("[T]he method of equal proportions calls for application of a set mathematical formula to the state population totals *produced by the census*." (emphasis added)).

In short, this history confirms our reading of the statutes' plain terms: The Secretary is required to report a single set of figures to the President — namely, "[t]he tabulation of total

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[14] The House Report to which DOJ cited noted unambiguously that "the enumerated decennial census population is the basis for the apportioning of [the House] among the several States." H.R. Rep. No. 91-1314, at 3 (1970). Elsewhere, it summarized the three "elements" of the President's statement under Section 2a(a): "(1) The population of each State *as determined by the decennial census*; (2) The existing total number of Representatives (435); and (3) The apportionment which results from using a mathematical method known as the method of equal proportions." *Id.* at 2 (emphasis added).

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population by States" under the "decennial census" — and the President is then required to use those same figures to determine apportionment using the method of equal proportions.

The Presidential Memorandum deviates from, and thus violates, these statutory requirements. Whereas the statute calls for the Secretary to include only the census figures in his report to the President, the Presidential Memorandum mandates that the Secretary provide a second set of figures as well: namely, the population of each State "exclud[ing]" illegal aliens. Presidential Memorandum, 85 Fed. Reg. at 44,680. The Presidential Memorandum leaves it to the Secretary how to come up with those figures, but they will necessarily be derived from something other than the census itself, as the 2020 census is not gathering information concerning citizenship or immigration status, and the 2020 census itself is counting illegal aliens. *See* Order at 1-2, *New York v. Dep't of Commerce*, 18-CV-2921 (JMF), ECF No. 653 (permanently enjoining the inclusion of a citizenship question on the 2020 census questionnaire); *see also* Presidential Memorandum, 85 Fed. Reg. at 44,680 (noting that "data on illegal aliens . . . relevant for the purpose of conducting the apportionment" may be available as a result of Executive Order 13880, which directed executive agencies "to share information with the Department of Commerce" regarding "the number of citizens, non-citizens, and illegal aliens in the country"). By doing so, the Presidential Memorandum violates Congress's mandate to use the results of the census — and only the results of the census — in connection with the apportionment process and the counting of them in the census pursuant the Residence Rule.

In arguing otherwise, Defendants rely almost exclusively on the Supreme Court's decision in *Franklin*, *see* Defs.' Mem. 40-42; Oral Arg. Tr. 48-54, but that reliance is misplaced. In *Franklin*, the plaintiffs brought two discrete challenges, one a constitutional challenge to the formula used in connection with reapportionment and one a challenge under the Constitution and

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the APA to the conduct of the census — specifically, to the Census Bureau's decision to count federal employees serving overseas as residents of the State listed as their home of record in their personnel files. *See Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233 (D. Mass. 1992). A three-judge district court rejected the first challenge, but agreed with the second. *See id.* at 267-68. On appeal from the latter ruling alone, the Supreme Court reversed. With respect to the plaintiffs' constitutional claim, the Court held that the Secretary's judgment "that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress" was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 505 U.S. at 806. With respect to the plaintiffs' APA claim, the Court held that the decision could not be challenged because the only final action affecting the States was the President's Section 2a(a) statement and the President does not qualify as an "agency" for purposes of the APA. *See id.* at 796-801. The Secretary's Section 141(b) report, the Court explained, "carries no direct consequences for the reapportionment" and, thus, "serves more like a tentative recommendation than a final and binding determination." *Id.* at 798.

While addressing the question of whether the plaintiffs could bring a claim under the APA, the Court described the interplay between Section 2a and Section 141:

> After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a). 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." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. For potential litigants, therefore, the "decennial census" still presents a moving target, even after the Secretary reports to the President. . . . Moreover, there is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him. It is not until the President submits the information to Congress

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> that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives.

505 U.S. at 797-98. The Court acknowledged that the President's role under Section 2a was "admittedly ministerial," but that "d[id] not answer the question whether the apportionment is foreordained by the time the Secretary gives her report to the President." *Id.* at 799. Put simply, the Court concluded, "§ 2a does not curtail the President's authority" — pursuant to "his accustomed supervisory powers over his executive officers" — "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." *Id.* at 799-800.

Defendants seize on this language to argue that the President has discretion to define who should be considered inhabitants — or "persons in each State," 2 U.S.C. § 2a(a); *see* U.S. Const. Art. I § 2, cl. 3 — for purposes of the census. Presidential Memorandum, 85 Fed. Reg. at 44,679; *see* Defs.' Mem. 40-42; Def. Reply 9-10; Oral Arg. Tr. 47. That may or may not be true — we address it below — but it is beside the point for present purposes. *Franklin* does not suggest, let alone hold, that the President has authority to use something other than the census when calculating the reapportionment; indeed, the Court did not even consider the plaintiffs' challenge to the apportionment. At most, *Franklin* establishes that the President retains his "usual superintendent role" with respect to the conduct of the census — and can direct the Secretary to make "policy judgments *that result in 'the decennial census.*'" *Id.* at 799-800 (emphasis added); *see also id.* at 797-98 (referring to "amendment of the 'decennial census' itself" and "instruction by the President to the Secretary to reform the census").[15] But by

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[15] Thus, defense counsel is wrong in suggesting that the *Franklin* Court blessed the use of a tabulation that was based on both the census and "separate records outside the census." Oral Arg. Tr. 52. The overseas personnel were counted as part of the census itself, resulting in a single "tabulation of total population by States" under the "decennial census." 13 U.S.C. § 141(a)-(b). That they were counted using administrative records rather than a questionnaire is

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Defendants' own admission, that is not what the President did here. *See, e.g.*, Joint Pre-Conference Ltr. 5 ("Plaintiffs are not challenging some procedure that will be used in the actual census, but an apportionment number that will be chosen by the President after the census is complete."); Defs.' Mem. 12 ("[T]he Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations . . . ."); ECF No. 120 (Decl. of Albert E. Fontenot, Jr.) ¶ 12 ("The Presidential Memorandum . . . has had no impact on . . . the Census Bureau's commitment to count each person in their usual place of residence, as defined in the [Residence Rule].").

In short, contrary to Defendants' arguments, the statutory scheme enacted by Congress does not give the President authority to "choose" any set of numbers he wants "to plug into the 'method of equal proportions.'" Defs.' Mem. 42. Instead, Congress mandated that the President use a specific set of numbers — those produced by the decennial census itself — for purposes of the reapportionment. By deviating from that mandate, the Presidential Memorandum exceeds the authority of the President and constitutes an *ultra vires* violation of the statutes.

B. The Apportionment Base Cannot Exclude Illegal Aliens Who Reside in a State

The Presidential Memorandum also deviates from Section 2a(a) in defining "the whole number of persons in each State" to categorically exclude illegal aliens residing in each State. Once again, we begin with the plain language of the statute. Defendants do not dispute — in the Presidential Memorandum or in their briefs — that illegal aliens are "persons" within the meaning of the Section 2a(a), and for good reason. The ordinary meaning of the word "person" is "human" or "individual" and surely includes citizens and non-citizens alike. *See Plyler v.*

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of no moment, as Section 141(a) broadly delegates to the Secretary the authority to conduct the census "in such form . . . as he may determine." *Id.* § 141(a).

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Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."). Moreover, the U.S. Code is filled with other statutes that use terms that plainly exclude illegal aliens, such as "citizen" or "alien lawfully admitted." *E.g.*, 5 U.S.C. § 552a(a)(2). "Congress thus distinguishes between a 'citizen' and 'any person' when it wishes to do so." *O'Rourke v. U.S. Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that the phrase "any person" in the Freedom of Information Act, 5 U.S.C. §§ 551 *et seq.*, includes non-citizens); *accord Stone v. Exp.-Imp. Bank of U. S.*, 552 F.2d 132, 136 (5th Cir. 1977); *see also, e.g.*, *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 729 (9th Cir. 2011) (holding that "any person" in the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*, "means any person, including foreign citizens").

Instead, Defendants hang their hats on the four-word phrase "persons in each State." Presidential Memorandum, 85 Fed. Reg. at 44,679; *see* Defs.' Mem. 2, 29-30; Defs.' Reply 11. That phrase, they argue, has been construed to mean "inhabitants" or to turn on "usual residence," terms that are not self-defining and call for "the exercise of judgment." Presidential Memorandum, 85 Fed. Reg. at 44,679. That is true enough. *See Franklin*, 505 U.S. at 803-05 (noting that, since 1790, Congress and the Census Bureau have used words such as "inhabitant" and "[u]sual residence" to "describe the required tie to the State" and that defining the metes and bounds of these terms are not always clear). But it does not follow that illegal aliens — a category defined by legal status, not residence — can be excluded from the phrase. To the contrary, the ordinary definition of the term "inhabitant" is "one that occupies a particular place regularly, routinely, or for a period of time." *See* MERRIAM-WEBSTER'S COLLEGE DICTIONARY 601 (10th ed. 1997). And however ambiguous the term may be on the margins, it surely

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encompasses illegal aliens who live in the United States — as millions of illegal aliens indisputably do, some for many years or even decades.[16]

The Presidential Memorandum provides two examples to support its conclusion that "[t]he 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," Presidential Memorandum, 85 Fed. Reg. at 44,679, but neither is remotely convincing. First, the Memorandum notes that "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." *Id.* True enough, but that is not based on their legal status. Instead, it is based on the fact that the United States is not their "usual residence." (Indeed, that is reflected in the Residence Rule.) Second, the Memorandum points to the fact that "overseas Federal personnel have, at various times, been included in" the apportionment base. *Id.* Once again, true enough. (Indeed, that was the issue in *Franklin*.) But that is based on the fact that the terms "usual residence" and "inhabitant" have "been used

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[16] Defendants argue that it is Plaintiffs' burden to show "that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment," Defs.' Mem. 39, and suggest that Plaintiffs cannot meet that burden because some categories of illegal aliens (e.g., aliens residing in a detention facility after being arrested while crossing the border) can be lawfully excluded, *see id.* at 27. But the examples Defendants proffer are arguably excluded (or excludable) based on their "usual residence," not their legal status. In any event, Defendants cite no authority for applying the standards for facial challenges to the constitutionality of statutes to claims, like those here, that the President has exceeded the authority granted to him by Congress. Indeed, that arguably gets it backwards: If the President goes outside the bounds of the authority granted to him by Congress, a court's power to grant relief should not depend on how far outside the bounds he went. Notably, courts considering similar claims have not approached them in the manner Defendants propose. *See, e.g.*, *Hawaii v. Trump*, 878 F.3d 662, 690-92 (9th Cir. 2017) (concluding that a presidential proclamation exceeded the President's delegated authority under the Immigration and Nationality Act), *rev'd and remanded on other grounds*, 138 S. Ct. 2392 (2018); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1324, 1337-39 (D.C. Cir. 1996) (concluding that an executive order announcing a "policy of the executive branch" was *ultra vires* and invalid).

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broadly enough to include some element of allegiance or enduring tie to a place" and to "include 'persons absent occasionally for a considerable time on public or private business.'" *Franklin*, 505 U.S. at 804-05 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 217 (Max Farrand ed., rev. ed. 1966) (statement of James Madison)). It is simply a non sequitur to suggest, as the Presidential Memorandum does, that just because the phrase "persons in each State" can be construed to *include* people who are "temporarily stationed abroad" but "retain[] their ties to the States," *id.* at 806, it can also be construed to *exclude* people who indisputably inhabit or reside in a State.

Defendants are on no firmer ground in arguing that illegal aliens can be excluded from "the whole number of persons in each State," as that phrase is used in Section 2a, because they "may be removed from the country at any time." Defs.' Mem. 39. A person living in a State but facing future removal is no less a "person[] in that State," Defs.' Reply 4 (internal quotation marks and alteration omitted), than someone living in the State without the prospect of removal. Moreover, many people in immigration custody or removal proceedings actually have *lawful* immigration status, *see, e.g.*, *Ragbir v. Homan*, 923 F.3d 53, 57-58 (2d Cir. 2019), and their placement in custody or removal proceedings does not necessarily render them unlawfully present. Notably, data reveal that immigration judges ultimately allow many aliens in custody or removal proceedings to remain in the United States. *See Immigration Judges Decide 57 Percent Entitled to Remain in U.S.*, TRAC IMMIGRATION (Aug. 17, 2016), https://trac.syr.edu/immigration/reports/435/. And many people initially designated as "undocumented" — including many intercepted at the border — ultimately obtain lawful status, such as asylum. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK FISCAL

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YEAR 2018, at 27 (2019), https://www.justice.gov/eoir/file/1198896/download. Nothing in Section 2a turns on such fluctuations and nuances in legal status.

Once again, legislative history and settled practice confirm our conclusion that "persons in each State" turns solely on residency, without regard for legal status. In looking to legislative history, we look not to the history surrounding the framing of the Constitution or the Reconstruction Amendments, even though the words in the statute mirror those in Article I and the Fourteenth Amendment. Instead, we look to 1929, when Section 2a was enacted and the words "whole number of persons in each State" entered the statutory lexicon. *See* Act of June 18, 1929, Pub. L. No. 71-13 § 22, 46 Stat. 21, 26. That is because our task is to interpret the statute itself, and we do so "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). That is not to say that the constitutional language is irrelevant to our task: The drafters of Section 2a used the same words as those in the Constitution, so their understanding of the constitutional language sheds light on their understanding — and the "ordinary public meaning" — of the statutory text "at the time of its enactment." *Id.* But it is their *understanding* of the constitutional language, *not* whether their understanding was correct (on which we need and do not opine), that matters. *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) ("It is a commonplace of statutory interpretation that Congress legislates against the backdrop of existing law." (internal quotation marks omitted)).[17]

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[17] For this reason, we need not and do not delve into the meaning of the terms "inhabitant" and "usual residence" at the time of the Founding or of the Reconstruction Amendments, or consider whether the concept of unlawful status was known to the Framers of Article I or the Fourteenth Amendment. There is no dispute that the concept of "illegal aliens" existed in 1929, when Section 2a was enacted. *See* Defs.' Mem. 36.

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Notably, in enacting the 1929 Act that used the phrase "whole number of persons in each State," the Senate and the House both considered and rejected amendments that would have excluded non-citizens from the apportionment base. *See* 71 Cong. Rec. 1907 (1929) (Sen. Sackett proposes amending S.B. 312 to require the President's statement to Congress to show "the whole number of persons in each State, exclusive of aliens and excluding Indians not taxed"); *id.* at 2065 (vote on amendment by Sen. Sackett fails); *id.* at 2360-63 (House adopts alienage exclusion as amendment to the apportionment bill); *id.* at 2448-2455 (House adopts amendment of Rep. Tilson to remove the previously adopted alienage exclusion). What is more, opposition to these amendments was based not only on a view that "the whole number of persons in each State" should include every resident of each State, without regard to legal status; it was based also on a view that the Constitution mandated inclusion of illegal aliens residing in the United States. Senator David Reed, for instance, voiced support for an amendment excluding illegal aliens from the apportionment base as a matter of policy but opposed it on grounds of constitutionality and consistent practice. "Every Congress that acted on that part of Article I of the original Constitution and every apportionment that was made in reliance upon that article," he explained, "included all free persons literally. It excluded Indians not taxed and it excluded slaves, but every apportionment inhabitant[] who" was not a "citizen[] w[as] included." *Id.* at 1958. "That construction," he noted then, "has been continuous and consistent." *Id.*

Further evidence of the understanding of the phrase "whole number of persons in each State" in Section 2a is revealed by the opinion of the Senate's legislative counsel on the issue. "That the fourteenth amendment was framed with the intention of including aliens," he wrote, "is indicated by the rejection by the Congress of proposals to base representation on the number of

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citizens and on the number of voters." *Id.* at 1822. Consistent with that understanding, Congress had always included aliens in the apportionment base:

> The practical construction of the constitutional provision by Congress in its apportionment legislation has been uniformly in favor of inclusion of aliens. No exception of noncitizens from the enumeration has been made under any past apportionment. The term "persons" necessarily either includes or excludes aliens; its constitutional meaning can not be changed by Congress; and the fact that it has from the beginning been construed to include aliens should be conclusive if the meaning was open to dispute.

Id. It was "therefore the opinion of [the legislative counsel's] office that there is no constitutional authority for the enactment of legislation excluding aliens from enumeration for the purposes of apportionment of Representatives among the States." *Id.* This prevailing view makes plain that when Congress directed the President to report the "whole number of persons in each State," it understood the phrase to include all who lived in each State, without regard for legal status, and that it did not grant to the President discretion to do by Memorandum what it could not do by statute.[18]

Not for nothing, until the Presidential Memorandum, the Executive Branch had also always taken the view that the 1929 Act, if not the Constitution, prohibited exclusion of illegal aliens from the apportionment base due to legal status alone. In defending against a 1980 challenge to *including* illegal aliens in the apportionment base, for example, the Department of Justice argued that "[t]he plain language of [the Act] maintains the Constitutional requirement of counting all inhabitants of the states, legal and illegal, for purposes of apportionment. . . .

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[18] For what it's worth, later Congresses took similar views. *See FAIR v. Klutznick*, 486 F. Supp. at 576-77 (three-judge court) (describing congressional debates); Stacy Robyn Harold, Note, *The Right to Representation and the Census*, 53 WAYNE L. REV. 921, 923 & n.15 (2007) (collecting congressional debates); *see also, e.g.*, *1980 Census: Counting Illegal Aliens: Hearing on S. 2366 Before the Subcomm. on Energy, Nuclear Proliferation & Fed. Servs. of the S. Comm. on Governmental Affairs*, 96th Cong. 12 (1980) (Senator Javits stating that the Constitution requires "the aggregate number of inhabitants, which includes aliens, legal and illegal").

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Moreover, the long-established practice of both Congress and the Census Bureau of reading the Constitution to require the counting of illegal aliens for apportionment purposes ratifies this construction." Defs.' Reply Mem. & Opp. Pls.' Mot. Summ. J. 11, *FAIR*, 486 F. Supp. 564 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1967)). In 1988, the Justice Department took the position in a letter to Congress that excluding illegal aliens from the census and apportionment base would be unconstitutional, *see* Letter from Thomas M. Boyd, Acting Assistant Attorney Gen., to Rep. William D. Ford (June 29, 1988) (reprinted in U.S. GOV'T PRINTING OFFICE, 1990 CENSUS PROCEDURES AND DEMOGRAPHIC IMPACT ON THE STATE OF MICHIGAN, 240-44 (1988)), a position it reaffirmed one year later, *see* Letter from Carol T. Crawford, Assistant Attorney Gen., to Sen. Jeff Bingaman (Sept. 22, 1989) (reprinted in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989)). And the Census Bureau itself has long "interpreted its constitutional charge *and its statutory mandate* to require counting every person [irrespective of citizenship status] who has a usual residence in any State." *Census Equity Act: Hearing on H.R. 2661 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv.*, 101st Cong. 68 (1989) (statement of Michael R. Darby, Under Sec'y of Commerce for Econ. Affairs) (emphasis added); *accord* Letter from Robert A. Mosbacher, Sec'y of Commerce, to Sen. Jeff Bingaman (Sept. 25, 1989) (reprinted in 135 Cong. Rec. S22,522 (daily ed. Sept. 29, 1989)).

In fact, since 1929 (if not before), the consistent view of both political branches has been that Section 2a, if not the Constitution, requires the inclusion of all residents in the apportionment base, without regard for their legal status. When pressed at oral argument to cite "any instance, any support . . . in the historical record" for the proposition that the President has discretion under Section 2a to exclude illegal aliens from the apportionment base, defense

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counsel came up empty. Oral Arg. Tr. 46 ("We have not been able to identify any."). With admirable candor, albeit some understatement, he was compelled to concede that "[P]laintiffs' best argument is history, and that cuts the other way." *Id.* at 47.

With neither text nor history on their side, the only thing Defendants have remaining is their assertion that excluding illegal aliens from the apportionment base is "more consonant with the principles of representative democracy underpinning our system of Government." Presidential Memorandum, 85 Fed. Reg. at 44,680. That is certainly a defensible (though contestable) proposition. But it is also irrelevant. The Constitution gives to Congress the authority to regulate the census and to reapportion the House. In exercising that authority, and delegating responsibility to the Executive Branch, Congress adopted a different theory of Government, in which the House of Representatives represents the whole population, not a subset of the population, and there is "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964). The President is not free to substitute his own view of what is most "consonant with the principles of representative democracy" for the view that Congress already chose.

The statutory command to use the "whole number of persons in each State" as the apportionment base does not give the President discretion to exclude illegal aliens on the basis of their legal status, without regard for their residency. In declaring that "it is the policy of the United States" to do so, and commanding the Secretary to take steps to carry out that policy, the Presidential Memorandum deviates from, and thus violates, Section 2a.

C. Conclusion

In sum, the Presidential Memorandum deviates from, and thus violates, the statutory scheme in two independent ways: first, by requiring the Secretary to include in his Section

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141(b) report a set of numbers other than "[t]he tabulation of total population by States" under the "decennial census" and contemplating reapportionment based on a set of numbers other than "the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population"; and second, by excluding illegal aliens from the "whole number of persons in each State" that Section 2a(a) requires to be used as the apportionment base.

As Defendants implicitly concede, it follows that Plaintiffs are entitled to summary judgment on their statutory claims pursuant to the *ultra vires* doctrine, a cause of action that "is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The doctrine provides that "[w]hen an executive acts *ultra vires*," as is the case here, "courts are normally available to reestablish the limits on his authority." *Reich*, 74 F.3d at 1328; *see also Stark v. Wickard*, 321 U.S. 288, 309-10 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all [executive branch] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("Courts remain obligated to determine whether statutory restrictions have been violated."). In light of that conclusion, we need not and do not reach Plaintiffs' constitutional claims, let alone the Plaintiffs' claims that did not form the basis

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for their motion. Thus, Defendants' motion to dismiss those claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure is moot.

REMEDIES

Having granted Plaintiffs summary judgment on their statutory claims, we turn to the issue of remedies. Plaintiffs seek a permanent injunction prohibiting all Defendants — including the President himself — from implementing the Presidential Memorandum and a declaratory judgment that the Presidential Memorandum is unlawful. *See* Gov't Pls.' Compl. 44-45; NGO Pls.' Compl. 88-89.

A. Injunctive Relief

It is well established that plaintiffs "seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Specifically, they must show: (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiffs and defendants, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See id.* But because "the government's interest is the public interest," where, as here, the government is a party, the last two factors merge. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *accord Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs easily satisfy each factor and, thus, are entitled to an injunction. First and foremost, as discussed above, the census-related harms that Plaintiffs have demonstrated would be irreparable absent an injunction. That is, because there are no census do-overs, there would be no way to remedy them after the fact. And even if there were a way to correct for them after the fact, the harms, by their nature, are difficult, if not impossible, to measure. *See, e.g.*, *Salinger*

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v. Colting, 607 F.3d 68, 81 (2d Cir. 2010) ("Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure . . . ."). Making matters worse, the harms caused by an inaccurate census would be felt for at least a decade, until the 2030 decennial census — if not longer. *See, e.g.*, Baldwin Decl. ¶ 25 (explaining that because the State of Washington relies on thirty-year population forecasts, which requires "an indicator that goes back in time as far as you are forecasting forward in time," the "2020 census data will be used in forecasting until at least the 2050 census data is available, and probably longer"). For much the same reason, the remedies available at law would plainly be inadequate. *See, e.g.*, *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing an injunction and finding that "the degradation of information . . . would be irreparable, without any adequate remedy at law").

Finally, the balance of the hardships and the public interest both favor an injunction. Indeed, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal quotation marks and citation omitted). Moreover, both the Supreme Court's decision in *Department of Commerce v. House of Representatives* — affirming the Eastern District of Virginia's permanent injunction against the use of statistical sampling to enumerate the population in the 2000 census — and the Second Circuit's holding in *Carey* — affirming a preliminary injunction requiring the Census Bureau to process certain forms and to compare its list of New York City residents against other government records — confirm that the public interest favors an injunction in these cases. *See House of Representatives*, 525 U.S. at 344; *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980).

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As the Second Circuit noted in *Carey*, "the public interest . . . requires obedience . . . to the requirement that Congress be fairly apportioned, based on accurate census figures. Furthermore, it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data." *Id.*

Defendants' sole claim of hardship is that an injunction would "interfere with the Bureau's ongoing process by hindering agency efforts to refine its policies and to apply its expertise." Defs.' Reply 2 (internal quotation marks and alterations omitted).[19] They do not elaborate further, but it is plain that they are not referring to the operations of the census itself because, as noted above, they repeatedly concede that the Presidential Memorandum does "not in any way affect the conduct of the actual census." *Id.* Thus, Defendants must be referring to the Census Bureau's ongoing efforts to figure out how, if at all, to implement the President's directive in the Presidential Memorandum in time to meet the statutory deadline for the Secretary's report to the President. *See* 13 U.S.C. § 141(b). But it is against the public interest to comply with an unlawful directive. And any suggestion that, in the event our decision is reversed on appeal, granting an injunction would hinder the Census Bureau's efforts to comply with the Presidential Memorandum by the deadline are undermined by Defendants' repeated

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[19] Referencing a point they made in passing in a footnote in their opening brief, Defendants also argue for the first time in their reply that an injunction prohibiting the Secretary from transmitting information would violate the Opinions Clause of the Constitution, *see* Defs.' Reply 11 (citing Defs.' Mem. 42 n.17), which empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. 2, § 2, cl. 1. A party may not raise an argument in a footnote or for the first time in reply, so we deem the argument to be waived. *See, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived . . . ."); *Levine v. Lawrence*, No. 03-CV-1694 (DRH) (ETB), 2005 WL 1412143, at *5 (E.D.N.Y. June 15, 2005) ("[F]ailure to adequately brief an argument constitutes waiver of that argument . . . ."). In any event, ensuring that the Secretary complies with the mandates of Section 141(b) — and, by extension, that the President complies with the mandates of Section 2a(a) — does not run afoul of the Opinions Clause.

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assertions that "an erroneous or invalid apportionment number can be remedied after the fact." Defs.' Mem. 48. Finally, any such hardship to Defendants can be mitigated, if not eliminated, by crafting the injunction — as we do below — to bar only the inclusion in the Secretary's Section 141 report of data concerning the number of illegal aliens in each State and to allow the Census Bureau to continue its research efforts.

Thus, a permanent injunction is warranted. In an exercise of our discretion, however, we grant injunctive relief against all Defendants other than the President. The parties vigorously dispute whether and under what circumstances a federal court can grant injunctive relief against the President. *Compare* Defs.' Mem. 44-45, *and* Defs.' Reply 14-15, *with* Pls.' Reply 27 & n.13. At a minimum, however, it is plain that the "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows." *Franklin*, 505 U.S. at 802. Thus, "[a]s a matter of comity," if nothing else, "courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President." *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc) (per curiam). That is particularly true where the court can grant complete relief without enjoining the President, as is the case here. *See, e.g.*, *Franklin*, 505 U.S. at 802 ("[W]e need not decide whether injunctive relief against the President [i]s appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."); *accord Evans*, 536 U.S. at 463-64. In fact, if anything, the need to enjoin the President himself is even weaker here than it was in *Franklin* and *Evans*, which were litigated *after* the President had transmitted his apportionment statement to Congress. For the plaintiffs in those cases to obtain meaningful relief, therefore, the President himself would have needed to calculate a new apportionment figure and to then submit a new report to Congress. Here, by contrast, enjoining Defendants

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other than the President (and granting a declaratory judgment, as discussed below) would provide Plaintiffs with complete relief, as the President cannot exclude illegal aliens from his apportionment calculations in his statement to Congress unless the Secretary gives him the relevant information in the Section 141 report.

Accordingly, the Court enjoins all Defendants other than the President from including in the Secretary's report to the President pursuant to Section 141(b) any "information permitting the President . . . to exercise the President's discretion to carry out the policy set forth in section 2" of the Presidential Memorandum — that is, any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Instead, consistent with the Census Act, the Secretary's Section 141(b) report shall include only "[t]he tabulation of total population by States under" Section 141(a) "as required for the apportionment of Representatives in Congress among the several States," 13 U.S.C. § 141(b) — that is, "information tabulated according to the methodology set forth in [the Residence Rule]," Presidential Memorandum, 85 Fed. Reg. at 44,680.[20] To be clear, as an exercise of its discretion, the Court does *not* enjoin Defendants from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State. That ensures that in the event that a higher court disagrees

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[20] Separately, there is an active debate over the propriety of "nationwide" or "universal" injunctions. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring); *see also* Memorandum from the Attorney General to Heads of Civil Litigating Components & United States Attorneys, U.S. Dep't of Justice, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download. That debate has no relevance to this case, for many of the same reasons that it had no relevance in the citizenship question litigation. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 677-78. Not surprisingly, therefore, Defendants do not even raise the issue.

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with our ruling (prior to the Section 141(b) deadline), the Secretary will be able to comply with the Presidential Memorandum in a timely fashion.

B. Declaratory Relief

In addition, we grant Plaintiffs' request for declaratory relief. The Declaratory Judgment Act vests federal courts with discretion to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). In exercising that discretion, courts must consider (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether a judgment would finalize the controversy and offer relief from uncertainty; (3) whether the proposed remedy is being used merely for procedural fencing or a race to *res judicata*; (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (5) whether there is a better or more effective remedy. *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359-60 (2d Cir. 2003). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate," Fed. R. Civ. P. 57, and we may grant declaratory relief "whether or not further relief is or could be sought," 28 U.S.C. § 2201(a); *see also Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("[A] request for declaratory relief may be considered independently of whether other forms of relief are appropriate.").

In our view, a declaration that the Presidential Memorandum is unlawful "would serve a useful purpose here, settle the legal issues involved, finalize the controversy, and offer [Plaintiffs] relief from uncertainty." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 105 (2d Cir. 2012). Indeed, an unambiguous declaration

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that the Presidential Memorandum is unlawful because the President does not have the authority to exclude illegal aliens from the apportionment base would serve the further useful purpose of "reasurr[ing] people they will be counted for the purpose of determining . . . congressional seats and electoral votes," Espinosa Supp. Decl. ¶ 8, thereby directly addressing the chilling effect on census participation that the Memorandum has caused. *Cf. Foretich v. United States*, 351 F.3d 1198, 1215 (D.C. Cir. 2003) ("[A] declaration will remove the imprimatur of government authority from [the illegal a]ct . . . ."). Such a declaration is particularly useful given that, for the reasons we discussed above, we decline to enjoin Defendants from taking steps to research whether or how the Presidential Memorandum could be implemented. That is, an unambiguous judicial declaration that the Presidential Memorandum is unlawful would help ensure that the chilling effects on participation in the census are mitigated to the maximum extent possible.

CONCLUSION

There is no dispute that the President has "accustomed supervisory powers over his executive officers," *Franklin*, 505 U.S. at 800, and thus retains some discretion in the conduct of the decennial census and resulting apportionment calculation. Nevertheless, where the authority of the President (or other members of the Executive Branch) to act is derived from statutes passed by Congress, the President must act in accordance with, and within the boundaries of, the authority that Congress has granted. For the reasons discussed above, we conclude that the President did not do so here and that the Presidential Memorandum is an *ultra vires* violation of Congress's delegation of its constitutional responsibility to count the whole number of persons in each State and to apportion members of the House of Representatives among the States according to their respective numbers under 2 U.S.C. § 2a and 13 U.S.C. § 141. Accordingly, Plaintiffs' motion for summary judgment with respect to their statutory *ultra vires* claims is

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GRANTED, Defendants (other than the President) are ENJOINED as set forth above, and the Presidential Memorandum is DECLARED unlawful. We need not and do not reach the merits of Plaintiffs' other claims and need not address their request, in the alternative, for a preliminary injunction. Finally, Defendants' motion to dismiss for lack of jurisdiction is DENIED and their motion to dismiss for failure to state a claim is DENIED as moot.[21]

The Clerk of Court is directed to terminate ECF Nos. 74 and 117 and to close this case.

SO ORDERED.

Dated: September 10, 2020
New York, New York

/s/
RICHARD C. WESLEY
United States Circuit Judge

/s/
PETER W. HALL
United States Circuit Judge

/s/
JESSE M. FURMAN
United States District Judge

[21] We believe that this matter was properly heard by a three-judge panel for the reasons set forth in Judge Furman's request to then-Chief Judge Katzmann for the appointment of such a panel. *See* ECF No. 68. Nevertheless, mindful that the issue is not clear-cut and that the Second Circuit has determined that it is jurisdictional, *see Kalson v. Paterson*, 542 F.3d 281, 286-87 (2d Cir. 2008), we follow the lead of prior three-judge panels by certifying that Judge Furman, to whom these cases were originally assigned, individually arrived at the same conclusions that we have reached collectively. *See Swift & Co. v. Wickham*, 382 U.S. 111, 114 n.4 (1965) (noting with approval that "[t]his procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear has been used before" (citing *Query v. United States*, 316 U.S. 486 (1942))); *FAIR v. Klutznick*, 486 F. Supp. at 578 (three-judge court) ("District Judge Gasch additionally certifies that he individually arrived at the same conclusion that we collectively reached . . . out of abundant caution, so that in the event we are mistaken, an appeal can still be expeditiously taken in the appropriate forum." (internal quotation marks and citation omitted)); *cf. Massachusetts v. Mosbacher*, 785 F. Supp. 230, 238 n.6 (D. Mass.) (three-judge court) ("Because the author of this opinion is the single district judge to whom this case was initially assigned, this opinion stands as certification that the author has individually arrived at the conclusions expressed collectively in the opinion and the judgment of this three-judge court."), *rev'd on other grounds sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992).

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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 (RCW) (PWH) (JMF)
NEW YORK IMMIGRANT COALITION, et al., Plaintiffs, -v- DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (RCW) (PWH) (JMF) (Consolidated) FINAL JUDGMENT AND PERMANENT INJUNCTION

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

Pursuant to the Court's Opinion and Order of September 10, 2020, it is ORDERED, ADJUDGED, and DECREED as follows:

FINAL JUDGMENT

Final judgment is entered for Plaintiffs and against Defendants on Plaintiffs' claims arising from an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141 (namely, the Fifth Claim for Relief in the Governmental Plaintiffs' Amended Complaint and Count Two in the NGO Plaintiffs' Amended Complaint).

DECLARATION AND PERMANENT INJUNCTION

The July 21, 2020 Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (the "Presidential Memorandum"), announcing that it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status, is DECLARED unlawful as an *ultra vires* violation of Congress's delegation of authority to conduct the decennial census and apportionment calculation pursuant to 2 U.S.C. § 2a and 13 U.S.C. § 141.

The Secretary of Commerce in his official capacity, the Director of the Census Bureau in his official capacity, the U.S. Department of Commerce, and the U.S. Census Bureau, and any successors to those offices, together with their agents, servants, employees, attorneys, and other persons who are in active concert or participation with the foregoing, *see* Fed. R. Civ. P. 65(d)(2), are PERMANENTLY ENJOINED from including in the Secretary's report to the President pursuant to Section 141(b) any information permitting the President to exercise the President's discretion to carry out the policy set forth in section 2 of the Presidential Memorandum — that is, any information concerning the number of aliens in each State who are not in a lawful immigration status under the Immigration and Nationality Act.

SO ORDERED.

Dated: September 10, 2020
New York, New York

/s/
RICHARD C. WESLEY
United States Circuit Judge

/s/
PETER W. HALL
United States Circuit Judge

/s/
JESSE M. FURMAN
United States District Judge

BC-DOC-0000028787

From: Martin, Nicole (Federal) [NMartin1@doc.gov]
Sent: 7/7/2020 6:47:07 PM
To: Kelley, Karen (Federal) [KKelley@doc.gov]
CC: Brooke, Beatrice E. (Federal) [BBrooke1@doc.gov]; Lane, Jennifer (Federal) [JLane@doc.gov]; Risko, Daniel (Federal) [DRisko@doc.gov]; Paranzino, Anthony (Federal) [AParanzino@doc.gov]
Subject: Schedule: Wednesday, July 8, 2020
Attachments: Kelley Karen (Federal) Calendar.ics; 0) Speaking Invitation for Review__PAC-DBIA- Meeting on July 28_ds_07012020.docx; 1a) SMDC__0. Sr Management Agenda 2020.07.08.docx; 1b) SMDC__2.a. SMDC Differential Privacy Slides 2020.07.08.pdf; 1c) SMDC__2.b. 2020 Census Secretary_Briefing b(5) - DP 2020.07.06.pdf; 1d) SMDC__3. b(5) - DP 1e) SMDC__4. 2020 Census Phased Restart DOC Exec Report Slides for 2020.07.06.pdf; 1f) SMDC__5. 2020 Census DOC Exec Report Slides for 2020.07.06.pdf; 2a) Policy Committee__07-08-2020 Policy Committee Agenda.docx; 4) WHL__White House Liaison Meeting 7.8.20.docx; 3) 07-08-2020 Bureau Leadership Agenda_KDK Book.docx

Good evening ma'am,

Please see tomorrow's schedule below. Meeting materials are attached and the attachment numbers are listed in the annotated schedule.
We have also included **ATTACHMENT 0** for you to review regarding a speaking engagement held on July 28 with Secretary Ross.

We are waiting on the updated BIG Memo for tomorrow's Policy Committee Meeting and will provide if/when received.

Best,
Nicole

Karen Kelley Calendar
Wednesday, July 8, 2020

Wed, Jul 8

8:00 AM – 8:30 AM	**Free**
8:30 AM – 8:45 AM	Check in b(6)
8:45 AM – 9:00 AM	Prep Call b(6)
9:00 AM – 10:15 AM	Senior Management Decennial Committee b(6) **ATTACHMENT 1A, 1B, 1C, 1D, 1E, 1F**
10:15 AM – 11:00 AM	Policy Committee Meeting b(6) **ATTACHMENT 2A**
11:00 AM – 11:45 AM	DOC Bureau Leadership b(6) **ATTACHMENT 3**
11:45 AM – 1:00 PM	Daily Check-In b(6)
12:00 PM – 12:30 PM	PMC COVID Call - Weekly on Wednesdays b(6)

☐	**1:00 PM – 1:30 PM**	**Free**
■	1:30 PM – 2:00 PM	Meet with CFO ASA b(6)
■	2:00 PM – 2:30 PM	Meet with Inspector General b(6)
■	2:30 PM – 3:00 PM	Enterprise Services b(6)
■	3:00 PM – 3:30 PM	Check In: OBL b(6)
■	3:30 PM – 4:30 PM	Check in: White House Liaison Office b(6) ATTACHMENT 4
☐	**4:30 PM – 5:00 PM**	**Free**

Nicole Martin
Office of the Deputy Secretary
U.S. Department of Commerce
NMartin1@doc.gov
Cell: b(6)

Organizer:	Kelley, Karen (Federal) : KKelley@doc.gov
Subject:	Check In: OBL
Location:	RM 58044
Start Time:	2020-07-08T15:00:00-04:00
End Time:	2020-07-08T15:30:00-04:00
Attendees:	Wilson, Patrick (Federal) : pwilson@doc.gov, Walsh, Michael (Federal) : invalid:nomail, Martin, Nicole (Federal), NMartin1@doc.gov

Location: b(6)
Start Time: 2020-07-08T19:00:00Z
End Time: 2020-07-08T19:30:00Z

b(6)
Participant: b(6)

Leader: b(6) Dan

Organizer:	Kelley, Karen (Federal) : KKelley@doc.gov
Subject:	Meet with CFO ASA
Location:	RM 58044
Start Time:	2020-07-08T09:00:00-04:00
End Time:	2020-07-08T09:30:00-04:00
Attendees:	Gilman, Thomas (Federal) : TGilman@doc.gov, Lane, Jennifer (Federal) : JLane@doc.gov, DepSec Conference Room Calendar b(6) @doc.gov, Schnare, Nicholas (Federal) : NSchnare1@doc.gov

Location: b(6)

Start Time: 2020-07-08T17:30:00Z

End Time: 2020-07-08T18:00:00Z

b(6)

Participant: b(6)

Leader: b(6) Dan

Organizer:	Kelley, Karen (Federal) : KKelley@doc.gov
Subject:	Meet with Inspector General
Location:	RM 58044
Start Time:	2020-07-08T14:00:00-04:00
End Time:	2020-07-08T14:30:00-04:00
Attendees:	Gustafson, Peg : pgustafson@oig.doc.gov, Walsh, Michael (Federal) : MWalsh@doc.gov, Gilman, Thomas (Federal), TGilman@doc.gov, DepSec Conference Room Calendar b(6) @doc.gov, Casey, Melissa, invalid:nomail, Johnston, Robert : rjohnston@oig.doc.gov, Cunningham, Melissa : MCunningham@oig.doc.gov, Preskenis, Kevin (Federal) : KPreskenis@doc.gov

Location: b(6)

Start Time: 2020-07-08T18:00:00Z

End Time: 2020-07-08T18:30:00Z

b(6)

Participant: b(6)

Leader: b(6) Dan

Organizer: Blair, Robert (Federal) : RBlair@doc.gov

Subject: Policy Committee Meeting

Location: b(6)

Start Time: 2020-07-08T10:00:00-04:00

End Time: 2020-07-08T11:00:00-04:00

Attendees: Woolcott, Craig (Federal) : CWoolcott@doc.gov, Boney, Virginia (Federal) : VBoney@doc.gov, Jones, Christa D, christa.d.jones@census.gov, McClelland, Michelle O (Federal) : mMcClelland@doc.gov, Phelps, Michael (Federal), MPhelps@doc.gov, Young, Henry (Federal) : HYoung1@doc.gov, McKinney, Bradley : Bradley.McKinney@trade.gov, Gilman, Thomas (Federal) : TGilman@doc.gov, Preskenis, Kevin (Federal) : KPreskenis@doc.gov, Rockas, James (Federal) : JRockas@doc.gov, Oconnell, Kevin (Federal) : kevin.oconnell@noaa.gov, Neuhaus, Chelsey (Federal) : CNeuhaus@doc.gov, Paranzino, Anthony (Federal) : AParanzino@doc.gov, Luce, John (Federal) : john.luce@noaa.gov, Kinkoph, Douglas : DKinkoph@ntia.doc.gov, Lane, Jennifer (Federal) : JLane@doc.gov, Iancu, Andrei : Andrei.Iancu@USPTO.GOV, Risko, Daniel (Federal) : DRisko@doc.gov, Kurland, Kevin : Kevin.Kurland@bis.doc.gov, Semsar, Joseph (Federal) : JSemsar@doc.gov, Frushone, Joel (Federal) : JFrushone@eda.gov, Byrd, David (Federal) : DByrd@mbda.gov, Stewart, Coke : Coke.Stewart@uspto.gov, Olson, Stephanie (Federal), SOlson@doc.gov, Gallatin, Kirt : Kirt.Gallatin@trade.gov, Kimball, Kevin A. : kevin.kimball@nist.gov, Wasilewski, Jim : JWasilewski@ntia.doc.gov, Hitt, Lucas : Lucas.Hitt@bea.gov, Campbell, Mara (Federal), MCampbell@eda.gov, Jacobs, Neil (Federal) : neil.jacobs@noaa.gov, Jordan, Taylor (Federal), Taylor.Jordan@noaa.gov, Sleiman, William (Federal) : WSleiman@doc.gov, Perlmutter, Shira, Shira.Perlmutter@USPTO.GOV, Hill, Joann (Federal) : Jhill@mbda.gov, Kelley, Karen (Federal) : KKelley@doc.gov, Martin, Nicole (Federal) : NMartin1@doc.gov, Ding, Michael (Federal) : MDing@doc.gov, Langdon, David (Federal), DLangdon@doc.gov, Holloway, Eric : Eric.Holloway@trade.gov, Burris, Meghan (Federal), MBurris@doc.gov, Buerstatte, Craig (Federal) : CBuerstatte@eda.gov, Ramdat, Grace : Grace.Ramdat@USPTO.GOV, Laroski, Joseph : Joseph.Laroski@trade.gov, Preston, Robert (Federal) : RPreston@doc.gov, Hull, Cordell : Cordell.Hull@bis.doc.gov, Copan, Walter : walter.copan@nist.gov, Sun, Ryan (Federal), RSun@mbda.gov, Foti, Anthony (Federal) : AFoti@doc.gov, Simms, Pat (Federal) : Pat.A.Simms@noaa.gov, Peter, Laura : Laura.Peter@USPTO.GOV, Lopes, Alexander : Alexander.Lopes@bis.doc.gov, Tufts, Clayton D. (Federal) : CTufts@eda.gov, Fleming, David (Federal) : DFleming@doc.gov, Teague, Anne (Federal) : ATeague@doc.gov, Goodman, Maria (Federal) : MGoodman@doc.gov, Walsh, Michael (Federal) : MWalsh@doc.gov, Teague, Anne : Anne.Teague@bis.doc.gov, Wasilewski, Jim : JWasilewski@ntia.gov, Boehm, Jason : jason.boehm@nist.gov, Van Meter, Garth (Federal), GVanMeter@eda.gov

b(6)

Participate Code: b(6)

Subject: Policy Committee Meeting
Location: b(6)
Start Time: 2020-07-08T14:15:00Z
End Time: 2020-07-08T15:00:00Z

b(6)
Participate Code: b(6)

Organizer: Kelley, Karen (Federal) : KKelley@doc.gov

Subject: Check in: White House Liaison Office

Location: b(6)

Start Time: 2020-07-08T15:30:00-04:00

End Time: 2020-07-08T16:30:00-04:00

Attendees: Risko, Daniel (Federal) : DRisko@doc.gov, Walsh, Michael (Federal) : MWalsh@doc.gov, Preskenis, Kevin (Federal), KPreskenis@doc.gov, Gilman, Thomas (Federal) : TGilman@doc.gov, LaBruna, Anthony (Federal), ALaBruna@doc.gov, McLean, Sean (Federal) : SMcLean@doc.gov, DepSec Conference Room Calendar; b(6) @doc.gov, Martin, Nicole (Federal) : NMartin1@doc.gov

Dial-in information:

b(6)

Participant: b(6)

Organizer: Kelley, Karen (Federal) : KKelley@doc.gov

Subject: DOC Bureau Leadership

Location: b(6)

Start Time: 2020-07-08T11:00:00-04:00

End Time: 2020-07-08T11:45:00-04:00

Attendees: Burris, Meghan (Federal) : MBurris@doc.gov, Byrd, David (Federal) : DByrd@mbda.gov, Dillingham, Steven, steven.dillingham@census.gov, Brebbia, Sean (Federal) : SBrebbia@doc.gov, Blair, Robert (Federal), RBlair@doc.gov, Semsar, Joseph : Joseph.Semsar@trade.gov, Gartzke, Dana (Federal) : DGartzke@eda.gov, Gilman, Thomas (Federal) : TGilman@doc.gov, Risko, Daniel (Federal) : DRisko@doc.gov, Oconnell, Kevin (Federal) : kevin.oconnell@noaa.gov, Hull, Cordell : Cordell.Hull@bis.doc.gov, Iancu, Andrei : Andrei.Iancu@USPTO.GOV, Copan, Walter : walter.copan@nist.gov, Jacobs, Neil (Federal) : neil.jacobs@noaa.gov, Gorey, Lauren (Federal) : LGorey@doc.gov, Rockas, James (Federal) : JRockas@doc.gov, Candeub, Adam : acandeub@ntia.gov, Walsh, Michael (Federal), MWalsh@doc.gov, McLean, Sean (Federal) : SMcLean@doc.gov, Olson, Stephanie (Federal), SOlson@doc.gov, Wilson, Patrick (Federal) : pwilson@doc.gov, Foti, Anthony (Federal), AFoti@doc.gov, Martin, Nicole (Federal) : NMartin1@doc.gov, Paranzino, Anthony (Federal) : AParanzino@doc.gov, Ramdat, Grace : Grace.Ramdat@USPTO.GOV, Luce, John (Federal) : john.luce@noaa.gov, Preskenis, Kevin (Federal) : KPreskenis@doc.gov, Pelter, Jeremy : Jeremy.Pelter@bis.doc.gov, Sun, Ryan (Federal) : RSun@mbda.gov, Boney, Virginia (Federal) : VBoney@doc.gov, Goudarzi, Talat (Federal) : TGoudarzi@doc.gov, Simms, Pat (Federal) : Pat.A.Simms@noaa.gov

Dial in:
b(6)
Participant code b(6)

Leader code: b(6)

Start Time:	2020-07-08T15:00:00Z
End Time:	2020-07-08T15:45:00Z

Organizer: Kelley, Karen (Federal) : KKelley@doc.gov

Subject: Enterprise Services

Location: b(6)

Start Time: 2020-07-08T13:30:00-04:00

End Time: 2020-07-08T14:00:00-04:00

Attendees: Lane, Jennifer (Federal) : JLane@doc.gov, Coggins, Wynn (Federal) : WCoggins@doc.gov, Gilman, Thomas (Federal), TGilman@doc.gov, Preskenis, Kevin (Federal) : KPreskenis@doc.gov, Risko, Daniel (Federal) : DRisko@doc.gov, Schnare, Nicholas (Federal) : NSchnare1@doc.gov, Armstrong, Darlene (Federal) : DArmstrong@doc.gov

b(6)

P: b(6)

L: b(6) Dan

Start Time: 2020-07-08T18:30:00Z

End Time: 2020-07-08T19:00:00Z

b(6)

P: b(6)

L b(6) Dan

Organizer: Rigas, Michael J. EOP/OMB : b(6)

Subject: PMC COVID Call - Weekly on Wednesdays

Location: Participant Dial-In: b(6) Code b(6)

Start Time: 2020-07-08T12:00:00-04:00

End Time: 2020-07-08T12:30:00-04:00

Attendees: Erin.McCracken@sba.gov : invalid:nomail, Lim, Evelyn : invalid:nomail, Noah.Mitchell@ed.gov : invalid:nomail, Catherine.Bird@hhs.gov : invalid:nomail, lupe.morales@hq.dhs.gov : invalid:nomail, b(6) invalid:nomail, william.cooper@hq.doe.gov : invalid:nomail, emily.murphy@gsa.gov : invalid:nomail, Kratchman, Jessica A. EOP/OMB : invalid:nomail, Jeffrey.J.Tribiano@irs.gov : invalid:nomail, b(6) - Director Cabaniss invalid:nomail, Scher, Adam A. EOP/OMB : invalid:nomail, b(6) invalid:nomail, Connor, Cameron M. EOP/WHO : invalid:nomail, sfrechter@usaid.gov, invalid:nomail, Corrigan, Patrick M. EOP/OMB : invalid:nomail, York, John W. : invalid:nomail, Seidner, Rob B. EOP/OMB : invalid:nomail, Schneider, Grant M. EOP/OMB : invalid:nomail, Abrams, Andrew D. EOP/OMB, invalid:nomail, Kelley, Karen (Federal) : invalid:nomail, pamela.powers@va.gov, invalid:nomail, Alexandra Petrucci - AC : invalid:nomail, b(6) - Timothy Duffy invalid:nomail, allison.brigati@gsa.gov : invalid:nomail, Kan, Derek T. EOP/OMB : invalid:nomail, b(6) b(6) invalid:nomail, Sarah.Williams@sba.gov : invalid:nomail, kiel_weaver@ios.doi.gov : invalid:nomail, Boyd, Marshall T. EOP/OMB : invalid:nomail, McCormack, Brian V. EOP/OMB : invalid:nomail, edh6886@hhs.gov, invalid:nomail, Omura, John Daniel (CDC/DDNID/NCCDPHP/DNPAO) : invalid:nomail, Charles.P.Rettig@irs.gov, invalid:nomail, Preskenis, Kevin (Federal) : invalid:nomail, Nevins, Kristan K. EOP/WHO, invalid:nomail, Williams.James.E2@dol.gov : invalid:nomail, Kelley, Michelle B. EOP/OMB : invalid:nomail, DeputySecretary@hhs.gov : invalid:nomail, SLC1@usda.gov : invalid:nomail, Billy, Stephen M. EOP/OMB, invalid:nomail, Paranzino, Anthony (Federal) : invalid:nomail, John.N.Bobbitt@hud.gov : invalid:nomail, Kenneth.Callahan@hhs.gov : invalid:nomail, Garza, Tony R. EOP/OMB : invalid:nomail, dfeith@usaid.gov, invalid:nomail, katherine_white@ios.doi.gov : invalid:nomail, kate_macgregor@ios.doi.gov : invalid:nomail, Kevin.Q.McIver@irs.gov : invalid:nomail, FZH7@cdc.gov : invalid:nomail, carla.sansalone@gsa.gov, invalid:nomail, Samantha.Upwright@treasury.gov : invalid:nomail, angela.bailey@hq.dhs.gov, invalid:nomail, Brian.D.Montgomery@hud.gov : invalid:nomail, Schoen, Ansley M. EOP/OMB, invalid:nomail, natalie.massey@nasa.gov : invalid:nomail, j.morhard@nasa.gov : invalid:nomail, Sandy, Mark S. EOP/OMB, invalid:nomail, scott_cameron@ios.doi.gov : invalid:nomail, Steven.Bradbury@dot.gov, invalid:nomail, benevento.douglas@epa.gov : invalid:nomail, SLC1@osec.usda.gov, invalid:nomail, Cutts, Matthew D. EOP/OMB : invalid:nomail, Taransky, Naomi S. EOP/OMB, invalid:nomail, Johnson, Miles M. EOP/OMB : invalid:nomail, Croghan, Mary E. EOP/WHO : invalid:nomail, Aman.Onallah@hhs.gov : invalid:nomail, Thomas.Keane@hhs.gov : invalid:nomail, Taylor.Hittle@hhs.gov, invalid:nomail, vmo0@cdc.gov : invalid:nomail, Kelsey.Kats@treasury.gov : invalid:nomail, Eng.Connie@epa.gov : invalid:nomail, mark.menezes@hq.doe.gov : invalid:nomail, Ursula.S.Gillis@irs.gov, invalid:nomail, Kinneen, Kelly A. EOP/OMB : invalid:nomail, Daniel.sitterly@va.gov : invalid:nomail, Wooten, Michael E. EOP/OMB : invalid:nomail, McGuire, Denzel E. EOP/OMB : invalid:nomail, Smith, Sarah B. EOP/OMB, invalid:nomail, Soltis, Timothy F. EOP/OMB : invalid:nomail, Warren, Peter N. EOP/OMB, invalid:nomail, pizzella.patrick@dol.gov : invalid:nomail, troy.edgar@hq.dhs.gov : invalid:nomail, Maya.a.suero@usdoj.gov, invalid:nomail, Lofthus, Lee EOP : invalid:nomail, MountsJX@state.gov : invalid:nomail, Dreher, Megan E. EOP/OMB : invalid:nomail, cathy.h.mangum@nasa.gov : invalid:nomail, Reilly, Tom M. EOP/OMB, invalid:nomail, emily.threadgill@sba.gov : invalid:nomail, 'Dahm, Matthew M. (CDC/NIOSH/DFSE/FRB)', invalid:nomail, dsx2@cdc.gov : invalid:nomail, kevin.d.johnson@gsa.gov : invalid:nomail, b(6) : invalid:nomail, b(6) : invalid:nomail, b(6) invalid:nomail, b(6) : invalid:nomail, Duffey, Michael P. EOP/OMB : invalid:nomail, robert.borden@gsa.gov : invalid:nomail, randolph.alles@hq.dhs.gov : invalid:nomail, 'RigasM2@opm.gov', invalid:nomail, Fairweather, Rob S. EOP/OMB : invalid:nomail, b(6) invalid:nomail, William.bookless@nnsa.doe.gov : invalid:nomail, b(6) : invalid:nomail, Mitchell.Zais@ed.gov, invalid:nomail, jovita@sba.gov : invalid:nomail, Pfundt, Tiffany (OS/IOS) : invalid:nomail, Lucas, Adrienne E. EOP/OMB : invalid:nomail, Jennifer.Funk@dot.gov : invalid:nomail, byi8@cdc.gov, invalid:nomail, Daphnis, Kristy L. EOP/OMB : invalid:nomail, David.Black@ssa.gov : invalid:nomail, KStaley@usaid.gov : invalid:nomail, Spooner, Sarah W. EOP/OMB : invalid:nomail, Aman.Dickel@hhs.gov, invalid:nomail, Burris, Jordan C. EOP/OMB : invalid:nomail, Demps, Tasha M. EOP/OMB, invalid:nomail, Frazier, Ashley N. EOP/OMB : invalid:nomail, Pasquantino, John C. EOP/OMB : invalid:nomail, Maureen.Gardner@usda.gov : invalid:nomail, Jacklyn.A.Ward2@hud.gov : invalid:nomail, Kent, Suzette K. EOP/OMB, invalid:nomail, Patricia.Griffin@treasury.gov : invalid:nomail, Otalora, Nicolas (HHS/IOS), invalid:nomail, michael.rigas@opm.gov : invalid:nomail, eric.hargan@hhs.gov : invalid:nomail, Rafiekian, Christine (Federal), invalid:nomail, Agrella, Austin J. EOP/WHO : invalid:nomail, bglick@usaid.gov : invalid:nomail, Uldricks, Nathan R. EOP/OMB : invalid:nomail, Walsh, Michael (Federal) : invalid:nomail, kailee.tkacz@usda.gov, invalid:nomail, Karen.Jeffries@va.gov : invalid:nomail, natalie.l.simms@nasa.gov : invalid:nomail, Hayes, Bradley F. EOP/OMB : invalid:nomail, Field, Lesley A. EOP/OMB : invalid:nomail, b(6) - Megan Scofield @usdoj.gov, invalid:nomail, Ginn, Vance V. EOP/OMB : invalid:nomail, Talbert, Kent : invalid:nomail, chris.fall@hq.doe.gov : invalid:nomail, Bedan, Morgan E. EOP/WHO : invalid:nomail, sob8@cdc.gov, invalid:nomail, Stephanie.Hall@ssa.gov : invalid:nomail, Denise.Carter@ed.gov :

invalid:nomail

DO NOT FORWARD
//Direct all questions to: b(6)

Daily PMC COVID Call
Wednesdays ONLY at 12 PM.

Dial-in
Please dial in 10 minutes before 12:00 PM to ensure all participants will be able to join the call
Participant Dial-In: b(6)
Access Code: b(6)

Reminders:

- This is a private call – closed to the press and off the record.
- This call is fully interactive – please mute your line if you are not speaking.
- This is a moderated call, all participants must dial-in directly.
- Please dial-in 10 minutes prior to the start of the call.

Organizer: Kelley, Karen (Federal) : KKelley@doc.gov

Subject: Check in

Location: b(6)

Start Time: 2020-07-08T08:30:00-04:00

End Time: 2020-07-08T08:45:00-04:00

Attendees: Gilman, Thomas (Federal) : TGilman@doc.gov, Preskenis, Kevin (Federal) : KPreskenis@doc.gov, Walsh, Michael (Federal), invalid:nomail, Risko, Daniel (Federal) : DRisko@doc.gov

b(6)

Participant: b(6)

Leader: b(6) - Dan

DEPUTY SECRETARY
MEETING OF THE PRESIDENT'S ADVISORY COUNCIL
ON DOING BUSINESS IN AFRICA (PAC-DBIA)

THROUGH:	Joseph Semsar Deputy Under Secretary for International Trade, Performing the non-exclusive functions and duties of the Under Secretary for International Trade
EVENT DATE & TIME:	July 28, 2020, from 12 pm to 1pm (EDT)
INTERNAL POC:	Giancarlo Cavallo, Giancarlo.Cavallo@trade.gov, b(6) Ashley Bubna, Ashley.Bubna@trade.gov, b(6)
LOCATION(S):	Videoconference
BACKGROUND:	The Secretary is convening the third meeting of the President's Advisory Council on Doing Business in Africa (PAC-DBIA or "the Council") via videoconference on July 28, 2020, from 12 pm to 1 pm. The Deputy Secretary's availability is requested to participate as a speaker in the meeting. The PAC-DBIA was established in 2014 to advise the President on strengthening commercial ties with Africa. The PAC-DBIA membership is comprised of executives from a cross section of American business and is a unique source of private sector advice on how to increase American exports to Africa. On June 7, 2019, the Secretary appointed 26 members to the 2019-2021 term of Council. On August 20, the Secretary convened the first meeting of the 2019-2021 term of the Council via teleconference to task the Council with providing an analysis and report of member's keys to success for doing business in Africa as well as develop recommendations on how the U.S. Government should implement Prosper Africa. Prosper Africa is the Administration's initiative focused on substantially increasing trade and investment between the U.S. and Africa. On February 26, 2020, Deputy Secretary Kelley, on behalf of Secretary Ross, convened the second meeting of the current term of the PAC-DBIA where the Council adopted its report of member's keys to success for doing business in Africa.
PURPOSE OF EVENT:	The PAC-DBIA will deliberate and adopt recommendations on measures the U.S. Government should consider in implementing and operationalizing the President's Prosper Africa initiative.

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b(5) - DP

b(5) - DP

The Deputy Secretary has a history of engagement with the PAC-DBIA. The Deputy Secretary publicly announced the third term of the Council in June 2019.

In September 2019, the Deputy Secretary hosted a dinner roundtable with PAC-DBIA members that participated in the "Keys to Success" panel at the Discover Global Markets conference in Houston. At the request of the PAC-DBIA, the Deputy Secretary hosted an October 2019 roundtable with the Finance Ministers (or their representatives) of Cote d'Ivoire, Senegal, Zambia, Ghana, and Ethiopia to better inform the Council's development of recommendations on Prosper Africa. And in November 2019, the Deputy Secretary hosted a lunch roundtable for members of the PAC-DBIA, their representatives, and the new U.S. Ambassador to South Africa as a part of her trip to South Africa for the Africa Investment Forum.

Most recently, in February 2020, the Deputy Secretary presided over the second meeting of the current term of the PAC-DBIA and hosted a lunch with PAC-DBIA members immediately following the meeting.

In addition to her history of engagement with the PAC-DBIA, the Deputy Secretary has served as a lead senior U.S. Government official on Prosper Africa. She delivered the official speech to launch the initiative, at the CCA U.S.-Africa Business Summit in Mozambique in 2019, and has led the mobilization of Department of Commerce agencies in support of Prosper Africa.

PARTICIPANTS:

Commerce

- Wilbur L. Ross, Secretary
- Karen Dunn Kelley, Deputy Secretary
- Joe Semsar, Deputy Under Secretary for International Trade, Performing the non-exclusive functions and duties of the Under Secretary for International Trade
- Camille Richardson, Acting Deputy Assistant Secretary for MEA
- Fred Stewart, Director, Office of Africa
- Ashley Bubna, PAC-DBIA Designated Federal Officer, Office of Africa

- Giancarlo Cavallo, PAC-DBIA Designated Federal Officer, Office of Africa

National Security Council

- Kevin Harrington, Deputy Assistant to the President for Strategic Planning
- Erin Walsh, Senior Director, Directorate for African Affairs

Council Members

- UPS – Laura Lane, President of Global Public Affairs (Co-Chair)
- GE Africa – Farid Fezoua, President & Chief Executive Officer, GE Africa (Co-Chair)
- Pfizer – Susan Silbermann, Global President for Emerging Markets (Vice Chair)
- Abbott – Damian Halloran, Vice President, Infectious Disease, Emerging Markets, Rapid Diagnostics
- ABD Group – John Nevergole, Chief Executive Officer
- Acrow Bridge – Bill Killeen, Chief Executive Officer and Chairman
- Akola – Brittany Underwood, Founder and Executive Chairman
- American Tower Corporation – Olivier Puech, Executive Vice President and President, Latin America and EMEA
- APR Energy – Paul Marcroft, Chief Commercial Officer
- Bechtel Overseas Corporation – Andrew Patterson, Global Manager for Strategy and Market and Business Development, Infrastructure
- Caterpillar Inc. – Denise Johnson, Resource Industries Group President
- Cigna Africa – Arjan Toor, Chief Executive Officer, Cigna Africa
- Citi – Peter Sullivan, Managing Director, Africa Public Sector Group
- Credence ID – Bruce Hanson, President and Chief Executive Officer
- CrossBoundary Group – Jake Cusack, Founding and Managing Partner
- IBM – Takreem El-Tohamy, General Manager of Middle East and Africa
- John Deere – Jason P.H. Brantley, Director for Sales and Marketing, Agriculture and Turf Division, Africa and Asia
- Kosmos Energy, LLC – Andrew G. Inglis, Chairman and Chief Executive

- Mastercard – Raghu Malhotra, President, Middle East and Africa
- Rendeavour, Inc. – Frank Mosier, Chief Executive Officer
- Shea Yeleen – Rahama Wright, Founder and Chief Executive Officer
- Synnove Energy – Fred Sisson, Chief Executive Officer
- Varian Medical Systems – Chris Toth, President, Oncology Systems
- Vermeer Corporation – Jason Andringa, President and Chief Executive Officer
- Visa Inc. – Andrew Torre, Regional President for Central and Eastern Europe, Middle East and Africa

Other U.S. Government to be invited:

- Elaine L. Chao, Secretary, United States Department of Transportation
- Sonny Perdue, Secretary, United States Department of Agriculture
- Michael Pompeo, Secretary, United States Department of State
- Chad Wolf, Acting Secretary, United States Department of Homeland Security
- Robert E. Lighthizer, United States Trade Representative, Office of the United States Trade Representative
- C.D. Glin, President and CEO, U.S. African Development Foundation
- John Barsa, Acting Administrator, United States Agency for International Development
- Kimberly A. Reed, President and Chairman, Export-Import Bank of the United States
- Thomas R. Hardy, Acting Director, United States Trade and Development Agency
- Sean Cairncross, Chief Executive Officer, Millennium Challenge Corporation
- Chad Wolf, Acting Secretary, United States Department of Homeland Security
- Adam Boehler, CEO, U.S. Development Finance Corporation
- Victoria Whitney, COO, Prosper Africa

AUDIENCE: Open to the public via videoconference. Conference details will be published in the federal register. The public will participate in listen only mode.

MEDIA COVERAGE: Open press via videoconference. Conference details will be published in the federal register. Press and the public will participate in listen only mode.

PRE-BRIEF: Teleconference with

- Camille Richardson, Acting Deputy Assistant Secretary for MEA
- Fred Stewart, Director, Office of Africa
- Ashley Bubna, Designated Federal Officer, President's Advisory Council on Doing Business in Africa, and Southern Africa Desk Officer, Office of Africa
- Giancarlo Cavallo, Designated Federal Officer, President's Advisory Council on Doing Business in Africa, East Africa Desk Officer, Office of Africa

ALTERNATE: None

ATTACHMENTS: None

Senior Management Agenda

Wednesday, July 8, 2020

1. Secretarial Conference Calls
   - Calls with low response rate cities
2. Differential Privacy
3. Contingency Funds Update
4. Phased Restart for the 2020 Census
5. 2020 Census Performance Reporting