20-069532

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

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BC-DOC-0000029838

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?
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    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?

[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

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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-0000029840

de la Vara, Hunter (Federal)

From: McGaan, Duncan (Federal)
Sent: Monday, February 24, 2020 9:45 AM
To: McDermott, Ryan (Federal); Jones, Sarah (Federal); Missouri Johnson, Marcellina (Federal); de la Vara, Hunter (Federal)
Subject: FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Attachments: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf; ATT00001.htm

Incoming letter to the Secretary and Census Director Dillingham. Thank you!

Duncan A. McGaan
b(6)

From: Mason, Jacque (Federal) <JMason1@doc.gov>
Sent: Sunday, February 23, 2020 5:51 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; McGaan, Duncan (Federal) <DMcGaan@doc.gov>
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Sent from my iPhone

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:52 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" b(6) @census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
> Attached is a new congressional letter from the Tri-Caucus regarding EO-13880.
>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
> Sent from my iPhone
>
> Begin forwarded message:

BC-DOC-0000029841

From: "Palencia, Stephanie" <Stephanie.Palencia@mail.house.gov>
Date: February 21, 2020 at 6:37:38 PM EST
To: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
Cc: "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

Please confirm receipt and we look forward to your response by Wednesday March 4, 2020.

Sincerely,
Stephanie Palencia

Organizer: Zimmerman, Paul (Federal)[PZimmerman@doc.gov]
From: Zimmerman, Paul (Federal)[b(6) b(6)]
Attendees: Brebbia, Sean (Federal); Olson, Stephanie (Federal); Nowell, Laura (Federal)
Location: OSP Conference Line
Importance: Normal
Subject: Tri-Caucus Response
Start Time: Thur 5/14/2020 12:30:00 PM (UTC-04:00)
End Time: Thur 5/14/2020 1:00:00 PM (UTC-04:00)
Required Attendees: Brebbia, Sean (Federal); Olson, Stephanie (Federal)
Optional Attendees: Nowell, Laura (Federal)

Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf

05-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880 v2 + MC + mb + as.docx

CUI/PRIV

Stephanie,

Sean and I would like to have a call with you to discuss b(5) - DP/AC the response to the Tri-Caucus congressional letter on the implementation of EO 13880. I've attached the original request and the draft response, b(5) - DP/AC b(5) - DP/AC

Please let me know if this time works or if there is another time tomorrow that would work better.

Conference Call Dial-In: b(6)
Participant Cod b(6)
Leader Code: b(6)

Thanks,

Paul

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
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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-0000029846

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Sincerely,

Joaquin Castro
Member of Congress
CHC Chair

Karen Bass
Member of Congress
CBC Chair

Judy Chu
Member of Congress
CAPAC Chair

BC-DOC-0000029847

Sent: Thur 5/28/2020 2:55:47 PM (UTC-04:00)
Subject: FW: Tri-Caucus Letter
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

Congress of the United States
Washington, DC 20515

February 21, 2020

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BC-DOC-0000029851

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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-0000029852

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Member of Congress
CHC Chair

Karen Bass
Member of Congress
CBC Chair

Judy Chu
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BC-DOC-0000029853

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (JMF)

NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5781 (JMF)

PLAINTIFFS' LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Local Civil Rule 56.1, Plaintiffs the State of New York et al. and the New York Immigration Coalition et al. submit the following statement of material facts as to which there is no genuine issue to be tried.

EXCLUDING UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE AFTER THE 2020 CENSUS WILL DEPRIVE CALIFORNIA AND/OR TEXAS OF CONGRESSIONAL SEATS

1. Since 1790, no decennial census has excluded any category of persons who usually reside in the United States on their basis of their citizenship or immigration status for purposes of

apportioning congressional representation. *See, e.g.*, *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg. 28,950, 28,950, (2015); Thompson Decl. ¶ 8 (Ex. 57).[1]

2. Millions of undocumented immigrants live in the United States and many have lived in the United States for many years. *See* Office of Immigration Statistics, U.S. Dep' t of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

3. California and Texas are consistently the two states with the largest populations of undocumented residents. *Id.* at 4-5.

4. According to the Department of Homeland Security, California had 2.9 million undocumented residents and Texas had 1.9 million undocumented residents in 2015. *Id.* at 2.

5. As of the most recent Congressional reapportionment following the 2010 Decennial Census, the average population of each U.S. House district is 710,767 people. *See* Kristin D. Burnett, *Congressional Apportionment*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf (last visited July 30, 2020).

6. According to the United States Census Bureau, as of July 1, 2019, the population of the United States was estimated to be 328,239,523. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019* (NST-EST2019-02), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited July 30, 2020).

[1] Citations to " Ex. __ " are to the exhibits to the accompanying Declaration of Matthew Colangelo dated August 7, 2020.

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7. If the July 1, 2019 Census Bureau estimate of the total United States population is divided by the total number of seats in Congress (435), the quotient is 754,574. *See id.*

8. The Memorandum states that " [i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the " Memorandum") (ECF No. 1-1).

9. The Memorandum states: " Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State' s entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.*

10. A state in which 2.2 million people represent 6 percent of the population would have a total population of more than 36 million residents.

11. According to the United States Census Bureau, as of April 1, 2010, the total population of the State of California was 37,253,956. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019* (NST-EST2019-02), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited July 30, 2020).

12. According to the Census Bureau, as of July 1, 2019, the total population of the State of California was 39,512,223. *Id.*

13. The second most populous state in the United States is Texas. *Id.*

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14. According to the United States Census Bureau, as of April 1, 2010, the total population of the State of Texas was 25,145,561. *Id.*

15. According to the United States Census Bureau, as of July 1, 2019, the total population of the State of Texas was 28,995,881. *Id.*

16. After California and Texas, the next most populous state is Florida, which, according to the Census Bureau, had a total population of 18,801,310 as of April 1, 2010, and an estimated total population of 21,477,737 as of July 1, 2019. *Id.*

17. Based on the Census Bureau' s 2019 estimate, 2.2 million people would constitute approximately 7.6 percent of the estimated total population of Texas as of July 1, 2019. *See id.*

18. Based on the Census Bureau' s 2019 estimate, 2.2 million people would constitute over 10 percent of the estimated total population of Florida as of 2019. *See id.*

19. The Memorandum anticipates that excluding undocumented immigrants from the apportionment base would deprive California of at least one seat in the House of Representatives. *See* 85 Fed. Reg. at 44,680.

20. Dr. Christopher Warshaw modeled the effects of excluding undocumented immigrants from the population count used to calculate Congressional reapportionment after the 2020 Census. *See* Warshaw Decl. at ¶ 11 (Ex. 58).

21. According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment basis, the probability that Texas will lose a seat in the House of Representatives is 98.3%. *Id.* § 5.2, Tbl. 7.

22. According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment basis, the probability that California will lose a seat in the House of Representatives is 72.1%. *Id.*

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THE POLITICAL INFLUENCE OF PLAINTIFFS CONSTITUENTS WILL BE DIMINISHED BY THE MEMORANDUM' S EXCLUSION OF UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE

23. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county. Gov' t Pls.' Am. Compl. ¶ 42 (ECF No. 34).

24. Residents of the City and County of San Francisco will lose political power because of California' s loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

25. Plaintiff Monterey County, California is a political subdivision of the State of California. *See* Gov' t Pls.' Am. Compl. ¶ 48 (ECF No. 34).

26. Residents of the Monterey County will lose political power because of California' s loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

27. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas. Gov' t Pls.' Am. Compl. ¶ 44 (ECF No. 34).

28. Residents of Cameron County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

29. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas. Gov' t Pls.' Am. Compl. ¶ 45 (ECF No. 34).

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30. Residents of El Paso County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

31. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 46 (ECF No. 34).

32. Residents of Hidalgo County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

33. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a membership-based not-for-profit organization. Khalaf Decl. ¶ 4 (Ex. 26).

34. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California and Texas. *See New York*, 351 F. Supp. 3d at 608; Khalaf Decl. ¶ 5 (Ex. 26).

35. Dr. Souhail Toubia is a member of ADC and a resident of Orange County, California. Khalaf Decl. ¶ 17 (Ex. 26).

36. George Majeed Khoury is a member of ADC and a resident of San Diego, California. *Id.*

37. Because Dr. Toubia and Mr. Khoury reside in California, they will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

38. George Majeed Khoury is a member of ADC and a resident of San Diego, California. Khalaf Decl. ¶ 17 (Ex. 26).

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39. Because Dr. Toubia and Mr. Khoury reside in California, they will lose political power because of California' s loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

40. Plaintiff FIEL Houston Inc. (" FIEL") is a membership-based not-for-profit organization based in Houston, Texas. Espinosa Decl. ¶ 2 (Ex. 18).

41. Today, FIEL has approximately 11,000 members in the greater Houston area. *Id.* ¶ 3.

42. Deyanira Palacios is a member of FIEL and a resident of Montgomery County, Texas. *Id.* ¶ 19.

43. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

44. Karen Ramos is a member of FIEL and a resident of Harris County, Texas. Espinosa Decl. ¶ 20 (Ex. 18).

45. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

46. Plaintiff Ahri for Justice (" Ahri") is a membership-based not-for-profit organization based in Los Angeles, California. Seon Decl. ¶ 2 (Ex. 43).

47. Ahri has roughly 220 individual members, with most residing in Southern California, and particularly in Orange and Los Angeles Counties. Some but not all of these members are U.S. citizens. *Id.* ¶ 4.

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48. Julie Kim is a member of Ahri and a resident of Orange County, California *Id.* ¶ 20.

49. Because Ms. Kim resides in California, she will lose political power because of California' s loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *Id.*

50. Simon Lee is a member of Ahri and a resident of Los Angeles County, California. *Id.* ¶ 21.

51. Because Mr. Lee resides in California, he will lose political power because of California' s loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58); Seon Decl. ¶ 21 (Ex. 43).

DATED: August 7, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "a radical revision of the constitutionally mandated system for allocation of Representatives to the States of the Union and an equally radical revision of the historic mission of the decennial census."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), the Secretary of Commerce is required by statute to report to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b) (emphasis added).

30. Thereafter, the President is required by statute to transmit to Congress two sets of numbers. First, the President must provide "a statement showing the ***whole number of persons***

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[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "to report 'upon a problem in mathematics . . . for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer.'" *Franklin*, 505 U.S. at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess. at 4-5 (1929)); *see also* S. Rep. No. 2, 71st Cong., 1st Sess. at 4 (1929) (stating that the President shall report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("The law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives [from the Secretary of Commerce] . . . It would be unlawful [for the President] . . . just to say, 'these are the figures, they are right, but I am going to submit a different statement.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to ***the whole number of free persons***, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***, excluding Indians not taxed" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 141 (1866) (remarks of Rep. Blaine)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

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

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 486 F. Supp. at 565. Opposing the suit, the U.S. Department of Justice ("DOJ") told this Court that the plaintiffs "s[ought] a radical revision of the constitutionally mandated system for allocation of Representatives to the States of the Union and

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an equally radical revision of the historic mission of the decennial census." Federal Defendants' Post-Argument Mem. at 1, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

46. "[F]or 200 years," the DOJ told this Court, "the decennial census has counted all residents of the states irrespective of their citizenship or immigration status," and those counts had been employed in apportionment. *Id.* Given "the clear and unequivocal language of Section 2 of the Fourteenth Amendment," the DOJ urged, the "radical revision" that the plaintiffs sought could come only from "a constitutional amendment." *Id.* What is more, the DOJ explained, such a revision would be "patently unfair" to residents of communities in which undocumented immigrants live, as undocumented immigrants "demand[] precisely the same level of the services from the municipalities and states in which [they] reside as do all other citizens." *Id.* at 12.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] In the DOJ's view, it was "clear" that, under the Fourteenth Amendment, "all persons, ***including aliens residing in this country***, [must] be included" in the congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, the Reconstruction Congress "rejected arguments that representation should be based on people with permanent ties to the country" and "consciously chose to include aliens." *Id.* at 2-3.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *Included in* 1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing Before the Committee on Post Office and Civil Service, House of Representatives, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

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present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

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

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

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. Supreme Court has found it "abundantly clear . . . that in allocating Congressmen the number assigned to each state should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously reaffirmed that the Constitution "select[s] . . . total population as the basis for allocating congressional seats, . . . ***whether or not [individuals] qualify as voters***." *Evenwel*, 136 S. Ct. at 1129. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares that it is now "the policy of the United States to exclude from the [congressional] apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. The Memorandum further asserts that these manipulated figures created at the President's direction, and not the actual "whole number of persons in each State," as provided in the governing statute, shall then "'settle[] the apportionment' of Representatives among the States." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. Instead, "the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process" as a "distraction" from his true, invidious motive. *Id.* at 2575-76.

69. On July 5, 2019, just days after the Supreme Court rendered its decision, President Trump admitted what the true reason for the citizenship question had always been. At a press conference, he was asked: "What's the reason . . . for trying to get a citizenship question on the census?" Contrary to what the Administration had maintained in the census litigation, the President answered: "Congress. You need it for Congress, for districting."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides that "Representatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***, excluding Indians not taxed." U.S. Const., amend. XIV, § 2.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

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

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

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

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OALABAMA SOUTHERN DIVISION

STATE OF ALABAMA, and MORRIS J. BROOKS, JR., Representative for Alabama' 5th Congressional District,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, in his official capacity as Secretary of Commerce; BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau,

Defendants,

and

DIANA MARTINEZ; RAISA SEQUEIRA; SAULO CORONA; IRVING MEDINA; JOEY CARDENAS; FLORINDA P. CHAVEZ; and CHICANOS POR LA CAUSA;

COUNTY OF SANTA CLARA, CALIFORNIA; KING COUNTY, WASHINGTON; and CITY OF SAN JOSÉ, CALIFORNIA,

Defendant-Intervenors.

Civil Action No. 2:18-cv-00772-RDP

OPPONENTS' RESPONSIVE SUBMISSION IN RESPONSE TO EXHIBIT B OF THE COURT' ORDER SUBMITTED IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MARTINEZ DEFENDANT-INTERVENORS' SUPPLEMENTAL MEMORANDUM

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INTRODUCTION

The decennial census is designed to serve "the constitutional goal of equal representation." *Franklin v. Massachusetts*, 505 U.S. 788 (1992). To that end, Congress has delegated to the Secretary of Commerce the authority to conduct the census to ensure that congressional representatives and Electoral College votes are "apportioned among the several States according to their respective numbers," Const. amend. XIV, § 2. The Secretary, working with the Census Bureau, intends to include illegal aliens as part of the total number of persons allocated to each state in the 2020 census.

Plaintiffs the State of Alabama and Representative Morris Brooks brought this suit against the Secretary, the Department of Commerce, the Census Bureau, and the Bureau's Acting Director. Plaintiffs contend that both the Constitution and the Administrative Procedure Act prohibit Defendants from including illegal aliens as part of the census count. And Plaintiffs have alleged that because the vast majority of illegal aliens in the United States are found in just a handful of states, those states will enjoy outsized political power at the expense of states like Alabama that have relatively few illegal aliens. More specifically, Plaintiffs have alleged that if illegal aliens are included in the 2020 census count, Alabama is substantially likely to lose a congressional seat and Electoral College vote that the State would maintain if the census included only citizens and lawfully present aliens. Moreover, Plaintiffs have alleged that this drop in Alabama's share of the National population will also deprive the State of federal funds that are tied to the census results.

Though the Supreme Court has repeatedly held that plaintiffs raising similar claims against these same Defendants had standing to press their challenges, Defendants and one set of Intervenors contend that Plaintiffs lack standing here. In their motion to dismiss, Defendants

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argue that Plaintiffs' impending losses of political representation and federal funding are "speculative" because it will be "all but impossible" for Plaintiffs to show that excluding illegal aliens from the count for all 50 states would leave Alabama better off. (*See* Doc. 45-1, p. 1).[1] But the Supreme Court has already held that plaintiffs raising a pre-count challenge to the conduct of the 2000 census were able to make such a showing. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-32 (1999). More fundamentally, Defendants' failure-of-proof argument is out of place at the pleading stage, where "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (quotations omitted). Because Plaintiffs have plausibly alleged that they face a substantial risk of harm, the Court must assume those allegations are true, and Defendants' motion thus should be denied.

The Martinez Intervenors, for their part, argue that Plaintiffs' harms cannot be redressed because even if this Court declared that it was unlawful to include illegal aliens in the census count and ordered the Commerce Department and Census Bureau to exclude illegal aliens, Congress could pass new laws negating that relief or the President could flout this Court's order by including illegal aliens in the census count anyway. (*See generally* Doc. 60). But Congress (within Constitutional limits) is always free to pass new laws that alter affairs between parties; even so, courts are not limited to granting only those remedies that an Act of Congress can never undo. And as to the President, while Justice Scalia would have held in *Franklin v. Massachusetts* that an order directed only to the Secretary and Census Bureau officials—and not the President as

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[1] Citations are to page numbers the parties added to their pleadings, as opposed to page numbers added by the Court.

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well—could redress harms related to apportionment, 505 U.S. 788, 824-29 (1992) (concurring in part and concurring in the judgment), the other "Eight members of the [*Franklin*] Court found that the plaintiff had standing," and the Supreme Court later held that Utah had standing to bring a similar suit against the same defendants who are now before this Court. *Utah v. Evans*, 536 U.S. 452, 460 (2002) (citing *Franklin*, 505 U.S. at 807). Because Plaintiffs' alleged harms here are likewise redressable, this case should proceed.

BACKGROUND

I. Constitutional and Statutory Background

The Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers," art. I, § 2, cl. 3, which requires, "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To ensure "the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, the Constitution requires that this count of the population of each State consist in an "actual Enumeration" of the number of "persons in each state conducted every ten years "in such manner as [Congress] shall by law direct," U.S. Const. art. I, § 2, cl. 3. This enumeration also determines the number of electors in the Electoral College to which each State is entitled, as each state is entitled to "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled to in Congress." *Id.* art. II, § 1, cl. 2.

Congress has delegated the responsibility to conduct the required enumeration to the Secretary of Commerce. The statute governing the conduct of the census provides that the Secretary "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. § 141(a). This "tabulation of total population by States ... as required for the apportionment of Representatives in Congress among

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the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b). After receiving the Secretary's report, the President is required 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, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions..." 2 U.S.C. § 2a(a). "Each State shall be entitled ... to the number of Representatives shown" in the President's statement, and the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

In addition to allocating political power, the census helps allocate numerous streams of federal funding that are pegged to the census' final tallies for each State. *See, e.g.*, 23 U.S.C. § 104(d)(3); 49 U.S.C. §§ 5307, 5340; 45 C.F.R. § 98.63; *see also* Doc. 1, ¶¶ 73-81. Indeed, Congress has recognized the longstanding and widespread use of the census "for the purpose of administering" federal laws "which population or other population characteristics are used to determine the amount of benefit received by State, county, or local units of general purpose government ..." 13 U.S.C. § 183(a). Congress thus requires the Secretary to "transmit to the President for use by the appropriate departments and agencies of the executive branch the data most recently produced and published under" the laws governing the census. *Id.*

The U.S. Census Bureau is an agency within the Department of Commerce. 13 U.S.C. § 2. The Secretary has delegated to the Census Bureau the authority to establish procedures for conducting the census. *Id.* § 4.

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II. Procedural History

On February 8, 2018, the Census Bureau issued the 2020 Residence Rule, which will govern how the Census Bureau and Department of Commerce conduct the census, tally the population, and allocate individuals to each State. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 ("Residence Rule"). The Residence Rule provides that aliens who are unlawfully present in the United States will be counted in the 2020 census and allocated to a state's final count just like U.S. citizens and lawfully present aliens. As a result, states with large illegal alien populations stand to gain greater representation in the U.S. Congress and Electoral College, and those states likewise stand to obtain a greater proportion of federal funds that are tied to a state's proportion of the national population.

On May 21, 2018, Plaintiffs the State of Alabama and Morris Brooks—a member of the U.S. House of Representatives and a registered voter in the State of Alabama—initiated this suit against the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau. (*See generally* Doc. 1). Plaintiffs contend that Defendants' decision to include illegal aliens in the final census count is unconstitutional, (*see, e.g.*, Doc. 1, ¶¶ 87-123, 140-48), and unlawful under the Administrative Procedures Act, (*see, e.g.*, Doc. 1, ¶¶ 124-139, 149-57), and that Defendants therefore must exclude illegal aliens from the final census allocations for each State.

Plaintiffs have alleged that they face a substantial risk of harm from Defendants' actions. (Doc. 1, ¶¶ 50-86). If Defendants include illegal aliens in the population allocations for each state and the Secretary includes those allocations in his report to the President showing the population totals for each state, the President will almost certainly include illegal aliens in the apportionment base when the President "transmit[s] to the Congress a statement showing the whole number of

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persons in each State, excluding Indians not taxed, as ascertained under the … decennial census of the population," which will determine " the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a); *see also id.* § 2(a)(b); Doc. 1, ¶¶ 16-28; *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (concluding that " a new ' report' from the Secretary to the President " containing a different conclusion about the relative populations of" states would make it " substantially likely" that that conclusion would be reflected in the final census figures and apportionment of representatives).

And Plaintiffs have alleged that because a disproportionate percentage of illegal aliens in the United States are found in only a few states and Alabama is not one of those states, Defendants' decision to include illegal aliens in the census count will decrease Alabama's proportionate share of the National population to the point that Alabama and its voters will lose a congressional representative and a vote in the Electoral College. (Doc. 1, ¶¶ 50-57). Conversely, if illegal aliens are not included in the census count, Alabama's proportionate share of the National population will remain high enough that Alabama will retain seven representatives in Congress and nine Electoral College votes. (Doc. 1, ¶¶ 58-59).

Likewise, because including illegal aliens in the census count decreases Alabama's proportionate share of the National population, Defendants' actions will harm Alabama by diminishing the share of federal funding the State otherwise would have received under a census count that does not include illegal aliens. (Doc. 1, ¶¶ 73-81).

As a remedy, Plaintiffs ask the Court to (a) declare the Residence Rule unlawful because it includes illegal aliens in the census count; (b) declare that any apportionment by the Secretary that does not use the best available methods to exclude illegal aliens from the population figures used to apportion congressional seats and Electoral College votes among the states is unconstitutional;

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(c) vacate and set aside the Residence Rule insofar as it permits or requires the Census Bureau to include illegal aliens in the population figures used for apportionment; (d) remand to the Commerce Department and Census Bureau to permit the Defendants to issue rules that comply with the Constitution, the APA, and governing statutes; and/or (e) award Plaintiffs such additional relief as the Court deems appropriate. (Doc. 1, ¶ 158).

ARGUMENT

Article III courts have power to adjudicate only "Cases" and "Controversies." Art. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quotations omitted). To do so, plaintiffs must show that they "(1) have suffered 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Plaintiffs must support each of these three elements "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. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Accordingly, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quotations omitted). Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts" — jurisdictional facts — "is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (quotations omitted).

At this early stage of litigation, Plaintiffs have met their burden of pleading allegations that are sufficient to demonstrate a (1) "substantial risk" that plaintiffs will suffer concrete,

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particularized, and actual harms if defendants include illegal aliens in the 2020 census count, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); (2) that this harm is traceable to defendants' conduct; and (3) that an order from this Court requiring defendants to exclude illegal aliens from the 2020 census' state population counts "would likely redress (at least in part) the plaintiffs' injury," which "is enough for standing purposes." *I.L. v. Alabama*, 739 F.3d 1273, 1282 (11th Cir. 2014); *see also Utah*, 536 U.S. at 463-64 (holding that Utah had standing to challenge Secretary's allocation of populations in census report because "the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered").

I. Plaintiffs Have Sufficiently Alleged A Substantial Risk That They Will Be Harmed By Defendants' Actions.

Plaintiffs have alleged that if Defendants include illegal aliens in the upcoming census count, Plaintiffs will suffer both representational and financial harms when Alabama is assigned a smaller percentage of the National population than the State would have received had illegal aliens not been included in the census count. Any decrease in the State's proportional share of the National population creates a substantial risk the State will lose federal funding it would have otherwise received. And because the drop in the State's share of the National population will be particularly steep, Alabama faces a substantial risk that it will lose a seat in the House of Representatives and a vote in the Electoral College.

A. Plaintiffs Have Sufficiently Alleged Representational Harm.

The Supreme Court has repeatedly held that the loss of a representative based on the conduct of the census is the sort of concrete, particularized, and actual harm sufficient to confer standing. For example, in *Department of Commerce v. U.S. House of Representatives*, plaintiffs

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challenged the Census Bureau's "plans to use two forms of statistical sampling" in the 2000 census. 525 U.S. 316, 320 (1999). An Indiana resident alleged that Indiana was likely to lose a congressional seat if the sampling methods were employed in the upcoming census, *id.* at 330-31, and the Court held that this "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing," *id.* at 331. As the Court explained, "[with] fewer Representative, Indiana residents' votes will be diluted. Moreover, the threat of vote dilution through the use of sampling is 'concrete' and actual or imminent, not 'conjectural' or hypothetical." *Id.* at 332 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The Court likewise held that other plaintiffs had standing to challenge the Census Bureau's sampling methods because it was "substantially likely that" the counties in which those plaintiffs resided would have a proportionately lower count under the Bureau's proposed method than under another method that did not employ sampling. *Id.* at 333. Likewise, in *Utah v. Evans*, the Supreme Court recognized Utah's standing to challenge the method the Secretary and Census Bureau officials used to arrive at the final census count on the ground that defendants' methods would cost Utah a seat in Congress. 536 U.S. at 459-64. And in *Franklin v. Massachusetts*, "[e]ight members of the Court found that the plaintiff had standing," to bring a similar challenge. *Utah*, 536 U.S. at 460 (citing *Franklin*, 505 U.S. at 803, 807). Plaintiffs here have alleged similar harms based on similar conduct by the same defendants. Those harms are sufficient to satisfy Article III's injury-in-fact requirement.

Defendants nevertheless argue that Plaintiffs have not alleged a sufficiently concrete and particularized harm because "Plaintiffs merely assert that including illegal aliens 'likely result' in a loss of representation." (Doc. 45-1, p. 7 (quoting Compl. ¶ 50) (emphasis added by Defendants)). But when a case concerns "future injury," such allegations "suffice if … there

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is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (quotation omitted). Thus, the plaintiffs in *U.S. House of Representatives* had standing, even though the census had not yet been conducted, and plaintiffs could allege only *likely* harm. *See* 525 U.S. at 330-32. And Plaintiffs here have sufficiently alleged a substantial risk of harm by pleading that Alabama will lose a congressional seat, an Electoral College vote, and federal funding if illegal aliens are included in the 2020 census. (*See* Doc. 1, ¶¶ 50-81).

Defendants next contend in a footnote that Plaintiffs fail to "plausibly allege how" uneven distribution of "illegal alien population … affects Alabama in comparison to other states." (Doc. 45-1, p. 7 n.3). But that assertion is belied by Plaintiffs' complaint. As Plaintiffs explain, reports from the U.S. government show that at least 11 million illegal aliens resided in the United States in 2010 and that this number has increased or held steady for most of the last decade. (Doc. 1, ¶ 30). Plaintiffs further explain that most of these aliens are concentrated in just a handful of states, such that including illegal aliens in the census count would so increase those states' proportion of the National population and so diminish Alabama's that Alabama would lose a congressional representative and Electoral College vote. (Doc. 1, ¶¶ 34-47, 50-59, 62-72). These allegations explain how Defendants' "prospective actions" "present a [] realistic and impending threat of direct injury." *Davis v. FEC*, 554 U.S. 724 (2008). Nothing more is presently required.

Finally, Defendants contend that Plaintiffs' alleged injury is "speculative" because it will purportedly be "impossible to determine whether Alabama will be harmed by including illegal aliens in the census count until after the count has been completed. (Doc. 45-1, p. 8). But Defendants' predictions about Plaintiffs' ability to muster evidence are no basis for dismissal, for "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 556. Indeed, there is no "probability requirement at

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the pleading stage," and thus " well-pleaded complaint may proceed even if it appears that a recovery is very remote and unlikely." *Id.* (quotation omitted). Plaintiffs have stated a plausible case for how they will be harmed by Defendants' actions, and Plaintiffs should have a chance to prove their case.

Defendants point to three census challenges that were rejected for lack of standing, but these decisions only underscore the premature nature of Defendants' arguments as each case was decided only *after* plaintiffs were given the opportunity to present evidence regarding their claims. (*See* Doc. 45-1, pp. 8-9). First, in *Federation for American Immigration Reform v. Klutznick*, the court allowed the case to proceed to summary judgment, and plaintiffs submitted evidence " showing their estimation of the effects on congressional apportionment given a variety of different possible assumptions about the illegal alien population." 486 F. Supp. 564, 571 (D.D.C. 1980). Only after finding that this evidence " failed to demonstrate with requisite specificity" whether plaintiffs would be harmed did the court dismiss their suit. *Id.* at 572.

The plaintiffs in *Ridge v. Verity* also challenged the inclusion of illegal aliens in the census count. 715 F. Supp. 1308, 1310 (W.D. Pa. 1989). While the court held that they lacked standing, it did so at the summary judgment stage and only after considering plaintiffs' evidence, which the court concluded fell short of establishing a concrete harm. *Id.* at 1313-18.

Finally, in *Sharrow v. Brown*, the plaintiff's challenge to the census count failed because he " introduced no evidence that New York's loss of six representatives over the past thirty years is the result of anything other than shifts in population." 447 F.2d 94, 97 (2d Cir. 1971). Plaintiffs here have not yet had a chance to prove that they face impending harm, and the Court should not simply assume Plaintiffs will be unable to do so.

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In sum, none of Defendants' cases involved dismissal of a census challenge at the pleading stage. And whatever purchase those cases once had is greatly diminished in light of the Supreme Court's later decision in *U.S. House of Representatives*, in which the Court held that plaintiffs were able to establish standing to challenge the proposed method for conducting the 2000 census. "Utilizing data published by the Bureau, [plaintiffs' expert] projected year 2000 populations and net undercount rates for all States under the 1990 method of enumeration and under the Department's proposed plan for the 2000 census." 525 U.S. at 330. Because "these projections" showed that Indiana would almost certainly lose a seat under the Department's plans, plaintiffs established standing. *Id.* Thus, it clearly is possible to prove harm based on a yet-to-be-conducted census, and Plaintiffs are entitled to a chance to do so here.

B. Plaintiffs Have Sufficiently Alleged Financial Harm.

Plaintiffs also have standing because they have adequately alleged a financial harm to Alabama that will follow if Defendants include illegal aliens in the census count and thereby decrease Alabama's proportionate share of the National population. As Plaintiffs allege (*see* Doc. 1, ¶¶ 73-81) and as the statute governing the census recognizes, *see* 13 U.S.C. § 183, numerous federal programs allocate funding to the states based on their proportionate share of the National population as determined by the census.[2] And because including illegal aliens in the census count will decrease Alabama's proportionate share of the National population, Defendants' actions will

[2] A recent Census Bureau report found that 132 federal programs used Census Bureau data to distribute more than $675 billion in funds during fiscal year 2015. U.S. Census Bureau, *Uses of Census Bureau Data in Federal Funds Distribution* at 3 (Sept. 2017), *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/ Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf (last visited Jan. 24, 2019).

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harm Plaintiffs by decreasing Alabama's share of many of these federal funding streams. This is no novel theory. Rather, "a number of courts have found such claims sufficient to establish injury-in-fact." *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 558 (D. Md. 2018) (citing *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 550 (E.D. Va. 1998); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980)). Indeed, even the Local Government Intervenor-Defendants in this case have stated that "Plaintiff State of Alabama has plausibly alleged Article III standing in connection with its claims—based on its asserted financial injury." (Doc. 59, p.1).

Defendants first contend that such financial harms are "too speculative to support standing" because Plaintiffs will have too hard a time proving what the census will show, (Doc. 45-1, p.10), but as explained above, this failure-of-proof argument carries no weight at the pleading stage. *See supra* pp. 10-11.

Next, Defendants and the Martinez Intervenors briefly contend that Plaintiffs have not pleaded the State's financial harm with sufficient specificity, (*see* Doc. 45-1, pp. 10-11; Doc. 60, pp. 7-8), but Plaintiffs have indeed alleged how "prospective operation of" federal statutes and Defendants' census count together "present[] a realistic and impending threat of direct injury" to Alabama through a drop in federal funding if illegal aliens are included in the 2020 census count. *Davis*, 554 U.S. at 734. Plaintiffs identify three of the numerous federal programs that peg funding to census numbers, Plaintiffs allege that Alabama participates in these programs, and Plaintiffs plausibly allege that "Alabama will lose federal funding that it would have received if illegal aliens had been excluded from the census." (Doc. 1, ¶ 81).

Defendants assert that "Plaintiffs have not calculated whether the inclusion of illegal aliens in every state's population would result in a proportional or absolute loss of federal funds going to

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Alabama." (Doc. 45-1, p.10). To the extent that statement is a factual assertion (and assumption) that Alabama's claimed injury lacks statistical support, it is premature. And to the extent Defendants are suggesting that Plaintiffs needed to plead detailed calculations of harm, Defendants are mistaken. It is enough that Plaintiffs have pleaded a cognizable harm; they need not also establish the exact amount of their damages before being allowed to prove that the harm will occur. *See Twombly*, 550 U.S. at 555 ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' not" "detailed factual allegations.").

The Martinez Intervenors make the related argument that because some of the federal programs listed in Plaintiffs' complaint are allocated based on subsets of a state's population (e.g., children under 13), Plaintiffs must allege not only that Alabama's share of the total population will fall under Defendants' proposed census count, but also that Alabama's share of that population subset will fall. (*See* Doc. 60, p. 8). That argument fails for at least two reasons. As an initial matter, the argument "improperly jumps ahead to a later stage of this case, ignoring the motion-to-dismiss standard," for courts "do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1247 (11th Cir. 2016). More fundamentally, two of the three federal programs provided as examples in Plaintiffs' complaint involve federal funds that are disbursed based on *total population*. *See* Doc. 1, ¶¶ 75-78; *see also* 49 U.S.C. § 5340(c)(1) (apportioning funds "based on the population trend for each State between the most recent decennial census and the most recent estimate of population made by the Secretary of Commerce" *id.* § 5307 (making funds available based on population as determined by census); 23 U.S.C. § 104 (requiring Secretary of Transportation to use census to determine population for purposes of apportionment of funds).

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Finally, Defendants in passing contend that any financial harm to Alabama is not " within the zone of interests protected by the Constitution' Census Clause" because the clause was " not intended … to provide funding to state or local projects." (Doc. 45-1, p. 11). This argument, of course, does not apply to harms Plaintiffs would suffer if Defendants cause Alabama to lose representation in Congress and the Electoral College. The argument is likewise inapplicable to any aspect of Plaintiffs' APA challenge.

And the argument fails even under the Census Clause as to Plaintiffs' financial harm. As an initial matter, to the extent Defendants would have the Court deem Plaintiffs' " claims nonjusticiable ' grounds that are " prudential rather than constitutional,' ' [t]he test is in some tension with [the Supreme Court' recent reaffirmation of the principle that " federal court' obligation to hear and decide" cases within its jurisdiction " virtually unflagging." ' " *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark Int' Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). In any event, the census was designed to apportion not only " [r]epresentatives" but also " direct taxes." Const. art. I, § 2, cl. 3. Because the census was intended to help apportion financial burdens among the states, the Court should also hear this challenge regarding the apportionment of financial benefits.

II. Plaintiffs' Alleged Harms Are Likely To Be Redressed By Plaintiffs' Requested Relief.

Binding precedent from the Supreme Court and the Eleventh Circuit make clear that Plaintiffs' claimed representational harm is likely to be redressed by Plaintiffs' requested relief. Plaintiffs have plausibly alleged that if illegal aliens are included in the 2020 census count, Alabama' share of the National population will fall far enough that the State will lose one congressional representative, whereas if illegal aliens are not included, the State will retain its

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current number of representatives. And if this Court declares that the Constitution and/or the APA requires Defendants to exclude illegal aliens from the census count, the Court could issue " a declaration leading, or an injunction requiring, the Secretary to" issue a report to the President that does not include illegal aliens in the census count. *Utah*, 536 U.S. at 463. If that report' s " conclusion about the relative population[]" of Alabama allowed the State to maintain the congressional seat it would otherwise lose, " the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post-20[20] census congressional election." *Id.* And " [u]nder these circumstances, it would seem, as in *Franklin*," and as in *Utah*, " substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision… *Id.* at 463-64 (quoting *Franklin*, 505 U.S. at 803 (opinion of O' Connor, J.)). Plaintiffs' claims therefore are redressable.

The Martinez Intervenors have offered no persuasive argument to the contrary. (*See* Doc. 60, pp. 3-7). Instead, they introduce a new test for redressability. According to the Martinez Intervenors, Plaintiffs must show not only that it is " likely that the injury will be redressed by a favorable decision," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but also that it is impossible for other non-parties (or at least for Congress or the President) to " thwart any redress ordered" by a court. (Doc. 60, p. 7). The Martinez Intervenors, however, do not cite a single authority for their new " thwartability test."

There are, however, multiple decisions from the Supreme Court that foreclose Intervenors' argument. Indeed, both *Utah* and *Franklin* recognized plaintiffs' standing to sue the very Defendants named in this lawsuit to obtain relief based on purportedly unlawful census counts. The Martinez Intervenors badly misconstrue these decisions to support their novel theory of

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redressability. For example, they assert that *Franklin* is distinguishable from this case because the *Franklin* plaintiffs sought only "to prevent the creation of alternative, adjusted Census data sets where the adjustments would injure the plaintiffs' interests." (Doc. 60, p. 4). That is flat wrong. In *Franklin*, the Census Bureau and Secretary had created one data set that included overseas military personnel in the census count. 505 U.S. at 793-94. Plaintiffs sought an order that would force defendants to create an additional data set by "eliminating [the] overseas federal employees from the apportionment counts." *Id.* at 791. Thus, far from seeking to "prevent the [] creation or use of an alternative data set," (Doc. 60, p.5), the plaintiffs sought to *mandate* the creation of a new data set. And though the Court ultimately ruled against plaintiffs on the merits, the Court did hold that plaintiffs had standing to bring their claim. *See id.* at 802-03 (plurality op.); *id.* at 807 (Stevens, J., concurring in part and concurring in the judgment).

The Court reached the same result in *Utah v. Evans*, in which the Census Bureau, Commerce Department, and related officials were sued for compiling a certain data set using estimates that "increased the final year 2000 count by about 1.2 million people." 536 U.S. at 458-59. Plaintiffs argued that those people should not be included in the count and "sought an injunction ordering the Secretary of Commerce to recalculate the numbers and recertify the official result." *Id.* at 460-61. And the Court held that because an order requiring the Secretary to report corrected census numbers to the President "would likely lead to a new, more favorable, apportionment of Representatives," the plaintiffs had standing. *Id.* at 461. The Court "would have ordered a change in a legal status (that of the 'reported' population), and the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Id.* at 464. Utah thus had standing, even though it was only "substantially likely" —certain not— "that the President and other executive and

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congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision." *Id.* (quoting *Franklin*, 505 U.S. at 803 (opinion of O' Connor, J.)).

Thus, the Martinez Intervenors are wrong on both the facts and the law when they assert that relief for the *Franklin* or *Utah* plaintiffs would have had " the hypothetical effect of making it difficult or even impossible for any other policymaker to use the challenged adjusted data set ... ." (Doc. 60, p. 5). The challenged data sets already existed, and if plaintiffs prevailed, " the datasets would be available." (*Id.* at 6). The prospect that the President might flout the Court' orders and " choose to use the unadjusted total population data, rather than the adjusted data preferred by Plaintiffs" (*id.* at 7) was not enough to deprive the plaintiffs of standing in *Franklin* or *Utah*, nor is it enough here.

Moreover, while the majority opinion in *Utah* settled *Franklin*' redressability debate by siding with Justice O' Connor' view over that of Justice Scalia, *see Utah*, 536 U.S. at 459-64, the Eleventh Circuit— a year before *Utah*— also expressly adopted Justice O' Connor' position. In *Made in the USA Foundation v. United States*, the Eleventh Circuit held that a " partial remedy would be sufficient for redressability, in spite of the fact that ' President has the power, if he so chose, to undercut this relief.' 242 F.3d 1300, 1310 (11th Cir. 2001) (quoting *Swan v. Clinton*, 100 F.3d 973, 980-81 (D.C. Cir. 1996)). Thus, despite the President' potential authority to thwart relief ordered by the court, " judicial order instructing subordinate executive officials to" take certain actions " would suffice for standing purposes." *Id.* at 1311.

These holdings foreclose the Martinez Intervenors' argument as to the President as well as their more novel argument that hypothetical Congressional action deprives Article III courts of jurisdiction. Intervenors speculate that Congress might later change the process for reapportionment or alter how federal funding is allocated among the states. (Doc. 60 at 6-7). But

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when an Article III court otherwise has jurisdiction and the ability to issue an order that is likely to redress a plaintiff's injury, it does not lose that ability (or duty) to act merely because Congress might possibly later pass legislation that "thwarts" the plaintiff's goals. Federal courts, for example, adjudicate disputes over eligibility for various forms of federal aid, even though Congress has the power to modify or even abolish those programs. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970).

The Martinez Defendants also assert that redressability is unlikely because the President or Congress could later be sued and ordered to include illegal aliens in the census count. (Doc. 60, p. 6-7). But that speculation is not enough to deprive this Court of jurisdiction, just as it was not enough in *Franklin* or *Utah*. Moreover, it is doubtful that a court could order the President or Congress to take any action regarding the census count. *See Franklin*, 505 U.S. at 802-03 (O'Connor, J.) (noting that "in general this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties" (quotations omitted); *id.* (Scalia, J.) (arguing that "the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary"). And the Clerk of the House's duties are purely ministerial and compelled by the text of 2 U.S.C. § 2a(b), making it unlikely, if not impossible, that he could be forced to take actions exceeding his statutory powers.

Finally, the Martinez Intervenors raise the curious argument that Plaintiffs' requested remedies would not relieve Alabama's financial injury because "all of the pleaded requests relate solely to the injuries they assert with respect to reapportionment." (Doc. 60, p. 7). But any relief that increases Alabama's proportion of the National population for purposes of apportionment will likewise increase Alabama's shares of federal funds and redress Alabama's financial harm.

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CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Respectfully submitted,

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Alabama Attorney General

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of January, 2019, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to all counsel of record electronically registered with the Clerk.

s/Winfield J. Sinclair
Winfield J. Sinclair
Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. DONALD TRUMP, *in his official Capacity as President of the United States,* et al., Defendants.	No. 20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. DONALD TRUMP, *in his official Capacity as President of the United States,* et al., Defendants.	No. 20-CV-5781 (JMF)

Declaration of Albert E. Fontenot, Jr.

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:

1. I am the Associate Director for Decennial Census Programs, in which capacity I serve as adviser to the director and deputy director on decennial programs. In this role, I provide counsel as to the scope, quality, management and methodology of the decennial 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, which govern the diverse programs of the Census Bureau. I have served in this capacity since November 12, 2017.

2. The following statements are based on my personal knowledge or on information supplied to me in the course of my professional responsibilities. These statements are provided in support of the Defendants' opposition to the Plaintiffs' motion for partial summary judgment or in the alternative for a preliminary injunction.

3. Since March 2020, the Census Bureau has been required to make a number of adjustments to its plans for field data collection for the decennial census as a result of the COVID-19 pandemic, and in order to comply with the statutory deadline of December 31, 2020 to deliver the apportionment count.

4. A statutory deadline under 13 U.S.C. § 141(b) requires that the tabulation of total population by States as required for the apportionment of Representatives in Congress among the several States shall be completed within nine months after the official start of the census and reported by the Secretary to the President of the United States. That date is December 31, 2020.

5. To meet that deadline in light of the delays caused by the Covid-19 pandemic, the Census Bureau, (as reflected in the Census Bureau Director's August 3, 2020 Statement), has updated its operations plan. Specifically, the Census Bureau intends to improve the speed of the count without sacrificing completeness. As part of its revised plan, the Census Bureau will conduct additional training sessions to increase the number of enumerators in the field Additionally we will be providing monetary awards to existing enumerators in recognition of those who maximize hours worked, as well as retention bonuses for those enumerators who serve for multiple weeks. The Census Bureau will also keep phone and tablet computer devices for enumeration in use for the maximum time possible.

The Census Bureau will end field data collection by September 30, 2020. Self-response options will also close on that date to permit the commencement of data processing. Under the revised 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. Once the Census Bureau has the data from self-response and field data collection in our secure systems, the Bureau plans to review the data for completeness and accuracy, streamline processing of the data, and prioritize apportionment counts to meet the statutory deadline.

6. Between the time field operations are completed and the statutory deadline, the Census Bureau must engage in post-data collection processing in order to produce the Census Unedited File (CUF), which will then be used to produce the apportionment numbers to be delivered to the Secretary.

7. As of August 18, 2020, over 94 million households, 64 percent of all households in the Nation, have self responded to the 2020 Census. The initial Non-Response Followup field work has begun and combined with the self response numbers approximately 71 percent of all the households in the nation have been enumerated. 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 recent and upcoming weeks, will work diligently to achieve an accurate count.

8. The Census Bureau has responded to the shortened calendar period for Non-Response Follow-Up (NRFU) operations by taking steps to increase and enhance the ability of its employees in the field to work as efficiently as possible, all in an effort to put in as many hours of work, spread across the total workforce, into field operations as would have been done under the original time frame. We have aimed to improve the speed of our count by continuing to maintain an optimal number of active field enumerators by conducting additional training sessions, providing awards to enumerators in recognition of those who maximize hours worked and retention awards to those who continue on staff for successive weeks. Additionally, we are keeping phone and tablet computer devices for enumeration in use for the maximum time possible.

9. As the Director stated on August 3, 2020, under the revised plan discussed above, the Census Bureau intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities.

10. The Census Bureau will continue to protect and keep confidential respondents' private and personally-identifying information, as is required by law under Title 13.

11. The Census Bureau will continue to comply with the Census Bureau's 2018 Residence Criteria, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (February 8, 2018), which, as in past decennial censuses, requires each person to be counted in their usual place of residence, as defined in the Residence Criteria.

12. The Presidential Memorandum issued on July 21, 2020, *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, has had no impact on the design of field operations for decennial census, or on the Census Bureau's commitment to count each person in their usual place of residence, as defined in the Residence Criteria.

Albert E Fontenot Digitally signed by Albert E Fontenot
Date: 2020.08.19 16:26:38 -04'00'

Albert E. Fontenot, Jr.
Associate Director
Decennial Census Programs
United States Department of Commerce
Bureau of the Census

Dated: _____

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.	No. 20 Civ. 5770 (JMF)
New York Immigration Coalition, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 20 Civ. 5781 (JMF)

DEFENDANTS' RESPONSE TO PLAINTIFFS' LOCAL RULE 56.1 STATEMENT

Pursuant to Local Civil Rule 56.1, Defendants submit the following responses to Plaintiffs' Local Rule 56.1 Statement of Material Facts as to Which There is No Genuine Issue to Be Tried.

1. Defendants do not dispute this statement.

2. Defendants do not dispute this statement.

3. Defendants state that the cited DHS document provides estimates that as of 2015, California and Texas are the two states with the two largest populations of illegal aliens. *See* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018).

4. Defendants state that the cited DHS document provides estimates that as of 2015, California had an illegal alien population of 2.9 million and Texas had an illegal alien population of 1.9 million. *Id.* at 4.

5. Defendants do not dispute this statement.

6. Defendants do not dispute this statement.

7. Defendants do not dispute this statement.

8. Defendants do not dispute that that the quoted language appears in the Memorandum.

9. Defendants do not dispute that that the quoted language appears in the Memorandum.

10. Defendants do not dispute this statement.

11. Defendants do not dispute this statement.

12. Defendants state that the Census Bureau's total estimated population of the State of California as of July 1, 2019 was 39,512,223. U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019 (NST-EST2019-02), https://www.census.gov/data/tables/timeseries/demo/popest/2010s-state-total.html (last visited August 17, 2020).

13. Defendants do not dispute this statement.

14. Defendants do not dispute this statement.

15. Defendants state that the Census Bureau's total estimated population of the State of Texas as of July 1, 2019 was 28,995,881. *Id.*

16. Defendants do not dispute that Florida is the third most populous State after California and Texas, and do not dispute that according to the Census Bureau Florida has a total population of 18,801,310 as of April 1, 2010. *Id.* Defendants state that the Census Bureau's total estimated population of the State of Florida as of July 1, 2019 was 21,477,737. *Id*

17. Defendants do not dispute this statement.

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18. Defendants do not dispute this statement.

19. Defendants dispute Plaintiffs' characterization of the Memorandum anticipating any particular outcome of apportionment. Defendants refer the Court to the cited page of the Memorandum for a full and accurate statement of its contents. *See* 85 Fed. Reg. at 44,680.

20. Defendants dispute that Dr. Christopher Warshaw could have performed any modeling based on "the population count used to calculate Congressional apportionment after the 2020 Census" because that count is not yet known. *See* Fontenot Decl. ¶¶ 4-8.

21. Defendants do not dispute that Table 7 of Dr. Warshaw's Expert Declaration contains the stated probability. Defendants dispute the premise underlying Dr. Warshaw's stated probability insofar as Dr. Warshaw assumes that all illegal aliens will be excluded from the apportionment base, a hypothetical proposition that is not yet known. Abowd Decl. ¶ 15. Defendants also dispute that Dr. Warshaw used a reliable method to reach his stated probabilities.

22. Defendants do not dispute that Table 7 of Dr. Warshaw's Expert Declaration contains the stated probability. But Defendants dispute the premise underlying Dr. Warshaw's stated probability insofar as Dr. Warshaw assumes that all illegal aliens will be excluded from the apportionment base, a hypothetical proposition that is not yet known. Abowd Decl. ¶ 15. Defendants also dispute that Dr. Warshaw used a reliable method to reach his stated probabilities.

23. Defendants do not dispute this statement.

24. Defendants dispute that residents of the City and County of San Francisco will lose political power because it is not yet known whether California will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15.

25. Defendants do not dispute this statement.

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26. Defendants dispute that residents of Monterey County will lose political power because it is not yet known whether California will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15.

27. Defendants do not dispute this statement.

28. Defendants dispute that residents of Cameron County will lose political power because it is not yet known whether Texas will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15.

29. Defendants do not dispute this statement.

30. Defendants dispute that residents of El Paso County will lose political power because it is not yet known whether Texas will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15.

31. Defendants do not dispute this statement.

32. Defendants dispute that residents of Hidalgo County will lose political power because it is not yet known whether Texas will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15.

33. Defendants do not dispute this statement.

34. Defendants do not dispute this statement.

35. Defendants do not dispute this statement.

36. Defendants do not dispute this statement.

37. Defendants dispute that Dr. Toubia and Mr. Khoury will lose political power because it is not yet known whether California will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15.

38. Defendants do not dispute this statement.

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39. Defendants dispute that Dr. Toubia and Mr. Khoury will lose political power because it is not yet known whether California will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15. Defendants also dispute that Dr. Toubia and Mr. Khoury will lose political power because it is not yet known whether Dr. Toubia and Mr. Khoury will reside in California after apportionment.

40. Defendants do not dispute this statement.

41. Defendants do not dispute this statement.

42. Defendants do not dispute this statement.

43. Defendants dispute that Ms. Palacios will lose political power because it is not yet known whether Texas will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15. Defendants also dispute that Ms. Palacios will lose political power because it is not yet known whether Ms. Palacios will reside in Texas after apportionment.

44. Defendants do not dispute this statement.

45. Defendants dispute that Ms. Ramos will lose political power because it is not yet known whether Texas will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15. Defendants also dispute that Ms. Ramos will lose political power because it is not yet known whether Ms. Ramos will reside in Texas after apportionment.

46. Defendants do not dispute this statement.

47. Defendants do not dispute this statement.

48. Defendants do not dispute this statement.

49. Defendants dispute that Ms. Kim will lose political power because it is not yet known whether California will lose any seats in the House of Representatives, or whether all illegal aliens will

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be excluded from the apportionment base. Abowd Decl. ¶ 15. Defendants also dispute that Ms. Kim will lose political power because it is not yet known whether Ms. Kim will reside in California after apportionment.

50. Defendants do not dispute this statement.

51. Defendants dispute that Mr. Lee will lose political power because it is not yet known whether California will lose any seats in the House of Representatives, or whether all illegal aliens will be excluded from the apportionment base. Abowd Decl. ¶ 15. Defendants also dispute that Mr. Lee will lose political power because it is not yet known whether Mr. Lee will reside in California after apportionment.

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Dated: August 19, 2020

Respectfully submitted,

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Counsel for Defendants

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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 Civ. 5770 (JMF)
New York Immigration Coalition, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	20 Civ. 5781 (JMF)

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law in support of this motion, as well as the declarations of John M. Abowd, Ph.D., and Albert E. Fontenot, Jr., Defendants Donald J. Trump, the President of the United States; Wilbur L. Ross, Jr., the Secretary of Commerce for the United States; Steven Dillingham, the Director of United States Census Bureau; the United States Department of Commerce, and the United States Census Bureau (collectively, "Defendants"), move this Court for an order dismissing all claims against Defendants pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, as well as for such other relief as the Court deems proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Court's Orders dated August 5 and August 14, 2020, *see* ECF Nos. 53, 95, opposition papers, if any, shall be served and

filed on or before August 25, 2020, and reply papers, if any, shall be served and filed on or before August 28, 2020.

Dated: New York, New York
August 19, 2020

RESPECTFULLY,

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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.	No. 20 Civ. 5770 (JMF)
NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 20 Civ. 5781 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs—a group of states and localities ("Government Plaintiffs") and a group of non-profit organizations ("NGO Plaintiffs")—bring constitutional and statutory challenges to a memorandum that the President issued on July 21, 2020, entitled Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (the "Presidential Memorandum" or "Memorandum"), 85 Fed. Reg. 44,679 (July 23, 2020). That Memorandum provides that for purposes of reapportionment of Representatives in Congress following the 2020 census, "it is the policy of the United States to exclude" illegal aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *Id.* at 44,680. It directs the Secretary of Commerce to submit to the President two tabulations in connection with the apportionment—one tabulation includes an enumeration according to the methodology set forth in the Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525 (Feb. 8, 2018) ("Residence Criteria"), and the second, "to the extent practicable," requires the Secretary to provide information permitting the President to exclude illegal aliens from the apportionment base. Because Plaintiffs' various challenges to this Memorandum fail as a matter of law, they should be dismissed.

As a threshold matter, this Court lacks subject-matter jurisdiction over Plaintiffs' claims both because the claims are not ripe and because Plaintiffs lack standing to challenge the Presidential Memorandum. Plaintiffs' alleged injuries, including lost representation in Congress, decreased federal funding, and diversion of resources, are speculative. At this point it is unknown what numbers the Secretary of Commerce will provide the President. Accordingly, any allegation as to the impact of the President's apportionment decision on matters such as congressional representation or federal funding is wholly theoretical and legally insufficient to meet the ripeness and standing requirements.

Plaintiffs' allegations that the Presidential Memorandum will have a significant chilling effect on immigrant communities' participation in the census likewise are speculative and conclusory. They are also based on hearsay. Plaintiffs rely on affidavits from fact and expert witnesses that contain only generalized, second- or third-hand accounts of alleged harm and unsubstantiated conjectures. The

Court should therefore dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(1) for lack of ripeness and standing.

In addition to these jurisdictional defects, Plaintiffs' claims are subject to dismissal for failure to state a claim pursuant to Rule 12(b)(6). Plaintiffs assert that the Presidential Memorandum violates the Administrative Procedure Act ("APA"), the constitutional separation of powers, the Tenth Amendment, principles of equal protection under the Fifth and Fourteenth Amendments, the Apportionment Clauses of Article I and the Fourteenth Amendment, 13 U.S.C. § 141, and 2 U.S.C. § 2a. Each of these claims fails as a matter of law.

First, there is no viable basis for APA review of the Presidential Memorandum—both because the President is not an "agency" under the APA and because Plaintiffs fail to allege any "final agency action" by the Secretary of Commerce. Second, to the extent the NGO Plaintiffs allege that the Presidential Memorandum contravenes the separation of powers, that claim fails because the Supreme Court in *Franklin v. Massachusetts* expressly recognized the broad scope of congressional delegation of authority to the President in relation to apportionment. 505 U.S. 788, 799 (1992). Third, the claim that the Presidential Memorandum amounts to "coercion" or "punish[ment]" in violation of the Tenth Amendment must be dismissed because Plaintiffs have offered only conclusory allegations as to the Memorandum's supposedly invidious purpose and have not alleged any commandeering of state resources. Fourth, Plaintiffs' equal protection claims fail because they rely on misleading characterizations of the Presidential Memorandum and because Plaintiffs fail to plausibly allege "animus" or "discriminatory intent." Fifth, Plaintiffs' claims under the Apportionment Clauses, 13 U.S.C. § 141, and 2 U.S.C. § 2a, are legally deficient, because they are inconsistent with the Executive Branch's longstanding discretion to define who qualifies as "inhabitants" (or "persons in each State") for purposes of apportionment. Finally, insofar as Plaintiffs seek an injunction against the President, such relief is precluded by Supreme Court precedents barring judicial intrusion on the President's exercise of policy-making discretion.

For the same reasons that their Complaints must be dismissed, Plaintiffs are not entitled to either partial summary judgment or a preliminary injunction. Plaintiffs cannot succeed on their claims

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both because of threshold jurisdictional flaws, but also because their claims are meritless. And even if Plaintiffs had standing to bring these actions, which they do not, they have failed to plausibly assert a threat of imminent irreparable harm from the Memorandum. Accordingly, if the Court declines to grant Defendants' Motion to Dismiss, it should deny Plaintiffs' Motion for Partial Summary Judgment or Preliminary Injunction.

BACKGROUND

I. The Census and Apportionment Generally

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 make apportionment possible, the Constitution requires that the federal government conduct a census every ten years in such a manner as directed by Congress. *Id.* art. I, § 2, cl. 3. Each State's number of Representatives, together with its two Senators, also determines the number of electors for President and Vice President in the Electoral College. *See id.* art. II, § 1, cl. 2.

Congress, in turn, has by law directed the Secretary of Commerce to conduct a census of the "total population" every 10 years "in such form and content as he may determine." 13 U.S.C. § 141(a) and (b). The Census Bureau assists the Secretary of Commerce in the performance of this responsibility. *See* 13 U.S.C. §§ 2, 4. For purposes of the 2020 census, the Census Bureau has announced that field data collection will end on September 30, 2020. *See* August 3, 2020, Statement from U.S. Census Bureau Director Steven Dillingham ("Director Dillingham"): Delivering a Complete and Accurate 2020 Census Count, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. According to Director Dillingham, the Census Bureau will take various actions, such as increasing training and providing awards to census takers who maximize the hours worked, to "improve the speed of [the] count without sacrificing completeness." *Id.* 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.*

The Census Bureau has promulgated criteria to count most people for census purposes "at their usual residence, which is the place where they live and sleep most of the time." Residence

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Criteria, 83 Fed. Reg. at 5,533. Following completion of the 2020 census, by December 31, 2020, the Secretary of Commerce must submit to the President "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). "On the first day, or within one week thereafter, of the first regular session of the [117th Congress]," the President must "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 . . . by the method known as equal proportions." 2 U.S.C. § 2a(a).

II. The July 21, 2020, Presidential Memorandum

On July 21, 2020, the President issued a Memorandum to the Secretary of Commerce regarding the exclusion of illegal aliens from the apportionment base following the 2020 census. *See* 85 Fed. Reg. at 44,679-81. The Presidential Memorandum states that "it is the policy of the United States to exclude" such aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *Id.* at 44,680. The Presidential Memorandum directs the Secretary of Commerce to submit to the President two tabulations. One is an enumeration "tabulated according to the methodology set forth in" the Residence Criteria. *Id.* The second calls for "information permitting the President, to the extent practicable," to carry out the stated policy, *i.e.*, an apportionment excluding illegal aliens. *Id.*

To date, the Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial census, *see* Exec. Order 13880, 84 Fed. Reg. 33,821-25 (July 16, 2019), and formulating a methodology for potentially excluding illegal aliens. *See* August 3, 2020, Dillingham Statement, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html ("The Census Bureau continues its work on meeting the requirements of Executive Order 13,880 issued July 11, 2019 and the Presidential Memorandum issued July 21, 2020. A team of experts [is] examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.").

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III. Plaintiffs' Challenge

On July 24, 2020, the Government Plaintiffs and NGO Plaintiffs filed complaints challenging the Presidential Memorandum; they amended their complaints on August 3 and August 6, respectively. *See* ECF Nos. 34 ("Gov't Pls.' Am. Compl."), 62 ("NGO Pls.' Am. Compl."). Plaintiffs allege, among other things, that the Presidential Memorandum violates requirements contained in Article I, the Fourteenth Amendment, 13 U.S.C. § 141, and 2 U.S.C. § 2a to base apportionment on the "whole number of persons in each State"; the Fifth and Fourteenth Amendment's Due Process Clause's prohibition against unlawful discrimination; the Tenth Amendment by punishing states that refuse to assist in enforcement of federal immigration law; the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; separation of powers; and 13 U.S.C. §§ 141 and 195 with respect to the use of statistical sampling. Gov't Pls.' Am. Compl. ¶¶ 4-5, 142-74; NGO Pls.' Am. Compl. ¶¶ 1, 8, 11, 182-262.

Plaintiffs further allege that if the President excludes illegal aliens from the apportionment base, some Plaintiffs will be injured by losing one or more Representatives (and corresponding electors in the Electoral College), undermining their ability to conduct congressional and state-level redistricting, depriving them of federal funding, and degrading the quality of the census data on which Plaintiffs rely to perform government functions; the NGO Plaintiffs further allege loss of political power and diversion of resources to census outreach efforts "to combat fear and disinformation resulting from the Presidential Memorandum." Gov't Pls.' Am. Compl. ¶¶ 6, 117-127, 135-36; NGO Pls.' Am. Compl. ¶¶ 8, 21-83, 161-69. Plaintiffs assert that the Presidential Memorandum will reduce the number of aliens who participate in the census by making them think that their responses are less valuable and causing "fears . . . that their data will not be safe." Gov't Pls.' Am. Compl. ¶¶ 130, 132-34; NGO Pls.' Am. Compl. ¶¶ 9, 170-74. Plaintiffs seek declaratory and injunctive relief. Gov't Pls.' Am. Compl. ¶¶ 7 & Prayer for Relief ¶¶ 1-9; NGO Pls.' Am. Compl. Request for Relief ¶¶ i-ix.

In support of their motion for partial summary judgment or a preliminary injunction (ECF No. 77), Plaintiffs submitted a declaration from Matthew Colangelo, an attorney representing the State of New York, which attached over 900 pages of documents, including three expert declarations and 51 fact witness declarations (ECF No. 76, "Colangelo Decl."). The expert reports come from (1)

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Mathew A. Barreto, Ph.D., a political science professor, Colangelo Decl. Ex. 56 ("Barreto Decl."); (2) John Thompson, a former Director of the Census Bureau, Colangelo Decl. Ex. 57 ("Thompson Decl."); and (3) Christopher Warshaw, Ph.D., an assistant professor of political science, Colangelo Decl. Ex. 58. The 51 fact declarations, from various state and local governmental and non-governmental sources, forecast purported injuries that the Presidential Memorandum could inflict on aliens' participation in the remaining portion of the 2020 census. Colangelo Decl. Exs. 1-51.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 94 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Plaintiffs fail this straightforward standard, so summary judgment should be denied and this case should be dismissed.

I. The Court Lacks Jurisdiction Because Plaintiffs' Claims Are Unripe

"To be justiciable, a cause of action must be ripe—it must present 'a real, substantial controversy, not a mere hypothetical question.' . . . . A claim is not ripe if it depends upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013); *see also Texas v. United States*, 523 U.S. 296, 300 (1998). Ripeness incorporates both a constitutional requirement and a prudential requirement. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The ripeness doctrine "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 Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Laboratories*, 387 U.S. at 148-49).

The constitutional requirement "overlaps with the standing doctrine, 'most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 110 (2d Cir. 2013) (quoting *Ross v. Bank of Am., N.A.*, 524 F.3d 217, 226 (2d Cir. 2008)). Under the ripeness doctrine, the Court also

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considers: "(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, Inc.*, 523 U.S. at 733; *see also Nat'l Org. for Marriage*, 714 F.3d at 691 ("To determine whether to abstain from a case on prudential ripeness grounds, we proceed with a two-step inquiry, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (citation and internal quotation marks omitted)).

Here, Plaintiffs' claims do not meet the constitutional requirement for ripeness because the claims are, at bottom, about apportionment, rather than census procedures—and any alleged apportionment injury that States may, or may not, suffer is at this point "conjectural or hypothetical" rather than "imminent."

A. It Is Currently Unknown What Numbers the Secretary May Report to the President

The Presidential Memorandum states that "it is the policy of the United States to exclude" illegal aliens from the apportionment base "*to the extent feasible* and to the maximum extent of the President's discretion under the law." 85 Fed. Reg. at 44,680 (emphasis added). It directs the Secretary of Commerce to provide two sets of numbers—one tabulated "according to the methodology set forth in" the Residence Criteria for counting everyone at their usual residence, and a second "permitting the President, *to the extent practicable*," to carry out the stated policy of excluding illegal aliens from the apportionment base. *Id.* at 44,680 (emphasis added).

The extent to which it will be feasible for the Census Bureau to provide the Secretary of Commerce a second tabulation is, at this point, unknown. *See* Decl. of Dr. John M. Abowd ¶ 15. As Director Dillingham recently publicly stated, the Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial census and formulating a methodology for potentially excluding illegal aliens. *See* August 3, 2020, Statement from Director Steven Dillingham, available https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. Indeed, Plaintiffs themselves repeatedly

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allege that the Census Bureau is currently unable to comply with the Presidential Memorandum's directive for an enumeration excluding illegal aliens. *See, e.g.*, NGO Pls.' Am. Compl. ¶ 176 ("The Census Bureau . . . does not currently have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction."); Gov't Pls.' Am. Compl. Sec. VI & ¶ 137 ("Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants," noting that "[j]ust months ago, the Federal Government represented . . . that there is a 'lack of accurate estimates of the resident undocumented population' on a state-by-state basis."), ¶ 138 (administrative records do not provide accurate information about the number of undocumented immigrants), ¶ 140 ("[T]he Census Bureau has not yet 'formulated a methodology' to estimate the undocumented population"); *see also generally* Gov't Pls.' Am. Compl. Sec. ¶¶ 137-41 & NGO Pls.' Am. Compl. ¶¶ 175-79 (containing similar allegations and citing statements by the federal government in support).[1]

Because it is not known what the Secretary may ultimately transmit to the President, it is necessarily not yet known whether the President will be able to exclude some or all illegal aliens from the apportionment base. As a result, Plaintiffs' apportionment claims are unripe as they depend upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *See Nat'l Org. for Marriage, Inc.*, 714 F.3d at 687. Put simply, until the Census Bureau and Secretary of Commerce transmit the information specified in the Presidential Memorandum, and until the President acts on the information, any claim of apportionment injury is speculative.

B. Other Considerations Underscore that Plaintiffs' Claims Are Not Ripe

Given that the effects of the Presidential Memorandum and any apportionment injuries to Plaintiffs are at this point unknown, other considerations, such as the hardship to the parties and the fitness of the issues for judicial consideration, also counsel against the Court's exercise of jurisdiction.

[1] The specific claim brought by the NGO Plaintiffs pursuant to 13 U.S.C. §§ 141, 195—alleging that the Census Bureau will impermissibly rely on sampling to enumerate the illegal alien population (NGO Pls.' Am. Compl. ¶¶ 251-62)—is similarly unripe because it is conjectural and hypothetical. Plaintiffs have provided nothing other than speculation that the Census Bureau will rely on sampling. Gov't Pls.' Am. Compl. Sec. ¶¶ 137-41; NGO Pls.' Am. Compl. ¶¶ 175-79.

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Nat'l Org. for Marriage, Inc., 714 F.3d at 691. For example, given the above-discussed uncertainties with respect to the effects of the Presidential Memorandum, delayed review would not cause undue hardship to Plaintiffs. *See, e.g.*, *Ohio Forestry Ass'n*, 523 U.S. at 733-34 (challenge to agency action unripe where there is no "significant practical harm" at the present time because a number of future actions would need to occur to make the harm more "imminent" and "certain"); *Texas*, 523 U.S. at 300, 302 (claim unripe where a number of actions would need to occur to cause the alleged harm, rendering it "too speculative whether the problem . . . will ever need solving"); *Simmonds v. INS*, 326 F.3d 351, 360 (2d Cir. 2003) ("The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship."). Further, judicial review would improperly interfere with the census, which is currently in progress, and could impede the apportionment, which has not yet occurred. *See, e.g.*, *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 735 (action unripe where judicial review "could hinder agency efforts to refine its policies"). Finally, the Court would benefit from further real-world factual development. *See, e.g.*, *id.* at 736 (action was unripe where it would require court to engage in "time-consuming judicial consideration . . . of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways," involved issues that could change in the future, and "depending upon the agency's future actions . . . review now may turn out to have been unnecessary"). The actual tabulations that are called for by the Memorandum must be reported by no later than the end of this year, assuming the statutory deadlines in § 141 and § 2a are not extended by Congress.

Perhaps unsurprisingly, census and apportionment cases generally are decided post-apportionment, when census enumeration procedures are no longer at issue and the actual apportionment figures are known. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 79-91 (1992) (challenging allocation of Department of Defense's overseas employees to particular states following census); *Dep't of Commerce v. Montana*, 503 U.S. at 445-46 (challenging method of equal proportions to determine representatives); *Utah v. Evans*, 536 U.S. 452, 458-59 (2002) (challenging sampling method known as "hot-deck imputation" used by Census Bureau after analyzing census figures); *Wisconsin v. City of New York*, 517 U.S. 1, 4 (1996) (challenging decision not to use particular statistical adjustment

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to correct an undercount). Here, Plaintiffs are not challenging the enumeration procedures themselves, but only the hypothetical apportionment that might result from actions that might be taken pursuant to the Presidential Memorandum. *See, e.g.*, Gov't Pls.' Am. Compl. ¶¶ 142-46; NGO Pls.' Am. Compl. ¶¶ 184-93. Consistent with this long line of Supreme Court precedent, such a challenge should await the actual apportionment.

II. This Court Lacks Jurisdiction Because Plaintiffs Lack Standing

For similar reasons, Plaintiffs lack standing to pursue their claims. The doctrine of standing requires a plaintiff to establish 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 traceable to the challenged action of the defendant"; and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Defs. of Wildlife*, 504 U.S. at 560-61. 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)). Plaintiffs bear the burden of establishing the required elements of standing. *Defs. of Wildlife*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *id.*, but "a plaintiff cannot rely solely on conclusory allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003). Here, none of the injuries Plaintiffs allege satisfy these requirements.

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

The standing requirement of "injury in fact" requires an allegation that "the plaintiff 'has sustained or is 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) (citations omitted). The injury or threat of injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Defs. of Wildlife*, 504 U.S. at 560. Thus, an alleged future injury must be "'certainly impending,' *or* there

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is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409 n.5). "'Allegations of possible future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As discussed above, *see supra* at 7-10, Plaintiffs' alleged apportionment injuries are speculative and conclusory, and at this point in time, there is no "substantial risk" that harm will occur. *See Susan B. Anthony List*, 573 U.S. at 158. In fact, Plaintiffs' own allegations that the Census Bureau has not yet "formulated a methodology" for excluding all illegal aliens contradicts their alleged harm. *See supra* at 8. Therefore, any injury to Plaintiffs—be it in the form of loss of a Representative, loss of funding, or otherwise—is conjectural or hypothetical. *Defs. of Wildlife*, 504 U.S. at 560.

B. Plaintiffs' Allegations That the Presidential Memorandum Will Reduce Participation in the 2020 Census Are Also Speculative, Not Traceable to the Memorandum, and Not Redressable by a Favorable Ruling

Plaintiffs alternatively allege that they will suffer injury because the Presidential Memorandum will purportedly reduce the number of aliens who participate in the census by making them think that their responses are less valuable and causing "fears . . . that their data will not be safe," thereby affecting the distribution of federal funds and degrading the quality of census data. Gov't Pls.' Am. Compl. ¶¶ 130, 132-36; NGO Pls.' Am. Compl. ¶¶ 9, 170-74. However, these alleged injuries are far too speculative to establish standing. In addition, those injuries are neither traceable to the Memorandum nor redressable by a favorable ruling from this Court.

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

As this Court noted in requesting the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, "the Presidential Memorandum does not purport to change the conduct of the census itself[;] [i]nstead, it relates to the calculation of the apportionment base used to determine the number of representatives to which each state is entitled." ECF No. 68 at 2. There is, facially, no reason why such a Memorandum should have any effect on census response rates. To the contrary, as explained by the Census Bureau's Associate Director for Decennial Census Programs, Albert E. Fontenot, Jr., the Census Bureau's enumeration is almost complete, and the Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations or "the Census Bureau's commitment to count each person in their usual place of residence." Decl. of Albert E. Fontenot, Jr. ¶¶ 7, 12. And although Plaintiffs submit a variety of declarations to purportedly bolster their claims that the Memorandum has a chilling effect on respondents,[2] those declarations are impermissibly conjectural, conclusory, and hearsay.

For example, Dr. Barreto's declaration provides an opinion regarding the so-called "chilling effect" of the Memorandum on individuals' participation in the 2020 Census that is based on multiple levels of conjecture. Dr. Barreto cites several Spanish-language news sources as providing hearsay statements that activists and organizations are concerned about the Memorandum causing fear in Hispanic and immigrant communities; that several studies have found that immigrant communities will rely on Spanish-language news sources; and that various studies, many of them from decades ago, suggest that response rates are affected by the overall socio-political environment. Barreto Decl. ¶¶ 15-16, 32-38. This "evidence" is insufficient to support Plaintiffs' allegations that the Memorandum will significantly reduce the number of aliens who participate in the census so as to materially affect

[2] A court "'may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [the Court] may not rely on conclusory or hearsay statements contained in the affidavits.'" *New York v. Dep't of Commerce*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (Furman, J.) (alteration in original) (quoting *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004)); *see also Broidy Capital Mgmt., LLC v. Benomar*, 944 F.3d 436, 441 (2d Cir. 2019) ("The district court can refer to evidence outside the pleadings when resolving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)."

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federal funding and degrade the quality of census data. Although Dr. Barreto discusses studies reflecting concerns among aliens about citizenship information in the census generally and a citizenship question on the census specifically (*see, e.g.*, Barreto Decl. ¶¶ 24-25, 54-55, 61, 68), this is far attenuated from the issues in this case, which involves the Presidential Memorandum. This case does not involve a citizenship question on the census questionnaire or a change to the Census Bureau's enumeration under the Residence Criteria.

Tellingly, Dr. Barreto cites no study actually addressing the Presidential Memorandum's effect on the 2020 Census. And Dr. Barreto's discussion of citizenship-question studies is grounded in inaccuracies. Notably, Dr. Barreto fails to address, or even acknowledge, the shortcomings that this Court identified in the very study Dr. Barreto now cites for the proposition that the placement of a citizenship question on a census questionnaire would depress response rates. *Compare* Barreto Decl. ¶ 68 *with New York v. Department of Commerce*, 351 F. Supp. 3d 502, 581 n.36 (S.D.N.Y. 2019) (noting that the Court would place "only limited weight on Dr. Barreto's study" because it had a flawed design, and did not weigh the resulting data "to match the population totals").

Further, Dr. Barreto fails to consider the results of the randomized controlled trial published by the Census Bureau after the Supreme Court issued its opinion in the citizenship question litigation, which found *no* statistically-significant depression of response rates for households that received a test questionnaire containing a citizenship question. *See* Abowd Decl. ¶ 13; *see also 2019 Census Test Report,* Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Test Report). That study contained a sample of 480,000 housing units, and was "capable of detecting response differences as small as 0.5 percentage points." *See* Abowd Decl. ¶ 13. Overall, "[t]he test questionnaire with the citizenship question had a self-response rate of 51.5 percent; [while] the test questionnaire without the citizenship question had a self-response rate of 52.0 percent." Census Test Report at ix. And while some narrow subgroups exhibited statistically-significant lower self-response rates, *id.* at x, the Census Bureau concluded that "[c]urrent plans for staffing for Nonresponse Followup would have sufficiently accounted for subgroup differences seen in this test."

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Id. *See generally* Abowd Decl. ¶ 13. As Dr. Abowd reports, this new finding illustrates the benefit of a "randomized controlled design," which properly isolates the independent variable (there, the citizenship question) and measures its effects. Abowd Decl. ¶ 13.

Mr. Thompson's expert declaration—expressing the subjective opinion that he is "extremely concerned" that the Presidential Memorandum will significantly increase the risk of undercounting immigrant communities—also cannot establish standing. Mr. Thompson's citation of studies conducted in planning for the 2020 Census that generally indicate immigrants' fear of the government and their concern about responses being used against them, and a 2018 study that he claims supports that a citizenship question would reduce response rates, again, have little bearing on this case. Despite discussing these studies, Mr. Thompson's declaration likewise does not address the June 2019 randomized controlled trial showing no statistically significant difference in response rates with and without a citizenship question. *See* Abowd Decl. ¶ 13. Nor do the studies Mr. Thompson cites—which have nothing to do with the Presidential Memorandum—support a significant chilling effect from the Presidential Memorandum.

Likewise, the statements contained in various fact witness declarations that the Presidential Memorandum will have a chilling effect on participation of immigrants in the 2020 census also offer nothing more than speculative, conclusory statements and hearsay. For example, many of the declarations provide no support whatsoever for their assertions. *See, e.g.*, Colangelo Decl. Exs. 9 ¶ 9-12; Ex. 11 ¶ 11; Ex. 12 ¶ 8-9; Ex. 16 ¶¶ 8-12; Ex. 22 ¶ 8; Ex. 26 ¶¶ 11-13; Ex. 33 ¶¶ 7-8; Ex. 38 ¶¶ 7-9; Ex. 41 ¶¶ 8-12; Ex. 47 ¶¶ 2, 13, 20. Other declarations vaguely reference that they heard from "community partners," "Census advocates," and the like that the Presidential Memorandum was decreasing participation among immigrants. *See, e.g.*, Colangelo Decl. Exs. 1 ¶ 10; Ex. 4 ¶¶ 8-9; Ex. 5 ¶ 5; Ex. 10 ¶ 6; Ex. 14 ¶¶ 15-19; Ex. 30 ¶¶ 9-10; Ex. 35 ¶¶ 5-7; Ex. 36 ¶¶ 10-14; Ex. 42 ¶¶ 5, 7; Ex. 43 ¶¶ 12-16; Ex. 44 ¶¶ 13, 17, 21-22; Ex. 51 ¶ 7. Very few of these declarations provide any examples to support their allegations, and the few that do, are vague and based on hearsay. *See, e.g.*, Colangelo Decl. Exs. 17 ¶¶ 6-9; Ex. 18 ¶¶ 10-13; Ex. 34 ¶¶ 8-10; Ex. 45 ¶¶ 11-12. They certainly do not provide sufficient support that the Presidential Memorandum would have an appreciable effect on the

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participation of illegal aliens in the remaining months of the 2020 census—for which field operations are to be completed by September 30, 2020.

Simply put, Plaintiffs' alleged injuries all depend on (i) the assumption that a significant percentage of illegal aliens who otherwise would have participated in the census will be deterred from doing so despite outreach by the Census Bureau, and that (ii) the belief this lack of participation will materially degrade the census data which will (iii) result in an appreciable effect on apportionment, redistricting, and funding. Plaintiffs fail to allege sufficient facts that the above sequence of events will occur with any likelihood. *See supra* at 12-14.

2. The Alleged Chilling Effect Is Not Traceable to the Memorandum

Separate from the question of injury, the materials submitted by Plaintiffs fail to show that any diminution in census response rates is fairly traceable to the Memorandum. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 03 (1998) (for plaintiff to establish standing "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"). To satisfy the "'traceability'" or "'causation'" prong of the Article III standing test, allegations must provide more than "'unadorned speculation'" to "'connect their injury to the challenged actions.'" *CREW v. Trump*, 953 F.3d 178, 191 (2d Cir. 2020) (quoting *Simon v. Eastern Kentucky Welf. Rights. Org.*, 426 U.S. 26, 44-45 (1976)), *reh'g en banc denied*, 2020 WL 4745067 (Aug. 17, 2020). The allegations of fact must plausibly support a "substantial likelihood" that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions (and that prospective relief could mitigate the harm). *Id.* Where a theory of injury rests on a "highly attenuated chain of possibilities," *Clapper v. Amnesty Int'l*, 568 U.S. 398, 410 (2013), "speculation regarding the future actions of third parties is not sufficient to establish an imminent injury, *Lower East Side People's Credit Union v. Trump*, 289 F. Supp. 3d 568, 580 (S.D.N.Y 2018); *see also Taylor v. Bernanke*, No. 13-CV-1013 (ARR), 2013 WL 4811222, at *6 (E.D.N.Y. Sept. 9, 2013) ("Where the occurrence of the future injury depends on the actions of a third party not included in the plaintiff's suit, the Supreme Court has shown particular reluctance to conclude that the 'imminence' requirement is met."); *Himber v. Intuit,*

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Inc., No. 10-CV-2511 (JFB), 2012 WL 4442796, at *7 (E.D.N.Y. Sept. 25, 2012) ("As the jurisprudence of the Supreme Court and Second Circuit has clearly articulated, claims of harm based upon speculation regarding decisions by third parties is insufficient to confer Article III standing.").

Here, as noted above, the primary basis for linking the Memorandum to response rates comes from Plaintiffs' expert Dr. Barreto. He opines that immigrant communities are less likely to respond to the census after the Memorandum because (1) immigrant communities' trust in the government and willingness to share information was undermined, Barreto Decl. ¶¶ 14, 19, by; (2) third-party reports featuring "immigrants, as well as individuals who worked with community-based organizations that serve immigrants, and even journalists, all stat[ing] that they believed the July 21 Memorandum was an effort to sow confusion and distrust, and to reduce the count of Latinos and immigrants on the 2020 Census," Barreto Decl. ¶¶ 33, 15; carried on (3) various media sources, particularly Spanish-language ones, which are highly influential in the immigrant and Latino communities, Barreto Decl. ¶¶ 16, 32. Dr. Barreto posits this chain as an unbroken line. But the media, and the community activists they feature, are independent actors; those entities' messages about the Memorandum are the product of their own interpretations and views, many of which are at odds with the plain terms of the Memorandum. *See, e.g.*, Torres Decl. ¶ 18, ECF No. 76.47 (stating that CASA de Maryland, Inc. "was approached by a number of media outlets, including CNN, to represent the reaction of our community . . . [and] conveyed how harmful the action is and our commitment to ensuring that our members are fully counted."); Barreto Decl. ¶ 33 (listing media messages characterizing the Memorandum as something "intended to promote fear").

It makes little sense 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." Barreto Decl. ¶ 62, Pls.' Br. at 43 (citing various declarations speculating that the Memorandum is likely to create fear of immigration enforcement). Simply put, any contention or concern that the Secretary's compliance with the Memorandum will somehow facilitate immigration enforcement is contrary to established statutory

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provisions mandating strict confidentiality for census responses. *See generally* 13 U.S.C. § 9 (providing that personal information collected by the Census Bureau cannot be used against respondents by any government agency or court); *id.* § 214 (setting forth penalty for wrongful disclosure of information). Indeed, the Census Bureau devotes resources to educating the public about the privacy and confidentiality of census responses specifically to allay such fears of adverse use. *See, e.g.*, *Data Protection and Privacy Program*, Census Bureau, available at https://www.census.gov/about/policies/privacy.html (last visited August 17, 2020); Fontenot Decl. ¶ 10. Because nothing in the Memorandum undermines these statutory protections, it is unreasonable to trace fear of immigration enforcement to the Memorandum itself, rather than to the messages conveyed by other actors in Plaintiffs' chain of causation. *See, e.g.*, Barreto Decl. ¶ 46 (noting that immigrants "may not do the full research to realize they can still fill out the Census safely, *because they hear the news which is connecting* the July 21 [Memorandum] to Trump's longstanding desire to increase deportation of undocumented immigrants" (emphasis added)); *see also supra* at 4.

The presence of such independent sources distinguishes this case from the litigation over the placement of a citizenship question on the census form, in which both this Court and the Supreme Court found that the placement of such a question could predictably cause lower self-response rates among certain communities. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). That case presented a situation not found here: namely, the direct collection of information from respondents. The Memorandum is not itself directed at census respondents and appears, even in Plaintiffs' telling, to be filtered to them through third-party intermediary sources. How those sources interpret the Memorandum should not be dispositive of the Memorandum's effects. Put another way, the alleged injuries here depend on "a chain of causation" with multiple "discrete links, each of which 'rest[s] on [the plaintiffs'] highly speculative fear that governmental actors" would exercise their "discretion in a [] way" that would adversely affect Plaintiffs. *See Dep't of Commerce*, 315 F. Supp. 3d at 787 (summarizing *Clapper*, 568 U.S. at 410-14, and distinguishing citizenship question case from *Clapper* partly on this basis). Such a speculative chain of causation is insufficient to establish standing.

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3. A Favorable Ruling Would Not Redress Plaintiffs' Alleged Enumeration Injuries

Finally, even if Plaintiffs could establish the existence of a "chilling" effect traceable to the Memorandum, they still fail to establish the last prong of standing: namely, that the effect would be cured by a favorable ruling from this Court. The redressability requirement "lies at the core of the standing doctrine" because "[a]n abstract decision without remedial consequence seems merely advisory, an unnecessary expenditure of judicial resources that burdens the adversary and carries all the traditional risks of making bad law and trespassing on the provinces of the executive and legislature." *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014); *see also Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Where a plaintiff requests prospective relief in the form of a declaratory judgment or 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). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107.

Here, it is entirely speculative that there are enough aliens who, while currently deterred from participating in the census, would *decide* to participate if this Court granted Plaintiffs relief. Indeed, nothing that Plaintiffs have submitted speaks to this issue with any particularity. The closest Plaintiffs come to attempting this showing is Dr. Barreto's report discussing research studies from 2018 that endeavored to predict how the removal of a citizenship question from the census questionnaire would affect response rates. Barreto Decl. ¶¶ 68–69. But, as noted above, those studies are inconsistent with the large, and statistically rigorous, study published in 2020 by the Census Bureau, which showed no statistically-significant diminution of response rates in the first instance. Abowd Decl. ¶¶ 13, 17. Further, there is no reason to expect the Memorandum, which asks nothing of respondents, to have a significant effect on response rates—and even less reason to expect that any people deterred from responding to the census would change their mind if the Memorandum were enjoined, especially since

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the census would conclude long before any such injunction would become final on appeal. *See supra* at 4.

If anything, the declarations proffered by Plaintiffs tend to paint the opposite picture. The declarations repeatedly lament an alleged "macro environment" of mistrust around immigration. Thompson Decl. ¶¶ 19–20; *see also* Barreto Decl. ¶ 46. It is hard to imagine that precluding the Secretary from complying with a Memorandum that does not implicate immigration enforcement or change census operations would alter the kind of mistrust that Plaintiffs allege to be in effect currently.

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The Supreme Court has emphasized that standing is not an "ingenious academic exercise in the conceivable." *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). Plaintiffs cannot "establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Clapper*, 568 U.S. at 419. Rather, Plaintiffs can establish standing only by shouldering the substantial burden of establishing that the Court, in a real way, can remedy an injury Plaintiffs have suffered as a result of some action Defendants took. *Id.* Because Plaintiffs have failed to make that showing here, their complaint should be dismissed for lack of subject matter jurisdiction.

III. Plaintiffs Fail to State a Claim

Even if the Court concludes that it has subject-matter jurisdiction over Plaintiffs' claims, Plaintiffs' failure to adequately plead any claim serves as an independent additional basis for the Court to dismiss these consolidated actions.

A. *Franklin* Mandates Dismissal of Plaintiffs' APA Claims

Plaintiffs seek APA review of both the President's policy directives in the Presidential Memorandum and steps that the Secretary of Commerce may have taken to prepare and transmit a set of "total population numbers for each state that exclude undocumented immigrants . . . to the President" in accordance with the Presidential Memorandum. *See* NGO Pls.' Am. Compl. ¶¶ 237-250 (asserting APA claim against "Defendants"); Gov't Pls.' Am. Compl. ¶¶ 159-163 (same). Their pleadings, however, challenge conduct by the President that is not subject to review under the APA

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and, in any event, fail to identify any act that satisfies the "final agency action" standard set forth in *Franklin*, 505 U.S. at 796-801 (applying the definition of final agency action in 5 U.S.C. § 704 to the apportionment context); *see also State of Cal. v. Dep't of Justice*, 114 F.3d 1222, 1225 (D.C. Cir. 1997) ("No final administrative action, no judicial review"). Accordingly, Plaintiffs' APA claims should be dismissed.[3]

First, insofar as Plaintiffs seek review of the President's action under the APA, the law is clear that the APA does not provide a basis for such review. In *Franklin*, for example, the Supreme Court held that because "the APA does not expressly allow review of the President's actions," such "actions are not subject to [the APA's] requirements." 505 U.S. at 800; *accord Dalton, v. Specter*, 511 U.S. 462, 468 (1994); *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (recognizing that under *Franklin* and *Dalton*, "the APA does not allow courts to review the President's actions"). Accordingly, Plaintiffs' APA challenges to the Presidential Memorandum should be dismissed under Rule 12(b)(6).

Second, to the extent that Plaintiffs also seek APA review of a "directive" that they believe the Secretary of Commerce has given to "the Census Bureau to effectuate the [Memorandum's] policy of excluding undocumented immigrants from the census" as well as the report the Secretary of Commerce is expected to submit to the President in January 2021, *see* NGO Pls.' Am. Compl. ¶ 242, that claim fails as well because there is no final agency action. In *Franklin*, the Supreme Court directly confronted the question whether a "statutory basis [existed] … under the APA" for judicial review of the Secretary of Commerce's report to the President regarding the decennial census data under 13 U.S.C. § 141(b). *See* 505 U.S. at 796-800. The Court concluded that the Secretary's report to the President is "not final and therefore not subject to [APA] review" because it "serves more like a tentative recommendation than a final and binding determination." *Id.* at 798. More specifically, the Court identified two prerequisites for an agency action to be deemed "final" for APA purposes — *one*,

[3] The Second Circuit has left open the question whether a plaintiff's threshold failure to identify a "final agency action" requires dismissal under Rule 12(b)(6) or Rule 12(b)(1). *Compare Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA . . . requirement of finality is jurisdictional"); *with Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (suggesting that whether the "threshold requirements" of APA review are satisfied may be analyzed under Rule 12(b)(6) instead of 12(b)(1)).

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that "the agency has completed its decisionmaking process," and, *two*, that "the result of that process is one that will directly affect the parties." *Id.* at 797.

Here, both the alleged directive from the Secretary of Commerce and his submission of a report to the President are the acts "of a subordinate official" preceding "the final action" to be taken the President. *See Franklin*, 505 U.S. at 796-97. Neither type of action by the Secretary of Commerce, therefore, is "final agency action" subject to review under the APA. *See id.* at 797.[4]

B. The Government Plaintiffs Have Failed to Plausibly Plead That the Presidential Memorandum Amounts to "Coercion" in Violation of the Tenth Amendment

The Government Plaintiffs also have failed to plead a viable Tenth Amendment Claim. The Tenth Amendment "reserve[s] to the states [] or to the people" those "powers not delegated to the [federal government] by the Constitution" or "prohibited by it to the states." The Government Plaintiffs conclusorily assert that Defendants have violated the Tenth Amendment because the Presidential Memorandum "punishes" Plaintiffs "for refusing to assist in the enforcement of federal immigration laws, in an attempt to coerce plaintiffs to change their policies." Gov't Pls.' Am. Compl. ¶ 155.

Plaintiffs' Tenth Amendment claim appears to derive from the "anti-commandeering" doctrine articulated by the Supreme Court. *See generally New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 925 (1997) ("the Federal Government may not compel the States to implement ... federal regulatory

[4] *See also Dalton*, 511 U.S. at 470 (holding the Secretary of Defense's implementation of the President's decision to close a naval yard is not a "final agency action" reviewable under the APA); *Public Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 551-52 (D.C. Cir. 1994) (holding that the NAFTA trade agreement negotiated by the Trade Representative is not a "final agency action" subject to APA review because it was up to the President to decide whether to submit the agreement to Congress); *see also Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 860-61 (4th Cir. 2003) ("even when agency action significantly impacts the choices available to the final decisionmaker, this distinction does not transfer [a] challenged action into reviewable agency action under the APA").

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programs"). But nothing in the Memorandum requires States to do *anything*, and this claim should therefore be dismissed.

While Plaintiffs allege that the federal government is attempting to coerce them to "assist the enforcement of federal immigration laws" or to "change their policies," Gov't Pls.' Am. Compl. ¶ 155, the Presidential Memorandum does not demand or require any specific effort that the Government Plaintiffs should devote toward immigration enforcement, let alone offer any "inducement [that is] impermissibly coercive," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012). Instead, to the extent that the Memorandum refers to immigrant populations at all, it does so only in the context of setting forth the President's views on the scope of his delegated authority under 2 U.S.C. § 2a and on "principles of representative democracy." 85 Fed. Reg. at 44,679-80.

Indeed, the Memorandum does not incentivize or pressure the States to cooperate in enforcing federal immigration law in any way. Rather, the apportionment policy set forth in the Memorandum is wholly divorced from immigration enforcement, and its implementation is not conditioned on some unspecified degree of enforcement cooperation from the States. Even if the Plaintiff States here were to begin cooperating with federal immigration enforcement, the Memorandum, if implemented to its maximal extent, would (crediting Plaintiffs' allegations) nonetheless reduce their apportionment population base (just as it would for States which *have* rendered such cooperation). And the converse is also true: Plaintiff States may continue not to assist in federal immigration efforts, but the Memorandum would operate without regard to that independent stance.

Beyond the text of the Presidential Memorandum, Plaintiffs also have not proffered "sufficient factual matter" that supports a reasonable inference about the existence of an unstated, improper, and "coercive" purpose. Conclusory allegations as to the Memorandum's "coercive" purpose are clearly not enough under *Iqbal*. *See Hayden v. Patterson*, 594 F.3d 150, 161 (2d Cir. 2010) (under *Iqbal*, "allegations that are conclusory … are not entitled to the assumption of truth").[5]

[5] As the courts have long recognized, the Government's stated reason for its policy decision is entitled to a "presumption of legitimacy." *See Nat'l Archives & Record Admin. v. Favish*, 541 U.S. 157, 174 (2006) (recognizing that "a presumption of legitimacy [is] accorded to the Government's official conduct");

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Further, insofar as Plaintiffs seek to ascribe a hidden, improper, coercive motive to the Presidential Memorandum because, in their view, this is of a piece with Defendants' immigration policies writ large, this also would not satisfy *Iqbal's* plausibility requirement. *See* 556 U.S. at 678 ("Where a complaint pleads facts that are *merely consistent with* a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (emphasis added and internal quotation marks omitted). Indeed, as another court in this District recently recognized in dismissing a Tenth Amendment coercion claim, it is well-established that courts "will not typically inquire into the hidden motives" for federal legislations and policies. *New York v. Mnuchin*, 408 F. Supp. 3d 399, 420 (S.D.N.Y. 2019) (internal quotation marks omitted) (dismissing Tenth Amendment challenge to federal tax law).

Similarly, courts have routinely held that directives and statutes do not violate the Tenth Amendment if they do not commandeer the states. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396–97 (2d Cir. 2008) (the "critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states," and holding that "[t]he PLCAA 'does not violate the Tenth Amendment as it does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.'") (quoting *Connecticut v. Physicians Health Servs. of Connecticut, Inc.*, 287 F.3d 110, 122 (2d Cir. 2002)). Here, the Presidential Memorandum does not implicate the Tenth Amendment because it does not command or compel state actors to take any action at all. Indeed, the Government Plaintiffs' Complaint does not allege that state actors were compelled to take specific action or refrain from taking specific action as a result of the Memorandum. Therefore, the Memorandum raises no commandeering issues, and the Court should dismiss the Tenth Amendment claim.

United States v. Armstrong, 517 U.S. 456, 464687 (1996) ("in the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties").

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C. Plaintiffs Have Failed to Sufficiently Allege an Equal Protection Claim Under the Fifth Amendment

Plaintiffs allege that the Presidential Memorandum was impermissibly motivated by discriminatory animus based on race, ethnicity, and national origin. *See* Gov't Pls. Am. Compl. ¶¶ 147-52; NGO Pls.' Am. Compl. ¶¶ 208-21. To make these claims, however, Plaintiffs rely on two faulty pleading devices—*first*, they improperly equate the Memorandum's scrutiny of illegal aliens' status as "inhabitants of a state" with defining those individuals as non-persons; and, *second*, they inaccurately conflate the Memorandum's facially neutral distinction between lawful and unlawful aliens with racial or ethnicity-based disparate treatment. Shorn of these devices, Plaintiffs fail to allege the unlawful "animus" or "racially discriminatory intent" required to plead an equal protection violation. *See Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) ("*Regents*") ("To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision.").

At the outset, and citing *Dred Scott*, the NGO Plaintiffs allege that the Presidential Memorandum is "denying the *personhood* of people living in the United States." NGO Pls.' Am. Compl. ¶ 214 (emphasis in original). This hyperbolic claim, however, cannot be squared with the text of the Memorandum, which specifically explains that "[d]etermining *which persons* should be considered '*inhabitants*' for the purpose of apportionment requires the exercise of judgment." 85 Fed. Reg. at 44,679 (emphasis added). Plaintiffs' unfounded inference of animus also fails to acknowledge that the Memorandum treats foreign business and tourist visitors just as it treats illegal aliens—that is, as "persons" who should be excluded from apportionment, *id.*—yet no one, including Plaintiffs, contends the former category need be included in apportionment. In short, the Presidential Memorandum expressly acknowledges the "personhood" of illegal aliens, but seeks to "examine" their status, *vel non*, as "inhabitants of each state." *Id.* at 44,679-80.

Further, Plaintiffs inaccurately conflate the distinction drawn in the Presidential Memorandum between lawful and illegal aliens with racial or ethnicity-based disparate treatment. Notwithstanding Plaintiffs' suggestion to the contrary, there can be no dispute that the Memorandum is facially neutral

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with respect to race, ethnicity, or national origin. To the extent that it makes any distinction between persons, the Presidential Memorandum is focused on the distinction between illegal aliens and citizens and other lawful residents. *See* 85 Fed. Reg. at 44,680. As the Supreme Court and the Second Circuit have both recognized, relying on this distinction does not require heightened scrutiny for equal protection purposes because non-citizens—much less illegal aliens—do not constitute a protected class. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976) (limitation on eligibility for a federal medical insurance program to citizens and long-term permanent residents did not violate Equal Protection Clause); *Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001) (upholding Welfare Reform Act's denial of prenatal care coverage to unqualified noncitizens against Equal Protection challenge).

Without the benefits of these two artifices, Plaintiffs are left with only conclusory allegations of animus, *see* Gov't Pls.' Am. Compl. ¶ 149; NGO Pls.' Am. Compl. ¶ 215, which are not sufficient to state an equal protection claim. Specifically, insofar as Plaintiffs rest their claim on a supposedly "disproportionate burden on Hispanics and immigrant communities of color," Gov't Pls.' Am. Compl. ¶ 150, this argument is foreclosed by the Supreme Court's recent *Regents* decision. As the Court recognized there, if the fact that an immigration policy would have "an outsized" impact on "Latinos" "because [they] make up a large share of the unauthorized alien population" by itself "were sufficient to a state a claim," then "'virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Regents*, 140 S. Ct. at 1916. Instead, as *Regents* concluded, an allegation of disproportionate burden on a specific racial or ethnic group is, in this context, inadequate to "establish[] a plausible equal protection claim." *Id.* at 1915.

Further, to the extent that Plaintiffs seek to base their equal protection claim on a purported link to the Commerce Secretary's decision to add a citizenship question to the 2020 Census, *see* Gov't Pls.' Am. Compl. ¶¶ 98, 150; NGO Pls.' Am. Compl. ¶ 132, the claim is implausible because these two actions involve separate decisions made by different decisionmakers that are distinct in terms of timing and implementation. In any event, Plaintiffs cannot bootstrap their equal protection claim here to the earlier decision because they "failed to prove, by a preponderance of the evidence, that a discriminatory purpose motivated Defendants' decision to reinstate the citizenship question on the

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2020 census questionnaire."[6] *New York*, 351 F. Supp. 3d at 671; *see also Kravitz v. Dep't of Commerce*, 366 F. Supp. 3d 681, 712 (D. Md. 2019).[7]

Finally, Plaintiffs cite a number of alleged statements by the President and other individuals. *See* NGO Pls.' Am. Compl. ¶¶ 130-31, 138-39 (citing statements by Richard Hofeller, Kris Kobach, and Matt Schlapp). At the outset, because the President is the only decision-maker with respect to issuance of the Presidential Memorandum, statements of other individuals are immaterial. *See Regents*, 140 S. Ct. at 1916 (statements by non-decisionmakers "remote in time and made in unrelated contexts" are "unilluminating"). Moreover, to the extent that Plaintiffs discuss the President's statements, *see, e.g.*, Gov't Pls.' Am. Compl. ¶¶ 114-15; NGO Pls.' Am. Compl. ¶ 141, they fail to draw any specific link between those statements and the specific policy announced in the Presidential Memorandum. Thus, they cannot plausibly serve as evidence for his subjective motivations in issuing that discrete policy.

The face of the Presidential Memorandum plainly states that the policy's purpose was to promote "the principles of representative democracy underpinning our system of Government." 85 Fed. Reg. at 44,630. Plaintiffs have failed to plausibly allege that, notwithstanding this permissible purpose, it was merely a pretext for a "real reason" to discriminate against Hispanics, *St Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), or that it was motivated by such animus, *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Accordingly, the Equal Protection claim should be dismissed.

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[6] Merely alleging that the Presidential Memorandum is a continuation of the attempt to add a citizenship question is insufficient to plausibly assert discriminatory intent. Indeed, Plaintiffs' allegations on this score are circular—they want to rely on the earlier decision to bolster their claim of animus here, without acknowledging their own failure to prove animus as to the earlier decision. Further, Plaintiffs have not identified any basis for imputing the motivation of the earlier decision by Secretary Ross to the President's decision-making here—even though that is a flaw the Court specifically identified in the earlier proceeding. *See New York*, 351 F. Supp. 3d at 670 ("Plaintiffs failed to prove a sufficient nexus between President Trump and Secretary Ross's decision to make the President's statements or policies relevant to the equal protection analysis.").

[7] In a decision that later became moot, a district court in the citizenship-question context concluded that "newly discovered evidence" raised a "substantial issue" because it suggested "that Dr. Hofeller was motivated to recommend the addition of a citizenship question to the 2020 Census to advantage Republicans by diminishing Hispanics' political power." *Kravitz v. Dept' of Commerce*, No. 18-cv-1041 (D. Md. June 3, 2019), ECF No. 162-1 at 1.

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D. Plaintiffs Have Failed to State an Apportionment Clause Claim

The operative Apportionment Clause mandates 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. But, after accounting for the express exclusion of "Indians not taxed," neither this Clause nor its predecessor in Article I was ever understood to mandate the inclusion of every person present within the boundaries of each State at the time of the census. *See id.* art. I, § 2, cl. 3. To the contrary, from the time of the Founding through the ratification of the Fourteenth Amendment and continuing to the present day, the Apportionment Clause has been understood to require counting "inhabitants." In other words, only usual residents—those with a fixed and enduring tie to a State, as recognized by the Executive—need be deemed "persons *in [that] State*," *id.* amend. XIV, § 2 (emphasis added). And because the word "inhabitants" is sufficiently indeterminate, the Supreme Court has recognized that the term confers significant discretion on the Executive to make legal determinations about the "usual residence" of an individual without treating his physical presence in a particular jurisdiction (or lack thereof) as dispositive. *See Franklin*, 505 U.S. at 804-06.

This well-established framework plainly forecloses Plaintiffs' facial challenge to the Presidential Memorandum. For Plaintiffs to succeed, they must establish that the Constitution requires including *all* illegal aliens in the apportionment base. But that is obviously incorrect. To give just one example, nothing in the Constitution requires that illegal aliens residing in a detention facility after being arrested while crossing the border must be accounted for in the allocation of Representatives (and hence political power). This is fatal to Plaintiffs' Motion.

1. Only "Inhabitants" Who Have Their "Usual Residence" in a State Need Be Included in the Apportionment.

As the Supreme Court has explained, "'[u]sual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration Act [of 1790] and has been used by the Census Bureau ever since to allocate persons to their home States." *Franklin*, 505 U.S. at 804. The Act also uses "other words [ ] to describe the required tie to the State: 'usual place of abode,' [and] 'inhabitant[.]'"

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Id. at 804-05. These terms "can mean more than mere physical presence, and [have] been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.*

The settled understanding that only "inhabitants" who have their "usual residence" in the country must be counted stems from the drafting history of the Apportionment Clause. In the draft Constitution submitted to the Committee of Style, the Apportionment Clause required "the Legislature [to] regulate the number of representatives by the number of *inhabitants*." 2 The Records of the Federal Convention of 1787, at 566, 571 (Max Farrand ed., rev. ed. 1966) (emphasis added). The Committee of Style changed the language to provide that "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." U.S. Const. art. I, § 2, cl. 3. But "the Committee of Style 'had no authority from the Convention to alter the meaning' of the draft Constitution," *Utah v. Evans*, 536 U.S. 452, 475 (2002), and the Supreme Court has thus found it "abundantly clear" that, under the original Clause, apportionment "should be determined solely by the number of the State's inhabitants," *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964); *see also Franklin*, 505 U.S. at 804-05 (observing that "the first draft" of the Apportionment Clause "used the word 'inhabitant,' which was omitted by the Committee of Style in the final provision").

Historical sources confirm this reading. In *The Federalist*, James Madison repeatedly explained that apportionment under the new Constitution would be based on a jurisdiction's "inhabitants." *See The Federalist* No. 54, at 369 (Jacob E. Cooke ed., 1961) (observing that "the aggregate number of representatives allotted to the several States[] is to be determined by a federal rule founded on the aggregate number of inhabitants"); *The Federalist* No. 56, at 383 (noting that the Constitution guarantees "a representative for every *thirty thousand inhabitants*"); *The Federalist* No. 58, at 391 (noting that the Constitution mandates a "readjust[ment] from time to time [of] the apportionment of representatives to the number of inhabitants"); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) ("[T]he basis of representation in the House was to include all inhabitants" (emphasis omitted)).

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Similarly, as the Supreme Court recognized, the first enumeration Act of 1790—titled "an act providing for the enumeration of the inhabitants of the United States"—directed "the marshals of the several districts of the United States" to count "the number of the inhabitants within their respective districts." Act of Mar. 1, 1790, § 1, 1 Stat. 101, 101; *see Franklin*, 505 U.S. at 803-05 (relying on the Census Act of 1790 to apply the Apportionment Clause).

This understanding of "usual residence" and "inhabitant" was enshrined in the constitutional text and incorporated by historical practice when the Fourteenth Amendment's Apportionment Clause was ratified almost 80 years later. According to Representative Roscoe Conkling, a member of the committee that drafted the Fourteenth Amendment, the operative Apportionment Clause's streamlined language—requiring apportionment based on "the whole number of persons in each State"—was meant to fully include former slaves in the apportionment base and otherwise "adhere[] to the Constitution as it is." Cong. Globe, 39th Cong., 1st. Sess. 359 (1866). The Amendment's text confirms that understanding: it underscores that a person who possesses sufficient ties to a State will be included by specifying that "the persons *in each State*" must be counted, U.S. Const. amend. XIV, § 2 (emphasis added)—a phrase that the Supreme Court later explained to be equivalent to the term "inhabitant." *Franklin*, 505 U.S. at 804-05. Indeed, the very next sentence of section 2 of the Fourteenth Amendment equates "persons in each State" with "inhabitants" by penalizing in the apportionment any State that denies the right to vote to the "male inhabitants of such State" who would otherwise be eligible to vote (principally by reason of citizenship and age). *Id.* Unsurprisingly, the first census after ratification of the Fourteenth Amendment was conducted in accordance with the same procedures that had been used for the 1850 census, *see* Act of May 6, 1870, ch. 87, § 1, 16 Stat. 118, 118, which, in turn had required "all [States'] inhabitants to be enumerated," Act of May 23, 1850, ch. 11, § 1, 9 Stat. 428, 428; *see also Franklin*, 505 U.S. at 804 ("'Usual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration Act [of 1790] and has been used by the Census Bureau ever since to allocate persons to their home States.").

Reading the Apportionment Clause to contemplate apportionment of Representatives based on "inhabitants" (or "usual residents") also helps explain the historical exclusion of certain people

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from the apportionment base. For example, transient aliens, such as those temporarily residing here for vacation or business, are not included in the apportionment base. *See, e.g.*, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5,526, 5,533 (2018) (Residence Criteria); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 980 (1991). That makes sense, as such aliens were not considered "usual residents" or "inhabitants" either at the Founding or the ratification of the Fourteenth Amendment. As contemporaneous sources using the term make clear, to qualify as an "inhabitant," one had to, at a minimum, establish a fixed residence within a jurisdiction and intend to remain there. *See, e.g.*, *Bas v. Steele*, 2 F. Cas. 988, 993 (Washington, Circuit Justice, C.C.D. Pa. 1818) (No. 1088) (concluding that a Spanish subject who had remained in Philadelphia as a merchant for four months before seeking to leave, "was not an inhabitant of this country, as no person is an inhabitant of a place, but one who acquires a domicil there").[8]

Likewise, foreign diplomats stationed overseas arguably remained "inhabitants" of their native countries rather than of their diplomatic posts. *See Franklin*, 505 U.S. at 805 (confirming that American diplomat stationed overseas could still qualify as an "inhabitant" who is "in" his home State for

[8] *See also, e.g, Hylton v. Brown*, 12 F. Cas. 1123, 1129 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 6,981) (charging jury while riding circuit that a particular individual "was no more an inhabitant of this state than I am, who spend one-third of each year in this city; or any other person, who comes here to transact a certain piece of business, and then returns to his family"); *Toland v. Sprague*, 23 F. Cas. 1353, 1355 (C.C.E.D. Pa. 1834) (No. 14,076) (distinguishing an "inhabitant" from a "transient passenger"); *United States v. Laverty*, 26 F. Cas. 875, 877 (D. La. 1812) (No. 15,569A) ("An inhabitant is one whose domicile is here, and settled here, with an intention to become a citizen of the country."); *United States v. The Penelope*, 27 F. Cas. 486, 489 (D. Pa. 1806) (No. 16,204) ("[T]he following has always been my definition of the words 'resident,' or 'inhabitant,' which, in my view, mean the same thing. 'An inhabitant, or resident, is a person coming into a place with an intention to establish his domicil, or permanent residence; and in consequence actually resides … .'"); 41 Annals of Cong. 1595 (1824) (referring to "the common acceptation" of "inhabitant" as "the persons whose abode, living, ordinary habitation, or home" is within a particular jurisdiction); Thomas Dyche & William Pardon, *A New General English Dictionary* (16th ed. 1781) ("a person that resides or ordinarily dwells in a place or home"); 1 & 2 Samuel Johnson, *A Dictionary of the English Language s. v.* abode, inhabitant, reside, residence, resident (6th ed. 1785) (a "[d]weller," or one who "lives or resides" in a place, with the terms "reside," "residence," and "resident" defined with reference to an "abode"—*i.e.*, a "continuance in a place"); Noah Webster, *American Dictionary of the English Language* (1828) (defining "inhabitant" as a "dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor").

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purposes of "the related context of congressional residence qualifications"); Emer de Vattel, *The Law of Nations*, ch. 19, § 213 (1817) (explaining that diplomats could not qualify as "inhabitants" because "the envoy of a foreign prince has not his settlement at the court where he resides"). And unsurprisingly, foreign diplomatic personnel living on embassy grounds have previously been excluded from the apportionment base. Murphy, *supra*, at 980.

Tourists and diplomats may be "persons" within a State's boundaries at the time of the Enumeration, but no one seriously contends that they must be included in the apportionment base under the Constitution. Physical location does not, in short, necessarily dictate whether one is an "inhabitant" (or "usual resident") of a particular jurisdiction.

2. The Executive Has Significant Discretion to Define Who Qualifies as an "Inhabitant."

Crucially, the term "inhabitant"—and the concept of "usual residence"—is sufficiently ambiguous to give Congress, and by delegation the Executive, significant discretion to define the contours of "inhabitants" for apportionment purposes. That discretion is rooted in the Constitution. Article I provides that apportionment numbers are determined by an "actual Enumeration" performed every 10 years "in such Manner as" Congress "shall by Law direct." U.S. Const. art. I, § 2, cl. 3; *see also id.* amend. XIV, § 5 (giving Congress the power to "enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the operative Apportionment Clause). This "text vests Congress with virtually unlimited discretion in conducting the 'actual Enumeration,' [and] … [t]hrough the Census Act, Congress has delegated its broad authority over the census to the Secretary." *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citations omitted). But the Secretary is not the final word on apportionment, and indeed is not the one responsible for determining the apportionment base. Instead, by statute, the Secretary must report census numbers to the President. *See* 13 U.S.C. § 141(b). And it is the President, then, who "transmit[s] 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

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number of Representatives." 2 U.S.C. § 2a(a). In doing so, the President has full "authority to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report." *Franklin*, 505 U.S. at 799. So "the Secretary cannot act alone; she must send her results to the President, who makes the calculations and sends the final apportionment to Congress." *Id.* at 800. That "final act" by the President is "not merely ceremonial or ministerial," but remains "important to the integrity of the process." *Id.* Indeed, it is "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States. *Id.* at 799.

Of course, the Executive's decisions in this area must be "consonant with … the text and history of the Constitution," *Franklin*, 505 U.S. at 806, but the term "inhabitants"—and the concept of "usual residence"—are sufficiently indeterminate to give him significant discretion within constitutional bounds. *See id.* at 804-06 (discussing how the notion of "usual residence" has been applied differently over time). Indeed, Madison himself acknowledged that the word "inhabitant" was "vague" in discussing the House Qualifications Clause. 2 The Records of the Federal Convention of 1787, at 216-17; *cf. Franklin*, 505 U.S. at 805 (in the course of applying the Apportionment Clause, drawing on Madison's interpretation of the "term 'inhabitant'" in "the related context of congressional residence qualifications"). As noted, historical evidence confirms that the term "inhabitant" was understood to require, at a minimum, a fixed residence within a jurisdiction and intent to remain there. *See supra* at 30 n.8. Moreover, Founding-era sources also reflect that, especially with respect to aliens, the term could be understood to further require a sovereign's permission to enter and remain within a given jurisdiction. *See, e.g.*, *The Venus*, 12 U.S. (8 Cranch.) 253, 289 (1814) (Marshall, C.J., concurring in part and dissenting in part) (quoting Vattel for the proposition that "inhabitants, as distinguished from citizens, are strangers who are *permitted* to settle and stay in the country" (emphasis added)); *The Federalist* No. 42, at 285 (Madison) (discussing provision of the Articles of Confederation that required every State "to confer the rights of citizenship in other States … upon any whom *it may allow to become inhabitants* within its jurisdiction" (emphasis added)).

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Accordingly, the Executive has wide discretion to make legal determinations about who does and does not qualify as an "inhabitant" for purposes of inclusion in or exclusion from the apportionment base. In *Franklin*, for example, the Supreme Court held that the Executive Branch could allocate over 900,000 military personnel living overseas to their home States on the basis of the Secretary's judgment that such people "had retained their ties to the States." 505 U.S. at 806. That allocation "altered the relative state populations enough to shift a Representative from Massachusetts to Washington"—and had not been used "until 1970," save for a "one-time exception in 1900." *Id.* at 791-93. Nevertheless, as the Court explained, even though the recent approach was "not dictated by" the Constitution, it was "consonant with [its] text and history" and thus a permissible "judgment" within the Executive Branch's discretion, even where Congress had not expressly authorized this practice. *Id.* at 806. In the course of reaching this judgment, the Court also listed a number of other legal determinations of usual residency that the Executive Branch has permissibly chosen to use over the years—including determinations the Census Bureau has since abandoned. For example, "up until 1950, college students were counted as belonging to the State where their parents resided, not to the State where they attended school," and at the time the case was decided, "[t]hose persons who are institutionalized in out-of-state hospitals or jails for short terms [were] also counted in their home States." *Id.* Under the current Residence Criteria, however, college students who live at school during the academic year and prisoners housed in out-of-state jails, even for the short term, are counted in the State in which those institutions are located. Residence Criteria, 83 Fed. Reg. at 5,534, 5,535.

Plaintiffs have never challenged the Residence Criteria in court. To the contrary, they intervened to defend it *against* challenge in another case. *See Alabama v. Dep't of Commerce*, No. 18-cv-772 (N.D. Ala.), Mot. to Intervene, ECF No. 97 at 15 (Aug. 12, 2019). Plaintiffs' ongoing defense of the Residence Criteria suggests that not even they dispute that the Executive has discretion to define "inhabitant" and to determine who meets its strictures. *See Franklin*, 505 U.S. 804-06. Nor can they, given constitutional text, history, and Supreme Court precedent. The Presidential Memorandum is no different insofar as it reflects the Executive Branch's discretionary decision to direct the Secretary in making policy judgments that result in the decennial census. *Franklin*, 505 U.S. at 799.

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3. The Apportionment Clause Does Not Require Inclusion of All Illegal Aliens as "Inhabitants" Having a "Usual Residence" in a State.

Plaintiffs maintain that the Presidential Memorandum facially violates the Apportionment Clause because *all* illegal aliens necessarily qualify as "persons in each State," and because the Memorandum contemplates the exclusion of such aliens—in some as-yet unknown number—for apportionment purposes. Put differently, Plaintiffs posit that the Constitution prohibits the exclusion of *any* illegal alien from the apportionment base, and that the Memorandum's announcement of that possibility violates the Apportionment Clause. But none of the constitutional constraints on the Executive's discretion to define the contours of "inhabitants" or "usual residence" require including *all* illegal aliens in the apportionment.

For example, if the Census Bureau finds it feasible to identify unlawfully present aliens who resided in a Customs and Border Patrol (CBP) or Immigration and Customs Enforcement (ICE) facility within a State on census day after being arrested while illegally entering the country, it would be permissible to exclude them. Such individuals—like alien tourists who happen to be staying in the country for a brief period on and around census day—cannot reasonably be said to have established "the required tie to [a] State," *Franklin*, 505 U.S. 804, or to be "inhabitants" under any definition of that term.[9]

Likewise, if feasibly identified, the Executive may exclude aliens who have been detained for illegal entry and paroled into the country pending removal proceedings, or who are subject to final

[9] These populations may be significant. During fiscal year 2019, ICE held in custody an average daily population of 50,165 aliens. U.S. ICE ERO, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*, at 5 (2019) (ICE ERO Report), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf. And on any given day in the summer of 2019, CBP held in custody between 8,000 and 12,000 detainees. *U.S. Customs and Border Protection – Border Patrol Oversight: Hearing Before the H. Subcomm. on Homeland Security of the Comm. on Appropriations*, 116th Cong. (2019) (testimony of Carla L. Provost, Chief, U.S. Border Patrol), https://docs.house.gov/meetings/AP/AP15/20190724/109834/HHRG-116-AP15-Wstate-ProvostC-20190724.pdf.

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orders of removal.[10] Such aliens do not have enduring ties to any State sufficient to become "inhabitants" with their "usual residence" in the United States. The government has either allowed them into the country solely conditionally while it is deciding whether they should be removed, or has conclusively determined that they must be removed from the country. In *Kaplan v. Tod*, 267 U.S. 228 (1925), for instance, the Supreme Court addressed the case of an alien minor who had been denied entry at Ellis Island in 1914 but could not be returned to Russia during the First World War and was therefore paroled into the country to live with her father in 1915. When the case reached the Supreme Court almost ten years later in 1925, it turned entirely on the question whether the alien minor had been "dwelling in the United States" or had "begun to reside permanently" in the United States for purposes of federal immigration statutes, which would have conferred derivative citizenship on her upon her father's naturalization in 1920. *Id.* at 230. The Court held that, during her parole, she "never has been dwelling within the United States" and "[s]till more clearly she never has begun to reside permanently in the United States." *Id.* As the Court explained, she "could not lawfully have landed in the United States" because she fell within an inadmissible category of aliens, and "until she legally landed [she] 'could not have dwelt within the United States.'" *Id.* (quoting *Zartarian v. Billings*, 204 U.S. 170, 175 (1907)). In the Court's view, she was in "the same" position as an alien "held at Ellis Island for deportation." *Id.* at 230; *see also, e.g.*, *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (holding that parole cannot affect an alien's status and does not place an alien "legally 'within the United States'"). Indeed, the Supreme Court recently reaffirmed that "aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border,'" and that the same principle applies to those detained "shortly after unlawful entry." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020).

[10] ICE's non-detained docket surpassed 3.2 million cases in fiscal year 2019, a population large enough to fill more than four congressional districts under the 2010 apportionment. ICE ERO Report at 10; Kristin D. Burnett, *Congressional Apportionment*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf. The non-detained docket includes aliens who are both pre- and post-final order of removal, and who have been released on parole, bond, an order of recognizance, an order of supervision, or who are in process for repatriation. ICE ERO Report at 10.

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Plaintiffs emphasize that Framers of both the original Apportionment Clause and the Fourteenth Amendment intended to include aliens in the apportionment base. Dkt. 77, at 16; *see id.* at 13-17. But Plaintiffs' historical evidence about the treatment of aliens does not and cannot resolve the distinct question whether *illegal* aliens must be included—for the simple reason that there were no federal laws restricting immigration (and hence no illegal aliens) until 1875. *See Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). And Plaintiffs provide no evidence to support the proposition that by employing the concepts of "inhabitants" and "usual residence," the Framers of either the original Constitution or Fourteenth Amendment were understood to have bound future generations to allocate political power on the basis of aliens living in the country in violation of federal law. To the contrary, as the Supreme Court has explained, the Framers understood the "fundamental proposition[]" that the "power to admit or exclude aliens is a sovereign prerogative." *Thuraissigiam*, slip op. at 35.[11] This "ancient principle[] of the international law of nation-states" is necessary to the sovereign's rights to define the polity ("the people") that make up the nation and to preserve itself, as both the Supreme Court and 19th-century international law scholars recognized.[12] It is fundamentally

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[11] *See also, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

[12] *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *see, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self- preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.") (citing Vattel and Phillimore); Vattel, *The Law of Nations*, bk. 2, §§ 94, 100 (explaining that the sovereign's authority to "forbid the entrance of his territory either to foreigners in general, or in particular cases," "flow[ed] from the rights of domain and sovereignty"); 1 Robert Phillimore, *Commentaries Upon International Law*, ch. 10, § CCXIX (1854) (similar); *see also, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) ("The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."); *Chae Chan Ping*, 130 U.S. at 603–04 (recognizing that a sovereign's power to "exclude aliens from its territory" is "an incident of every independent nation" and is "part of its independence," and "[i]f it could not exclude aliens it would be to that extent subject to the control of another power"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an

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antithetical to those elementary principles to say, as Plaintiffs do, that illegal aliens can arrogate to themselves the right to redistribute "political power" within this polity by flouting the sovereign power of the United States to define who can enter and become part of the polity. Pls.' Br. 10, 41, 51. Rejecting Plaintiffs' approach is certainly "consonant with" with the terms and history of the Fourteenth Amendment. *Franklin*, 505 U.S. at 806.

If anything, the debates over the Fourteenth Amendment on which Plaintiffs rely indicate that the rationale the Framers offered for including aliens in the apportionment base do not apply to illegal aliens. Specifically, various legislators made clear that unnaturalized aliens should be included in the apportionment base precisely because the law provided them with a direct pathway to citizenship—mainly, an oath of loyalty and five years of residence in the United States, *see* Act of Apr. 14, 1802, 2 Stat. 153. As Representative Conkling pointed out, "[t]he political disability of aliens was not for this purpose counted against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment." Cong. Globe, 39th Cong., 1st Sess., at 356 (1866) (emphasis added); *see also, e.g.*, *id.* at 3035 (Senator Henderson explaining that "[t]he road to the ballot is open to the foreigner; it is not permanently barred"). Indeed, the five-year residency requirement meant that aliens could "acquire [the vote] in the current decade"—and thus unnaturalized aliens could be voting citizens before the next apportionment. *Id.* at 354 (Representative Kelley). And even an opponent of the inclusion of aliens in the apportionment agreed that unnaturalized aliens were on "a short period of probation—five years; and in most of the states the great body of them are promptly admitted to citizenship." *Id.* at 2987 (Sen. Sherman). That rationale plainly does not extend to illegal aliens, who generally are prohibited by law from becoming citizens and are subject to removal. 8 U.S.C. §§ 1182(a)(9), 1227(a), 1255(a) & (c), 1427(a).

Plaintiffs are also wrong in arguing that *Plyler v. Doe*, 457 U.S. 202 (1982), requires the inclusion of illegal aliens in the apportionment base. Dkt 77, at 12. *Plyler* held only that illegal aliens are "persons

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external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.").

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within the jurisdiction" of a State for purposes of the Equal Protection Clause, 457 U.S. at 210, which is inapposite here. In contrast to the Apportionment Clause, the Equal Protection Clause has never been understood to be limited to "inhabitants" or "usual residents" of a State. That is why no one seriously contends that alien tourists visiting the United States should be included in the apportionment base, even though they are undoubtedly "persons" protected by the Equal Protection Clause. *See also Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.").

Indeed, Plaintiffs' reading of *Plyler*—that *all* illegal aliens must be included in the apportionment—is at odds with history and precedent. Likewise, Plaintiffs' reliance on a redistricting decision, *Evenwel v. Abbott*, for the proposition that "the basis of representation in the House was to include all inhabitants," 136 S. Ct. 1120, 1127 (2016); Pls.' Br. 14, does not dispose of this case as Plaintiffs contend, but rather begs the central question here as to the limits on how "inhabitant" may be defined. Nothing in the terms "inhabitants" or "usual residence" suggests that this concept covers all illegal aliens. Rather, as noted above, the Supreme Court has observed that the term "'[u]sual residence' … has been used broadly enough to include some element of allegiance or enduring tie to a place." *Franklin* 505 U.S. at 804. In addition, the Founding generation was aware that the term "inhabitant" could be understood to require that an alien be given *permission* to settle and stay in a jurisdiction according to the definition provided by Vattel, whom the Supreme Court has extolled as the "founding era's foremost expert on the law of nations." *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *see* 1 Vattel, *The Law of Nations* ch. 19, § 213 (defining "inhabitants, as distinguished from citizens," as "foreigners, who are permitted to settle and stay in the country").[13] And in *Kaplan*,

[13] As the Supreme Court has observed: "The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel. In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'" *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 n.12 (1978) (ellipsis and citations omitted omitted).

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the Supreme Court held that an alien who had not effected a lawful entry into the country could not be characterized as "dwelling" in the country under the latest version of a naturalization law dating from 1790 that had conditioned derivative citizenship for certain aliens on their "dwelling" in the United States—a concept linked with "inhabitants" since the Founding Era. 267 U.S. at 230; *see* Act of Mar. 26, 1790, § 1, 1 Stat. 103, 104. Illegal aliens, however, are necessarily limited in claiming that they have "enduring ties" to, or are "dwelling" in, this country, because as a matter of law they may be removed from the country at any time. *See also Gonzalez v. Holder*, 771 F.3d 238, 245 (5th Cir. 2014) (applying *Kaplan* to an alien who "entered the United States at the age of seven, albeit illegally, and … remained in the country" for 16 years); *U.S. ex rel. De Renzo v. Rodgers*, 185 F. 334, 338 (3d Cir. 1911) (explaining that an alien "cannot begin" to "reside permanently" in the United States "if he belongs to a class of aliens debarred from entry into the country by the act to regulate the immigration of aliens into the United States").

Ultimately, however, it is neither necessary nor appropriate for this Court to resolve whether any particular category of illegal aliens must be deemed "inhabitants" for purposes of the apportionment. In order to prevail on this facial challenge to the Presidential Memorandum, Plaintiffs must establish that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment. *See, e.g.*, *Deshawn E v. Safir*, 156 F.3d 340, 347 (2d Cir. 1998) ("A facial challenge will only succeed if there is no set of circumstances under which the challenged practices would be constitutional."). Plaintiffs have not, and indeed cannot, make that showing. Rather than facing that question, Plaintiffs divert attention by asking the Court to decide a much different question—and more than is necessary to resolve this case—by seeking a holding that the Apportionment Clause would prohibit the exclusion of all categories of aliens. That question is not properly presented here. The Presidential Memorandum states that it will be 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.*" 85 Fed. Reg. at 44,679 (emphasis added). And Plaintiffs have rushed to Court before the Census Bureau has determined which illegal aliens it may be "feasible" to

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exclude, before the Census Bureau has reported any numbers to the Secretary, before the Secretary has reported any numbers to the President, and before the President has reported any numbers to Congress. Accordingly, this Court need not and should not resolve whether the Apportionment Clause necessarily *excludes* or *includes* any particular category of illegal aliens from the apportionment base. Rather, for Plaintiffs to prevail, they must establish that there is *no* category of illegal aliens that could ever be excluded. They cannot do so.

E. Plaintiffs Have Failed to State an *Ultra Vires* or "Separation of Powers" Claim

Plaintiffs posit that "[b]y requiring the exclusion of undocumented immigrants from the statutory phrases 'total population' and 'whole number of persons in each State,' the Memorandum directs the President and the Secretary of Commerce to perform unlawful, *ultra vires* actions." Pls.' Br. at 29. NGO Plaintiffs also allege that the President has violated the Constitution's separation-of-powers principle because Congress "delegated authority over the census to the *Commerce Secretary*, not the *President*." *See* NGO Pls.' FAC ¶¶ 222–36. However characterized, these claims fail. Like every other census and apportionment conducted under 13 U.S.C § 141 and 2 U.S.C. § 2a, the Memorandum fully complies with powers delegated by Congress under this statutory scheme.

Nothing in the statutory language of "total population," 13 U.S.C. § 141(b), or "whole number of persons in each State," 2 U.S.C. § 2a(a), requires counting every person physically present on Census Day, even if they lack "usual residence" in the United States.[14] It is, of course, true that "the word 'person' in § 2a makes no distinction based on citizenship or immigration status." Pls.' Br. at 29. And no one disputes that aliens (legal or illegal) are "persons." *Cf. Plyler v. Doe*, 457 U.S. 202 (1982). But § 2a does not reference only "persons"; it tracks the Fourteenth Amendment's text mandating apportionment based on the "whole number of persons *in each State*." 2 U.S.C. § 2a(a) (emphasis

[14] Everyone seems to agree that the Executive may lawfully *exclude* individuals from the enumeration and apportionment if they do not have a "usual residence" or "enduring tie" to a State. *See* Section III.E, *supra*; Pls.' Br. at 23 ("[T]emporary visitors are not included in the apportionment base precisely because the United States is not their 'usual residence.'"); Br. of *Amici Curiae* Historians at 11, ECF No. 105-1 ("The rationale for excluding [ ] limited categories of noncitizens is clear and entirely consistent with the Framers' intent, and longstanding census practice, to count all persons *residing* in the United States.").

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added). So while Plaintiffs argue that Congress is "presumed to legislate with familiarity of the legal backdrop for its legislation," Pls.' Br. at 30 (quoting *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 114 (2d Cir. 2017)), that legal backdrop only *supports* the exclusion of individuals from apportionment if they do not have a "usual residence" in the United States. *Franklin*, 505 U.S. at 804; *accord* Pls.' Br. at 30 (arguing that when "Congress used the materially same language in a statute it . . . intended for [the language] to retain its established meaning" (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018)); *id.* at 32 (contending that "2 U.S.C. § 2a, has always been understood to include people who *reside* in a particular State" (emphasis added)). That is why no apportionment conducted under the Census Act has included literally everyone physically present in the country. *See* Br. of *Amici Curiae* Historians at 10 ("This 'usual residence rule' is consistent with the Framers' repeated emphasis on counting 'inhabitants' on United States soil . . . and has remained the guiding principle for census-taking for 230 years."). Just as the Memorandum does not violate the Constitution merely by contemplating the exclusion of some as-yet-unknown number of illegal aliens for lack of "usual residence," neither does it violate the identical language of § 2a.[15] *See* Section III.E, *supra*.

Nor does it matter that the President is making an independent choice in the apportionment process. While the apportionment calculation itself—feeding numbers into a mathematical formula known as the "method of equal proportions"—is "admittedly ministerial," there is nothing "ministerial" about the President's role in obtaining the numbers used in that formula. *Franklin*, 505 U.S. at 799 (explaining that "the admittedly ministerial nature of the apportionment calculation itself does not answer the question [of] whether the apportionment is foreordained by the time the Secretary

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[15] This "usual residence" approach is consistent with the approach taken in the Census Bureau's 2018 Residence Criteria, which Plaintiffs are currently defending in other litigation and touting here. *See* Section III.E, *supra*; Pls.' Br. at 31–32. As with every census, the Census Bureau always planned to exclude some people from the 2020 Census without a "usual residence" in a particular State. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018).

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gives her report to the President"). To the contrary, "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census.'" *Id.*[16] And that is exactly what the President has done here: direct the Secretary to report two sets of numbers, of which the President will choose one to plug into the "method of equal proportions. *See* 2 U.S.C. § 2a(a); 85 Fed. Reg. at 44,680.

Plaintiffs' position is incompatible with the Supreme Court's view of the President's role as more than "merely ceremonial or ministerial." *Compare* Pls.' Br. 32, 36–37 *with Franklin*, 505 U.S. at 789. "[I]t is the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives, making the President "important to the integrity of the process." *Franklin*, 505 U.S. at 799–800. Plaintiffs' attempt to reduce the President to mere statistician cannot be squared with the Supreme Court's holding that § 2a contemplates his exercise of substantial discretion.[17]

Plaintiffs also seek to contravene Supreme Court precedent (and 230 years of history) by arguing that the numbers used for apportionment must be derived solely from individual responses

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[16] Other courts since *Franklin* have likewise understood that § 2a allows the President to perform a significant role beyond the mere "ministerial" calculation leading to reapportionment. *See Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 860 (4th Cir. 2002) (likening an EPA report to the Secretary's § 141(b) report because it "is advisory and does not trigger the mandatory creation of legal rules, rights, or responsibilities," allowing the President "to embrace or disregard" the Secretary's report); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993) (characterizing the Commerce Secretary's report to the President a "moving target" because "the President has statutory discretion to exercise supervisory power over the agency's action); *Alabama v. Dep't of Commerce*, 396 F. Supp. 3d 1044, 1055 (N.D. Ala. 2019) (noting that in fulfilling his responsibilities under § 2a, "the President is not necessarily bound to follow the Secretary's tabulation").

[17] Plaintiffs also seem to suggest that that the Memorandum is unlawful merely because the President has directed the Secretary to provide information about illegal aliens. *See, e.g.*, Pls.' Br. 29, 38. But that contention also fails. Article II empowers the President to supervise the conduct of subordinate officials like the Secretary, *see* U.S. Const., art. 2, § 1, and the Opinions Clause further 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," *id.*, art. 2, § 2, cl. 2. In *Franklin*, even the dissenting Justices acknowledged that § 2a "does not purport to limit the President's 'accustomed supervisory powers' over the Secretary of Commerce." 505 U.S. at 813 n.11 (Stevens, J., dissenting). So Plaintiffs cannot preclude the President from obtaining information from the Secretary, nor the Secretary from providing it.

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to the census questionnaire. *See* Pls.' Br. at 33–36. But the census has *never* tallied the total number of "usual residents" based only on questionnaire responses. In fact, for the first 170 years of American census taking, no census questionnaire existed because all enumeration was done in person. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 520 (S.D.N.Y.) (Furman, J.), *aff'd in part, rev'd in part and remanded,* 139 S. Ct. 2551 (2019). And for the 2020 Census, individuals have been, and will be, enumerated through (1) census-questionnaire responses online, by mail, or by phone; (2) in-person visits by enumerators; (3) "proxy" responses given by those such as a neighbor or landlord; (4) high-quality administrative records from other federal agencies; and, as a last resort, (5) filling gaps in enumeration data by imputing other data from the same area. *Id.* at 521. In the citizenship-question litigation, Plaintiffs elicited extensive testimony on each of those enumeration methods, but never suggested that any of them violated the Census Act. *See generally id.* at 572–626. Indeed, the Supreme Court has *specifically approved* the use of purported "non-census data"—like administrative records and imputation—in apportionment without remotely hinting that either one was unlawful. *Compare* Pls.' Br. at 35–36 (taking issue with the hypothetical use of administrative records from other federal agencies) *with Franklin*, 505 U.S. at 794–96, 803–06 (approving the Census Bureau's use of "home of record" information from Defense Department personnel files for apportionment) *and Utah v. Evans*, 536 U.S. 452, 457–59, 473–79 (2002) (approving the Census Bureau's use of "hot-deck imputation" for apportionment).

In any event, it is entirely premature for Plaintiffs to surmise that "the President will necessarily have to rely on information that is not contained within the census" if he is going to exclude some as-yet-unknown number of illegal aliens from apportionment. Pls.' Br. at 35. As discussed above, it is not yet known what numbers the Secretary will transmit to the President pursuant to the Presidential Memorandum. *See supra* at 8. And Plaintiffs cannot assume that those numbers will be derived from purported "non-census data.".

Put simply, Plaintiffs' attempt to manufacture an *ultra vires* or separation-of-powers claim detached from their Apportionment Clause claim is unavailing. By delegation of the Census Act, the Executive stands in the shoes of Congress and may properly exclude individuals from apportionment

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for lack of "usual residence"—just as he has done in every other apportionment calculated under the Census Act.

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

Plaintiffs ask this court to enjoin the President from implementing the policy in the Presidential Memorandum, to issue a writ of mandamus to that effect, and to declare his policy decision unlawful. *See* Gov't Pls.' Am. Compl. at 45 (Prayer for Relief ¶¶ 1-4, 7); NGO Pls.' Am. Compl. at 88 (Request for Relief ¶¶ (i)-(iv), (vi), (vii)). As the Supreme Court has long recognized, however, federal courts cannot exercise injunctive authority over the President's discretionary policy judgments. *See Mississippi v. Johnson*, 4 Wall 475, 501 (1867) (the judicial branch has "no jurisdiction of a bill to enjoin the President in the performance of his official duties"). This limitation reflects the respect due to the President's "unique position in the constitutional scheme." *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27, 749-50 (1982) (declining to assume that implied damages "cause[s] of action run[] against the President"). In *Franklin*, the Supreme Court reaffirmed this constitutional principle. *See* 505 U.S. at 802 (noting that "grant of injunctive relief against the President [] is extraordinary, and should have raised judicial eyebrows"). Plaintiffs may contend that their injunctive claims fit within a narrow exception that the Supreme Court potentially left open for injunctive claims that seek to direct the President to perform "ministerial" functions. *See Franklin*, 505 U.S. at 802-03 (noting that *Mississippi v. Johnson* "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty"); *see also Mississippi v. Johnson*, 4 Wall at 500 (defining "ministerial duty" as "one in respect to which nothing is left to discretion").

Franklin, however, forecloses that argument in this case. Specifically, the Supreme Court recognized that under 2 U.S.C. § 2a, "the Secretary [of Commerce] cannot act alone"; instead, the President has the "authority to direct the Secretary in making policy judgments." *Franklin*, 505 U.S. at 799-800. This "clear[ly]" demonstrates Congress's belief that "it was important to involve a constitutional officer," *i.e.*, the President, "in the apportionment process." *Id.* at 799. The President's role and "duties" in the congressional apportionment process, therefore, "are not merely ceremonial or ministerial." *Id.* at 800.

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Put simply, even if *Franklin* and *Mississippi v. Johnson* could be read to allow injunctive claims seeking performance of purely ministerial functions, that possible exception has no application here—because the President's implementation of the Presidential Memorandum is part of his duties under 2 U.S.C. § 2a, which "are not merely ceremonial or ministerial." Instead, *Franklin* applies squarely to Plaintiffs' injunctive claims against the President, and requires the dismissal of those claims. 505 U.S. at 802-03.

Moreover, and at a minimum, even if injunctive relief against the President in the performance of his statutory duties were theoretically available, *Franklin* makes clear that it "would require an express statement by Congress" authorizing such relief. *Franklin*, 505 U.S. at 801. Plaintiffs have identified no such "express statement" and none exists.

Finally, although declaratory relief claims against the President may be viable under existing Second Circuit law, *see Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2018), other courts have questioned the appropriateness of such claims. For example, the D.C. Circuit, following *Franklin*, has determined, "declaratory relief" against the President for his non-ministerial conduct "is unavailable." *Newdow v, Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010). This is because "a court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Id.* at 1012 (emphasis added) (citing *Mississippi*, 71 U.S. at 499); *see also Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) ("Sound separation-of-power principles counsel the Court against granting [injunctive and declaratory] relief against the President directly."). Thus, "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment." *Swan v. Clinton*, 100 F.3d at 973, 978 (D.C. Cir. 1996).

IV. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY OR PERMANENT INJUNCTION

If the Court declines to dismiss Plaintiffs' claims, it should nonetheless deny Plaintiffs' request for the extraordinary relief of a permanent or preliminary injunction.

Although Plaintiffs seek partial summary judgment on their Apportionment Clause and *ultra vires* claims, they do not specify what remedy they wish to accompany that judgment. Presumably,

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however, Plaintiffs would have this Court enter, at minimum, a permanent injunction prohibiting Defendants "from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy." NY FAC at 45, ¶ 4; *see* NGO FAC at 88, ¶¶ 3-4. Unlike the motion-to-dismiss context in which Plaintiffs' well-pleaded allegations are accepted as true, *Chamberlain Estate of Chamberlain v. City of White Plains*, 960 F.3d 100, 105 (2d Cir. 2020), the "extraordinary remedy" of an injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 169 (S.D.N.Y. 2010) (contrasting the standing inquiry on a motion to dismiss with the "heavy burden of clearly establishing the 'actual and imminent' threat of irreparable harm" for an injunction). To obtain permanent injunctive relief, Plaintiffs bear the burden of demonstrating (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 parties, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

While Plaintiffs appear to understand that these factors are required to obtain a *preliminary* injunction, Pls.' Br. at 40, they fail to acknowledge that these same factors must be met to obtain permanent relief as well. Insofar as Plaintiffs believe they are entitled to any form of injunctive relief without satisfying other factors, they are incorrect. *Winter*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."); *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 272 (2d2011); *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). As explained above, Plaintiffs' Apportionment Clause and *ultra vires* claims lack merit and their request for partial summary judgment and an injunction should be rejected for that reason alone. *Winter*, 555 U.S. at 32–33. Even if these

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claims were meritorious, however, Plaintiffs could not satisfy the remaining factors, so they would not be entitled to either preliminary or permanent injunctive relief.

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; *see also 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)). To establish a likelihood of irreparable harm, a plaintiff "must 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 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 at every step—and further fail to establish that the remaining injunction factors tilt in their favor.

1. Plaintiffs Cannot Establish Any Irreparable Apportionment Injury

Because Plaintiffs rushed to Court before the Secretary has implemented the Memorandum—and before any census enumeration has even been completed—Plaintiffs cannot show any imminent threat of apportionment injury.

As detailed above, it is currently unknown what numbers the Secretary may ultimately transmit to the President. *See supra* at 8; Abowd Decl. ¶ 15. Plaintiffs' expert declarations posit only that the *wholesale* exclusion of illegal aliens may cause certain states to lose a Congressional seat. *See* Pls.' Br. at 49–50; *see generally* Warshaw Decl. But those experts do not—and cannot—predict what apportionment injury any state might suffer from some hypothetical smaller exclusion, assuming a state suffers any injury at all. Given that the Secretary of Commerce has not yet transmitted his report to the President, and the President has not yet transmitted any numbers to Congress, any effort to

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predict the ultimate effect of the Memorandum on apportionment, or the resulting "political power of Plaintiffs' constituents," Pls.' Br. at 41, is entirely speculative.

More fundamentally, any purported apportionment injury that Plaintiffs could suffer is, as a legal matter, not irreparable. The Supreme Court has regularly decided census cases that, like this one, contest the relative apportionment of representatives post-apportionment, because an erroneous or invalid apportionment number can be remedied after the fact.[18] *See, e.g., Utah*, 536 U.S. at 462 (holding that post-apportionment redress is possible if the apportionment calculation contains an error); *see also Franklin*, 505 U.S. at 803 (finding that a post-apportionment order against the Secretary would provide redress for plaintiffs); *Dep't of Commerce v. Montana*, 503 U.S. 445-46 (1992); *Wisconsin v. City of New York*, 517 U.S. 1 (1996). Indeed, in *Wisconsin*, it was not until *six years* after the 1990 census that the Court resolved an apportionment dispute based on those results. This case is not different. As this Court noted in requesting the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, "the Presidential Memorandum does not purport to change the conduct of the census itself[;] [i]nstead, it relates the calculation of the apportionment base used to determine the number of representatives to which each state is entitled." ECF 68 at 2. Accordingly, this Court could order adequate relief after apportionment when any injury to Plaintiffs is known with certainty, assuming there is any at all. Indeed, the very fact that the Memorandum calls for the Secretary to report two numbers—one arrived at after the Census Bureau applies its Residency Criteria, and another reflecting the number of illegal aliens that the Secretary is able to identify—makes clear that a post-apportionment remedy would be easy to craft.

[18] The only census cases decided by the Supreme Court pre-apportionment involved challenges to the mechanics of conducting the census, which could not be undone post-apportionment. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (challenge to a citizenship question on the 2020 Census); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (challenge to the use of statistical sampling in the census).

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2. Plaintiffs' Allegations of Enumeration Injury Do Not Withstand Scrutiny

Plaintiffs' alternative efforts to link the Memorandum to some ongoing enumeration injury fare no better. As explained by Associate Director Fontenot, the Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations. *See* Fontenot Decl. ¶¶ 7, 12; *see generally* Census Bureau, *Review of 2020 Operational Plan Schedule*, Aug. 17, 2020, https://2020census.gov/content/dam/2020census/materials/news/2020-operational-plan-schedule-review.pdf ("Operational Plan") Those operations include a variety of protocols specifically designed over the course of the past decade to ensure that hard-to-count and minority communities—some of the core constituencies for which Plaintiffs advocate—are accurately reflected in the census. *See generally* Fontenot Decl. ¶¶ 11, 12; Operational Plan at 2-11 (describing non-response follow-up, and other efforts to achieve "acceptable level of accuracy and completeness, with a goal of resolving at least 99% of Housing Units in every state, comparable with previous censuses").[19] Plaintiffs speculate that, notwithstanding these protocols, the Memorandum "and Defendants' corresponding public statements" will render the enumeration less accurate—purportedly by deterring immigrant communities from participating. Pls. Br. at 42, 47. But these claims suffer from at least three fundamental flaws, each of which seriously undermines the causation Plaintiffs are trying to establish.

a. Plaintiff's Theory of Harm Relies on Attenuated Events Involving the Independent Actions of Third-Parties

First, as discussed in the standing section, Plaintiffs' theory for why the Memorandum may depress response rates relies on a highly attenuated chain of events. Plaintiffs' expert, Dr. Barreto, opines that immigrant communities are less likely to respond to the census after the Memorandum because of how that Memorandum is discussed in the media and by community activists. Barreto Decl. ¶¶ 15-16, 32. But those independent actors' messages are the product of their own

[19] *See also 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, Apr. 16, 2018, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan.pdf; *see also 2020 Census Research and Testing Management Plan*, Dec. 28, 2015, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/research-testing-plan.pdf, at 7.

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interpretation, and often at odds with the plain terms of the Memorandum. *See, e.g.*, Torres Decl. ¶ 18., ECF No. 76.47 (stating that CASA de Maryland, Inc. "was approached by a number of media outlets, including CNN, to represent the reaction of our community . . . [and] conveyed how harmful the action is and our commitment to ensuring that our members are fully counted."); Barreto Decl. ¶ 33 (listing media messages characterizing the Memorandum as something "intended to promote fear"); *id.* ¶ 46 (noting that aliens "may not do the full research to realize they can still fill out the Census safely, *because they hear the news which is connecting* the July 21 [Memorandum] to Trump's longstanding desire to increase deportation of undocumented immigrants" (emphasis added)). It makes little sense to attribute whatever harm is caused by those independent actors' messaging 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." Barreto Decl. ¶¶ 62, Pls. Br. at 43 (citing various declarations speculating that the Memorandum is likely to create fear of immigration enforcement). Given the strong privacy protections for census response data, any suggestion that the Secretary's compliance with the Memorandum will somehow facilitate immigration enforcement is flatly wrong. *See generally* 13 U.S.C. § 9 (providing that personal information collected by the Census Bureau cannot be used against respondents by any government agency or court); *id.* § 214 (setting forth penalty for wrongful disclosure of information).

b. Plaintiffs' Theory of Harm Is Limitless

Second, setting aside the role of independent actors, Plaintiffs' theory of harm proves too much. Plaintiffs' core claim is that the Memorandum will depress aliens' participation in the census by allegedly "send[ing] a clear message that this community does not count and should be left out of the democratic process." Pls. Br. at 42; *see, e.g.*, Barreto Decl. ¶ 14; Choi Decl. ¶¶ 16-18 (Ex. 14); Torres Decl. ¶ 19 (Ex. 47). But the same line of reasoning could apply to almost any government action or statement that Plaintiffs find disagreeable. As Plaintiffs themselves acknowledged during the initial status conference with the Court, their theory would recognize harm sufficient for standing (and presumably for a preliminary injunction) based on a President's mere statements suggesting that he is

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exploring new legislation that would permit the Census Bureau to share data with immigration enforcement agencies. *See, e.g.*, Conference Tr. 34:13–35:6. That makes little sense.

The transmission of a general policy message—like the kind Plaintiffs claim the Memorandum sends—cannot suffice to show that irreparable harm is imminent or likely. *Winter*, 555 U.S. at 12, 20. The Supreme Court has repeatedly rejected efforts to conjure irreparable injury from a hypothetical series of events that could theoretically cause a plaintiff injury. *See, e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Rizzo v. Goode*, 423 U.S. 362, 372–73 (1976). Indeed, it has explicitly noted that allegations of "fear[]" of future harm must be assessed for reasonableness: "[i]t is the *reality* of the threat of" future harm that is relevant, "not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8 (emphasis added). Where, as here, fear is based on a series of conjectures and subjective misinterpretations—tethered not to something the government has actually done, but to some different policy the government might (or might not) pursue in the future—such fear cannot form the basis for irreparable harm. *See id.* at 107. Merely harboring an objection to the President's expression of a policy preference falls far short of the standard for injunctive relief.

c. The Alleged Harm is at Odds with Existing Evidence

Third, and finally, Plaintiffs' claims that the Memorandum is likely to decrease response rates is simply inconsistent with empirical evidence. Plaintiffs go to great lengths to analogize the Memorandum to a citizenship question on a census questionnaire. *See, e.g.*, Pls. Br. at 42; Barreto Decl. ¶¶ 14, 18, 24, 28, 57, 68, 86. But, as noted above, a randomized control trial published by the Census Bureau after the Supreme Court issued its opinion in the citizenship question litigation found *no* statistically-significant depression of response rates for households that received a test questionnaire containing a citizenship question. *See* Abowd Decl. ¶ 13; *see also 2019 Census Test Report,* Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Test Report). As explained by Dr. Abowd, this test contained a sample of 480,000 housing units, and was "capable of detecting response differences as small as 0.5 percentage points." *See* Abowd Decl.¶ 13. And while some narrow subgroups did exhibit statistically-significant lower self-response rates, Census Test Report at x, the

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Census Bureau concluded that "[c]urrent plans for staffing for Nonresponse Followup would have sufficiently accounted for subgroup differences seen in this test." *Id.* This result was contrary to the prediction of experts who previously testified during the citizenship-question litigation, and some of whose declarations Plaintiffs again submit now. *See generally* Abowd Decl. ¶ 13; *see, e.g.*, Barreto Decl. ¶ 68. As Dr. Abowd reports, this finding illustrates the benefit of a "randomized controlled design," which properly isolates the independent variable (there, the citizenship question) and measures its effects. Abowd Decl. ¶ 13.

Plaintiffs cannot reasonably contend that the Memorandum would have a greater effect on response rates than did the citizenship question. Unlike a question on a census questionnaire, the Memorandum does not call for respondents to submit any information, and it changes nothing about the enumeration process. *See* 85 Fed. Reg. at 44,679 (directing the Secretary to make use of existing information). Indeed, neither Dr. Barreto nor any other declarant proffered by Plaintiffs identifies a rigorous survey or statistical study measuring whether this kind of internal Government action, which seeks nothing of respondents and has no connection to immigration enforcement, has any effect on response rates within immigrant communities. *See generally* Barreto Decl. ¶¶ 39-86. And nothing Plaintiffs submit purports to statistically measure the effect of the Memorandum itself on response rates. *See generally* Barreto Decl. ¶¶ 39-86; Thompson Decl. ¶¶ 21–23 (offering an opinion about the effect of the Memorandum without relying on a source of data).

Under these circumstances, Plaintiffs cannot be said to establish anything more than the abstract "possibility of irreparable injury." *Nken*, 556 U.S. at 434. 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 the single most important prerequisite for the issuance of a preliminary injunction," *Faiveley Transport. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009), Plaintiffs' failure to establish anything more than the theoretical possibility of harm is sufficient basis to deny the injunction they seek.

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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). In particular, an injunction would impede the Executive's historic discretion in conducting both the census and the apportionment, contrary to Congressional intent. *See generally Franklin*, 505 U.S. at 796-800. Plaintiffs discount these interests, arguing that the Government cannot have an interest in enforcing "an unconstitutional law," Pls. Br. at 51, but that argument only holds if Plaintiffs are correct on the merits of their argument—which, as explained above, they are not.

In any event, Plaintiffs' conception of the balance and hardship and public interest collapses those two parts of the traditional four-part injunction test into the very first prong: merits. As the Supreme Court has emphasized, however, that should not be done. *See Winter*, 555 U.S. at 32. The public interest prong is a stand-alone requirement that must be met separately, and cannot be short-circuited at plaintiffs' whim. *Id.*

Plaintiffs vaguely suggest that enjoining the Memorandum would allegedly remedy "Defendants' misinformation." Pls. Br. 52. But the only misinformation Plaintiffs have identified in this case is the misinterpretation of the Memorandum by the various activists and news sources that their expert, Dr. Barreto, and their other declarants describe in their declarations. *See* Barreto Decl. ¶¶ 66-69 (Ex. 56); Choi Decl. ¶ 24-25 (Ex. 14); Seon Decl. ¶ 22 (Ex. 43); Torres Decl. ¶ 24 (Ex. 47). Plaintiffs have never identified one piece of "misinformation" that the Defendants disseminated about the Memorandum. Any attempt to remedy misinformation would therefore require an injunction against some other entity. The public interest may favor that injunction, but it does not favor an injunction against Defendants here.

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CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss and dismiss these consolidated actions. In the event the Court declines to grant Defendants' motion to dismiss, Plaintiffs' motion for partial summary judgment or preliminary injunction should be denied.

Dated: New York, New York

August 19, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. DONALD TRUMP, *in his official Capacity as President of the United States,* et al., Defendants.	No. 20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. DONALD TRUMP, *in his official Capacity as President of the United States,* et al., Defendants.	No. 20-CV-5781 (JMF)

Declaration of John M. Abowd, Ph.D.

I, John M. Abowd, 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:

Qualifications

1. I am the Chief Scientist and Associate Director for Research and Methodology at the United States Census Bureau. I have served in that capacity since June 2016. The following statements are based on my personal knowledge or on information supplied to me in the course of my professional responsibilities. These statements are provided in support of the Defendants' opposition to the Plaintiffs' motion for partial summary judgment or in the alternative for a preliminary injunction.

2. In 1977, I received my Ph.D. in economics from the University of Chicago with specializations in econometrics and labor economics. My B.A. in economics is from the University of Notre Dame.

3. I have been a university professor since 1976. My first appointment was assistant professor of economics at Princeton University. I was also assistant and associate professor of econometrics and industrial relations at the University of Chicago Graduate School of Business. In 1987, I was appointed associate professor of industrial and labor relations with indefinite tenure at Cornell University. I am currently on unpaid leave from Cornell University to work in my current position at the Census Bureau as part of the Career Senior Executive Service.

4. I am a member and fellow of the American Statistical Association, Econometric Society, and Society of Labor Economists (president 2014). I am an elected member of the International Statistical Institute. I am also a member of the American Economic Association, International Association for Official Statistics, National Association for Business Economists, American Association for Public Opinion Research, Association for Computing Machinery, American Association for the Advancement of Science, and American Association of Wine Economists. I regularly attend and present papers at the meetings of all of these organizations.

5. I have served on the American Economic Association Committee on Economic Statistics. I have also served on the National Academy of Sciences Committee on National Statistics, the Conference on Research in Income and Wealth Executive Committee, and the Bureau of Labor Statistics Technical Advisory Board for the National Longitudinal Surveys (chair: 1999-2001).

Relevant professional experience

6. In 1998, the Census Bureau and Cornell University entered into the first of a sequence of IPAs and other contracts under which I served continuously as Distinguished Senior Research Fellow at the Census Bureau until I assumed my current position in 2016, under a new IPA contract. Since March 29, 2020, I have been in the Associate Director position at

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the Census Bureau as a career Senior Executive Service employee. While I was a senior research fellow, I worked with numerous senior executives. This includes Directors (Martha Riche, Kenneth Prewitt, C. Louis Kincannon, Stephen Murdoch, Robert Groves, and John Thompson), Deputy Directors (Hermann Habermann, Thomas Mesenbourg, and Nancy Potok), Chief Scientists (Roderick Little and Thomas Louis), and numerous other associate directors, assistant directors, and division chiefs. I also worked with Chief Economists John Haltiwanger, J. Bradford Jensen, Daniel Weinberg, and Lucia Foster, and researchers in all program areas.

7. I was one of three senior researchers who founded the Longitudinal Employer-Household Dynamics (LEHD) program at the Census Bureau. This program produces detailed public-use statistical data on the characteristics of workers and employers in local labor markets using large-scale linked administrative, census and survey data from many different sources. The program is acknowledged as the Census Bureau's first 21st Century data product: built to the specifications of local labor market specialists without additional survey burden, and published using state-of-the-art confidentiality protection. In addition to very substantial financial support from the Census Bureau, this project was supported by a $4.1 million grant from the National Science Foundation (NSF) on which I was the lead Principal Investigator.

8. From 2004 through 2009, I was the lead Principal Investigator on the $3.3 million NSF-supported collaborative project with the Census Bureau to modernize secure access to confidential social science data. This project led to the first production implementation worldwide of differential privacy1 for OnTheMap—a product of the LEHD program. It also produced prototype confidential data access systems with public-use synthetic micro-data supported by direct analysis of the confidential data on validation servers. These projects were the precursors to the Census Bureau's current program to implement central differential privacy for all publications from the 2020 Census of Population and Housing, which will be the first large-scale production implementation worldwide.

9. From 2011 until I assumed my position as Chief Scientist at the Census Bureau in 2016, I was the Principal Investigator of the Cornell University node of the NSF-Census Research Network (NCRN), one of eight such nodes that worked collaboratively with the Census Bureau and other federal statistical agencies to identify important theoretical and applied research projects of direct programmatic importance to the agencies. The Cornell node produced the fundamental science explaining the distinct roles of statistical policymakers and computer scientists in the design and implementation of differential privacy systems at statistical agencies.

10. I have published more than 100 scholarly books, monographs, and articles in the disciplines of economics, econometrics, statistics, computer science, and information science. I have been the principal investigator or co-principal investigator on 35 sponsored research projects. My full professional resume is attached to this report.

Scope of work

11. I have been asked to provide expert opinion responding to the expert report submitted in this case by Dr. Matthew H. Barreto.

Expert opinion

12. The most significant challenge to the quality of 2020 Census data is the COVID-19 pandemic. The effects of the pandemic and the multiple reprograms of the field operations of the 2020 Census make it nearly impossible to predict with any certainty whether any groups will be differentially disadvantaged in the final count. There are no natural or field experiments that speak to disruptions on this scale.

13. The Census Bureau's randomized controlled trial of a census questionnaire with and without a citizenship question, in June 2019, showed no statistically significant difference in the self-response rates with and without a citizenship question. With a sample of 480,000 housing units, capable of detecting differences as small as 0.5 percentage points (see https://www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/testing-activities/2019-census-test/2019-census-test-report.html), this test was large-scale and properly designed to measure the differential self-response rates using the 2020 Census contact and self-response protocols. The June 2019 Census Test did not inform the question of whether overall self-response might have been lower because of the possibility of receiving a question about citizenship (the macro environment), nor did it inform the quality of the overall census procedures, including and especially non-response follow-up (NRFU).

14. An overview of the changes to the 2020 Census field and post-processing operations because of the COVID-19 pandemic and the shortened time window for the NRFU operation are detailed in the declaration of Albert E. Fontenot, Jr., Associate Director of the Decennial Census Programs for Census Bureau.

15. Pursuant to the President's July 21, 2020 *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census* ("the PM"), and based on information currently available to it, the Census Bureau is in the process of determining the appropriate methodologies and finalizing, to the extent possible, how it may exclude illegal aliens in keeping with the stated purpose of the PM to use the data for apportionment. At this time, the Census Bureau does not know exactly what numbers the Secretary may report to the President, and it is therefore impossible to assess precisely the effects of the PM on apportionment. The Census Bureau is remaining consistent with best practices for a federal statistical agency.

Comments on Dr. Barreto's report

16. With regard to Dr. Barreto's paragraph 14 (in which he concludes that the PM will reduce participation in the 2020 Census and reduce the accuracy of the 2020 census), paragraph 19 (in which he concludes that the PM erodes trust that many community-based organizations with experience serving immigrants built up over the past year), and paragraph 21 (in which he cites studies finding that Census participation drops in immigrant communities when federal immigration enforcement is perceived to be connected with the Census): As stated

above in paragraph 12, the most significant challenge to the quality of 2020 Census data is the COVID-19 pandemic. The effects of the pandemic and the coinciding multiple reprograms of the field operations of the 2020 Census required to adapt to the circumstances of the COVID-19 pandemic make it nearly impossible to predict with any certainty whether any groups will be differentially disadvantaged in the final count. There are no natural or field experiments that speak to disruptions on this scale. Additionally, as demonstrated in paragraph 13 above, a randomized trial of the actual protocol used would be the best evidence to properly draw any conclusions.

17. With regard to Dr. Baretto's paragraph 68, in which he references 2018 survey research that he conducted in relation to the citizenship question on the 2020 decennial, and his conclusions that participation in the Census would increase after removing any fear of immigration status being exposed: The best way to accurately develop such conclusions is to conduct a randomized trial of the actual protocol being used in the 2020 Census, as referenced in paragraph 13 above. His research failed to do this making his conclusions as set out in paragraph 68 less reliable.

18. With regard to Dr. Baretto's paragraph 77, in which he concludes that administrative records are less useful than direct responses: More field visits by enumerators are still scheduled to occur. After some number of visit attempts, the enumerator will only try to get a population count, which does not have any associated characteristics (like Hispanic ethnic origins). Such a population count does not present the same incentives to avoid responding nor to misrepresent the number of people in the household. As long as the NRFU reaches comparable levels of completeness in getting population counts for address identifiers (MAFIDs), the differential effects of administrative record linkage with respect to apportionment are controlled.

19. With respect to Dr. Baretto's paragraph 79, his assertions that the count imputation process is biased by non-ignorable non-response are speculative. In the presence of the pandemic, it is very difficult to predict which neighborhoods will have larger count imputation rates and which will have smaller ones.

20. With respect to Dr. Baretto's paragraph 81, he misuses Rubin's missing data definitions. MCAR means that no variables-measured or unmeasured can predict which units are missing. Ignorable missing data (the standard assumption used by statistical agencies) means that the observed responses can be reliably used to predict the unobserved ones. Since the observed responses are all the agency typically has (including data in the sampling frame), that is all the data it can use for imputation. Non-ignorable missing data means that some unobserved information on the non-respondents is required to accurately predict their missing responses. Such information comes from extra-survey sources. The quote from my previous testimony was taken out of context. As I have previously explained, accuracy has at least two dimensions. These are commonly called bias—the statistic's tendency to systematically overcount or undercount its target—and variance—the statistic's tendency to fluctuate around its target. Count imputation is a statistical measure not based on sampling that has both of these accuracy components. I was commenting on the variance of imputations not the bias. The Census Bureau's count imputation procedure is tested for unbiasedness before use.

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JOHN ABOWD

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Date: 2020.08.19 16:15:22 -04'00'

John M. Abowd, Ph.D.
Chief Scientist and Associate Director for Research
And Methodolgy
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Dated: _____

John M. Abowd

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[Updated July 27, 2020]

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Short biography in PDF format

CURRENT POSITIONS

Chief Scientist and Associate Director for Research and Methodology, U. S. Census Bureau June 2016 –

Edmund Ezra Day Professor, Department of Economics, Cornell University, July 2011 – currently on leave

Director, Labor Dynamics Institute, Cornell University, October 2011 – currently on leave

Founding member and Professor of Information Science (by courtesy), Faculty of Computing and Information Science, July 2000 – currently on leave

Professor of Statistics, September 2013 – currently on leave

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Member of the Graduate Fields of Economics, Industrial and Labor Relations, Information Science, and Statistics

Research Associate, National Bureau of Economic Research, 1050 Massachusetts Avenue, Cambridge, Massachusetts 02138, September 1983 – (on leave while serving at the U.S. Census Bureau)

Research Affiliate, Centre de Recherche en Economie et Statistique/INSEE, 15, bd Gabriel Péri, 92245 Malakoff Cedex France, November 1997 –

Research Fellow, IZA (Institute for the Study of Labor), P.O. Box 7240 D-53072 Bonn, Germany, June 2002 –

Research Fellow, IAB (Institut für Arbeitsmarkt-und Berufsforschung), Dienstgebäude Weddigenstraße 20-22, 90478 Nürnberg, Germany, January 2013 –

President and Principal, ACES-Research, LLC, john@aces-research.com, July 2007 –

Editor, Journal of Privacy and Confidentiality Online journal

PREVIOUS AND VISITING POSITIONS

Distinguished Senior Research Fellow, United States Census Bureau, September 1998 – May 2016

Associate Chair, Department of Economics, Cornell University, August 2015 – May 2016

Visiting Professor, Center for Labor Economics, University of California-Berkeley, August 2014 – July 2015

Director of Graduate Studies, Economics, July 2010 – June 2014

Professor of Economics and Econometrics, University of Notre Dame, January 2008 – May 2008.

Director, Cornell Institute for Social and Economic Research (CISER), July 1999 – December 2007

Associate Director, Cornell Theory Center (became Cornell University Center for Advanced Computing), September, 2006 – August 2007.

Professor of Labor Economics, Cornell University, January 1990 – October 2001.

Edmund Ezra Day Professor, School of Industrial and Labor Relations, November 2001 –

Associate Director, Cornell Institute for Social and Economic Research (CISER), July, 1998 – June, 1999.

Chair, Department of Labor Economics, Cornell University, September, 1992 – June, 1998.

Acting Director, CISER, January, 1998-June, 1998.

Professeur invité, Laboratoire de Microéconomie Appliquée-Theorie Et Applications en Microéconomie et macroéconomie (LAMIA-TEAM), Université de Paris-I (Panthéon-Sorbonne), May 1998.

Consultant, Centre de Recherche en Economie et Statistique (CREST), Institut National de la Statistique et des Etudes Economiques (INSEE), February 1997.

Professeur invité, ERMES (Equipe de Recherche sur les Marchés, l'Emploi et la Simulation) Université Panthéon-Assas (Paris II), October 1995 – July 1996 (part time).

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Professor, Samuel Curtis Johnson Graduate School of Management, Cornell University (adjunct appointment), August 1987 – July 1995.

Chercheur étranger, Institut National de la Statistique et des Etudes Economiques (INSEE), Paris, Department of Research, August 1991 – July 1992, January 1993, January 1994.

Professeur visitant, HEC (Hautes Etudes Commerciales, Paris) Department of Finance and Economics, September 1991 – July 1992 and January 1993, December 1993 – January 1994.

Professeur visitant, CREST (Centre de Recherche en Statistiqu et Economie, Paris), September 1991 – July 1992, July 1993.

Associate Professor with tenure, Cornell University, August 1987 – December 1989.

Research Associate, Industrial Relations Section, Department of Economics, Princeton University, September 1986 – August 1987.

Visiting Associate Professor of Economics, Department of Economics, Massachusetts Institute of Technology, September 1985 – August 1986.

Associate Professor of Econometrics and Industrial Relations, Graduate School of Business, University of Chicago, September 1982 – August 1986. Assistant Professor, September 1979 – August 1982. Visiting Assistant Professor, September 1978 – August 1979.

Senior Study Director/Research Associate, NORC/Economics Research Center, 6030 Ellis Avenue, Chicago, Illinois 60637, September 1978 – August 1986.

Academic Consultant, Centre for Labour Economics, London School of Economics, January 1979 – April 1979.

Assistant Professor of Economics, Department of Economics, Princeton University, September 1977 – August 1979 (on leave September 1978 – August 1979). Lecturer in Economics, September 1976 – August 1977.

Associate Editor, *Journal of Business and Economic Statistics*, 1983 – 1989.

Editorial Board, *Journal of Applied Econometrics*, 1987 – 1989.

Associate Editor, *Journal of Econometrics*, 1987 – 1989.

EDUCATION

Ph.D. Department of Economics, University of Chicago, December 1977.
Thesis: An Econometric Model of the U.S. Market for Higher Education

M.A. Department of Economics, University of Chicago, March 1976.

A.B. Department of Economics (with highest honors), University of Notre Dame, May 1973.

LANGUAGES

English (native), French

HONORS AND FELLOWSHIPS

Julius Shiskin Award, American Statistical Association, Business and Economic Statistics Section (2016)

Cornell University, Graduate and Professional Student Assembly Award for Excellence in Teaching, Advising, and Mentoring (May 2015)

Fellow, Econometric Society (elected November 2014)

Roger Herriot Award, American Statistical Association, Government and Social Statistics Sections (2014)

Elected member, International Statistical Institute (March 2012)

Council of Sections (2014-2016), Chair (2013) Business and Economic Statistics Section (Chair-elect 2012), American Statistical Association

President (2014-2015), Society of Labor Economists, President-elect (2013-2014), Vice President (2011-2013)

Fellow, The American Statistical Association (elected August 2009)

Fellow, Society of Labor Economists (elected November 2006)

La bourse de haut niveau du Ministère de la Recherche et de la Technologie, fellowship for research at the Institut National de la Statistique et des Etudes Economiques (INSEE) awarded by the French Government, September 1991 – February 1992.

National Institute of mental Health postdoctoral fellow at NORC, September 1978 – August 1980.

National Institute of Mental Health pre-doctoral fellow at the University of Chicago, September 1973 – June 1976.

TEACHING EXPERIENCE

Graduate:

Microeconometrics using Linked Employer-Employee Data (CREST-ENSAE)
Understanding Social and Economic Data (Cornell, co-instructor: Lars Vilhuber)
Third-year Research Seminar I and II (Cornell)
Seminar in Labor Economics I, II, and III (Cornell)
Microéconometrie des Données Appariées (CREST-GENES, in French)
Microéconomie et Microéconometrie du Travail (Université de Paris I, in French)
Economie du Travail (Université de Paris II, in French)
Economics of Compensation and Organization (Cornell)
International Human Resource Management (Cornell)
Corporate Finance (Hautes Etudes Commerciales, Paris)
International Human Resource Management (HEC, Paris)
Workshop in Labor Economics (Cornell)
Economics of Collective Bargaining (Cornell)
Executive Compensation (Cornell)
Labor Economics (MIT)
Labor and Public Policy (MIT)
Applied Econometrics I, II (Chicago)
Introduction to Industrial Relations (Chicago)
Econometric Theory I (Chicago)
Industrial Relations and International Business (Chicago)
Workshop in Economics and Econometrics (Chicago)
Econometric Analysis of Time Series (Princeton)
Mathematics for Economists (Princeton)

Undergraduate:

Understanding Social and Economic Data (Cornell, co-instructor: Lars Vilhuber)
Introductory Microeconomics (Cornell)
Economics of Employee Benefits (Cornell)
Economics of Wages and Employment (Cornell)

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Corporate Finance (Cornell)
Introduction to Econometrics (Princeton)
Microeconomics (Princeton)

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Books

1. Abowd, John M. and Francis Kramarz (eds.) *The Microeconometrics of Human Resource Management*, special issue of *Annales d'économie et de statistique* 41/42 (Paris: ADRES, January/June 1996).
2. Abowd, John M. and Richard B. Freeman (eds.) *Immigration, Trade and the Labor Market* (Chicago: University of Chicago Press for the National Bureau of Economic Research, 1991).

Articles

1. McKinney, Kevin L., Andrew S. Green, Lars Vilhuber and John M. Abowd "Total Error and Variability Measures for the Quarterly Workforce Indicators and LEHD Origin-Destination Employment Statistics in OnTheMap" *Journal of Survey Statistics and Methodology* (forthcoming). [download arxiv preprint], supplemental online materials DOI: https://doi.org/10.5281/zenodo.3951670
2. Abowd, John M., Ian M. Schmutte, William Sexton, and Lars Vilhuber "Why the Economics Profession Must Actively Participate in the Privacy Protection Debate," *American Economic Association: Papers and Proceedings*, Vol. 109 (May 2019): 397-402, DOI: 10.1257/pandp.20191106. [download preprint]
3. Abowd, John M. and Ian M. Schmutte "An Economic Analysis of Privacy Protection and Statistical Accuracy as Social Choices," *American Economic Review*, Vol. 109, No. 1 (January 2019):171-202, DOI:10.1257/aer.20170627. [AER, ArXiv preprint, Replication information]
4. Weinberg, Daniel H., John M. Abowd, Robert F. Belli, Noel Cressie, David C. Folch, Scott H. Holan, Margaret C. Levenstein, Kristen M. Olson, Jerome P. Reiter, Matthew D. Shapiro, Jolene Smyth, Leen-Kiat Soh, Bruce D. Spencer, Seth E. Spielman, Lars Vilhuber, and Christopher K. Wikle "Effects of a Government-Academic Partnership: Has the NSF-Census Bureau Research Network Helped Secure the Future of the Federal Statistical System?" *Journal of Survey Statistics and Methodology* (2018) DOI:10.1093/jssam/smy023. [download, open access] [download preprint]
5. Abowd, John M., Ian M. Schmutte and Lars Vilhuber "Disclosure Limitation and Confidentiality Protection in Linked Data," in A.Y. Chun, M. Larson, J. Reiter, and G. Durrant (eds.) *Administrative Records for Survey Methodology* (New York: Wiley, forthcoming). [download preprint]
6. Abowd, John M., Kevin L. McKinney and Ian M. Schmutte "Modeling Endogenous Mobility in Earnings Determination," *Journal of Business and Economic Statistics* Vol. 37, Issue 3 (2019):405-418. DOI: 10.1080/07350015.2017.1356727. [download preprint] [JBES]
7. Abowd, John M., Francis Kramarz, Sébastien Perez-Duarte, and Ian Schmutte "Sorting between and within Industries: A Testable Model of Assortative Matching," *Annals of Economics and Statistics* 129 (March 2018): 1-32. NBER WP-20472. [download preprint] [programs] [data]
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9. Abowd, John M. "How Will Statistical Agencies Operate When All Data Are Private?" *Journal of Privacy and Confidentiality*, Vol. 7, Issue 3, Article 1 (2017). [download, open journal]
10. Haney, Samuel, Ashwin Machanavajjhala, John M. Abowd, Matthew Graham, Mark Kutzbach, and Lars Vilhuber "Utility Cost of Formal Privacy for Releasing National Employer-Employee Statistics," ACM SIGMOD 2017, DOI: 10.1145/3035918.3035940. [download]
11. Abowd, John M. and Kevin L. McKinney "Noise Infusion as a Confidentiality Protection Measure for Graph-based Statistics" *Statistical Journal of the International Association for Official Statistics* (2016) Vol. 32, No. 1, pp. 127-135, DOI: 10.3233/SJI-160958. [download article, open access] [download preprint]

12. Abowd, John M. and Ian Schmutte "Economic Analysis and Statistical Disclosure Limitation" *Brookings Panel on Economic Activity* (Spring 2015): 221-267. [download article and discussion, open access] [download preprint]
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14. Lagoze, Carl, William C. Block, Jeremy Williams, Lars Vilhuber, and John M. Abowd "Data Management of Confidential Data." *International Journal of Digital Curation* 8, no. 1 (2013): 265–278. doi:10.2218/ijdc.v8i1.259. [download preprint]
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36. Abowd, John M. and Simon Woodcock "Multiply-Imputing Confidential Characteristics and File Links in Longitudinal Linked Data," in J. Domingo-Ferrer and V. Torra (eds.) *Privacy in Statistical Databases* (Berlin: Springer-Verlag, 2004), pp. 290-297. [download preprint]
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39. Abowd, John M. and Francis Kramarz "The Costs of Hiring and Separations," *Labour Economics*, Vol. 10, Issue 5 (October 2003): 499-530. [download preprint]
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41. Abowd, John M. and Orley Ashenfelter "Using Price Indices and Sale Rates to Assess Short Run Changes in the Market for Impressionist and Contemporary Paintings" in *The Economics of Art Auctions*, G. Mosetto and M. Vecco (eds.), (Milan: F. Angeli Press, 2002). [download preprint] [access book]
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44. Abowd, John M., Francis Kramarz, David Margolis, and Kenneth Troske "The Relative Importance of Employer and Employee Effects on Compensation: A Comparison of France and the United States," *Journal of the Japanese and International Economies*. Vol. 15, No. 4, (December 2001): 419-436. [download preprint]

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49. Abowd, John M. and Francis Kramarz "Econometric Analysis of Linked Employer-Employee Data," *Labour Economics*, 6(March 1999): 53-74. [download preprint]
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61. Abowd, John M. and Michael Bognanno "International Differences in Executive and Managerial Compensation" in R.B. Freeman and L. Katz, eds. *Differences and Changes in Wage Structures* (Chicago: NBER, 1995), pp. 67-103. [download]
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75. Abowd, John M. and Arnold Zellner "Estimating Gross Labor Force Flows," *Journal of Business and Economic Statistics 3* (July 1985): 254-283.
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Miscellany

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13. Abowd, John M. Kobbi Nissim and Chris Skinner "First Issue Editorial" *Journal of Privacy and Confidentiality*, Vol. 1, No. 1 (2009): 1-6. [download]
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Working and Unpublished Papers

1. Abowd, John M., Ian M. Schmutte, William Sexton, and Lars Vilhuber "Suboptimal Provision of Privacy and Statistical Accuracy When They are Public Goods," (June 2019). [download preprint]
2. Abowd, John M., Joelle Abramowitz, Margaret C. Levenstein, Kristin McCue, Dhiren Patki, Trivellore Raghunathan, Ann M. Rodgers, Matthew D. Shapiro, Nada Wasi, 2019. "Optimal Probabilistic Record Linkage: Best Practice for Linking Employers in Survey and Administrative Data," Working Papers 19-08, Center for Economic Studies, U.S. Census Bureau, handle: RePEc:cen:wpaper:19-08. [download preprint]

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3. McKinney, Kevin L. Andrew Green, Lars Vilhuber, and John M. Abowd "Total Error and Variability Measures with Integrated Disclosure Limitation for Quarterly Workforce Indicators and LEHD Origin Destination Employment Statistics in On The Map" (December 2017). [download preprint]
4. Abowd, John M. and Ian Schmutte "Revisiting the Economics of Privacy: Population Statistics and Confidentiality Protection as Public Goods" (April 2017). [download preprint].
5. Abowd, John M. "Where Have All the (Good) Jobs Gone? (May 2014) Society of Labor Economists Presidential Address. [download preprint] [accompanying audio]
6. Abowd, John M., John Haltiwanger, Julia Lane, Kevin McKinney and Kristin Sandusky "Technology and Skill: An Analysis of Within and Between Firm Differences" (March 2007) NBER WP-13043. [download preprint]
7. Abowd, John M., Francis Kramarz, David N. Margolis, and Thomas Philippon "Minimum Wages and Employment in France and the United States" (February 2006). [archival download]
8. Abowd, John M., Paul Lengermann and Kevin L. McKinney "The Measurement of Human Capital in the U.S. Economy," (March 2003) [download Census, cited on September 1, 2015] [archival download]
9. Abowd, John M., Robert Creecy and Francis Kramarz "Computing Person and Firm Effects Using Linked Longitudinal Employer-Employee Data," (March 2002). [download Census, cited on September 1, 2015] [archival download] [Fortran source] [Support files] [VirtualRDC archive]

MAJOR GRANTS AND RESEARCH CONTRACTS

1. Associate Director for Research and Methodology and Chief Scientist U.S. Census Bureau, Intergovernmental Personnel Act (IPA) with Cornell University, June 1, 2016—May 31, 2020.
2. Research and Methodology Support Services, U.S. Census Bureau contract with Cornell University, June 1, 2015—May 31, 2016, $268,897.
3. The Economics of Socially Efficient Privacy and Confidentiality Management for Statistical Agencies, Alfred P. Sloan Foundation awarded to Cornell University, April 1, 2015—March 31, 2019, $535,970. (co-PIs Lars Vilhuber and Ian Schmutte)
4. RCN: Coordination of the NSF-Census Research Network, National Science Foundation SES 1237602 awarded to the National Institute of Statistical Sciences, July 15, 2012—June 30, 2017, transferred to Cornell University, September 2014, $748,577. (PI Lars Vilhuber, other co-PIs Alan Karr, Jerome Reiter)
5. NCRN-MN: Cornell Census-NSF Research Node: Integrated Research Support, Training and Data Documentation, National Science Foundation Grant SES 1131848 awarded to Cornell University, October 1, 2011—September 30, 2016, $2,999,614. (with William Block, Ping Li, and Lars Vilhuber)
6. A Census-Enhanced Health and Retirement Study: A Proposal to Create and Analyze an HRS Dataset Enhanced with Characteristics of Employers, Alfred P. Sloan Foundation grant awarded to the Institute for Social Research, University of Michigan with a subcontract to Cornell University, September 1, 2011—August 31, 2016, Cornell component $349,608. (PI: Margaret Levenstein; other co-PIs: Matthew Shapiro, Kristin McCue and David Weir)
7. Synthetic Data User Testing and Dissemination, National Science Foundation Grant SES 1042181 awarded to Cornell University, September 15, 2010 to September 14, 2013, $197,170. (Co-PI Lars Vilhuber)
8. CDI-Type II: Collaborative Research: Integrating Statistical and Computational Approaches to Privacy, National Science Foundation Grant BCS 0941226 awarded to Cornell University, September 1, 2010—August 31, 2014, $409,296. (Other PIs: Aleksandra B Slavkovic, Stephen E. Fienberg, Sofya Raskhodnikova, and Adam Smith)
9. TC:Large: Collaborative Research: Practical Privacy: Metrics and Methods for Protecting Record-level and Relational Data, National Science Foundation Grant TC 1012593 awarded to Cornell University, July 15, 2010 to July 14, 2015, $1,326,660. (Other PIs: Johannes Gehrke, Gerome Miklau, and Jerome Reiter)
10. The Longitudinal Employer-Household Dynamics Program, U.S. Bureau of the Census, Interagency Personnel Act (IPA) with Cornell University, September 18, 1998 – September 17, 2000, $260,000; renewed September 14, 2000—September 13, 2002, $320,000; contract renewed as consultant September 14, 2002—September 13, 2003 ($120,000); renewed as IPA September 15, 2003 – September 14, 2005 ($384,590); renewed as IPA September 15, 2005—September 14, 2007 ($425,215); new September 15, 2008—September 14, 2010 (497,897);

renewed September 15, 2010—September 14, 2012 (532,893); continued as a contract with ACES-Research, LLC (September 17, 2012–September 16, 2013); re-established as IPA October 1, 2013—September 30, 2014 ($231,757); re-established as IPA November 14, 2014 —May 31, 2015 ($229,095).

11. Social Science Gateway to TeraGrid, National Science Foundation Grant SES 0922005 awarded to Cornell University, July 1, 2009 to June 30, 2012, $393,523. (Co-PI Lars Vihuber) [Cornell Chronicle Article] [ILR News Release]
12. Joint NSF-Census-IRS Workshop on Synthetic Data and Confidentiality Protection, July 2009 Washington, DC, National Science Foundation Grant SES 0922494 awarded to Cornell University, July 1, 2009 to June 30, 2010, $18,480. (Co-PIs Lars Vilhuber, Jerome Reiter, and Ron Jarmin)
13. The Economics of Mass Layoffs: Displaced Workers, Displacing Firms, Causes and Consequences, National Science Foundation Grant SES-0820349 awarded to Cornell University, October 1, 2008 to September 30, 2010, $245,950. (Co-PI Lars Vilhuber)
14. LEHD Developmental and Confidentiality Research, Census Bureau Contract to Abt Associates with subcontract awarded to Cornell University, August 1, 2007 to September 30, 2008, $358,270.
15. CT-T: Collaborative Research: Preserving Utility While Ensuring Privacy for Linked Data, National Science Foundation Grant CNS-0627680 awarded to Cornell University, September 5, 2006 to August 31, 2009, $488,950. (PI Johannes Gehrke)
16. LEHD Confidentiality Research, Census Bureau Contract to Abt Associates with subcontract awarded to Cornell University, October 1, 2004 to September 30, 2005, $230,155.
17. ITR-(ECS+ASE)-(dmc+int): Info Tech Challenges for Secure Access to Confidential Social Science Data, National Science Foundation Grant SES-0427889 awarded to Cornell University, October 1, 2004 to September 30, 2007, $2,938,000. (Co-PIs Matthew D. Shapiro, Ronald Jarmin, Stephen F. Roehrig, and Trivellore Raghunathan) [Cornell Chronicle article]
18. EITM: Developing the Tools to Understand Human Performance: An Empirical Infrastructure to Foster Research Collaboration, National Science Foundation Grant SES-0339191 awarded to Cornell University, October 1, 2004 to September 30, 2007, $337,455 (Co-PIs John Haltiwanger and Ron Jarmin)
19. The New York Research Data Center, National Science Foundation Grant SES-0322902 awarded to the NBER, August 1, 2003 to July 31, 2004, $300,000. (PI Neil G. Bennett, Other co-PIs Bart Hobijn, Erica L. Groshen, Robert E. Lipsey)
20. Workshop on Confidentiality Research, National Science Foundation Grant SES-0328395 awarded to the Urban Institute, June 1, 2003 – May 31, 2004, $43,602. (Co-PI Julia Lane)
21. Firms, Workers and Workforce Quality: Implications for Earnings Inequality and Economic Growth, Alfred P. Sloan Foundation Grant 22319-000-00 awarded to the Urban Institute, January 2003—January 2006, $1,400,000. (Co-PIs John Haltiwanger, Julia Lane, J. Bradford Jensen, Fredrick Knickerbocker, and Ronald Prevost)
22. The Demand for Older Workers: Using Linked Employer-Employee Data for Aging Research, National Institute on Aging, R01-AG18854-01 to Cornell University, July 1, 2002 – April 30, 2007, $1,753,637. (Co-PIs John Haltiwanger, Andrew Hildreth, and Julia Lane)
23. Workers and Firms in the Low-wage Labor Market: Interactions and Long Run Dynamics, Russell Sage Foundation, Rockefeller Foundation, and Department of Health and Human Services (ASPE) to the Urban Institute $700,000, September 1, 2001 August 31, 2003. (Co-PIs John Haltiwanger, Harry Holzer, and Julia Lane)
24. From Workshop Floor to Workforce Clusters: A New View of the Firm, Alfred P. Sloan Foundation, 99-12-12 to the Urban Institute, March 1, 2000 – March 31, 2002, $314,604. (Co-PIs John Haltiwanger and Julia Lane)
25. Dynamic Employer-Household Data and the Social Data Infrastructure, National Science Foundation, SES-9978093 to Cornell University, September 28, 1999 – September 27, 2005, $4,084,634. (Co-PIs John Haltiwanger and Julia Lane)
26. The Longitudinal Employer-Household Dynamics Program, National Institute on Aging, interagency funding to the United States Census Bureau, September, 1999 – August, 2001, $490,000. Renewed September 2001– August 2004, $750,000 (Co-PIs John Haltiwanger and Julia Lane) [Cornell Chronicle article]
27. Individual and Firm Heterogeneity in Labor Markets: Studies of Matched Employee-Employer Data, National Science Foundation SBER 9618111 to the NBER, March 15, 1997 – February 28, 2002, $243,361.

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28. Creation of an Employer Identification Link File and Addition of Employer Information to the National Longitudinal Survey of Youth 1979 Cohort, Bureau of Labor Statistics (subcontracted by NORC, University of Chicago, Chicago, IL 60637), July 1, 1995 – December 31, 1997, $82,946.
29. Employment and Compensation Policies: Studies of American and French Labor Markets Using Matched Employer-Employee Data, National Science Foundation SBR 9321053 to the NBER, July 1, 1994 – June 31, 1997, $ 185,257. (Co-PIs David Margolis and Kenneth Troske)
30. Compensation System Design, Employment and Firm Performance: An Analysis of French Microdata and a Comparison to the United States, National Science Foundation, SBR 9111186 to Cornell University, July 1, 1991 – December 30, 1994, $174,565.
31. The Effects of Collective Bargaining and Threats of Unionization on Firm Investment Policy, Return on Investment, and Stock Valuation, National Science Foundation, SES 8813847 to the NBER, July 1, 1988 – June 30, 1990, $81,107.
32. Improving the Scientific Research Utility of Labor Force Gross Flow Data, National Science Foundation, SES 85-13700 to the NBER, April 15, 1986 – March 31, 1988, $69,993.
33. Program Evaluation: New Panel Data Methods for Evaluating Training Effects, U.S. Department of Labor Contract 23-17-80-01 to NORC at the University of Chicago, 1983.
34. Minority Unemployment, Compensating Differentials and the Effectiveness of the EEOC, U.S. Department of Labor Contract 20-17-80-44 to NORC at the University of Chicago, 1982.
35. An Analysis of Hispanic Employment, Earnings and Wages with Special Reference to Puerto Ricans, U.S. Department of Labor Grant 21-36-78-61, 1981.

PROFESSIONAL SERVICE, SURVEYS, AND DATA COLLECTION

1. Canadian Research Data Centre Network Inaugural Board 2017-2019.
2. American Economic Association, Committee on Economic Statistics (AEAWeb) 2013-2018.
3. National Academy of Sciences, Committee on National Statistics (CNSTAT) 2010-2013; reappointed 2013-2016.
4. National Academy of Sciences, CNSTAT, Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin, (Chair) 2011-2012.
5. National Academy of Sciences, CNSTAT, Panel on Measuring Business Formation, Dynamics and Performance, 2004-2007.
6. National Academy of Sciences, CNSTAT, Panel on Data Access for Research Purposes, 2002-2005.
7. Executive Committee, Conference on Research in Income and Wealth 2002-.
8. Distinguished Senior Research Fellow, LEHD Program, U.S. Census Bureau 1998-2016.
9. Social Science and Humanities Research Council (Canada), Major Collaborative Research Initiatives review panel, 1997, 1998.
10. Technical Advisory Board for the National Longitudinal Surveys of the Bureau of Labor Statistics, 1988-1990, 1992-2001, Chair 1999-2001.
11. National Science Foundation, Economics Panel, 1990-91, 1992-93; KDI Panel 1999; Infrastructure Panel 2000; CDI Panel 2008; CDI Panel 2009.
12. Principal Investigator for The Center for Advanced Human Resource Studies Managerial Compensation Data Base. sponsored by the Cornell University Center for Advanced Human Resource Studies, 1989-1994.
13. Principal Investigator for A Longitudinal Data Base of Collective Bargaining Agreements. Sponsored by the Bureau of National Affairs and the University of Chicago Graduate School of Business, 1985.

PROFESSIONAL ORGANIZATIONS

1. American Economic Association
2. American Statistical Association
3. Econometric Society
4. Society of Labor Economists
5. International Statistical Institute
6. International Association for Official Statistics
7. National Association for Business Economics
8. American Association of Wine Economists
9. American Association for Public Opinion Research

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10. Association for Computing Machinery
11. American Association for the Advancement of Science

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

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS; and ADRIAN GARCIA,

Plaintiffs,

v.

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; and U.S. CENSUS BUREAU,

Defendants.

CASE NO. 20-cv-5799

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau (the "Bureau") Director Steven Dillingham, to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic.

2. The Census Bureau's staff spent most of the past decade developing a final operational plan for the 2020 Census that reflected the Bureau's understanding of the best methods for counting everyone once and in the right place (the "Final Operational Plan"). In April 2020, as the COVID-19 pandemic spread throughout the country, the Census Bureau revised its plan to account for both the difficulties of census-taking during a pandemic and the Bureau's constitutional and statutory obligation to achieve a fair and accurate count (the "COVID-19 Plan"). To achieve both ends, the Department of Commerce and the Census Bureau delayed the counting process, shifted the timeframe for conducting and completing its data-collection operation, and increased the time for conducting data-processing, while, crucially, preserving the same amount of time for each step of those operations.

3. On August 3, 2020, the Department of Commerce and the Census Bureau suddenly and without explanation reversed course and replaced the Bureau's COVID-19 Plan with a new one (the "Rush Plan"). The Bureau's Rush Plan requires the Bureau to complete eight and a half months of data-collection and data-processing in half the time. It ignores the multi-month delay in census data-collection that the COVID-19 pandemic caused. It compels a final date for delivering apportionment data to the President that Bureau officials have repeatedly asserted they cannot meet. And it threatens a massive undercount of the country's communities of color and the municipalities, cities, counties, and states where they live. Under these circumstances, the Bureau's new plan to rush the 2020 Census violates, among other things, the federal government's legal obligations to secure an accurate count and statutory prohibitions on arbitrary, capricious, and pretextual federal government action.

4. The federal government's attempt to rush the census count poses a grave threat to

all the vital functions that rely on census data, from reapportioning the United States House of Representatives and redrawing state and local electoral districts, to equitably distributing over $1.5 trillion annually in federal funds that support basic needs such as food, health care, and education. Undercounted cities, counties, and municipalities will lose representation in Congress and tens of millions of dollars in funding. And communities of color will lose core political power and vital services. In contrast to these dire stakes, the immediate solution to this problem is simple: set aside and enjoin implementation of the impossibly-shortened Rush Plan, which is based on an unexplained change of position, and allow the Census Bureau to implement the plan that it had designed to fulfill its constitutional duties during the pandemic.

5. The COVID-19 pandemic upended all 2020 Census field operations, many of which the Census Bureau designed to enumerate populations that it has long struggled to count, including racial and ethnic minorities, non-English speakers, and undocumented persons. Among the disrupted census operations was the largest, most time-consuming operation undertaken to count the country's hard-to-count communities—the "Non-Response Follow Up" operation. During Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census and perform other vital data-collecting functions.

6. The Bureau's staff responded to the pandemic—and the impossibility of conducting house visits during widespread lockdowns—by making necessary adjustments to the timeline in the Final Operational Plan. This revised operational plan, the COVID-19 Plan issued on April 13, 2020, was intended to ensure that hard-to-count communities would be enumerated and the health and safety of Bureau employees and the public would be protected. This plan adjusted the deadlines of, but did not shorten the time for, critical operations. Under this plan—which experts and census stakeholders alike endorsed as a scientifically sound approach for minimizing the pandemic's potential damage to the accuracy of the count—the Bureau extended its data-collection deadlines to October 31, 2020 and its data-processing deadlines into the second quarter of 2021. Critically, the COVID-19 Plan delayed door-knocking by three months, pushing it from May–July 2020 to August–October 2020. But the COVID-19 Plan

acknowledged that the Bureau must spend the same amount of time—around eleven and a half weeks—on door-knocking, just as it had planned to do before the pandemic. The COVID-19 Plan also incorporated the same methods and techniques contemplated in the Final Operational Plan that the Bureau had spent years developing. Indeed, the only respect in which the COVID-19 Plan altered the amount of time devoted to operations set out in the Final Operational Plan was a requirement that the Bureau spend *more* time than originally planned *processing* the data it collected—that is, performing the necessary work to transform over 100 million individual census forms into high-quality, reliable, and legitimate data. This additional investment in data-processing reflected daunting new challenges the COVID-19 pandemic posed to an accurate count, including massive displacements of people that would introduce problems of duplicate responses, responses without unique census identifiers, and other complex data issues.

7. The Department of Commerce and the Census Bureau also recognized that the impact of COVID-19 had made it impossible to meet certain statutory deadlines for reporting census results to Congress. Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham announced that the Bureau was seeking relief from Congress to formally extend two statutory deadlines: first, the deadline for reporting the state-population totals used to calculate the congressional apportionment to the President, which Congress was asked to extend from December 31, 2020 to April 30, 2021; and, second, the deadline for reporting redistricting data to the states, which Congress was asked to extend from March 31, 2021, to July 31, 2021. Commenting on the statutory-deadline extensions, President Trump publicly stated on April 13, 2020, "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

8. Recognizing that more time was necessary to complete an accurate census, and consistent with the President's statement, the Bureau proceeded immediately under its COVID-19 Plan. The Bureau delayed its door-knocking operation to late summer, with the declared

intention of completing it by October 31, 2020. And recognizing that a successful census is dependent on all levels of government working together, the Bureau publicized this plan to the public, as well as to government and non-profit partners involved in the years-long and multi-million-dollar public education campaign to ensure public trust and encourage public participation in the census.

9. Throughout the summer, Bureau officials repeatedly stated that the pandemic had rendered it impossible for the Bureau to complete a reasonably accurate count by December 31, 2020. But to comply with its constitutional obligations, the Bureau continued collecting data on the timelines set in the COVID-19 Plan, which itself extended the Bureau's data-processing timelines into 2021.

10. On August 3, 2020—in the face of a pandemic that has only grown worse and in disregard of the Census Bureau's constitutional and statutory duties to conduct an actual enumeration of the entire population—Secretary Ross and Director Dillingham abruptly abandoned the COVID-19 Plan. Without explanation, they announced the new Rush Plan for the 2020 Census, including shortening the Bureau's data-collection operation by one month to September 30, 2020, and requiring the Bureau to process and report the apportionment data to President Trump by December 31, 2020. The Rush Plan cuts a crucial four weeks from the data-collection operation. And it disregards the Bureau's own prior conclusions that such rushed processing renders it impossible to fulfil its constitutional obligation to ensure reasonable quality and accuracy of 2020 Census data.

11. Defendants' decision to abandon the COVID-19 Plan in favor of the Rush Plan does not satisfy the Supreme Court's clear command that any decision relating to the census bear a "reasonable relationship" to producing an accurate count. *See Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). As demonstrated by Defendants' own prior statements, the challenged decision cannot be justified by any legitimate interest in conducting an accurate census, and in fact will introduce several inaccuracies in the count, chief among them major undercounts of communities of color.

12. The reason for this abrupt change of position is not apparent on the face of the

press release announcing the Rush Plan or any other subsequently issued statements or publications from the federal government. The Bureau has refused requests from Congress and at least one Plaintiff in this action to provide one.

13. The announcement of the Rush Plan did reference two developments that occurred between the adoption of the COVID-19 Plan and the announcement of the Bureau's intent to adopt the Rush Plan. But neither of these developments can justify Defendants' actions. First, the announcement refers to the Secretary of Commerce's direction to the Bureau to comply with the statutory deadline of December 31, 2020 for completing the apportionment count. But this statutory deadline cannot justify an unconstitutional decision to cut short crucial operations and fail to satisfy its constitutional obligation. A statutory deadline, particularly one that was set without a global pandemic in mind, cannot override the federal government's constitutional duty to accomplish an accurate census; there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980). Moreover, the Bureau was cognizant of this deadline even as it designed and implemented the COVID-19 Plan, including delaying crucial field operations by several months. And Bureau officials have repeatedly made clear that because of the impediments introduced by COVID-19, together with the multi-month delay, it is *already* too late to satisfy these pre-COVID-19 deadlines.

14. Second, both the text of the Rush Plan announcement and the timing of the decision suggest that the federal government's motivation for the Rush Plan is to facilitate another illegal act: suppressing the political power of communities of color by excluding undocumented people from the final apportionment count. On July 21, 2020—just a few weeks earlier—President Trump issued a Presidential Order titled "Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Apportionment Exclusion Order")—which expressly stated the President's determination to exclude undocumented people from the population count used for apportionment. To increase the chance that the President can fully effectuate the Apportionment Exclusion Order, he must receive the population totals while he is still in office, and he ordered the Secretary of Commerce to provide

him with 2020 decennial census information by December 31, 2020 to carry out his objective.

15. The President's Apportionment Exclusion Order (currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District) represents only the most recent of Defendants' serial attempts to manipulate the 2020 Census to suppress the political power of communities of color. These attempts started with a campaign to introduce a historically unprecedented and untested citizenship question onto the 2020 Census questionnaire to advantage—in the words of a deceased Republican redistricting consultant—"Republicans and non-Hispanic whites." Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. Since the Supreme Court blocked the question, Defendants have looked for other means to achieve that same end, including collecting data on citizenship from administrative records and, now, cutting the census short.

16. Plaintiffs are local governments, civil rights and civic organizations, and individuals whose communities will almost certainly be inaccurately represented and underrepresented in the final census count if the administration succeeds in truncating census data-collection and data-processing.

17. Plaintiffs seek declaratory relief affirming that Defendants' actions violate the Enumeration Clause and the Administrative Procedure Act. Plaintiffs additionally seek to set aside and enjoin implementation of the illegal Rush Plan, thereby permitting the Bureau to implement the preexisting COVID-19 Plan it carefully designed to ensure a complete and accurate count. This relief will allow the Bureau to conduct the 2020 Census on the timeline it has repeatedly asserted is necessary to complete a full, fair, and accurate count.

18. Without such relief, Plaintiffs and the communities they represent will suffer irreparable harm for at least another decade, until the next census is conducted.

JURISDICTION AND VENUE

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

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

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

22. The proper intradistrict assignment for this action is the San Jose Division, in light of the location of Plaintiffs City of San Jose and members of the League of Women Voters.

PARTIES

I. Plaintiffs

23. The National Urban League ("Urban League") is a civil-rights organization with over 90 affiliates serving 300 communities in 37 states and the District of Columbia. Founded in 1910, the National Urban League is headquartered in New York City. The mission of the National Urban League is to help African Americans and others in underserved communities achieve their highest human potential and secure economic self-reliance, parity, power, and civil rights.

24. For the 2020 Census, the Urban League has expended substantial resources developing programs designed to encourage self-response and cooperation with Census Bureau offices in historically undercounted communities. Specifically, the organization has engaged in efforts to educate the public about the census through various methods, including virtual town halls, production and distribution of toolkits, workshops for locally based get-out-the-count organizations, and publication and upkeep of a website, www.MakeBlackCount.org, to disseminate critical information about the census. The Urban League has also worked with Census Bureau regional offices to encourage enumerator recruitment, and the organization uses social media to encourage 2020 Census participation.

25. Plaintiff Black Alliance for Just Immigration ("BAJI") is a nonprofit organization organized and existing under the laws of California, with offices and members across the country, including in Oakland, California, Miami, Florida, Atlanta, Georgia, and New York City.

BAJI collaborates with African Americans and Black immigrants to organize and advocate for equal and just laws in their communities. BAJI campaigns to advance racial justice and provides partner organizations with varied assistance—particularly on immigration policy—and it spends significant resources educating its partner organizations, individuals, and other constituents through presentations, workshops, publications, technical assistance, and trainings. BAJI is a membership organization, and its members either pay dues or volunteer their time to support the organization. Members also actively participate in BAJI's self-governance and decision-making at the local level.

26. For the 2020 Census, BAJI has worked to ensure non-responsive households in Black and immigrant communities are counted. BAJI has hired additional staff dedicated to engaging local communities on the census, and has engaged in outreach using social media and mailers to bolster self-response. In addition, since the outbreak of the COVID-19 pandemic, BAJI staff regularly participate in webinars and virtual events to provide the public more information about the census, with a specific focus on encouraging participation in Black and immigrant communities.

27. The League of Women Voters is a nonprofit civic organization that encourages informed and active participation in government. Founded in 1920, the League of Women Voters is headquartered in Washington, D.C. The League of Women Voters has over 800 state and local affiliates, located in all 50 states and in 764 specific communities, including affiliates with members in San Francisco and Monterey County, California, Detroit, Michigan, Miami, Florida, Philadelphia, Pennsylvania, and New York City. The League of Women Voters seeks to empower voters and defend democracy. The League of Women Voters has over 65,000 members nationwide, and its members either pay dues or volunteer their time to support the organization.

28. The League of Women Voters has engaged in significant efforts to ensure historically undercounted communities are enumerated during the 2020 Non-Response Follow Up operation. Prior to the outbreak of COVID-19 in the United States, the League of Women Voters and its affiliates participated in public events across the country aimed at providing information about the census to undercounted communities. Since March of this year, the League

of Women Voters has shifted to a digital public-education campaign, encouraging education and participation through social media, email listservs, webinars, and blog posts. Affiliates in Kansas, South Carolina and Maine are also participating in state Complete Count Committees that seek to increase awareness of the 2020 Census, improve participation, and coordinate with Census Bureau officials.

29. Harris County, Texas is a political subdivision of the State of Texas. With over 4.7 million residents, Harris County is the third largest county in the United States. The county's population is over 43% Latino, 20% Black, over 7% Asian, and over 28% non-Hispanic White. During the 2010 Census, 65.1% of households in Harris County self-responded to the census. As of August 14, 2020, 58.3% of households in Harris County had self-responded to the 2020 Census. This response rate in Harris County was well below the national response rate on that date, 63.6%.

30. For the 2020 Census, officials in Harris County engaged in extensive efforts to encourage participation in the County. County officials formed a Complete Count Committee with city officials in Houston that engaged in public education about the census, and built partnerships with local Census Bureau officials to coordinate outreach efforts. In addition, in 2019, the County approved a budget of nearly $4 million dollars to conduct outreach during the 2020 Census. To that end, the County has contracted with vendors to conduct surveys about the opinions and attitudes of non-responsive populations and develop a digital advertising campaign on Facebook and Instagram to encourage 2020 Census participation. And the County receives substantial federal funding tied to census data.

31. King County is a political subdivision of the State of Washington. Over 2.2 million people live in King County, making it the most populous county in Washington. As of August 14, 2020, 26.1% of households in King County had not responded to the 2020 Census. The county has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, King County had nearly 12,000 residents experiencing homelessness, the third highest total of any locale in the country. The Seattle metro area, which includes King County, is estimated to have 140,000

undocumented immigrant residents.

32. King County worked in partnership with local cities to provide $1.17 million to community-based organizations serving historically undercounted communities. Specifically, King County sought to fund organizations that work with communities that are Limited English Proficient. Through this funding, these organizations produced public education materials related to the 2020 Census, and developed campaigns to get-out-the-count. And King County, too, receives substantial federal funding tied to census data.

33. The City of Los Angeles, California is a municipal corporation organized and existing under the laws of the State of California, and is a charter city pursuant to Article XI of the California Constitution. The City is home to roughly 4 million people, and is located in the county recognized by the Census Bureau as the hardest to count in the nation. The city's population is a large contributor to the County's hard-to-count status as more than half of the City's residents live in census tracts that are hard to count. As of August 14, 2020, only 53.8% of the City's households had responded to the 2020 Census—well below the statewide average of 65.1% and even further below the City's own 2010 self-response rate of 68 percent.

34. As a result of its hard-to-count status, Los Angeles has engaged in years of planning and devoted significant resources to developing a strategy for an accurate count, tailored to the unique challenges of the City's population. To fund these efforts, the City has overseen distribution of roughly $2 million dollars to community-based organizations and the investment of almost $1.5 million of both City general fund and grant money in its own efforts. And the City of Los Angeles also receives substantial federal funding tied to census data.

35. The City of Salinas, California is a political subdivision of the State of California. Salinas is the most populous city in and the government seat of the County of Monterey. The city is home to more than 150,000 people, including 38.5% of the county's "hard-to-count" population. As of August 14, 2020, 57.2% of all households in Salinas have responded to the 2020 Census, which is 422nd out of all 482 California cities. The current response rate is 7.9 percentage points below California's statewide average for self-responses and more than 10 percentage points below Salinas's self-response rate from the 2010 Census.

36. Salinas has dedicated significant resources to funding and staffing its "Census Action Team," which is composed of city staff and representatives from the County of Monterey's "Complete Count Committee," as well as community-based organizations, school districts, and local businesses. The city's population is more than 75% Latino, and more than 1 in 5 households have limited English-language proficiency. As part of its outreach, the Salinas Census Action Team engages religious and community organizations, such as local food banks, to assist with enumeration efforts in the Latino community and all communities of color as these organizations are able to assist with trust and communication barriers that can make these groups hard to count. The City of Salinas also receives substantial federal funding tied to census data.

37. The City of San Jose is a political subdivision of the State of California. San Jose has over 1 million residents, making it the largest city in Northern California, and the tenth largest city in the United States. San Jose's population is 32% Latino, and 35% Asian, and nearly 40% of residents are foreign born. As of August 14, 2020, 28% of households in San Jose had not responded to the census. San Jose has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, in 2019, San Jose had over 6,000 residents experiencing homeless. In addition, the San Jose metro area is estimated to have over 150,000 undocumented immigrant residents.

38. The City of San Jose has engaged in extensive public-education and get-out-the-count efforts during the 2020 Census. San Jose has formed a Complete Count Committee with Santa Clara County, and nearly 90 community-based organizations. The Committee focuses on raising awareness of the census in historically undercounted communities. San Jose also disseminates information about the census to the public through city departments and offices. San Jose also worked closely with the Census Bureau to recruit qualified bilingual enumerators. The City of San Jose receives substantial federal funding tied to census data.

39. Plaintiff Rodney Ellis is the Commissioner for Precinct One on the Harris County Commissioners Court. He is a resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Ellis regularly drives on roads and highways in Harris County.

40. Plaintiff Adrian Garcia is the Commissioner for Precinct Two on the Harris County Commissioners Court. He is a life-long resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Garcia also regularly drives on roads and highways in Harris County.

II. Defendants

41. Defendant Wilbur L. Ross is the Secretary of the U.S. Department of Commerce and is sued in his official capacity. Secretary Ross oversees the U.S. Department of Commerce and the Census Bureau. Congress has delegated the responsibility for carrying out the decennial census to the Secretary of Commerce. 13 U.S.C. § 141(a).

42. Defendant U.S. Department of Commerce is a cabinet agency within the Executive Branch responsible for administering the decennial census.

43. Defendant Steven Dillingham is the Director of the U.S. Census Bureau and is sued in his official capacity.

44. Defendant U.S. Census Bureau is an agency within the Department of Commerce responsible for planning and administering the decennial census. 13 U.S.C. § 2.

FACTUAL ALLEGATIONS

I. Defendants' Constitutional and Statutory Obligations.

45. Under the United States Constitution, the federal government must conduct an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2.

46. The population totals produced by the decennial enumeration are used to apportion congressional representatives to the various states. *Id.* Census figures are also used in state and local redistricting and in the distribution of federal funds to communities across the United States.

47. The Enumeration Clause requires that decisions relating to the census bear a "reasonable relationship" to the constitutional purpose of the enumeration. *Wisconsin*, 517 U.S. at 20.

48. Similarly, the Census Act imposes a mandatory duty on the Secretary of Commerce to "conduct a census that is accurate and that fairly accounts for the crucial

representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

49. Consequently, the Secretary of Commerce and the Census Bureau are constitutionally obligated to make decisions in conducting the census that are reasonably related to achieving a fair and accurate calculation of the population of the United States.

II. The Census Bureau's Pre-COVID-19 Operational Plans for the 2020 Census.

50. For the 2020 Census, the Census Bureau spent the better part of a decade designing operations to fulfill its constitutional and statutory mandate, including: soliciting and incorporating feedback from seasoned experts, advisors, and community groups; testing various features of its data-collection and data-processing operations; and ensuring that its decisions for conducting the census reflected sound, scientifically based judgment.

51. To this end, the Bureau created an operational plan to guide its efforts, including its efforts to collect data from census respondents and to process that data into usable forms for constitutionally and statutorily mandated purposes, including reapportionment and redistricting.

52. On December 31, 2018, the Bureau promulgated the final version of its operational plan, which the Bureau called "Version 4.0" (hereinafter referred to as the "Final Operational Plan"). *See* U.S. Census Bureau, Final Operational Plan (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf. In the Final Operational Plan, the Census Bureau stated that its goal for the 2020 Census is to "count everyone once, only once, and in the right place."

53. Under the Paperwork Reduction Act, the Office of Management and Budget must review and approve the plans for any federal survey, including the decennial census, to ensure that those surveys meet government standards, minimize respondent burden, and maximize the utility of the collected information. 44 U.S.C. § 3504(c).

54. The Office of Management and Budget formally reviewed and approved the Census Bureau's pre-COVID-19 plans for the decennial census, including the Final Operational Plan.

55. The Final Operational Plan includes over 200 pages of detailed and transparent

conclusions for achieving the 2020 Census's objective of an accurate count.

56. The Final Operational Plan reflects the conclusions of various experts including survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

57. The Final Operational Plan states that it "reflects and supports evidence-based decision-making" about the operations necessary to gather and process census responses from every household in the country.

58. The Final Operational Plan states that it was "informed through research, testing, and analysis conducted from 2012 through 2018."

59. The Bureau conducted at least fifteen tests between 2012 and December 31, 2018, when it published its Final Operational Plan.

60. Career Bureau staff developed the Final Operational Plan following substantial consultation with outside experts and census stakeholders, including members of the Census Scientific Advisory Committee and the National Advisory Committee.

61. The Census Bureau also produced a series of "detailed operational plans," which supplement the Final Operational Plan, and provide more parameters for the individual operations that, together, comprise the 2020 Census.

62. The detailed operational plans likewise reflect the conclusions of various subject-matter experts regarding how to complete an accurate count.

63. The Bureau's Final Operational Plan contains several major categories of operations. Two of those categories are particularly important for purposes of this lawsuit: data-collection and data-processing.

64. "Data-collection" refers to operations through which the Bureau obtains information from and about all the people living in the United States.

65. "Data-processing" refers to operations through which the Bureau fills in any gaps in the personal information that it collects from people, transforms the resulting data into usable forms, checks those results for accuracy and other aspects of data quality, and publishes those results, among other things.

66. The Bureau must thoroughly, fully, and correctly perform both categories of

operations—collection and processing—to achieve its stated goal of counting everyone once, only once, and in the right place.

A. Census Data Collection

67. During the census, the Bureau attempts both to determine the number of people in the country and their characteristics, such as their race and ethnicity.

68. Although the Census Bureau planned to deploy many methods during the 2020 Census to collect counts and characteristics from households around the country, the Bureau contemplated, in both the Final Operational Plan, and in the supplemental detailed operational plans, that three methods would account for the overwhelming majority of census responses: the "Self-Response" method; the "Update Leave" method; and the "Non-Response Follow Up" method. *See* U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Non-Response Follow Up Operation* (July 15, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf.

69. The Self-Response method was the "primary methodology for the 2020 Census." Under this method, heads of households would provide their 2020 Census responses directly to the Census Bureau by mailing back a paper census form, filling out a digital form on the Bureau's online census portal, or calling into telephone hotlines to provide their responses to Bureau employees operating those hotlines.

70. The Update Leave method was the methodology for reaching housing units that could not receive physical mail or did not have verifiable mailing addresses. Under this method, Bureau employees would travel throughout both rural and urban areas, leaving invitations to participate and paper census questionnaires at these housing units, so that the people living in those locations could respond themselves.

71. The Self-Response method and the Update Leave method are crucial for obtaining accurate information about the number of people in the country and their characteristics, because data people report about themselves and the members of their housing units is the highest quality data that the census collects.

72. But for the tens of millions of households that do not report their personal data through the Self-Response or Update Leave method, the Bureau's next-best source of personal data is data it collects directly from people through the Non-Response Follow Up method.

73. As part of the Non-Response Follow Up method, the Bureau sends its employee enumerators directly to housing units so that they can attempt to speak with a person occupying each unit and obtain information about everyone who should be counted in that unit.

74. The Bureau requires enumerators to record their responses for each household through iPhones that the Bureau specifically contracted and customized for this purpose. The enumerators' iPhones include software designed to lead enumerators consistently and reliably to solicit information from people at their doors. The enumerators' iPhones also include software to ensure that any data collected from housing units remains confidential as it is being transmitted to the Bureau. The limited supply of these customized iPhones places a limit on the number of enumerators that the Bureau can deploy in the field.

75. The Bureau's Detailed Operational Plan for Non-Response Follow Up, which supplements the Final Operational Plan, sets out a specific protocol for conducting Non-Response Follow Up.

76. Under the Detailed Operational Plan, each housing unit assigned for a visit from an enumerator was eligible for up to six "contact days." A "contact day" could include more than one attempted contact per day.

77. The Bureau concluded it could pursue less than six contact days only under certain scenarios.

78. One scenario that would allow the Bureau to pursue fewer than six contact days was the existence of high-quality administrative records for the housing unit. The Census Bureau has collected data from federal administrative agencies, such as the Social Security Administration, the Internal Revenue Service, and the Department of Housing and Urban Renewal, among others, as well as data from states, which it uses to provide information about the count and characteristics of non-responsive households.

79. If the Bureau had located administrative data from federal and/or state

administrative records and concluded that those records contained accurate demographic data for the occupants of a housing unit, the Bureau's enumerators would attempt only one contact with that unit. If—during that contact attempt—the enumerator did not succeed in finding a live person at the unit, then the Bureau would use the information in the administrative records to fill in the census responses for that unit during the data-processing phase of the 2020 Census.

80. A second scenario that would allow the Bureau to pursue less than six contact days would arise if the Bureau identified a proxy—a person such as a neighbor or landlord that the enumerator could ask for information about the occupants of the housing unit in question. After a third failed contact attempt, a unit would become eligible for being counted through proxy.

81. Proxies can produce many types of data. For instance, proxies are useful for helping the Bureau identify whether a housing unit is vacant—and thus should be marked "vacant" in the Master Address File that the Bureau uses to keep track of the overwhelming majority of housing units that it must enumerate—or non-existent—and thus should be deleted from the Master Address File. For the 2020 Census, the Bureau is planning to use administrative records, such as the United States Postal Service's directory of non-deliverable addresses, to identify vacant housing, but proxies are generally more accurate for this purpose. Finally, proxies provide vital data for other operations that the Bureau undertakes during its data-processing phase, described further below.

82. If the Bureau is unable to enumerate a household after six contact days, in most cases, it will resort to less accurate methods for determining the count and characteristics of the household during its data-processing phase, described below.

83. The Bureau performs several other vital operations in addition to door-knocking during the Non-Response Follow Up period, including a series of operations to ensure the quality of the data that it collects in the field.

84. During the Non-Response Follow Up process, the Bureau: follows up with people who self-responded to the census online but did not enter their unique census identification number to ensure that they are counted in the right place (a process known as "Field

Verification"); and corrects information reported erroneously or omitted from previously submitted census forms (a process known as "Coverage Improvement").

85. In addition, the Bureau re-collects census responses in select instances to ensure that the original submissions were accurate (a process known as "Self-Response Quality Assurance"). This operation protects against enumerators falsifying the information that they provide to the Bureau. Specifically, the Bureau conducts quality control reinterviews of a sample of households. This component is designed to deter and detect cases where enumerators have provided false information about the housing units they are assigned to canvass.

86. Quality control reinterviews are part of a broader set of protocols that the Bureau has developed to guard against factors that endanger the accuracy of the count. Non-Response Follow Up is thus important not only for collecting information, but also for ensuring that the information that is collected is accurate. These two components—gathering data and ensuring its accuracy—must both occur for the Bureau to get a fair and accurate count.

87. The Bureau anticipated that approximately 60% of housing units nationally would respond to the 2020 Census through Self-Response and Update Leave, potentially making up to 40% of housing units targets for Non-Response Follow Up.

88. A Non-Response Follow Up universe of 40% of the housing units in the country would have been the largest follow up universe on a percentage basis since at least 1970.

89. The Census Bureau did not anticipate that the Non-Response Follow Up universe in 2020 would mirror the demographic makeup of the nation's population as a whole.

90. Instead, the Census Bureau anticipated that the Non-Response Follow Up universe in 2020 would contain a disproportionate number of people who belong to communities that the Bureau calls "hard-to-count."

91. The Final Operational Plan describes hard-to-count populations as including, but not limited to, the following populations: young children; highly mobile persons; racial and ethnic minorities; non-English speakers; low-income persons; persons experiencing homelessness; undocumented immigrants; persons who have distrust in the government; lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) persons; persons with mental and

physical disabilities; and persons who do not live in traditional housing.

92. Historically, these populations have had low self-response rates and have, thus, made up disproportionate shares of households that must receive contact days during Non-Response Follow Up.

93. Consequently, the Final Operational Plan acknowledges, "[t]he NRFU Operation is entirely about hard-to-count populations."

94. The Final Operational Plan also acknowledges that hard-to-count populations may require more outreach than the Non-Response Follow Up method would normally provide, and the Bureau designed its Final Operational Plan accordingly.

95. The Final Operational Plan states that "[w]hile most cases receive a maximum of six attempts, cases in hard-to-count areas may receive more than six attempts to achieve a consistent response rate for all geographic areas."

96. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

B. Census Data-Processing

97. After collection activities are complete, the Census Bureau must process the data.

98. Census data-processing cannot begin until census data-collection concludes.

99. Census data is unusable for its intended purposes until it has been processed.

100. The Census Bureau's data-processing operations transform tens of millions of census responses into usable products, including the population totals used to reapportion seats in the U.S. House of Representatives and to create electoral districts.

101. The Bureau uses its data-processing operations to, among other things, ensure that data received from different data-collection methods are all in a single format allowing them to be processed together.

102. The Bureau uses its data-processing operations to "unduplicate responses"—

meaning to resolve conflicts of information among multiple forms attributable to the same housing unit.

103. The Bureau uses its data-processing operations to determine the final status of a housing unit—such as vacant or inhabited—and determine the total number of people that should be attributed to any apparently inhabited unit that was not counted through Self-Response, Update Leave, or Non-Response Follow Up.

104. The Bureau also uses its data-processing operations to ensure that Bureau data products accurately report respondents' characteristics, such as age, race, and ethnicity.

105. The Bureau uses administrative records and statistical imputation during the data-processing phase to fill in both missing people and their characteristics. But administrative records—especially low-quality administrative records—and statistical imputation are generally less accurate than self-response data.

106. For many households, administrative data provides only low quality information, replete with inaccuracies and incomplete information. This is especially the case for particular communities that are underrepresented in administrative records, including communities of color, immigrants, and low-income families. Use of this low-quality data to fill in missing information for non-responsive households produces less accurate information.

107. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household. Imputation thus assumes the existence of other data points gathered through other data-collection methods—such as self-response, proxies, and administrative records—and generates more accurate results when it can be triangulated against those data points. The processes that the Bureau uses to collect and process self-response data, proxy data, and administrative records are thus critical and inextricably linked to the Bureau's ability to impute data accurately.

108. At various phases of the Bureau's data-processing operations, Census Bureau personnel must review the quality of files in-process before those files can be sent to the subsequent steps in the data-processing operation. These reviews include personnel with subject-matter expertise from several different divisions of the Bureau.

109. The Bureau's data-processing operations help ensure that people are not missed, that other people are not counted multiple times, and that people's characteristics are accurately reported. These processes help eliminate or reduce undercounts, among other kinds of data-quality issues.

C. The Final Operational Plan's Original Timeline for the 2020 Census

110. The Bureau's Final Operational Plan called for data-collection to run from January 21, 2020, to July 31, 2020, for a total of more than six months.

111. In that window, the Self Response method was scheduled to run from March 12, 2020 to July 31, 2020, and the Update Leave method was scheduled for March 15, 2020 to April 17, 2020.

112. The Bureau also scheduled several special operations to occur early in its census taking process. The Service-Based Enumeration, which counts people experiencing homelessness, was scheduled for March 30, 2020 to April 1, 2020, and Group Quarters Enumeration, which counts people living in group housing such as nursing homes, was scheduled from April 2, 2020 to June 5, 2020.

113. The Bureau scheduled the Non-Response Follow Up method to run from May 13, 2020 to July 31, 2020, for a total of approximately eleven and a half weeks.

114. The Bureau scheduled up to five months—from July 31, 2020 to December 31, 2020—to process census data for the congressional reapportionment report.

115. The Bureau also scheduled an additional three months—from January 1, 2021 to March 30, 2021—to process census data for redistricting.

116. The Bureau's timelines for implementing the Final Operational Plan reflect the Bureau's scientifically informed understanding of the time necessary to complete its operations and generate an accurate count.

III. The Census Bureau's COVID-19 Plan.

A. COVID-19 Disrupts the 2020 Census

117. On January 21, 2020, the Bureau began 2020 Census data-collection in remote Alaska.

118. On March 10, 2020, the Bureau began to accept self-responses on its website.

119. Shortly thereafter, many parts of the nation rapidly began to shut down due to the COVID-19 pandemic.

120. The Census Bureau quickly concluded that it could not continue to engage in operations safely. On March 18, 2020, the Bureau announced that it would suspend all field operations for two weeks in order to "help protect the health and safety of the American public." Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/press-releases/2020/operational-update.html.

121. On March 28, 2020, the Bureau announced yet another two-week suspension until April 15, 2020, as the coronavirus pandemic made it impossible to engage in operations.

122. The suspension disrupted several field operations, including Update/Leave method, the Service Based Enumeration counting people experiencing homelessness, and the Group Quarters Enumeration counting people living in group housing.

123. In addition, the Bureau halted all hiring and training of the hundreds of thousands of enumerators it needs to conduct Non-Response Follow Up. This included halting any and all background checks and fingerprinting of enumerators that were conditionally hired at that time.

124. The Bureau also decreased office staff at regional centers responsible for processing mail-in self-response forms and at the Bureau's call centers.

B. Changes to the Final Operational Plan in the COVID-19 Plan

125. On April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the long-term impact of the COVID-19 pandemic. The new plan included a shifted timeline for data-collection and data-processing operations that corresponded with the delays in operations that the pandemic has caused (the "COVID-19 Plan").

126. Adjustments to plans approved by the Office of Management and Budget under the Paperwork Reduction Act must be re-submitted for approval. 44 U.S.C. § 3507(h)(3). The Census Bureau submitted the COVID-19 Plan to the Office of Management and Budget on April 30, 2020. The changes were approved on May 11, 2020.

127. The COVID-19 Plan was designed to "[e]nsure a complete and accurate count of all communities," "[p]rotect the health and safety of the American public and Census Bureau employees," and "[i]mplement guidance from federal, state, and local authorities regarding COVID-19." Press Release, U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19 Fact Sheet* (Apr. 27, 2020).

128. The COVID-19 Plan reflected the conclusions of various experts for how best to proceed with completing an accurate count during the current pandemic. These experts include survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

129. Under the COVID-19 Plan, the Bureau suspended 2020 Census field operations for several months, including those operations that were designed to ensure a full count of traditionally undercounted communities.

130. The COVID-19 Plan provided that the Bureau would start the nationwide Non-Response Follow Up operation on August 11, 2020, and continue the door-knocking process through October 31, 2020.

131. Thus, the COVID-19 Plan delayed the start of most door-knocking by three months while maintaining the same amount of time spent undertaking the process—approximately eleven and a half weeks—as the Final Operational Plan had required.

132. Under the COVID-19 Plan, the Bureau also delayed the start of other operations that enumerate traditionally undercounted populations, including the enumeration of the country's homeless population, which the Bureau shifted from March 30, 2020 to September 22, 2020.

133. And the COVID-19 Plan permitted households to submit self-response data to the Bureau until October 31, 2020, extending the deadline under which private persons were able to submit their responses to be counted by more than one month.

134. The Bureau also granted itself one additional month to process data under its COVID-19 Plan, extending the data-processing leg of its operations to nine months given the pandemic. Under this plan, the Bureau would have up to six months to process the data for the apportionment count (between October 31, 2020 and April 30, 2021) and three months to process

the data for redistricting (between April 30, 2021 and July 31, 2021).

135. The Bureau's timelines for implementing the COVID-19 Plan reflect a scientifically informed understanding of the time necessary to appropriately and fully complete its operations and generate an accurate count.

C. Expert and Stakeholder Response to the COVID-19 Plan

136. The Census Bureau solicited feedback on the COVID-19 Plan from relevant area experts and interested stakeholders, including state and local governments and national and community-based non-profit partners.

137. For instance, four former Census Bureau Directors—who served under both Democratic and Republican administrations—issued a statement saying that they had "discussed these operational and schedule adjustments with senior career leadership at the Census Bureau." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

138. These four former Census Bureau Directors further asserted: "Based on (1) our extensive experience in planning, executing, and often adjusting operations of previous decennial censuses, and (2) our firm conclusion that the extension of the field operations reflect careful analysis by the technical, scientific, and operational staff at the Census Bureau, we support the decision and urge Congress to act in concert with it." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

139. Prominent civil-rights groups endorsed the COVID-19 Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that her organization "support[ed] the Census Bureau's updated timeline." Press Release, Leadership Conference Education Fund, *Census Timeline Must Protect Health, Ensure Fair Count* (Apr. 13, 2020), https://civilrights.org/edfund/2020/04/13/census-timeline-must-protect-health-ensure-fair-count/.

D. Implementation of the COVID-19 Plan

140. When announcing the COVID-19 Plan, Secretary Ross and Director Dillingham issued a statement indicating that the Bureau requested that Congress extend by 120 days the December 31, 2020 statutory deadline for reporting the state-population totals to the President for purposes of calculating the state apportionments, and extend by 120 days the March 30, 2021 statutory deadline for delivering redistricting data to the states.

141. That same day, President Trump suggested this request was unnecessary, stating:

142. "I don't know that you even have to ask them. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

143. Indeed, the Census Bureau did not wait for Congress to act before beginning implementation of the COVID-19 Plan. And the Bureau continued implementation of the COVID-19 Plan for over three months through the end of July 2020.

144. For instance, the Census Bureau field operations remained suspended through May 2020.

145. The Bureau only began re-opening a few limited operations, such as the Update Leave method, on a phased basis through mid-June 2020, over two months after the operation was originally planned to occur in the Final Operational Plan.

146. The Bureau did not undertake any Non-Response Follow Up operations in most of the country between May 13, 2020 and July 31, 2020, the timeframe originally set out in the Final Operational Plan.

147. Instead, while the Bureau "soft-launched" door-knocking in select regions of the country in mid-July 2020, the COVID-19 Plan did not call for door-knocking across the country until August 11, 2020, at the earliest.

148. The Bureau ultimately opened six area census offices for Non-Response Follow Up on July 16, 2020, six more on July 23, 2020, thirty-five on July 30, 2020, and forty additional

offices on August 6, 2020.

149. The remaining 161 stateside offices remained unopened until August 9, 2020, including offices in many states and localities with relatively low response rates such as the entire southeastern United States, Texas, New Mexico, Arizona, and Southern California.

150. All along the Bureau continually communicated to the public, and to important local partners, including local governments and national and community based non-profit organizations, that self-responses would be accepted until October 31, 2020, and that Non-Response Follow Up would continue until at least that date.

151. Census partners, stakeholders, and state and local governments relied on the new deadlines set forth in the COVID-19 Plan to redirect their outreach efforts.

152. For example, Plaintiffs Urban League and BAJI, publicized the October 31, 2020 deadline, letting their constituents, members and local organizations know that households had until that time to self-respond. Urban League representatives informed coalition partners participating in the Black Census Roundtable of the new deadlines, and spoke of the deadlines on webinars and other public events. Officials at BAJI publicized the deadlines at public events, including webinars in July 2020, and as part of the organization's social media campaign.

153. Similarly, officials in City of Los Angeles, Harris County, King County, City of San Jose, and City of Salinas, publicized the new deadline while conducting 2020 Census outreach efforts.

154. These public education efforts were significant because they were directed at the general public and at local non-profits that do not primarily work on census issues. The latter often rely on information about the census provided by Plaintiff national non-profits and local governments when communicating with their constituents. Plaintiffs, by disseminating the October 31, 2020 deadline for nearly three months to the public, were largely successful in spreading the understanding that communities had until at least that time to complete the count.

155. For example, the City of Los Angeles announced this date on its own social media platforms and in a social media toolkit that it developed for partner organizations. Los Angeles is deeply concerned that residents have already received information about the October 31, 2020

self-response date and, as a result, will fail to respond before the newly shortened deadline, especially given the Bureau's own minimal efforts at explanation and outreach around the new deadline.

156. Finally, the level of self-response during the 2020 Census, and the ongoing COVID-19 pandemic, provided further evidence for the necessity of continued implementation of the COVID-19 Plan.

157. Under its Final Operational Plan, for example, the Census Bureau had planned to spend eleven and a half weeks canvassing a Non-Response Follow Up universe comprised of 39.5% of households nationally.

158. As of August 9, 2020, the first date of nationwide Non-Response Follow Up, the national self-response rate was 63.2%, meaning that nearly 37% of households nationwide had not yet responded to the census.

159. Several cities with large percentages of traditionally undercounted populations, have even lower response rates. For instance, as of August 14, 2020, the response rate in the City of Detroit was 48.9%, Miami was 49.9%, Philadelphia was 52.3%, Los Angeles was 53.8%, Houston was 54.4%, and New York City was 55.6%.

160. The United States had 24,156 new coronavirus cases on April 13, 2020, the day the Bureau announced its COVID-19 Plan. On August 3, 2020, the United States had approximately 50,000 new coronavirus cases.

161. With COVID-19 limiting the willingness of people to apply for enumerator positions, the areas where the Bureau can safely send enumerators to knock on doors, and the willingness of the public to interact with enumerators, the Non-Response Follow Up operation continues to face far more complications than the Final Operational Plan anticipated.

162. Given these conditions of low response rates and increased coronavirus spread, the Bureau can reasonably expect that it will need to engage in a Non-Response Follow Up operation at least as comprehensive and time-consuming as the operation laid out in the Final Operational Plan.

163. Due to significant delays in operations resulting from the implementation of the

COVID-19 Plan, the Bureau itself has recognized that it would be impossible to produce fair and accurate apportionment numbers to the President by December 31, 2020.

164. On May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of American Indians that, "[w]e have passed the point where we could even meet the current legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am. Indians, *2020 Census Webinar: American Indian/Alaska Native*, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689.

165. On July 8, 2020, Al Fontenot, Jr., Associate Director for Decennial Census Programs and a top Census Bureau official, affirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

IV. The Census Bureau's New Rush Plan.

A. The Announcement of the Rush Plan

166. On August 3, 2020, at the behest of the Secretary of Commerce, Director Dillingham abruptly and without explanation abandoned the COVID-19 Plan and announced the Rush Plan.

167. The Rush Plan drastically shortens the timelines for multiple operations set out in the COVID-19 Plan.

168. The Rush Plan took the form of a short press release on the Census Bureau's website. The press release included a statement from Director Dillingham, which did not provide an explanation for Defendants' decision to suddenly abandon the COVID-19 Plan that the Bureau had adopted and implemented for approximately three and a half months. Nor did it provide any specifics as to why the Bureau no longer believed the timelines called for in the COVID-19 Plan were necessary to ensure an accurate count.

169. The statement noted that the Bureau was taking this action at the direction of the

Secretary of Commerce. But the Secretary made no statement explaining his reason for giving this directive.

170. The Director's statement was largely silent on specific adjustments the Bureau would need to make in order to reengineer its field operations to meet its new, artificially compressed schedule. The statement included proposals for enumerator "awards" and maximizing enumerators' phone and tablet usage, but it did not provide any details about adjustments to the detailed operations provided in the Final Operational Plan.

171. The only adjustments announced under the Rush Plan were severely truncated timelines for conducting data-collection and data-processing operations.

172. Under the Rush Plan, data-collection is now set to end on September 30, 2020, one month earlier than contemplated in the Bureau's COVID-19 Plan.

173. While the Bureau's pre-COVID-19 Final Operational Plan provided 79 days for the nationwide door-knocking stage of the census, and the COVID-19 Plan provided 81 days, the Rush Plan provides just 52 days of nationwide door-knocking.

174. The Rush Plan also cuts post-collection data processing for the apportionment report from up to 6 months as provided in the COVID-19 Plan, and up to 5 months as originally provided in the Final Operational Plan, to less than 3 months.

175. The Rush Plan also shortened the time under which households can self-respond, providing that self-responses delivered after September 30, 2020—which previously would have been timely under the October 31, 2020 deadline—will no longer be counted.

176. While the Rush Plan requires the Bureau to accelerate its operations to complete the 2020 Census by the same deadline contemplated in the Final Operational Plan, it ignores the multiple-month pause in operations, beginning in mid-March 2020, caused by the initial outbreak of COVID-19 in the United States.

177. The decision to rescind the COVID-19 Plan and adopt the Rush Plan was announced without consultation with important stakeholders.

178. As noted above, as late as July 8, 2020, senior Bureau officials were still confirming that it was impossible to complete an accurate count by December 31, 2020.

179. In addition, until July 30, 2020, just four days before the Bureau announced its decision to abandon the COVID-19 Plan, the Bureau was informing respondents on its website that it would engage in Non-Response Follow-Up until October 31, 2020 and that non-responsive households would have until that date to self-respond. Those references were deleted from the website on or about July 31, 2020 and were replaced with the shortened timeframe after the August 3, 2020 announcement.

180. An official at the Government Accountability Office confirmed that Bureau officials told his office that they were given "hours rather than days or weeks" to adjust their plans to finish counting by September 2020. Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

181. While the Census Bureau's decisions, even during the COVID-19 emergency, have often involved consultations with scientific advisory committees, the Committee on National Statistics in the National Academies of Science, other external experts and local government officials, and the thousands of organizations partnering with the Bureau to conduct crucial outreach to historically undercounted communities, no such consultation was made before the Bureau announced its abandonment of the COVID-19 Plan.

182. Census stakeholders immediately denounced the Rush Plan, including stakeholders who had endorsed the COVID-19 Plan.

183. The same four former Census Bureau Directors who endorsed the COVID-19 Plan issued a statement saying that "our expert opinion is that failing to extend the deadlines to April 30, 2021 will result in seriously incomplete enumerations in many areas across our country." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

184. These four former Census Bureau Directors further asserted: "The Census Bureau

will not be able to carry out the NRFU fully and will be forced to take steps such as fewer in-person visits and rely instead on the use of administrative records or statistical techniques on a much larger scale tha[n] in previous census. The end result will be under-representation of those persons that NRFU was expected to reach and, at even greater rates for traditionally hard-to-count populations and over-representation of all other populations with potentially extreme differential undercounts." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

185. The President of the American Statistical Association, the world's largest professional organization of statisticians, issued a statement saying "[t]here is no scientific rationale to curtail the data-collection period for this constitutionally mandated activity, and the premature cessation of census enumeration will produce flawed counts." Letter from Rob Santos, President of the American Statistical Association, to Mitch McConnell, U.S. Senate Majority Leader (Apr. 5, 2020), https://www.amstat.org/asa/files/pdfs/POL-CensusSenateAugust.pdf.

186. Nearly 450 nonpartisan philanthropic organizations who "rely on accurate census data to help identify community needs and to prioritize grantmaking" issued a letter to Secretary Ross and Director Dillingham urging the Bureau to revert to its COVID-19 Plan. Letter from U.S. Philanthropy Leaders to Wilbur Ross, Secretary of the U.S. Dep't of Commerce (Aug. 5, 2020), https://funderscommittee.org/wp-content/uploads/2020/08/Letter-Philanthropic-Leaders-on-Census-Being-Cut-Short-8-5.pdf.

187. Prominent civil-rights groups condemned the Rush Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that "[c]urtailing operations is an obvious ploy to guarantee the Census Bureau won't be able to finish counting millions of people—especially those hit hardest by the pandemic." Press Release, Leadership Conference on Civil and Human Rights, *Trump Plans to Sabotage 2020 Census by Cutting Short Operations* (July 31, 2020),

https://civilrights.org/2020/07/31/trump-plans-to-sabotage-2020-census-by-cutting-short-operations/.

188. And the Census Bureau's own field workers have confirmed the impossibility of this new timeline, explaining that the Rush Plan means that it will not be an accurate count for the next 10 years.

B. The Rush Plan Fails to Appropriately Account for Key Factors Affecting the 2020 Census

189. The Rush Plan fails to account for several important factors that affect the 2020 Census Non-Response Follow Up operation.

190. *First*, the Rush Plan does not adequately account for the large number of households in the Non-Response Follow Up universe.

191. Under the Rush Plan, the Census Bureau must attempt to count approximately the same number of households during Non-Response Follow Up as it anticipated counting in its pre-COVID-19 Final Operational Plan, but the Bureau will have four weeks less than provided in that plan to complete the operation. In other words, the Bureau must now try to complete the same amount of work in just 65% of the time it had originally scheduled to complete that work.

192. Over 37% of households nationwide are non-responsive, and several states have even higher percentages of households in the Non-Response Follow Up universe, including New Mexico (46.1%), South Carolina (42.4%), Texas (41.3%), and Georgia (40.8%).

193. While soft-launches of Non-Response Follow Up began in select locations in mid-July 2020, the operation did not begin in any of these states, with large amounts of non-responsive households, until August 9, 2020.

194. Within states, and in particular cities and localities, there are even higher Non-Response Follow Up workloads. For instance, in Plaintiff Harris County, enumerators must still visit over 41% of households. In the City of Los Angeles, over 46% of households remain to be enumerated. The self-response rate in Los Angeles is approximately 14 percentage points below the final self-response rate the City attained during the 2010 Census. Counting in these jurisdictions also did not begin until August 9, 2020.

195. Moreover, given the time constraints placed by the Rush Plan, counting will need to be conducted while these jurisdictions, in many places, struggle to control a surge in COVID-19 cases.

196. While the Bureau announced on August 11, 2020 that it is now "training census takers to follow up with households by phone" in light of the pandemic, that change in Non-Response Follow Up operations was not anticipated in the Final Operational Plan. Press Release, U.S. Census Bureau, *Door-to-Door Visits Begin Nationwide for 2020 Census* (Aug. 11, 2020), https://www.census.gov/newsroom/press-releases/2020/door-to-door-visits-begin-nationwide.html.

197. Given the traditionally low response rates for phone surveys in the wireless era, following up by phone is unlikely to materially increase response rates.

198. A recent Census Bureau survey running in parallel with the 2020 Census demonstrates the difficulty in obtaining responses via phone or email. This spring, the Bureau began conducting a "Household Pulse Survey" to measure household experiences under the COVID-19 pandemic. This survey solicited participation through emails and text messages. Over the first twelve weeks of this survey, response rates were meager, ranging from 1.3% to 3.8%.

199. *Second*, the Rush Plan does not account for the staffing challenges that the Bureau is currently experiencing, many of which are directly related to the ongoing pandemic.

200. As demonstrated in the soft-launch of Non-Response Follow Up in select locales, the Bureau is already experiencing staffing shortages and retention problems with enumerators.

201. In the midst of the ongoing pandemic, prospective enumerators, many of whom are elderly and at high risk of contracting a severe COVID-19 related illness, are less willing to engage in the required door-to-door canvassing.

202. Indeed, Tim Olson, head of field operations for the 2020 Census, stated at a July 8, 2020 press briefing that "[a]bout a third of our [enumerator] applicants [are] older persons considered high risk of the virus." U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

203. And Deborah Stempowski, the Census Bureau's Assistant Director for Decennial Programs, noted the Bureau's difficulty retaining enumerators in early August 2020, confirming that potential enumerators were "a little hesitant because of the COVID environment." Mike Schneider, *Census Bureau Drop-Outs Complicate Door-Knocking Efforts*, Associated Press (Aug. 8, 2020), https://www.usnews.com/news/us/articles/2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts.

204. In testimony before Congress on July 28, 2020, Director Dillingham confirmed that the Bureau believed that "the pandemic is estimated to increase the number of no shows to training sessions, as well as the number of employees who complete training but decline to show up for work." *Id.*

205. According to reports from census-operations staff working in the field, these predictions have come to pass. One census field supervisor working in the mid-Atlantic noted that, given the new rushed timeline and lack of sufficient staff, "[w]e're just sending bodies out regardless of whether they're ready or not." Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

206. In addition to enumerator low-count and hesitancy, another source of staffing issues involves delays in processing background checks on enumerator applicants and in enumerator onboarding.

207. A June 2020 GAO report on the 2020 Census delays COVID-19 has caused, and the risks the pandemic has exacerbated, noted that the Bureau "will have to quickly hire and onboard sufficient staff to conduct its operations" to reach adequate staffing levels. U.S. Gov't Accountability Office, *COVID-19 Presents Delays and Risks to Census Count* (June 2020), https://www.gao.gov/assets/710/707456.pdf.

208. That same report also noted that, once potential enumerators accept a job offer from the Bureau, the new hires "must wait a minimum of 60 days before they can begin training, a time period during which they must complete fingerprinting and a background check." *Id.*

209. Reports from recently hired enumerators confirm that the Bureau is facing these

technical challenges as well, under the compressed timeline. One recent hire in Boulder, Colorado noted that he lost six potential days of door-knocking because he was unable to complete the Bureau's online training module.

210. Thus, under the Rush Plan, the Bureau will not be able to hire and train sufficient enumerators.

211. Even if it were possible for the Bureau to hire all of the enumerators it will need, the Bureau would also need time and funding to obtain additional equipment for any additional enumerators it hires beyond its initial estimates of equipment. For example, the Bureau would need more of the iPhones discussed above that the Bureau specifically contracted and customized for 2020 Census enumerators.

212. With fewer enumerators in the field, in addition to training and equipment issues, the Bureau cannot ensure that non-responsive households receive the requisite number of visits, as contemplated in the Final Operational Plan.

213. While the Bureau had a $2 billion contingency fund prior to the existence of the COVID-19 pandemic, it has already used $1.5 billion of that fund addressing pandemic-related issues. The remaining $500 million will be needed to further respond to the pandemic, and, in any event, is nowhere near the $1 billion that the administration claims that the Bureau would need to conduct adequate Non-Response Follow Up operations under the Rush Plan.

214. Thus, instead of providing additional enumerators, the Bureau's Rush Plan will likely result in a smaller number of enumerators shouldering larger-than-planned workloads. Increasing workloads for enumerators over a short period of time can result in errors and inaccuracies in counting but it cannot make up for the time lost to the Rush Plan.

215. *Third*, the Rush Plan fails to account for factors relevant to efficient enumeration, such as the time when enumerators visit households.

216. For instance, under the Final Operational Plan, enumerators visit households at specific times of day and on specific days of the week, depending on when residents are likely to answer.

217. Under the Rush Plan, enumerators will be under pressure to complete their work

in a tightly constrained timeframe. As a result, ensuring that non-responsive households receive the requisite number of enumerator visits at the most opportune times for enumeration may become exceedingly difficult, if not impossible. Instead, the Rush Plan increases the likelihood that households will either receive visits at less opportune times, or simply receive fewer visits altogether.

218. *Fourth*, the Rush Plan fails to account for the additional crucial operations that enumerators must conduct, as contemplated in the Bureau's final plans for the 2020 Census. Apart from visiting households upwards of six times, enumerators also engage in a host of additional quality control activities.

219. As noted above, enumerators are expected to visit the households of persons that self-responded to the census online but did not enter the unique identifier provided on census mailers. This "non-ID processing" is necessary to verify the address information provided by respondents. While this process only requires a single visit to a household, it nevertheless must be completed in the compressed timeline provided for under the Rush Plan.

220. Similarly, the Bureau must conduct quality control reinterviews of a sample of households during Non-Response Follow Up. This operation is designed to deter and detect enumerator falsification. Detecting such falsifications will be especially important under the Rush Plan where individual enumerators must shoulder a heavier workload. The use of enumerators to conduct these reinterviews will, under the Rush Plan, place additional strain on the Bureau's already stretched labor resources.

221. Cutting any one of these functions will cause errors and inaccuracies to affect the final 2020 Census data. By reversing the COVID-19 Plan and shortening the timeframe for conducting Non-Response Follow Up by a month, the Bureau will likely need to make cuts to one or more of these operations.

222. By reducing the amount of time and resources necessary to perform the kinds of quality-control measures that the Bureau originally planned for Non-Response Follow Up, the Rush Plan actively dismantles processes that the Bureau has specifically developed over the course of time as checks against falsified census responses. The Rush Plan thus threatens census

accuracy not only by reducing the Bureau's time to *collect* data, but also by reducing the Bureau's time to ensure that the data it has collected has been collected *properly* and *truthfully*.

223. *Fifth*, the Rush Plan fails to account for the other field operations enumerators will need to conduct at the same time as they attempt to speed through door-knocking operations.

224. Under the Final Operational Plan, the Bureau planned to finish specialized operations for counting people experiencing homelessness, and people living in group housing in April 2020, before engaging in nationwide door-knocking. After suspending operations due to COVID-19, the Bureau moved these operations to September 2020, well-before the October 31, 2020 deadline the Bureau set for completing the Non-Response Follow Up operation.

225. The new Rush Plan requires the Bureau to conduct these specialized operations at the same time as it is scrambling to complete Non-Response Follow Up. This will further stretch the Bureau's limited resources and increase the likelihood of missing information.

C. The Rush Plan Also Fails to Appropriately Account for Factors that Will Affect Post-Collection Data Processing

226. The Rush Plan fails to account for the additional strain on data-processing operations resulting from the consequences of the COVID-19 pandemic.

227. Following the outbreak of COVID-19 in the United States in mid-March 2020, colleges and universities across the country closed, and students moved out of campus and off-campus housing. Similarly, many residents of cities, especially those living in COVID-19 hotspots, moved to locations where the virus was less prevalent. In a recent study, three percent of people surveyed reported that they had moved permanently or temporarily as a result of the pandemic.

228. This significant movement of people coincided with Census Day, April 1, 2020, and will lead to confusion about what residence should be listed on responses.

229. It is likely that the Bureau will receive an increased amount of duplicate responses, which will, in turn, require more time and Bureau resources to review and correct.

230. The Rush Plan also fails to account for the Bureau's inability to timely obtain and process all the administrative-records data crucial for completing an accurate count.

231. The Bureau relies principally on Title 26 data—that is, tax returns that individuals file with the Internal Revenue Service ("IRS")—for the administrative records it uses to fill in missing people and their characteristics.

232. Because this year's tax filing deadline was July 15, 2020, and the IRS generally requires three months to transfer Title 26 data to the Census Bureau, the Bureau will not possess all the Title 26 data it is planning to use until mid-October 2020, at the earliest. Once the Bureau has possession of that Title 26 data, it will have to undertake a time-consuming round of additional review and processing, further delaying its ability to use the data for its planned purposes. These delays will compel the data-processing phase of 2020 Census operations to proceed more slowly than the Rush Plan contemplates or would allow.

233. Ultimately, the solution to alleviate each of these problems was articulated in the COVID-19 Plan: provide the Bureau's limited number of enumerators with additional time to conduct the data-collection operations necessary to ensure a complete and accurate census, and provide Bureau staff with additional time to conduct the data-processing operations necessary to ensuring the same. The Rush Plan fails to address these issues or explain why the Bureau's prior conclusions were incorrect..

D. The Rush Plan Does Not Account for Federal Statistical Guidelines

234. In replacing the COVID-19 Plan with the Rush Plan, Defendants departed from federal government statistical standards that promote the accuracy of information collected and disseminated by the agencies.

235. The Bureau's failure to follow these standards further emphasizes its inability to conduct an adequate count in the time and under the conditions that the Rush Plan provides.

236. Under the Paperwork Reduction Act, the Office of Management and Budget is responsible for coordinating the federal statistical system, including the development and implementation of "Governmentwide policies, principles, standards, and guidelines" "concerning [] statistical collection procedures and methods." 44 U.S.C. § 3504(e)(3) (A).

237. The Office of Management and Budget is responsible for issuing guidelines that provide "procedural guidance to Federal agencies for ensuring and maximizing the quality,

objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies." Consolidated Appropriations Act, FY 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

238. One such guideline issued by the Office of Management and Budget provides specific standards to agencies like the Census Bureau, in ensuring the quality and utility of federal statistical surveys, such as the decennial census. Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2 (2006).

239. Under these standards, agencies are required to develop "realistic timetable[s]" for surveys. *Id.* § 1.2.

240. The Bureau failed to take this basic requirement into account when it decided to implement the Rush Plan. The Rush Plan compresses the timeline for counting operations despite evidence of staffing shortages and heavier workload. The Plan attempts to accomplish a task—speedy delivery of results by December 31, 2020—that the Bureau has already deemed "impossible."

241. The standards also require agencies, including the Census Bureau, to "[e]ncourage respondents to participate to maximize response rates and improve data quality." Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2.3.2. This standard requires that the Census Bureau "[e]nsure that the data collection period is of adequate and reasonable length."

242. Again, the Rush Plan does not account for this standard. The Final Operational Plan and the COVID-19 Plan provided for over eleven weeks of Non-Response Follow Up, and up to five and six months, respectively, of post-collection data processing for the apportionment report. The Rush Plan, on the other hand, cuts the time allotted for counting by four weeks, without explaining how it will encourage more efficiency in collecting responses than the plan it reversed.

243. The standards also require the Bureau to plan for "an adequate number of contact attempts" to the respondent and to establish protocols for minimizing enumerator falsification, including "reinterviewing respondents." Office of Mgmt. & Budget, Standards and Guidelines

for Statistical Surveys, Directive No. 2, § 2.3.3.

244. With the Rush Plan significantly cutting the time available to conduct Non-Response Follow Up, it is expected that the Bureau will need to cut particular Non-Response Follow Up processes. This includes reducing the number of housing unit visits it earlier deemed necessary to enumerate a non-responsive household, or cutting back on enumerator reinterviews. Either decision will conflict with the Bureau's obligation to abide by federal statistical standards.

E. The Rush Plan Will Produce Low Quality and Inaccurate Data

245. Ultimately, Defendants' decision to rush completion of the 2020 Census will produce a significantly less accurate census than the COVID-19 Plan.

246. By cutting down the time allotted for door-knocking, the Rush Plan will result in fewer contact days by enumerators to non-responsive households, and less data collected by enumerators about those households.

247. The concerns about inaccuracy resulting from shortening time for Non-Response Follow Up are real and verified. A GAO review of the 2010 Non-Response Follow Up operation determined that local census offices with "higher percentages" of "less complete house-hold data" were more likely to have completed their Non-Response Follow Up in 53 days or less as compared to those offices that took a longer period of time. U.S. Gov't Accountability Office, *2010 Census: Data Collection Operations Were Generally Completed as Planned, but Long-Standing Challenges Suggest Need for Fundamental Reforms* (Dec. 2010), https://www.gao.gov/new.items/d11193.pdf.

248. As noted above, after the Bureau exhausts attempts to enumerate households through methods that render more accurate results, such as self-response and enumerator interviews, the Bureau turns to less accurate sources of data and statistical methods as a last resort to fill in missing information.

249. By curtailing Non-Response Follow Up, the Rush Plan will force the Bureau to resort to less accurate methods of data collection, well before the exhaustion of more accurate methods. Consequently, the Rush Plan will lead to the production of lower-quality information.

250. For instance, under the Final Operational Plan, the Bureau would not consider

low-quality administrative data before conducting the requisite number of contact days for a particular type of housing unit. By reducing the number of enumerator contact days, the Rush Plan will lead to reliance on these types of lower-quality data sources prior to exhausting the more accurate methods contemplated in the Final Operational Plan. Consequently, the Rush Plan will lead to more inaccuracies in the data.

251. Based upon past practices, the Bureau may also use whole-count imputation to calculate missing household data but to an extent and in ways not used previously. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household.

252. In previous censuses, the Bureau imputed upwards of 2.0% of households left over after exhausting its Non-Response Follow Up efforts. Under the time constraints of the Rush Plan, the Bureau will need to turn to imputation before exhausting its in-person enumeration efforts. One former Census Bureau Director estimates that, under the Rush Plan, the Bureau may end up imputing up to 10% of households.

253. Since data produced through the Bureau's current imputation methods are less accurate than data collected from enumerator interviews, Defendants' decision to rush completion of the 2020 Census will result in significantly less accurate total-population data than would have been produced under the COVID-19 Plan. This decline in accuracy will affect both the census's calculations of the total number of people living in the country and the census's recording of the characteristics of those people, and such inaccurate data will not meet the constitutional minimum for conducting the decennial enumeration or satisfy the "strong constitutional interest in accuracy" of the Census. *Utah v. Evans*, 536 U.S. 452, 478 (2002).

254. The Rush Plan will likely exacerbate the quality problems associated with imputation by compromising the Bureau's ability to collect the other kinds of data—such as self-responses, proxies, and administrative records—that it requires to impute most accurately. As noted above, imputation does not occur in isolation from the Bureau's other data sources, but in concert with them. With less data drawn from these other sources and less accurate data drawn from these other sources, the quality of the Bureau's imputation will decline.

255. The Rush Plan will also disrupt the post-collection data processing operations, described above. As noted by Secretary Ross and Director Dillingham in mid-April 2020, following Non-Response Follow Up the Bureau engages in "lengthy, thorough and scientifically rigorous" data processing, which is essential to ensuring an accurate census.

256. In announcing the new plan to rush the completion of the 2020 Census, Director Dillingham stated that the Bureau would "streamline" these operations in order to meet the December 31, 2020 deadline.

257. While the Director has not specified what this "streamlining" means for post-collection operations, the bottom line is that the Bureau cannot fully engage in the operations as contemplated in its Final Operational Plan on the shortened timeframe. As a result, the Bureau will have to cut or reduce its efforts to review and process collected data to ensure accuracy.

F. The New "Rush" Plan Will Create Confusion that Plaintiffs Will Be Forced to Spend Time and Money Counteracting

258. The new plan to rush completion of the 2020 Census also creates additional confusion about census operations at a critical moment in the census-taking process.

259. The Census Bureau's abrupt change will require groups and local governments engaging in Get Out the Count campaigns, including Plaintiff localities and Plaintiff organizations, to expend resources to correct confusion about the last date for counting in the 2020 Census.

260. As noted above, Plaintiff organizations and localities engaged in extensive public information campaigns that publicized the October 31, 2020 deadline.

261. The Rush Plan requires Plaintiffs to expend additional resources in order to update existing public materials, distribute new materials, and engage in more public-facing efforts to educate the public, their constituents, their members and/or constituents, and local organizations that the self-response period for the census ends on September 30, 2020.

262. For instance, in Harris County, officials ordered a mailing to constituents informing them that they had until October 31, 2020 to respond to the census. That order occurred before the August 3, 2020 decision to implement the Rush Plan. In light of the new

plan, the officials were forced to order stickers to cover the reference to October 31, 2020 on the mailer and to dedicate office staff to spend time affixing those stickers and updating the mailer. Similarly, Plaintiffs the City of Los Angeles, BAJI, and Urban League must update advertisements on social media to correct previous communications that referenced the October 31, 2020 deadline.

263. Apart from correcting misinterpretations arising from earlier statements Plaintiffs made in reliance on the Bureau's COVID-19 Plan, Plaintiffs must now also engage in more, unanticipated outreach to educate the public about the Census Bureau's Rush Plan decision. With one month less of counting, there is now increased urgency for non-responsive households to self-respond. As a result, Plaintiffs are developing new plans to reach more households and encourage more census participation.

G. The New "Rush" Plan Will Lead to Undercounting of Minorities

264. The new plan to rush completion of the 2020 Census will exacerbate undercounting of Black, Latino, and Native American communities.

265. As noted above, Non-Response Follow Up, is specifically designed to ensure that traditionally hard-to-count communities, including Black, Latino, and Native American communities are fully counted. By cutting Non-Response Follow Up short, the administration is disrupting the operation most essential to ensuring an accurate count for these communities.

266. For the 2020 Census, Black, Latino and Native American populations make up a disproportionate share of the population in tracts with the lowest self-response rates in the United States. For instance, as of July 23, 2020, one in five residents living in census tracts with the lowest self-response rates was Black, and one in four was Hispanic, far larger proportions than Black and Hispanic shares of the general population.

267. Consequently, Black, Latino, and Native American households will make up a disproportionate share of the Non-Response Follow Up universe.

268. Given the challenges of the shortened Non-Response Follow Up timeline, Black, Latino, and Native American households have a high likelihood of being missed, or inaccurately enumerated through administrative records and imputation. As noted above, these alternative

methods for enumeration will result in lower quality data for these groups.

269. The problem, however, is even more serious because it replicates and exacerbates problems the Census Bureau has found in prior censuses and has striven to correct in subsequent censuses. Data from previous censuses shows that Black, Latino, and Native Americans have historically been undercounted. Over-reliance on alternative methods of data to enumerate a disproportionate share of the population in these groups will further exacerbate potential undercounting in these groups during the 2020 Census.

270. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

271. Truncating Non-Response Follow Up will exacerbate undercounts of communities of color in at least two ways: first, by missing members of those communities entirely; or, second, by recording their characteristics incorrectly, such that the census results will not register them as members of communities of color. In either instance, data regarding communities of color will be inaccurate. This inaccuracy then deprives communities of color of federal funding, all the material support that flows from federal funding, the protections of the law, and political power at the federal, state, and local levels.

H. The New Rush Plan Has No Legitimate Justification

272. In announcing the Rush Plan, Defendants provided no express justification. Defendants stated in passing, however, that reporting of apportionment data to the President by December 31, 2020 is required by statute.

273. But there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980).

274. The Supreme Court thus determined that the government can and should substitute apportionment counts that have already been filed and certified with "newer, more

accurate version[s]." *Utah v. Evans*, 536 U.S. 452, 462 (2002).

275. Defendants have also recognized that, in the event of a conflict between the two, the constitutional requirement of a fair and accurate enumeration, rather than the statutory deadline, is the controlling legal requirement. With the COVID-19 pandemic threatening the health and safety of communities across the country, Defendants adjusted 2020 Census operations in the COVID-19 Plan, shifting the timeline by several months. Defendants did not wait for Congress to act to implement this plan, recognizing that the Plan was necessary to protect enumerators and respondents, and to ensure an accurate count.

276. Because of those delays, as the Bureau itself recognized, it was no longer possible for Defendants to produce data by December 31, 2020 that fulfilled their constitutional and statutory mandate. Specifically, the Bureau could not simultaneously pursue an accurate 2020 Census, and speed through completion of census-taking in order to report numbers to the President by the end of the year.

277. Several senior officials charged with actually conducting the 2020 Census confirmed the impossibility of this task throughout the summer, including approximately four weeks before Defendants' abruptly announced their decision to adopt the Rush Plan.

278. The statutory deadline at issue is not mandated by the Constitution. Taking the modest additional time necessary to ensure an accurate census, should not prevent a timely reapportionment, as elections for congressional seats impacted by reapportionment will not occur until 2022.

279. Ultimately, Defendants cannot sacrifice their mandatory *constitutional* obligation to make decisions reasonably related to producing an accurate count in order to comply with a pro forma *statutory* deadline. Congress clearly could not, for instance, satisfy its constitutional obligations by providing the Census Bureau with a single week in which to conduct the census. Strictly adhering to the December 31, 2020 deadline, as applied in extraordinary circumstances of the ongoing pandemic, would be equally unconstitutional.

I. Implementation of the Apportionment Exclusion Order

280. Defendants have not yet sought to justify their motivation for adopting the Rush

Plan, and it cannot be justified on the basis of artificial statutory deadlines. Instead, the timing of the abandonment suggests that the decision was influenced by a desire to implement the President's Executive Memorandum excluding undocumented immigrants from the apportionment count, thereby undercutting the contribution of communities of color to the calculations for equal representation for purposes of congressional apportionment (the "Apportionment Exclusion Order").

281. In late June 2020, the White House took the unprecedented step of adding two political appointees to Census Bureau staff with unspecified job duties. Neither appointee had an expertise in statistics, and both had a demonstrated history of partisan activity. These unusual appointees had previously engaged with the Census Bureau on questions about changing operations and methodology.

282. In mid-July 2020, White House officials reportedly asked congressional appropriators to include $1 billion in the next coronavirus stimulus bill for the purpose of completing the 2020 Census by the December 31, 2020 deadline.

283. This abrupt change in policy coincided with and was motivated by the President's July 21, 2020 issuance of the unconstitutional Apportionment Exclusion Order declaring that it is the policy of the United States to remove undocumented persons from the apportionment count, and requiring the Secretary of Commerce to produce estimates of the number of undocumented persons in the United States when reporting total population counts to the President. As noted, the Apportionment Exclusion Order is currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District.

284. Shortening the census timeline increases the likelihood that, regardless of the outcome of the November 2020 election, this President will have the opportunity to implement his Apportionment Exclusion Order. Delaying reporting until spring—as the COVID-19 Plan issued by the Census Bureau and Department of Commerce previously did—leaves open the possibility that the President will no longer be in office when data is provided, and thus will be unable to effectuate the Apportionment Exclusion Order.

285. Defendants did not justify their sudden, unexplained reversal of position with any evidence that Bureau officials had been wrong in stating, repeatedly, that it would be impossible to produce accurate counts by December 31, 2020. There is also no evidence that the decision to cut short counting operations was driven by the scientifically based judgment of Bureau personnel or external experts.

286. To the extent that Defendants' are motivated by a desire to implement the President's Apportionment Exclusion Order, that motivation is improper. It bears no reasonable relationship to the achievement of a fair and accurate census, and, under the circumstances currently facing the count, implementing the Apportionment Exclusion Order will undermine that goal.

287. Moreover, that Memorandum is just the latest attempt by the President and Secretary Ross to manipulate the census along racial and ethnic lines. Beginning in 2017, Secretary Ross attempted to add an untested citizenship question to the 2020 Census, claiming that the question was necessary to better enforce the Voting Rights Act. In reality, the administration was seeking block-level citizenship data so states could draw district lines in a manner that would disadvantage Black and Latino communities.

288. Defendant Ross's decision was litigated, and enjoined by three district courts. One of those cases ultimately ended up before the Supreme Court. There the Court found that Defendant Ross's stated Voting Rights Act rationale to support the addition of a citizenship question to the 2020 Census was "contrived" and vacated Defendant Ross's decision. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

289. On July 5, 2019, following the Supreme Court's decision, President Trump confirmed the real rationale—and fully justified the Supreme Court's holding that the administration's rationale for this census decision was pretextual—when he stated that the administration sought a citizenship question, not to enforce the Voting Rights Act, but rather "for districting" and "for appropriations." Remarks by President Trump Before Marine One Departure (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

290. Indeed, further evidence that Defendants' actions were pretextual arose from files of a prominent redistricting strategist, Thomas Hofeller. In 2015, Hofeller prepared a study titled "The Use of Citizen Voting Age Population in Redistricting." In the study, Hofeller recommended adding a citizenship question to the census so that states could use citizen voting-age population rather than total population to redistrict. This change in the redistricting base, in Hofeller's words, would be advantageous to "Non-Hispanic Whites" and would undercut the political power of Hispanics.

291. It was later revealed that Hofeller was involved in drafting portions of the memorandum from the Department of Justice to Defendant Commerce seeking addition of a citizenship question on the 2020 Census, including sections relating to the pretextual reason for requesting the question. *See* Ex. 8 to NYIC Pls.' Mot. for Sanctions at 124-31, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. July 16, 2019), ECF No. 635-1; Defs.' Opp. to Letter Mot. to Compel at 3, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Oct. 30, 2018), ECF No. 451.

292. Shortly after the Supreme Court's decision, President Trump issued an executive order, demanding executive agencies provide the Census Bureau with administrative records sufficient to allow the Bureau to determine "the number of citizens and noncitizens in the country." Exec. Order No. 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order explicitly states that the reason this data is necessary is to design "legislative districts based on the population of voter-eligible citizens," instead of total population. *Id.* at 33,823-84.

293. In light of that history, the Apportionment Exclusion Order, and the near-contemporaneous decision to cut counting operations short represent yet another attempt by the administration to manipulate the 2020 Census and potentially undercut the political power of communities of color. Defendants cannot rely on this memorandum as justification to support their decision to undermine the accuracy of the census.

V. Harm to Plaintiffs.

294. Plaintiffs and Plaintiff non-profits' members and/or constituents reside in locales

that will suffer harm as a result of Defendants' decision because that decision is very likely to cause these locales to be more disproportionately undercounted in the 2020 Census than they otherwise would have been.

295. On August 9, 2020, at the beginning of the Non-Response Follow Up operation, Plaintiff City of Los Angeles, had a response rate of just 53.1%, which was significantly lower than the 64.5% statewide response rate in California on that same date.

296. The Urban League, League of Women Voters, and BAJI have affiliates, constituents, and members in major cities across the United States. This includes cities where response rates were lower than their corresponding statewide response rates on the first day of Non-Response Follow Up including San Francisco (61.4%) and Monterey (60.5%) as compared to California (64.5%), Miami (49.6%) as compared to Florida (60.1%), Philadelphia (52%) as compared to Pennsylvania (65.5%), Detroit (48.7%) as compared to Michigan (68.9%), and New York City (54.9%) as compared to New York State (58.9%).

297. Plaintiffs Ellis and Garcia are residents of Houston, Texas. The response rate in Houston at the beginning of Non-Response Follow Up was 54%, which was lower than the statewide response rate for Texas on that date, 58.2%.

298. As noted above, Defendants' decision will result in fewer enumerations through Non-Response Follow Up, increased reliance on low-quality administrative data, and increased imputation. Consequently, Defendants' decision will result in cities' with higher rates of non-response (1) having less accurate data; and (2) experiencing higher rates of undercounting.

299. Because these cities have a higher proportion of households in the Non-Response Follow Up universe than their corresponding states, these cities have a substantially higher likelihood of being undercounted because of Defendants' decision than surrounding communities in their states. These disproportionate undercounts will cause Plaintiffs to suffer both fiscal and representational harm.

A. Funding Harms

300. The Rush Plan will result in loss of federal funding for Plaintiffs Harris County, City of Salinas, and the City of Los Angeles and the communities where members of Plaintiff

non-profits reside, including Miami, Detroit, Philadelphia and New York.

301. Over 130 programs and 675 billion dollars are allocated to states and localities on the basis of census-derived information. This includes funding to states for federal transportation planning purposes, education, and healthcare.

302. Many important federal programs, including Title I Grants under the Every Student Succeeds Act, require states to distribute funds to localities on the basis of census-derived information.

303. State Education Agencies must allocate Title I Grants, at least in part, on the number of children aged 5-17 living in poverty in a local education agency's jurisdiction.

304. Given that members of Plaintiff non-profits reside in cities that are likely to be more undercounted under the Rush Plan relative to surrounding communities in their states, including San Francisco, Miami, Detroit, Philadelphia, and New York City, Defendants' decision will likely deprive the communities where these members reside of Title I Grant funding they would have otherwise received. Similarly, Defendants' decision places Plaintiffs Ellis and Garcia's community at higher risk of deprivation of Title I Grant funding.

305. Several additional federal programs require states to use census-derived information to distribute funds directly to cities and counties, based on their share of a relevant population. For instance, the Low Income Home Energy Assistance Program, the Workforce Innovation and Opportunity Act program, and the Community Services Block Grant Program, all require states to distribute funds to cities and counties, at least in part, on the proportion of a state's low-income residents living in those cities and counties. This data is derived from information collected during the decennial census.

306. Both Harris County and the City of Los Angeles receive funds under these programs. Consequently, disproportionate undercounting of Harris County and the City of Los Angeles, as compared to their states, is likely to result in loss of funds under these and similar programs.

307. Several federal funding programs provide funding directly to cities and counties based on census-derived information. For instance, the Community Development Block Grant

program, and the Emergency Solutions Grant, allocate funding to cities and counties based, at least in part, on their share of the overall population count relative to other metropolitan areas.

308. Of cities with over 500,000 people, the City of Los Angeles had the fourth lowest response rate in the country, just behind Detroit and Philadelphia. Consequently, Los Angeles will likely lose Community Development Block Grant funds because of Defendants' decision.

309. Similarly, members of Plaintiff non-profits live in major metropolitan areas with some of the lowest response rates in the country, such as Miami, Detroit and Philadelphia. Defendants' decision will likely deprive these members' communities of funding under the Community Development Block Grant program.

310. Finally, the allocation of federal transportation including the Surface Transportation Block Grant Program, and the Metropolitan and Statewide Nonmetropolitan Transportation Planning Programs are based on the population of urbanized areas in a state compared to those of other states, as determined by the decennial census.

311. Plaintiffs Ellis and Garcia regularly drive on highways and roads in Texas. Disproportionate undercounting of urbanized areas in Texas during the 2020 Census will result in reduced transportation funding for Texas under federal transportation programs.

B. Representational Harm

312. Defendants' decision will also likely result in representational harm to individual Plaintiffs and to the members of Plaintiff organizations.

313. Plaintiffs Ellis and Garcia reside in Houston, Texas. In terms of self-response rates, Texas ranks 39th in the United States. Approximately four million Texas households are in the Non-Response Follow Up universe, which is more households than any state other than California.

314. Consequently, Defendants' decision will not only cause a substantial undercount in Texas, but that undercount will likely be disproportionate as compared to other states. Texas will likely be deprived of its fair share of representation in the next congressional apportionment.

315. As a result, Defendants' decision is likely to result in reduction of voting power and representation for Plaintiffs Ellis and Garcia, because it will likely cause the loss of a seat in

Texas, and will result in fewer Representatives spread out over the state of Texas.

316. As for Plaintiff City of Los Angeles, at least one study has predicted that, were California to lose a congressional seat because of the final census count, that seat is very likely to come from a district that includes portions of South Los Angeles, thus reducing the city's representational delegation.

317. Defendants' decision will also cause Plaintiff Ellis and members of Plaintiff non-profits to experience a loss of intrastate voting power.

318. By causing disproportionate undercounting of communities in Houston, Detroit, Philadelphia, and Miami, as compared to their corresponding states, Defendants' decision will result in drawing of district lines that do not accurately represent the population of the state, and disadvantage Plaintiffs Ellis and Garcia, and members of Plaintiff organizations that live in undercounted communities.

C. Inaccurate Data

319. Plaintiff local governments will suffer harm from the adverse impact Defendants' decision will have the accuracy of population counts produced by the Census Bureau. Plaintiff local governments often rely on accurate information collected by the Census Bureau for crucial public planning purposes, including planning for how to respond to emergencies.

320. For example, local governments often rely on a Social Vulnerability Index to identify communities that are at high risk during a particular emergency. Government officials rely on this index to determine where to allocate resources before and during emergencies. A Social Vulnerability Index use census data to identify specific populations that may be vulnerable to a particular emergency, including data relating to age, housing density, income status, and race and ethnicity. Inaccurate census data would make disaster planning and emergency response more difficult, and could disrupt important public programs.

321. In Harris County, officials used the Center for Disease Control's Social Vulnerability Index to inform decisions about proper distribution of COVID-19 Relief Funds. The funds were allocated to provide relief to Harris County residents most impacted by the global pandemic. That Social Vulnerability Index, which was based on census data, was used to

identify census tracts with the most vulnerable residents, and applications from residents from those tracts were prioritized and given higher chances of acceptance for funds. Without accurate census data, Harris County would struggle to ensure that crucial relief funds were reaching the communities most in need of them.

322. Similarly, King County relies on accurate census data to inform its public-policy decision making. For instance, the county uses census data to plan public-transit service, and to ensure priority populations have transit access, and to site public health clinics.

323. The low-quality data and undercounting that Defendants' decision will cause will also harm Plaintiffs. For instance, undercounting of Black, Latino, Native American, and immigrant communities will negatively affect the Urban League, League of Women Voters and BAJI by undermining these organizations' core missions of promoting equal and just laws and empowering vulnerable communities through building coalitions and initiating campaigns with African Americans and Black immigrants, and fostering racial, economic, and social equality for the communities they serve.

D. Expending Additional Resources

324. Plaintiff organizations, the Urban League, the League of Women Voters, and BAJI, and Plaintiff local governments, City of San Jose, Harris County, King County, City of Salinas, and City of Los Angeles will need to expend additional resources and divert resources from planned programs and projects in order to address the adverse consequences of Defendants' decision to abandon the COVID-19 Plan, and implement the Rush Plan.

325. Plaintiffs' planned efforts to ensure the effective enumeration of historically undercounted communities were based on the understanding that the Census Bureau would implement the Non-Response Follow Up operation contemplated in the Final Operational Plan and adjusted in the COVID-19 Plan.

326. The abrupt reversal of the COVID-19 Plan, and the implementation of curtailed Non-Response Follow Up in the Bureau's Rush Plan will adversely affect Plaintiffs' plans.

327. Plaintiff organizations and local governments will likely need to adjust plans, and divert resources from other planned activities and programs in order to ensure the communities

they serve are adequately counted. Specifically, Plaintiffs will need to recruit and train staff to engage in increased and expanded outreach to potential non-responsive households in order to make up for fewer enumerator visits, or to other aspects of the Non-Response Follow Up program, such as the reinterview process.

328. For instance, Plaintiff BAJI is planning significant adjustments to its 2020 Census outreach plans in light of Defendants' decision, that include diversion of resources from other sources, and significant expenditures. In order to engage in effective outreach, BAJI needs organizing staff dedicated to civic engagement. With Non-Response Follow Up occurring from August 11, 2020 through October 31, 2020, BAJI anticipated that it could spread its staffing resources over that timeframe to ensure it was meeting its goals within the organization's budget. However, on a shorter timeframe, BAJI needs additional staff on a shorter timeframe, which will require adjusting the organization's budget and priorities for the next several months.

329. The adjustment is also challenging for BAJI as the organization caters to immigrant communities with a variety of language needs. Increasing staffing on a short timeframe poses significant challenges for the organization, because it must locate staff that can communicate with the particular community that the organization is targeting for outreach efforts.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of the Enumeration Clause, and Fourteenth Amendment
(U.S. Const. art. I, § 2; U.S. Const. amend. XIV, § 2)

330. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

331. Under the Enumeration Clause of the U.S. Constitution, Congress, and, by delegation, the Secretary of Commerce, must conduct an "actual Enumeration" of the population. This clause requires that decisions relating to census-taking "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996).

332. The COVID-19 pandemic severely disrupted the 2020 Census, resulting in

months of suspended operations and significant delays in crucial counting processes. Moreover, the public-health crisis continues to impact census operations, as the Bureau struggles to retain enumerators and engage in door-knocking in communities experiencing surges of the virus.

333. To navigate this emergency, the Bureau took necessary action to adjust its operational timelines in the COVID-19 Plan while seeking to maintain the operations and processes included in the Final Operational Plan that had been designed to help ensure a complete and accurate count.

334. Abruptly and without explanation, on August 3, 2020, Defendants abandoned the COVID-19 Plan and implemented the Rush Plan. The Rush Plan does not "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." After delaying all operations for months, the Bureau and its staff repeatedly recognized that it was impossible to produce counts consistent with their duties to ensure a full, fair, and accurate count by December 31, 2020. Indeed, current conditions demonstrate that it is infeasible to obtain a fair and accurate count by the end of the year. Nevertheless, the Defendants abandoned their constitutionally mandated pursuit of fair and accurate data, in favor of the speed of the Rush Plan, and the inaccurate data it will produce.

335. Under these circumstances, the decision to curtail crucial 2020 Census operations violates the Enumeration Clause of the United States Constitution.

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

SECOND CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Arbitrary and Capricious
(5 U.S.C. § 706(2)(A))

337. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

338. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Rush Plan is final agency action because it marks the consummation

of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).

339. In determining whether an action violates the APA, courts consider whether the agency examined relevant data and articulated a satisfactory explanation for its decision, including formulating a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency wishes to depart from an earlier decision, it must acknowledge that change and any reliance interests its previous actions engendered. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105-06 (2015).

340. The Bureau spent several years developing its Final Operational Plan for the 2020 Census. That plan carefully determined the required length of each operation, including the appropriate length for data-collection and data-processing. It also included details about the implementation of the various operations.

341. The COVID-19 pandemic disrupted census operations, and the Bureau responded by adjusting its operations in its COVID-19 Plan. That plan involved retaining the details and the length of time of various operations laid out in the Final Operational Plan, but shifting the timeline for counting several months into the future to account for both the necessity of those operations and the public-health emergency.

342. The Bureau began implementing the plan, and critical operations were suspended and delayed through the summer. Bureau officials publicly and expressly recognized that it was no longer possible to comply with the December 31, 2020 deadline if the Bureau intended to fulfill its constitutional and statutory obligation of producing reasonably accurate population counts.

343. Without explanation and without citing any evidence, Defendants suddenly changed their position and issued a new plan with shortened timelines. Among other things, that change conclusively changed the legal rights and obligations of private households, who now have substantially less time to respond if they wish to be counted in the 2020 Census. Defendants

have provided no evidence to support rescinding the COVID-19 Plan, have failed to acknowledge or explain their departure from their previous conclusions as to the length of time necessary for an accurate census, and have cited no evidence that they could obtain accurate counts on the shortened timeframe. Defendants' unexplained and unjustifiable reversal is precisely the sort of arbitrary and capricious agency action that the Administrative Procedure Act forbids.

344. Defendants' decision also fails to account for several factors relevant to the decision, including the multiple-month long suspension in operations and delay of crucial census operations, the staffing shortages facing the Bureau, the meticulously designed and tested technical requirements for effective enumeration included in the Bureau's Final Operational Plan, and the various quality-control measures the Bureau must engage in to ensure that its reported data is accurate.

345. Consequently, Defendants' action is arbitrary and capricious.

346. This unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

THIRD CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Pretext
(5 U.S.C. § 706)

347. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

348. Under the Administrative Procedure Act, agencies are required to disclose the "genuine justification[] for important decisions." *Dep't of Commerce*, 139 S. Ct. at 2569, 2575-76. Courts will not accept "contrived reasons" provided by agencies as that would defeat the purpose of judicial review. *Id.* at 2576. Moreover, agencies cannot simply avoid providing reasoning for their decision-making altogether.

349. Defendants have decided to cut crucial operations in order to produce 2020 Census population results to the President by December 31, 2020. In announcing that decision, Defendants provided no legitimate justification for abandoning the COVID-19 Plan and

implementing the Rush Plan.

350. Any attempt by the Defendants to rely on the reporting deadline provided under the Census Act as justification for their decision is mere pretext. 13 U.S.C § 141(b).

351. For months, Defendants implemented the COVID-19 Plan, the timeline for which necessarily assumed the statutory deadlines could not defeat the constitutional duty to conduct an accurate enumeration, as applied to the extraordinary circumstances at hand. Defendants made significant adjustments, including months-long delays of census operations, on the assumption that the Bureau could and would conduct a full and robust count through the end of October 31, 2020. Since mid-April 2020, Defendants have expressly and publicly recognized that the Bureau could not provide a complete and accurate count by December 31, 2020. And President Trump maintained that the statutory deadlines need not be followed.

352. Defendants' reversal of position on the 2020 Census timeline appears driven by Defendants' efforts to ensure implementation of the President's unconstitutional Apportionment Exclusion Order, which attempts to exclude undocumented persons from the apportionment count and continues a long-running pattern of racially discriminatory and improperly politically motivated conduct of the 2020 Census.

353. In light of these considerations, Defendants' purported justification is pretextual and, thus, arbitrary and capricious under the Administrative Procedure Act.

354. Defendants' unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

PRAYER FOR RELIEF

355. Plaintiffs respectfully request that this Court:

356. Declare that Defendants' promulgation of the Rush Plan, and corresponding revocation of the COVID-19 Plan is unconstitutional under the Enumeration Clause, and unlawful under the Administrative Procedure Act.

357. Vacate the Rush Plan, thereby reinstating the COVID-19 Plan.

358. Enjoin Defendants from implementing the Rush Plan or otherwise unlawfully

interfering with the COVID-19 Plan.

359. Award Plaintiffs costs, expenses, and reasonable attorneys' fees.

360. Award any other relief the Court deems just and proper.

Dated: August 18, 2020

LATHAM & WATKINS LLP

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Attorneys for Plaintiff City of San Jose

ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: August 18, 2020

LATHAM & WATKINS LLP

By: */s/ Sadik Huseny*
Sadik Huseny

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
NATIONAL URBAN LEAGUE; BLACK ALLIANCE FOR JUST IMMIGRATION; LEAGUE OF WOMEN VOTERS; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; and CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS, and ADRIAN GARCIA

(b) County of Residence of First Listed Plaintiff New York City, NY
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Steven M. Bauer / Sadik Huseny
Latham & Watkins LLP
505 Montgomery Street, Suite 2000,
San Francisco, CA 94111-6538

DEFENDANTS
WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau

County of Residence of First Listed Defendant Washington County, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment Of Veteran's Benefits
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury -Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury – Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities–Employment
- ☐ 446 Amer. w/Disabilities–Other
- ☐ 448 Education

PRISONER PETITIONS

HABEAS CORPUS
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

OTHER
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee–Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC § 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC § 158
- ☐ 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent—Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC § 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation–Transfer ☐ 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Administrative Procedure Act, 5 U.S.C. 701 et seq.

Brief description of cause:
Action to set aside unlawful agency action as arbitrary, capricious, and not in accordance with law, and declare Defendants' actions unconstitutional.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S), IF ANY *(See instructions):*

JUDGE Judge Lucy H. Koh DOCKET NUMBER 5:20-cv-05167-LHK; 5:20-cv-05169-LHK

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) ☐ **SAN FRANCISCO/OAKLAND** ☒ **SAN JOSE** ☐ **EUREKA-MCKINLEYVILLE**

DATE 08/18/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Sadik Huseny

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

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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?

[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-0000030097

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-0000030098

20-069532

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

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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

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BC-DOC-0000030101

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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    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?

---

[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-0000030102

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?
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    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?
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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-0000030103

de la Vara, Hunter (Federal)

From: McGaan, Duncan (Federal)
Sent: Monday, February 24, 2020 9:45 AM
To: McDermott, Ryan (Federal); Jones, Sarah (Federal); Missouri Johnson, Marcellina (Federal); de la Vara, Hunter (Federal)
Subject: FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Attachments: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf; ATT00001.htm

Incoming letter to the Secretary and Census Director Dillingham. Thank you!

Duncan A. McGaan
b(6)

From: Mason, Jacque (Federal) <JMason1@doc.gov>
Sent: Sunday, February 23, 2020 5:51 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; McGaan, Duncan (Federal) <DMcGaan@doc.gov>
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Sent from my iPhone

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:52 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" <boc.correspondence.quality.assurance@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
> Attached is a new congressional letter from the Tri-Caucus regarding EO-13880.
>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
> Sent from my iPhone
>
> Begin forwarded message:

From: "Palencia, Stephanie" <Stephanie.Palencia@mail.house.gov>
Date: February 21, 2020 at 6:37:38 PM EST
To: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
Cc: "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

Please confirm receipt and we look forward to your response by Wednesday March 4, 2020.

Sincerely,
Stephanie Palencia

To: Olson, Stephanie (Federal)[SOlson@doc.gov]
Cc: Brebbia, Sean (Federal)[SBrebbia@doc.gov]; Cannon, Michael (Federal)[MCannon@doc.gov]
From: Zimmerman, Paul (Federal) b(6)
b(6)
Sent: Fri 5/8/2020 2:47:10 PM (UTC-04:00)
Subject: RE: Draft Tri-Caucus Letter
Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf
05-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880 v2 + MC.docx

Confidential – Deliberative – Privileged – Attorney Work Product

Thank you, Stephanie. The original letter is attached, and I have attached the draft response with Mike's edits.

From: Olson, Stephanie (Federal) <SOlson@doc.gov>
Sent: Friday, May 8, 2020 2:41 PM
To: Zimmerman, Paul (Federal) <PZimmerman@doc.gov>
Cc: Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Cannon, Michael (Federal) <MCannon@doc.gov>
Subject: RE: Draft Tri-Caucus Letter

Thanks Paul. Can you please send me the initial letter? b(5) - DP/AC

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

From: Zimmerman, Paul (Federal) <PZimmerman@doc.gov>
Sent: Thursday, May 7, 2020 2:59 PM
To: Olson, Stephanie (Federal) <SOlson@doc.gov>
Cc: Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Cannon, Michael (Federal) <MCannon@doc.gov>
Subject: FW: Draft Tri-Caucus Letter

Confidential – Deliberative – Privileged

Following up on this tri-caucus response with Mike's edits. Stephanie, please let us know if you have any changes.

Thanks,

Paul

From: Cannon, Michael (Federal) <MCannon@doc.gov>
Sent: Tuesday, May 5, 2020 10:07 AM
To: Zimmerman, Paul (Federal) <PZimmerman@doc.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>
Cc: Brebbia, Sean (Federal) <SBrebbia@doc.gov>
Subject: RE: Draft Tri-Caucus Letter

CUI//PRIVILEGE//FED ONLY

Paul, it is evident that you did a lot of work pulling this together. Great work and thank you very much! I have some minor edits attached. And over to Stephanie for her thoughts. b(5) - DP
b(5) - DP

Best,

Mike

Michael A. Cannon
Chief Counsel for Economic Affairs
Office of the General Counsel

U.S. Department of Commerce
Telephone: (202) 482-5395
Cell: b(6)
Email: mcannon@doc.gov

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From: Zimmerman, Paul (Federal) <PZimmerman@doc.gov>
Sent: Monday, May 4, 2020 6:10 PM
To: Cannon, Michael (Federal) <MCannon@doc.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>
Cc: Brebbia, Sean (Federal) <SBrebbia@doc.gov>
Subject: Draft Tri-Caucus Letter

Confidential – Deliberative – Attorney Work Product – Privileged

Mike, Stephanie,

Attached for your review is our draft response to the Tri-Caucus's letter on implementation of EO 13880, incorporating input from Mike and members of the Census team.

b(5) - DP/AC

Thanks very much,

Paul

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

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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.

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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?

[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-0000030109

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?
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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-0000030110

To: Sharma, Sapna (Federal)[SSharma@doc.gov]
Cc: Cannon, Michael (Federal)[MCannon@doc.gov]; Heller, Megan (Federal)[MHeller@doc.gov]; Brebbia, Sean (Federal)[SBrebbia@doc.gov]
From: Olson, Stephanie (Federal) b(6)
b(6)
Sent: Fri 5/8/2020 2:46:58 PM (UTC-04:00)
Subject: CUI//PRIV FW: Congressional inquiry
2020-04-14 Tri-Caucus to Ross, Dillingham re EO 13880.pdf
04-XX-2020 DRAFT to Castro et al on EO 13880 (2).docx

CUI//PRIV

Sapna,

Please see attached b(5) - DP/AC Thank you.

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(5) - DP/AC

20-069532

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,

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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-0000030114

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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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-0000030115

de la Vara, Hunter (Federal)

From: McGaan, Duncan (Federal)
Sent: Monday, February 24, 2020 9:45 AM
To: McDermott, Ryan (Federal); Jones, Sarah (Federal); Missouri Johnson, Marcellina (Federal); de la Vara, Hunter (Federal)
Subject: FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Attachments: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf; ATT00001.htm

Incoming letter to the Secretary and Census Director Dillingham. Thank you!

Duncan A. McGaan
b(6)

From: Mason, Jacque (Federal) <JMason1@doc.gov>
Sent: Sunday, February 23, 2020 5:51 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; McGaan, Duncan (Federal) <DMcGaan@doc.gov>
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Sent from my iPhone

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:52 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" b(6) @census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
> Attached is a new congressional letter from the Tri-Caucus regarding EO-13880.
>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
> Sent from my iPhone
>
> Begin forwarded message:

From: "Palencia, Stephanie" <Stephanie.Palencia@mail.house.gov>
Date: February 21, 2020 at 6:37:38 PM EST
To: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
Cc: "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

Please confirm receipt and we look forward to your response by Wednesday March 4, 2020.

Sincerely,
Stephanie Palencia

To: Cannon, Michael (Federal)[MCannon@doc.gov]; Olson, Stephanie (Federal)[SOlson@doc.gov]
Cc: Brebbia, Sean (Federal)[SBrebbia@doc.gov]
From: Zimmerman, Paul (Federal) b(6)
b(6)
Sent: Mon 5/4/2020 6:10:06 PM (UTC-04:00)
Subject: Draft Tri-Caucus Letter
05-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880 v2.docx
Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf
RE: Draft
Tri-Caucus Responses.docx

Confidential – Deliberative – Attorney Work Product – Privileged

Mike, Stephanie,

Attached for your review is our draft response to the Tri-Caucus's letter on implementation of EO 13880, incorporating input from Mike and members of the Census team.

b(5) - DP/AC

Thanks very much,

Paul

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

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BC-DOC-0000030121

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?

[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-0000030122

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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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?
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Sincerely,

Joaquin Castro
Member of Congress
CHC Chair

Karen Bass
Member of Congress
CBC Chair

Judy Chu
Member of Congress
CAPAC Chair

BC-DOC-0000030123

To: Cannon, Michael (Federal)[MCannon@doc.gov]; Olson, Stephanie (Federal)[SOlson@doc.gov]
Cc: Zimmerman, Paul (Federal)[PZimmerman@doc.gov]
From: Brebbia, Sean (Federal) b(6)
b(6)
Sent: Thur 4/30/2020 4:46:50 PM (UTC-04:00)
Subject: Draft
04-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880.docx
2020-04-14 Tri-Caucus to Ross, Dillingham re EO 13880 (1).pdf

CUI//PRIV

Mike and Stephanie, attached is our draft response to the Tri-Caucus's letter. Please note b(5) - DP/AC
b(5) - DP/AC Sending to you two
b(5) - DP/AC Thank you

Sean

Sean B. Brebbia
Acting Deputy General Counsel for Special Projects
Department of Commerce
202-482-9051 (direct)
b(6) (mobile)

20-069532

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

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BC-DOC-0000030130

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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-0000030131

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Joaquin Castro
Member of Congress
CHC Chair

Karen Bass
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Judy Chu
Member of Congress
CAPAC Chair

BC-DOC-0000030132

de la Vara, Hunter (Federal)

From: McGaan, Duncan (Federal)
Sent: Monday, February 24, 2020 9:45 AM
To: McDermott, Ryan (Federal); Jones, Sarah (Federal); Missouri Johnson, Marcellina (Federal); de la Vara, Hunter (Federal)
Subject: FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Attachments: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf; ATT00001.htm

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Duncan A. McGaan
b(6)

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Sent: Sunday, February 23, 2020 5:51 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; McGaan, Duncan (Federal) <DMcGaan@doc.gov>
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Sent from my iPhone

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:52 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" <b(6)@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
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>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
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Date: February 21, 2020 at 6:37:38 PM EST
To: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
Cc: "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

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Sincerely,
Stephanie Palencia

To: Olson, Stephanie (Federal)[SOlson@doc.gov]; Cannon, Michael (Federal)[MCannon@doc.gov]
Cc: Kelly, Lucy (Federal)[LKelly@doc.gov]; Zimmerman, Paul (Federal)[PZimmerman@doc.gov]
From: Brebbia, Sean [b(6)]
Sent: Tue 4/21/2020 1:22:33 PM (UTC-04:00)
Subject: Congressional inquiry
2020-04-14 Tri-Caucus to Ross, Dillingham re EO 13880.pdf
04-XX-2020 DRAFT to Castro et al on EO 13880 (2).docx

Hi Stephanie and Mike, **b(5) - AC/WP** Would you both be available tomorrow sometime between 12 and 1 to discuss potential responses?

Sean B. Brebbia
Acting Deputy General Counsel for Special Projects
Department of Commerce
202-482-9051 (direct)
b(6) (mobile)

20-069532

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

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[1] https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connection-with-the-decennial-census

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BC-DOC-0000030136

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?

[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-0000030137

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-0000030138

de la Vara, Hunter (Federal)

From: McGaan, Duncan (Federal)
Sent: Monday, February 24, 2020 9:45 AM
To: McDermott, Ryan (Federal); Jones, Sarah (Federal); Missouri Johnson, Marcellina (Federal); de la Vara, Hunter (Federal)
Subject: FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Attachments: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf; ATT00001.htm

Incoming letter to the Secretary and Census Director Dillingham. Thank you!

Duncan A. McGaan
b(6)

From: Mason, Jacque (Federal) <JMason1@doc.gov>
Sent: Sunday, February 23, 2020 5:51 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; McGaan, Duncan (Federal) <DMcGaan@doc.gov>
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Sent from my iPhone

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:52 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" b(6) @census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
> Attached is a new congressional letter from the Tri-Caucus regarding EO-13880.
>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
> Sent from my iPhone
>
> Begin forwarded message:

From: "Palencia, Stephanie" <Stephanie.Palencia@mail.house.gov>
Date: February 21, 2020 at 6:37:38 PM EST
To: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
Cc: "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

Please confirm receipt and we look forward to your response by Wednesday March 4, 2020.

Sincerely,
Stephanie Palencia

To: Olson, Stephanie (Federal)[SOlson@doc.gov]
From: Brebbia, Sean (Federal) b(6)
b(6)
Sent: Wed 6/10/2020 3:24:14 PM (UTC-04:00)
Subject: FW: Nomination Hearing Binder (Version1.0)
b(5) - DP Nomination Hearing Binder (v.1.0).docx
ATT00001.htm

From: Foti, Anthony (Federal) <AFoti@doc.gov>
Sent: Wednesday, June 10, 2020 11:45 AM
To: Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Kumar, Harry (Federal) <HKumar@doc.gov>; Dombrowski, Eileen (Federal) <EDombrowski@doc.gov>
Subject: Fwd: Nomination Hearing Binder (Version1.0)

Hi guys! Bumping this to the top of your in box for today's b(5) - DP at 3:30.

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:** June 10, 2020 at 11:43:33 AM EDT
> **To:** Anthony Foti <anthonypfoti@mac.com>
> **Subject: Fwd: Nomination Hearing Binder (Version1.0)**
>
> 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:** "McGaan, Duncan (Federal)" <DMcGaan@doc.gov>
> > **Date:** June 8, 2020 at 12:14:07 PM EDT
> > **To:** "Walsh, Michael (Federal)" <MWalsh@doc.gov>
> > **Cc:** "Foti, Anthony (Federal)" <AFoti@doc.gov>, "Kumar, Harry (Federal)" <HKumar@doc.gov>, "Gilman, Thomas (Federal)" <TGilman@doc.gov>, "Preskenis, Kevin (Federal)" <KPreskenis@doc.gov>
> > **Subject: Nomination Hearing Binder (Version1.0)**
> >
> > Mike,
> >
> > Please see the attached nomination hearing binder. This document includes b(5) - DP
> > b(5) - DP

This is our first draft of this document, and we will continue updating throughout the wee b(5) - DP

b(5) - DP

Best,

Duncan McGaan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5781 (JMF)

PLAINTIFFS' LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Local Civil Rule 56.1, Plaintiffs the State of New York et al. and the New York Immigration Coalition et al. submit the following statement of material facts as to which there is no genuine issue to be tried.

EXCLUDING UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE AFTER THE 2020 CENSUS WILL DEPRIVE CALIFORNIA AND/OR TEXAS OF CONGRESSIONAL SEATS

1. Since 1790, no decennial census has excluded any category of persons who usually reside in the United States on their basis of their citizenship or immigration status for purposes of

apportioning congressional representation. *See, e.g.*, *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg. 28,950, 28,950, (2015); Thompson Decl. ¶ 8 (Ex. 57).[1]

2. Millions of undocumented immigrants live in the United States and many have lived in the United States for many years. *See* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

3. California and Texas are consistently the two states with the largest populations of undocumented residents. *Id.* at 4-5.

4. According to the Department of Homeland Security, California had 2.9 million undocumented residents and Texas had 1.9 million undocumented residents in 2015. *Id.* at 2.

5. As of the most recent Congressional reapportionment following the 2010 Decennial Census, the average population of each U.S. House district is 710,767 people. *See* Kristin D. Burnett, *Congressional Apportionment*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf (last visited July 30, 2020).

6. According to the United States Census Bureau, as of July 1, 2019, the population of the United States was estimated to be 328,239,523. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019* (NST-EST2019-02), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited July 30, 2020).

[1] Citations to "Ex. __" are to the exhibits to the accompanying Declaration of Matthew Colangelo dated August 7, 2020.

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7. If the July 1, 2019 Census Bureau estimate of the total United States population is divided by the total number of seats in Congress (435), the quotient is 754,574. *See id.*

8. The Memorandum states that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the "Memorandum") (ECF No. 1-1).

9. The Memorandum states: "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.*

10. A state in which 2.2 million people represent 6 percent of the population would have a total population of more than 36 million residents.

11. According to the United States Census Bureau, as of April 1, 2010, the total population of the State of California was 37,253,956. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019* (NST-EST2019-02), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited July 30, 2020).

12. According to the Census Bureau, as of July 1, 2019, the total population of the State of California was 39,512,223. *Id.*

13. The second most populous state in the United States is Texas. *Id.*

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14. According to the United States Census Bureau, as of April 1, 2010, the total population of the State of Texas was 25,145,561. *Id.*

15. According to the United States Census Bureau, as of July 1, 2019, the total population of the State of Texas was 28,995,881. *Id.*

16. After California and Texas, the next most populous state is Florida, which, according to the Census Bureau, had a total population of 18,801,310 as of April 1, 2010, and an estimated total population of 21,477,737 as of July 1, 2019. *Id.*

17. Based on the Census Bureau's 2019 estimate, 2.2 million people would constitute approximately 7.6 percent of the estimated total population of Texas as of July 1, 2019. *See id.*

18. Based on the Census Bureau's 2019 estimate, 2.2 million people would constitute over 10 percent of the estimated total population of Florida as of 2019. *See id.*

19. The Memorandum anticipates that excluding undocumented immigrants from the apportionment base would deprive California of at least one seat in the House of Representatives. *See* 85 Fed. Reg. at 44,680.

20. Dr. Christopher Warshaw modeled the effects of excluding undocumented immigrants from the population count used to calculate Congressional reapportionment after the 2020 Census. *See* Warshaw Decl. at ¶ 11 (Ex. 58).

21. According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment basis, the probability that Texas will lose a seat in the House of Representatives is 98.3%. *Id.* § 5.2, Tbl. 7.

22. According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment basis, the probability that California will lose a seat in the House of Representatives is 72.1%. *Id.*

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THE POLITICAL INFLUENCE OF PLAINTIFFS CONSTITUENTS WILL BE DIMINISHED BY THE MEMORANDUM'S EXCLUSION OF UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE

23. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county. Gov't Pls.' Am. Compl. ¶ 42 (ECF No. 34).

24. Residents of the City and County of San Francisco will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

25. Plaintiff Monterey County, California is a political subdivision of the State of California. *See* Gov't Pls.' Am. Compl. ¶ 48 (ECF No. 34).

26. Residents of the Monterey County will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

27. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 44 (ECF No. 34).

28. Residents of Cameron County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

29. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 45 (ECF No. 34).

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30. Residents of El Paso County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

31. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 46 (ECF No. 34).

32. Residents of Hidalgo County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

33. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a membership-based not-for-profit organization. Khalaf Decl. ¶ 4 (Ex. 26).

34. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California and Texas. *See New York*, 351 F. Supp. 3d at 608; Khalaf Decl. ¶ 5 (Ex. 26).

35. Dr. Souhail Toubia is a member of ADC and a resident of Orange County, California. Khalaf Decl. ¶ 17 (Ex. 26).

36. George Majeed Khoury is a member of ADC and a resident of San Diego, California. *Id.*

37. Because Dr. Toubia and Mr. Khoury reside in California, they will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

38. George Majeed Khoury is a member of ADC and a resident of San Diego, California. Khalaf Decl. ¶ 17 (Ex. 26).

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39. Because Dr. Toubia and Mr. Khoury reside in California, they will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

40. Plaintiff FIEL Houston Inc. ("FIEL") is a membership-based not-for-profit organization based in Houston, Texas. Espinosa Decl. ¶ 2 (Ex. 18).

41. Today, FIEL has approximately 11,000 members in the greater Houston area. *Id.* ¶ 3.

42. Deyanira Palacios is a member of FIEL and a resident of Montgomery County, Texas. *Id.* ¶ 19.

43. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

44. Karen Ramos is a member of FIEL and a resident of Harris County, Texas. Espinosa Decl. ¶ 20 (Ex. 18).

45. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

46. Plaintiff Ahri for Justice ("Ahri") is a membership-based not-for-profit organization based in Los Angeles, California. Seon Decl. ¶ 2 (Ex. 43).

47. Ahri has roughly 220 individual members, with most residing in Southern California, and particularly in Orange and Los Angeles Counties. Some but not all of these members are U.S. citizens. *Id.* ¶ 4.

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48. Julie Kim is a member of Ahri and a resident of Orange County, California *Id.* ¶ 20.

49. Because Ms. Kim resides in California, she will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *Id.*

50. Simon Lee is a member of Ahri and a resident of Los Angeles County, California. *Id.* ¶ 21.

51. Because Mr. Lee resides in California, he will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58); Seon Decl. ¶ 21 (Ex. 43).

DATED: August 7, 2020

Respectfully submitted,

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Attorneys for the Plaintiffs in 20-CV-5770

BC-DOC-0000030168

IH-32 Rev: 2014-1

United States District Court
for the
Southern District of New York
Related Case Statement

Full Caption of Later Filed Case:

NEW YORK IMMIGRATION COALITION, MAKE THE ROAD NEW YORK, CASA, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, FIEL HOUSTON INC.

Plaintiff

vs.

DONALD J. TRUMP, in his official capacity as President of the United States, UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau

Defendant

Case Number

Full Caption of Earlier Filed Case:

(including in bankruptcy appeals the relevant adversary proceeding)

STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON; COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, and VIRGINIA; DISTRICT OF COLUMBIA; CITIES OF CENTRAL FALLS, CHICAGO, COLUMBUS, NEW YORK, PHILADELPHIA, PHOENIX, PITTSBURGH, PROVIDENCE, and SEATTLE; CITY and COUNTY of SAN FRANCISCO; COUNTIES OF CAMERON, EL PASO, HIDALGO, and MONTEREY; and the UNITED STATES CONFERENCE OF MAYORS,

Plaintiff

vs.

UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, and BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau,

Defendant

Case Number

1:18-cv-02921-JMF

BC-DOC-0000030176

IH-32 Rev: 2014-1

Status of Earlier Filed Case:

☑ Closed (If so, set forth the procedure which resulted in closure, e.g., voluntary dismissal, settlement, court decision. Also, state whether there is an appeal pending.)

☐ Open (If so, set forth procedural status and summarize any court rulings.)

Following the Supreme Court's decision affirming in part and reversing in part this Court's decision, this Court entered an order consistent with the Supreme Court's decision. Defendants appealed to the Second Circuit, but moved for voluntary dismissal of the appeal. The motion was granted.

Judge Furman retains jurisdiction over No. 18-cv-02921 under his July 16, 2019 order, which states, "The Court will retain jurisdiction in this case to enforce the terms of this Order until the 2020 census results are processed and sent to the President by December 31, 2020."

Explain in detail the reasons for your position that the newly filed case is related to the earlier filed case.

In this case, Plaintiffs The New York Immigration Coalition ("NYIC") et. al. challenge President Trump's July 21, 2020 Memorandum addressed to Defendant Commerce Secretary Wilbur Ross titled, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"). Under Local Rule 13, this case is related to the consolidated cases of State of New York et al. v. United States Department of Commerce, and New York Immigration Coalition v. United States Department of Commerce and New York, 1:18-cv-2921-JMF (the "Citizenship Question Cases"). All four factors identified in Local Rule 13 support a finding of relatedness.

First, this case and the Citizenship Question Cases involve the same parties and many of the same events. Both cases have the same plaintiffs and the same defendants. Based on overlapping conduct, both cases allege violations of the Fifth Amendment, the Administrative Procedure Act, and the Enumeration Clause, arising from the same course of conduct, i.e., Defendants' wrongful efforts to suppress the census response rates of immigrant communities, and to manipulate the census to curb the political power of immigrant communities.

Indeed, the Trump Administration has specifically tied the Memorandum challenged in this case to the Citizenship Question Cases. In unveiling the Memorandum, the President issued a statement that begins: "Last summer in the Rose Garden [following the Supreme Court's decision in the Citizenship Question Cases], 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." The President's July 21 statement similarly concludes: "Under an Executive Order I signed last year [after the Supreme Court's decision in the Citizenship Question Cases], 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."

Plaintiffs in this case, moreover, allege that the challenged Memorandum conflicts with representations that the Department of Justice made to Judge Furman in the Citizenship Question Cases regarding whether undocumented immigrants would be counted in the 2020 census and relatedly in apportioning U.S. House seats among the states. The Administration's reversal of these prior representations to Judge Furman forms part of the basis for Plaintiffs' claims in this case and the equitable relief that Plaintiffs may seek.

Second, this case and the Citizenship Question Cases have considerable factual overlap. In the Citizenship Question Cases, Plaintiffs established injuries at trial by demonstrating that the Administration's actions would lower census response rates from immigrant communities. Plaintiffs allege the same injuries in this case. This case, like the Citizenship Question Cases, may also involve factual questions regarding the existence and reliability of administrative data that the Executive Branch possesses to determine the citizenship status of individuals residing in the United States. The claims in this case are based on a continuation of the same facts that formed the basis of the Citizenship Question Cases, as well as actions taken by the Defendants during the course of, and in response to, the Citizenship Question Cases.

Third, absent relation of these cases, the parties may be subject to conflicting orders. Judge Furman retains jurisdiction to enforce the permanent injunction concerning the conduct of the 2020 census in the Citizenship Question Cases, and the Defendants' conduct challenged in this case—similarly in violation of the Administrative Procedure Act and the Constitution—presents an end run around the injunction. In addition, given the Defendants' history of discovery misconduct in the Citizenship Question Cases as well as more recently, see New York v. Wolf, 1:20-cv-01127-JMF, ECF No. 89 (S.D.N.Y. July 23, 2020), relation will ensure consistent enforcement of orders relating to the Defendants' discovery obligations.

Finally, without a determination of relatedness there will be substantial duplication of effort for the parties, witnesses and the Court. In the Citizenship Question Cases, Judge Furman held an eight-day bench trial, which included testimony of over 30 witnesses and 513 exhibits entered into evidence. Much of that testimony and evidence related to Plaintiffs' injuries from reduced census response rates among immigrant communities of color, which will be directly relevant to Plaintiffs' alleged injuries in this case. Judge Furman issued a 277-page opinion and order including findings of fact and conclusions of law, many of which are relevant to the instant case. Without a determination of relatedness, much of this effort could be duplicated.

Under Local Rule 13, there is a general presumption that two cases are not related if one of the cases is no longer pending before the Court. It is unclear whether that presumption applies given that Judge Furman expressly retains jurisdiction over the Citizenship Question Cases until December 31, 2020. But even if the presumption does apply, it is overcome, both by the compelling connection between the two cases, judicial economy, and by the fact that the Court retains jurisdiction in the Citizenship Question Cases to enforce its order.

Signature: /s/ John Freedman Date: 7/24/20

Arnold & Porter Kaye Scholer LLP

Firm: _____

BC-DOC-0000030177

IH-32 Rev: 2014-1

United States District Court
for the
Southern District of New York
Related Case Statement

Full Caption of Later Filed Case:

STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAI I, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON; CITY OF CENTRAL FALLS, CITY OF CHICAGO, CITY OF COLUMBUS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PHOENIX, CITY OF PITTSBURGH, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CITY OF SEATTLE; CAMERON COUNTY, EL PASO COUNTY, HIDALGO COUNTY, and MONTEREY COUNTY

Plaintiff	Case Number
vs.	20-5770
DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; BUREAU OF THE CENSUS; and STEVEN DILLINGHAM, in his official capacity as Director of the United States Census Bureau,	

Defendant

Full Caption of Earlier Filed Case:

(including in bankruptcy appeals the relevant adversary proceeding)

STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON; COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, and VIRGINIA; DISTRICT OF COLUMBIA; CITIES OF CENTRAL FALLS, CHICAGO, COLUMBUS, NEW YORK, PHILADELPHIA, PHOENIX, PITTSBURGH, PROVIDENCE, and SEATTLE; CITY and COUNTY of SAN FRANCISCO; COUNTIES OF CAMERON, EL PASO, HIDALGO, and MONTEREY; and the UNITED STATES CONFERENCE OF MAYORS,

Plaintiff	Case Number
vs.	1:18-cv-2921 (JMF)
UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, and BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau,	

Defendant

BC-DOC-0000030178

IH-32 Rev: 2014-1

Status of Earlier Filed Case:

☑ Closed (If so, set forth the procedure which resulted in closure, e.g., voluntary dismissal, settlement, court decision. Also, state whether there is an appeal pending.)

☐ Open (If so, set forth procedural status and summarize any court rulings.)

On 1/15/2019, the district court issued findings of fact and conclusions of law and entered final judgment and a permanent injunction in 18-cv-2921. No appeal is pending. Following the entry of judgment, there was further litigation relating to sanctions; the sanctions motion was resolved by the court's decision dated 5/21/2020.

Explain in detail the reasons for your position that the newly filed case is related to the earlier filed case.

Please see attached addendum.

Signature: /s/ Elena Goldstein Date: 7/24/2020

Firm: New York State Office of the Attorney General

BC-DOC-0000030179

Addendum

Local Rule 13, which governs the designation of related actions, strongly favors a determination of relatedness.

First, both actions concern substantially similar parties and events. *See* Local Rule 13(a)(1)(A). Both cases stem from defendants' efforts to exclude immigrants from the decennial census count and to effectively redistribute political power away from jurisdictions that are home to large numbers of immigrant families. After defendants failed in their efforts to effectuate these goals by adding a citizenship question to the decennial census, they announced that they would take another action to accomplish their goal; the instant case challenges that subsequent action. Indeed, the Presidential Memorandum at issue in the instant matter explicitly references and relies upon actions related to the prior litigation, namely, the Federal government's decision to use administrative records to gather citizenship information. Moreover, the parties are substantially similar. Thirty-two of the the state, county, and local government plaintiffs in the instant action were likewise plaintiffs in *New York v. Commerce*. Likewise, both cases include the same defendants, the Department of Commerce, Secretary of Commerce, Bureau of the Census, and Director of the Census Bureau; the instant matter also names the President of the United States as a defendant.

Second, there is substantial factual overlap between the two matters. *See* Local Rule 13(a)(1)(B). As detailed above, both cases concern the same fundamental conduct, namely, the federal government's efforts to deny immigrants, and the jurisdictions in which they disproportionately reside, their proper allocation of political power. Both cases allege overlapping harms; in both cases, plaintiffs alleged that defendants' interference with the census count will harm plaintiffs by, *inter alia*, undermining their ability to conduct congressional and state-level redistricting, depriving them of critical federal funding, and eroding the quality of census data relied on by plaintiffs to perform essential government functions. There are a myriad of other overlapping factual issues, including the quality and availability of administrative records to demonstrate citizenship or immigration status, the role and impact of census non-response follow up operations in ensuring data quality, and issues surrounding response rates for hard-to-count communities.

The district court's prior factual findings raise a concern that, absent a related case designation, the "parties could be subjected to conflicting orders" in contravention of Local Rule 13(a)(1)(C). The district court made a multitude of findings on the complex and technical overlapping factual issues described above. A related-case designation would ensure consistency with respect to these findings and concomitant orders. Moreover, the conduct alleged in the instant case may implicate the permanent injunctive relief already ordered by the district court, and over which that court retains jurisdiction. Relatedness would ensure that multiple proceedings need not be commenced before multiple judges.

Finally, absent a determination of relatedness, "there would be a substantial duplication of effort" and burden on the Court. Local Rule 13(a)(1)(D). The district court previously held a lengthy bench trial and reviewed hundreds and thousands of pages of documents relating to these issues. Given the substantial overlap between the cases, a relatedness determination would conserve judicial resources.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CITY OF SAN JOSE, CALIFORNIA; KING COUNTY, WASHINGTON; ARLINGTON COUNTY, VIRGINIA; HARRIS COUNTY, TEXAS; BLACK ALLIANCE FOR JUST IMMIGRATION, a California nonprofit corporation; SAM LICCARDO; RODNEY ELLIS; ZERIHOUN YILMA; LOVETTE KARGBO-THOMPSON; and SANTCHA ETIENNE,

Plaintiffs,

vs.

DONALD J. TRUMP, in his official capacity as President of the United States; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE; U.S. CENSUS BUREAU; and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau,

Defendants.

CASE NO. 5:20-cv-05167-LHK

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

THREE-JUDGE COURT REQUESTED PURSUANT TO 28 U.S.C. § 2284

INTRODUCTION

1. On July 21, 2020, President Donald J. Trump issued a Presidential Order titled "Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Apportionment Exclusion Order"). The Apportionment Exclusion Order states that, for the first time in this country's history, undocumented immigrants will not be treated as "persons" under the Constitution. In spite of the Constitution's plain text and drafting history, in spite of precedent, in spite of statutory command, and in spite of the unbroken practice of every administration since 1790, the President has declared that he will "exclude from the apportionment base aliens who are not in a lawful immigration status." To accomplish this, he has ordered the Secretary of Commerce to provide him with 2020 decennial census information "to carry out" his objective. 85 Fed. Reg. 44679 (July 23, 2020) (Attachment 1). The President's stated justification for reversing our country's democratic tradition is his personal view of a nation "more consonant with the principles of representative democracy."

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

3. The Apportionment Exclusion Order violates the plain text of the Constitution. The Constitution's Apportionment Clause, as amended by the Fourteenth Amendment, states that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2, which requires "counting the whole number of persons in each State," U.S. Const. amend. XIV, § 2. When the drafters meant to exclude certain classes of persons, they said so expressly, e.g., "excluding Indians not taxed." *Id.* No provision excludes undocumented immigrants residing in the United States. And regardless of their immigration status, the Supreme Court has squarely held that undocumented immigrants are *persons* under the Constitution. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210 (1982)

("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

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

5. Defendants' own statements make clear their intent to effectuate the Apportionment Exclusion Order by determining the number of undocumented persons in each State through the use of statistical sampling or reliance on incomplete administrative records. Use of either of these methods will violate the Census Act and the Constitution. The use of statistical sampling to estimate the population of undocumented immigrants in each State violates the Constitution's and the Census Act's prohibitions against the use of statistical sampling in connection with the apportionment of congressional representatives. U.S. Const. art. I, § 2, cl. 3; 13 U.S.C. § 195. And relying in the alternative on a patchwork of administrative records that the Administration has admitted are inaccurate will lead to an unlawfully and unconstitutionally inaccurate population count for apportionment.

6. By excluding undocumented immigrants from the definition of persons for apportionment purposes, the Apportionment Exclusion Order abandons over two hundred years of consensus among all three branches of government, through Republican and Democratic

administrations alike. Since the Nation's founding, every administration has understood that requirement to mean what it says: "person" means "person." And every administration that has addressed the issue, including those of Ronald Reagan and George H.W. Bush, has rejected any claim that undocumented immigrants are not among the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. But under this Apportionment Exclusion Order, all "persons" somehow becomes "all persons *except* those the sitting president in any given census year may deem unworthy of inclusion." No President has ever been granted, and no President has, unfettered discretion to rewrite the Constitution and 200 years of history through such personal fiat.

7. One year ago, the United States Supreme Court held that the Secretary of Commerce's claimed justification for inserting a question about citizenship in the census was "a distraction" and "contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Here, once again, the stated reason for defining undocumented immigrants as non-persons is contrived. The Order itself reveals that the President's intent is to reapportion congressional seats away from disfavored States such as California and to dilute the congressional representation of ethnic and racial minorities. That plan follows a consistent history of actions and statements by the President and his advisors showing that the Apportionment Exclusion Order is motivated by an intent to discriminate against these ethnic and racial minorities.

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

JURISDICTION AND VENUE

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

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States officers or agencies sued in their official capacities, a substantial

part of the events or omissions giving rise to this action have occurred or will occur in this district, and one or more Plaintiffs reside in this district.

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

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

REQUEST FOR THREE-JUDGE COURT

13. Plaintiffs respectfully request that a three-judge court be convened to hear this case.

14. Section 2284(b)(1) specifically requires that:

> Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge.

28 U.S.C. § 2284(b)(1). This action warrants a three-judge court for two reasons.

15. First, pursuant to 28 U.S.C. § 2284(a), a "district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). Plaintiffs challenge the constitutionality of the Apportionment Exclusion Order, which by excluding from the apportionment base all persons who are not in a lawful immigration status, will misapportion congressional districts.

16. Second, Plaintiffs challenge Defendants' use of any statistical method for enumerating the total undocumented population to determine the population for purposes of the apportionment of Representatives in Congress, in violation of 13 U.S.C. § 195, in connection with the 2020 Census. Pursuant to Public Law No. 105-119, § 209(e)(1), 111 Stat. 2440 (1997) (13 U.S.C. § 141 note(e)(1)), consideration of this claim "shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code."

PARTIES

A. Plaintiffs

17. Plaintiff City of San Jose is a municipal corporation in the County of Santa Clara, California. It is the tenth-largest city in the United States, with an estimated population of 1,927,852. Since its founding, San Jose has always been a home to immigrant communities. Today, nearly 40 percent of its population was born in another country, and nearly one-third of its population is of Hispanic, Latinx, Black, or African American origin. San Jose is part of California's 17th congressional district. It brings this action on its own behalf as a municipal corporation.

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

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

20. Plaintiff Harris County is a political subdivision of the State of Texas, existing under the Texas Constitution and the laws of the State of Texas. Harris County is the most populous county in Texas and the third most populous county in the United States. In 2019, the Census Bureau estimated that Harris County's population was 4,713,325, of which 26.1 percent was foreign born. Approximately 43.7 percent of Harris County's population is Hispanic or

Latinx and 20 percent of its population is Black or African American. Harris County is represented in Texas' 2nd, 7th, 9th, 10th, 18th, 22nd, 29th, and 36th congressional districts. It brings this action on its own behalf as a political subdivision of the State of Texas.

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

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

23. Plaintiff Rodney Ellis is a Harris County Commissioner and former Texas State Senator for the 13th State Senate District in Texas. He is a resident and citizen of Houston, Texas in Harris County, where he is registered to vote and regularly exercises his right to vote.

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

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

26. Plaintiff Santcha Etienne is an Organizer and Member of BAJI. She is a resident and citizen of North Miami, Florida, where she is registered to vote and regularly exercises her right to vote.

B. Defendants

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

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

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

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

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

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

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

34. The Apportionment Exclusion Order requires Secretary Ross, the Department of Commerce, the Census Bureau, and Director Dillingham to take "all appropriate action" to

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

ALLEGATIONS

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

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

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free *Persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

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

36. The Fourteenth Amendment, enacted in the wake of the Civil War, eliminated the Apportionment Clause's three-fifths component and provided that Representatives must be apportioned based on "the whole number of *persons* in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2 (emphasis added).

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

38. The ordinary meaning of "person" remains the same today as it was when the Constitution and the Fourteenth Amendment were ratified. "Person" means a human being. *See, e.g.*, *Person*, Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) ("A general loose term for a human being; one; a man."); *Person*, Noah Webster, American Dictionary of the English Language (1865) ("[A] living human being; a man, woman, or child; an individual of the human race."); *Person*, Merriam-Webster Online Dictionary ("1. Human, Individual"), https://www.merriam-webster.com/dictionary/person (last visited July 27, 2020)[https://perma.cc/S58J-7F97]. That ordinary meaning of person does not exclude persons who are undocumented immigrants.

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

40. The intended inclusive meaning of "persons" in the Apportionment Clause and Section 2 of the Fourteenth Amendment is confirmed further by binding precedent interpreting the meaning of the same word used elsewhere in the Constitution and, specifically, the Fourteenth Amendment. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting)

(collecting cases); *see also Hurtado v. California*, 110 U.S. 516, 534-35 (1884) ("due process" had the same meaning in the Fourteenth and Fifth Amendments because "the same phrase was employed"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 329, 1 Wheat. 304, 329 (1816) (examining the use of the phrase "shall be vested" in locations across the Constitution to determine its consistent meaning).

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

42. The Framers of the Constitution reflected their understanding of the breadth of the term "persons" in another provision too. *See* U.S. Const. art. I, § 9, cl. 1 (using "persons" to refer to slaves who could be "[i]mport[ed]" into the United States until 1808). And, when the drafters of the Fourteenth Amendment intended to describe a narrower class than *all* persons, they chose a narrower term. Section 1, for instance, differentiates between "persons" in the Citizenship, Equal Protection, and Due Process Clauses, and "citizens" in the Privileges and Immunities Clause. U.S. Const. amend. XIV, § 1. When the drafters of the Fourteenth Amendment sought to qualify "persons" by whether they are citizens of the United States and of the State wherein they reside, they did so explicitly. *See* U.S. Const. amend. XV, § 1 ("*All persons born or naturalized in the United States and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside.") (emphasis added).

43. Section 2 of the Fourteenth Amendment likewise differentiates between "persons" and "citizens." The first sentence requires "counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. By contrast, the second sentence is limited to "citizens": "But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." *Id.* The use of these two different words in Section 2 is not accidental. To the contrary, "[f]rom [a] difference of phraseology, . . . a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason." *Martin*, 14 U.S. at 334 (Story, J.).

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

45. Interpreting "person" according to its ordinary, inclusive meaning is also the reading most consistent with the Framers' theory of representative democracy. In the Federalist Papers, James Madison explained that it "is a fundamental principle of the proposed constitution that as the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants; so, the right of choosing this allotted number in each state, is to be exercised by such part of the inhabitants, as the state itself may designate." The

Federalist No. 54, p. 284 (James Madison) (G. Carey & J. McClellan eds. 2001). This means that "the basis of *representation* in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016). "Endorsing apportionment based on total population, Alexander Hamilton declared: 'There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government.'" *Id.* (citing 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911)).

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

47. The 39th Congress actively debated several different methods for calculating apportionment, including whether to base apportionment on the population of voters, citizens, or all persons residing in a State. *See generally* Van Alstyne, *The Fourteenth Amendment*, 1965 Sup. Ct. Rev. at 45-48; *Fed'n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980). At the time of the debate, non-citizens were counted in determining representation in Congress. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 353 (Jan. 22, 1866) (statement of Rep. Rogers) ("Every man in this House knows perfectly well in the several States

a person under the age of twenty-one years cannot vote, unnaturalized citizens cannot vote, and the whole class of females, constituting nearly one half of the population of this country, cannot vote; yet for these persons the States are entitled to representation.").

48. Some in Congress advocated apportionment based on the number of voters instead of the number of persons, for two reasons: to deal with the changing composition of Congress that would occur were the then-current population-based apportionment to continue, and to encourage expansion of the franchise to the freed slaves. *See* Van Alstyne, *The Fourteenth Amendment*, 1965 Sup. Ct. Rev. at 46-47. But the voter-based apportionment proposal was met with the objection that "population is the true basis of representation," Cong. Globe, 39th Cong., 1st Sess. 141 (Jan. 8, 1866) (statement of Rep. Blaine), and practical concerns about States with roughly the same population but vastly different number of voters. *Id.*

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

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

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

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

52. When interpreting the Constitution, courts consistently turn to historical practice for guidance. *See, e.g.*, *Evenwel*, 136 S. Ct. at 1132 ("What constitutional history and our prior decisions strongly suggest, settled practice confirms."); *see generally* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019). And that historical sword cuts both ways—it can condone or condemn. For instance, in *NLRB v. Noel Canning*, the Court upheld the constitutionality of certain types of recess appointments based in large part on the "longstanding 'practice of the government.'" 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819)). This year, by contrast, the Supreme Court invalidated the structure of an independent agency, noting that sometimes "the most telling indication of [a] severe constitutional problem . . . is a lack of historical precedent to support it." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (internal quotation marks omitted).

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

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

55. Close historical analogues to undocumented persons demonstrate that the census must count all persons residing in a State, regardless of whether they are residing in that State with the right papers or not. For example, in the 1860 Census—the only one conducted after Congress enacted the Fugitive Slave Act of 1850 (which required free States to cooperate with the capture and return of escaped slaves within their borders, who were deemed to have no lawful presence there, *see* 9 Stat. 462-65 (1850)) but before ratification of the Thirteenth Amendment—the census explicitly counted fugitive slaves in Northern States as part of the "free colored population," despite their unlawful residence in those States. *See* Bureau of the Census, *Population of The United States in 1860*, at vi-vii, xi, xv-xvi (Gov't Printing Office 1864) (discussing changes in the fugitive slave population from 1850 to 1860), [https://perma.cc/H5GS-3M8V].

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

57. During the first half of the 20th century, a variety of proposals were made in Congress to exclude aliens from the apportionment base, but it was recognized that such a result would require a constitutional amendment. For example, in 1929, the Senate Legislative Counsel concluded that, without a constitutional amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Klutznick*, 486 F. Supp. 564, 576-77

(D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980) (citing 71 Cong. Rec. 1821 (1929)).

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

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

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

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

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

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

62. "[F]or 200 years," DOJ told courts, "the decennial census has counted all residents of the states irrespective of their citizenship or immigration status," and those numbers were used for apportionment. *Id.* Given "the clear and unequivocal language of Section 2 of the

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

63. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5 (included in 1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing Before the Committee on Post Office and Civil Service, House of Representatives, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988)). In DOJ's view, it was "clear" that, under the Fourteenth Amendment, "all persons, *including aliens residing in this country*, [must] be included" in the congressional apportionment base. *Id.* at 2 (emphasis added). In fact, DOJ noted, the Reconstruction Congress "rejected arguments that representation should be based on people with permanent ties to the country" and "consciously chose to include aliens." *Id.* at 2-3.

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

65. In 1989, under President George H. W. Bush, DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable aliens from the decennial census count." Letter from Carol T. Crawford, Assistant Attorney General, dated Sept. 22, 1989, at 1, 135 Cong. Rec. S12235 (1989). DOJ responded that "section two of the Fourteenth Amendment which provides for 'counting the whole number of persons in each state' and the

original Apportionment and Census Clauses of Article I section two of the Constitution *require that inhabitants of States who are illegal aliens be included* in the census count." *Id.* (emphasis added). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

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

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

68. This aligns with the census concept of "usual residence," which "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.'" 83 Fed. Reg. at 5526. The Census Bureau promulgates such criteria as to every decennial census. *See* U.S. Census, 2020 Census Residence Criteria and Residence Situations (Feb. 25, 2020), https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html [https://perma.cc/5W42-NCQ7].

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

70. The judiciary, too, has consistently shared this understanding. For over fifty years, the Supreme Court has found it "abundantly clear . . . that in allocating Congressmen the number assigned to each state should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). Just four years ago, the Supreme Court stated that the Constitution "select[s] . . . total population as the basis for allocating congressional seats, . . . *whether or not [individuals] qualify as voters*." *Evenwel*, 136 S. Ct. at 1129 (emphasis added). No court in the United States has ever held otherwise.

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

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

72. The Census Act mandates that "[t]he Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." It authorizes the Secretary to conduct the census "in such form and content as he may determine." 13 U.S.C. § 141(a). Under the direction of the Secretary and the Bureau Director, the Bureau conducts the constitutionally required census every ten years by counting all U.S. residents in the place where they live. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count *all residents* of the

several states," including "[c]itizens of foreign countries living in the United States." U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 27, 2020).

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

74. Thereafter, the President must "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) (emphasis added).

75. The "method of equal proportions" is a method of apportionment based on each State's population designed to minimize disparities in "population per Representative" among States. 71 Cong. Rec. at 4965 (Mar. 2 1929) ("Memorandum on the Method of Equal Proportions" by Professor Edward Huntington noting unanimous adoption of method by Advisory Committee of the Census); 67 Cong. Rec. at 7078 (Apr. 7, 1926) (Advisory Committee report describing method as providing "an apportionment in which the ratios between the representation and the population of the Several States are as nearly alike as possible"). The Department of Justice has recognized that the method of equal proportions relies on each State's total population. Br. for Appellants, *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992), 1992 WL 672939, at *9-11 ("Under all of the methods, the formula for establishing each State's priorities has as its numerator the population of the State.").

76. "Each State shall be entitled . . . to the number of Representatives shown in the [President's] statement" and "no State to receive less than one Member." 2 U.S.C. § 2a(b). "It

shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." *Id.*

D. The Census Act and Enumeration Clause of the Constitution Require an Accurate Enumeration and Prohibit the Use of Statistical Sampling to Determine the Total Population for Congressional Apportionment

77. The Census Act expressly prohibits "the use of the statistical method known as 'sampling' in carrying out" "the determination of population for purposes of apportionment of Representatives in Congress among the several States[.]" 13 U.S.C. § 195.

78. The Supreme Court has held squarely that 13 U.S.C. § 195 "prohibits the use of sampling in calculating the population for purposes of apportionment." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 340 (1999).

79. The Supreme Court explained further that 13 U.S.C. § 195 prohibits the use of statistical sampling for apportionment purposes, "[w]hether used as a 'supplement' or as a 'substitute.'" *Id.* at 342.

80. Likewise, the Constitutional mandate to make an "actual Enumeration" requires the Census Bureau to make an actual count. The use of statistical sampling to estimate "the whole number of persons in each State" . . . in lieu of any effort to actually count such persons violates the constitutional requirement of an "actual Enumeration." U.S. Const. art. I, § 2, cl. 3; *see U.S. House of Representatives*, 525 U.S. at 346-47 (Scalia, J. concurring in part) ("Dictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that an 'enumeration' requires an actual counting, and not just an estimation of number.").

81. The Supreme Court has recognized that the Enumeration Clause embodies a "strong constitutional interest in accuracy," and observed that "the Framers expected census enumerators to seek to reach each individual household" when making determinations that bear on apportionment. *Utah v. Evans*, 536 U.S. 452, 477-78 (2002). To the extent other "methods substitute for any such effort, it may be argued that the Framers did not believe that the Constitution authorized their use." *Id.*

82. Defendants recently conceded these points. When Secretary Ross issued his memorandum reinstating a citizenship question on the 2020 Census, he repeatedly emphasized the importance of "*complete and accurate data*" and stated that "it is [] incumbent upon the Department [of Commerce] and Census Bureau to make every effort to provide a complete and accurate decennial census" in order to secure the "foundational elements of our democracy," "including apportionment of Congressional seats among states." Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs, from the Sec'y of Commerce on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire, at 1, 8 (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf.

83. Thereafter, when the State of New York and others challenged the addition of a citizenship question to the 2020 Census as a violation of (*inter alia*) the Enumeration Clause, the Department of Justice—on behalf of Defendants—recognized that "the Constitution's reference to 'actual Enumeration' is simple: population [for purposes of apportionment] is to be determined *through a person-by-person headcount, rather than through estimates or conjecture*." Br. in Support of Defendants' Mot. to Dismiss (ECF No. 155) at 30, *New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. filed May 25, 2018) (emphasis added); *see also id.* at 25 (stating that the Enumeration Clause "provides a simple judicial standard for determining the constitutionality" of a practice used in creating data used for apportionment: "the Secretary must perform a *person-by-person headcount*, rather than an estimate of population" (emphasis added)).

84. Consistent with the Constitution's demand for an "actual Enumeration," starting "[f]rom the very first census" in 1790, "Congress has prohibited the use of statistical sampling in calculating the population for purposes of apportionment." *House of Representatives*, 525 U.S. at 335. Instead, it has required that "enumeration . . . be made by an *actual inquiry at every dwelling-house . . . and not otherwise*." *Id.* (emphasis added) (quoting Act of Mar. 26, 1810, § 1, 2 Stat. 565-66).

E. President Trump's Unlawful Apportionment Exclusion Order

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

86. Although the Apportionment Exclusion Order is styled a "Memorandum," that label has no legal significance—because the Order's language and its publication in the Federal Register confirm that it has binding legal force and effect. *See* 44 U.S.C. § 1505(a) (requiring executive documents with "general applicability and legal effect" to be published in the Federal Register); *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44679 (July 23, 2020) ("order[ing]" that action be taken). And "there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order." *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 Op. O.L.C. 29 (2000); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) (analyzing presidential memorandum's legal effects under *Youngstown* tripartite framework for executive action).

87. Section 1 of the Apportionment Exclusion Order provides the purported authority for the President's action. It states that "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))." Apportionment Exclusion Order § 1. It also states that "[t]he 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))." *Id.* The Apportionment Exclusion Order then asserts that the President has "discretion to settle the apportionment." *Id.*

88. Section 1 of the Apportionment Exclusion Order observes that the Constitution's requirement that "persons in each State, excluding Indians not taxed" be enumerated in the census "has been interpreted to mean that only the 'inhabitants' of each State should be included." *Id.* The Order then claims that the President has discretion "to determine who qualifies as an 'inhabitant.'" *Id.*

89. Purportedly in the exercise of that discretion, the Apportionment Exclusion Order announces that the President has "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," without regard to whether they reside in the United States. *Id.* § 2. The Apportionment Exclusion Order also sets forth the President's motivation: he wants to punish States like California and Washington that, he says, have adopted "policies that encourage illegal aliens to enter this country" by diminishing their "representation in the House of Representatives." *Id.* Indeed, the Order specifically identifies "one State [that] is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population," and states that "two or three" congressional seats would be allocated in this State than would otherwise be allocated not counting those undocumented persons. On information and belief, that "one State" is California, where Plaintiffs City of San Jose, BAJI, Sam Liccardo, and Zerihoun Yilma are located. *See* Pew Research Center, *U.S. unauthorized immigrant population estimate by state, 2016* (Feb. 5, 2019), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/.

90. To implement the Apportionment Exclusion Order, the President orders the Secretary of Commerce, "[i]n preparing his report to the President under section 141(b) of title 13 . . . to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry the policy . . . ." Apportionment Exclusion Order § 3. In other words, the Secretary is directed to provide information in the census report he is statutorily

required to transmit to the President that will enable the President to categorize undocumented immigrants as "non-persons" and thereby exclude them from the apportionment calculation.

91. The President's stated legal justification for this action is that the Constitution's requirement that "persons in each State, excluding Indians not taxed" be enumerated in the census "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, he notes, the term 'persons in each State' has been interpreted to mean that only the 'inhabitants' of each State should be included." *Id.* § 1. The Apportionment Exclusion Order states that "[d]etermining which persons should be considered 'inhabitants' for the purposes of apportionment requires the exercise of judgment," and it defends excluding undocumented persons as an exercise of that judgment. *Id.*

92. That rationale is contrived. Under the Constitution, Representatives are apportioned among the States by "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. Accepting that this means persons who actually reside in the United States, and that tourists are not included for these purposes, millions of undocumented persons in fact reside in California and the United States. They are not just tourists passing through. *See, e.g.*, Brian Baker, *Estimates of the Illegal Alien Population Residing in the United States: January 2015*, Office of Immigration Statistics, Dep't of Homeland Security (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf (estimating 12 million undocumented immigrants living in the United States, and estimating 2.9 million living in California).

93. The Order's focus on "inhabitants" is immaterial. To begin, the Constitution speaks of "persons," not "inhabitants." But even if the term used were "inhabitants," the result would be the same. The meaning of "inhabitant" (now, in 1787, and in 1865) is persons who reside in a place—without any overlay or additional requirement of legal documentation or status. *See, e.g.*, *Inhabitant*, Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) ("Dweller; one that lives or refides [sic] in a place."); *Inhabitant*, Noah Webster, American Dictionary of the English Language (1865) ("1. One who dwells or resides

permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor"); *Inhabitant*, Merriam-Webster Online Dictionary ("one that occupies a particular place regularly, routinely, or for a period of time"), https://www.merriam-webster.com/dictionary/inhabitant (last visited July 27, 2020). "Inhabitant" is not restricted to "citizen," which connotes a particular relationship with the government, and which lawmakers in 1787, again in 1865, and again now, know very well how to use when they want to limit the scope of persons to the smaller class of citizens of the United States alone. *See, e.g.*, 2 Records of the Federal Convention of 1787, pp. 182-83 (M. Farrand ed. 1911) (draft of Constitution providing "proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) . . . ."); U.S. Const. art. I, § 2, cl. 2 & § 3, cl. 2 (qualifications to be a Representative or Senator include "be[ing] nine years a Citizen of the United States" as well as "an inhabitant of that State [in or for] which he shall be chosen"); U.S. Const. amend. XIV, § 2 (referring to "male inhabitants of [a] State, being twenty-one years of age, and citizens of the United States").

F. The Apportionment Exclusion Order Will Necessitate Reliance on Wholly Incomplete and Inaccurate Data or the Use of Statistical Sampling

94. No Government agency has ever undertaken a person-by-person enumeration of undocumented immigrants in each State.

95. Following the Supreme Court's decision last year enjoining Secretary Ross from including a citizenship question on the 2020 Census in *Department of Commerce v. New York*, 139 S. Ct. at 2575-76, the President issued Executive Order Executive Order 13880 on July 11, 2019, directing all executive agencies instead to provide the Department of Commerce with access to administrative records that may be useful in accomplishing the President's objective of determining the number of citizens and non-citizens in the country.

96. On August 3, 2020, the Census Bureau announced that it is "continu[ing] its work on meeting the requirements of Executive Order 13880 issued July 11, 2019 and the Presidential

Memorandum issued July 21, 2020." U.S. Census Bureau, Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html.

97. Without a 2020 Census question regarding immigration status, the Census Bureau lacks the means to accurately enumerate the population of undocumented immigrants in each State in order to exclude them from the total population apportionment count. The Department of Commerce has expressly conceded that it "lack[s] . . . accurate estimates of the resident undocumented population on a state-by-state basis." Defs' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *State of Alabama v. Dep't of Commerce*, Case No. 2:18-cv-00772-RDP (N.D. Ala. March 13, 2020).

98. The administrative records, which the President has directed are to be the basis for the Department of Commerce's enumeration of the undocumented population, are riddled with inaccuracies and inconsistencies. Jeffrey Mervis, *Why the U.S. Census Bureau could have trouble complying with Trump's order to count citizens*, Science Mag. (Sept. 16, 2019), https://www.sciencemag.org/news/2019/09/why-us-census-bureau-could-have-troublecomplying-trump-s-order-count-citizens (detailing the "formidable challenge" in relying on administrative records); Ruth Greenwood, et al, Collection of State Administrative Records Data, OMB Control Number 0607-0995 (Jan. 17, 2020), https://campaignlegal.org/sites/default/files/2020-01/Final%20Campaign%20Legal%20Center%20Comment%20OMB%20Control%20No%200607-0995.pdf (noting that "[s]tate administrative data on individual citizenship status are notoriously riddled with errors and outdated information" and "records misidentify naturalized U.S. citizens as non-U.S. citizens"); Jennifer Van Hook, *Counting 11 million undocumented immigrants is easier than Trump thinks*, The Conversation (July 17, 2019, 7:22 AM EDT), https://theconversation.com/counting-11-million-undocumented-immigrants-is-easier-than-trump-thinks-120459 (observing that administrative records provide "inconsistent information about the same person," have "limited value for describing those who fall outside of the

administrative records system," and will require researchers to "make assumptions about coverage error"). Moreover, administrative records do not provide information as to lawful immigration status, as opposed to citizenship, and cannot therefore be used to determine whether census respondents are undocumented, as opposed to lawful, immigrants.

99. In the absence of a means to accurately enumerate the total population *excluding* undocumented immigrants, the Census Bureau will have no choice but to rely either on statistical sampling to estimate the number of undocumented persons in each State or on inaccurate administrative records regarding citizenship in order to deliver to the President an apportionment base that excludes undocumented immigrants from the "whole number of persons in each State."

100. The Government has already admitted that Defendants may use statistical modeling to estimate the undocumented population and thereby calculate an apportionment population that excludes undocumented immigrants. In separate litigation, Department of Justice attorney Stephen Ehrlich recently stated that there may be a need for "some statistical modeling" in order to effectuate the Apportionment Exclusion Order, though the Government had not yet "formulated a methodology." Hansi Lo Wang, *Trump Sued Over Attempt To Omit Unauthorized Immigrants From A Key Census Count*, N.P.R. (July 24, 2020, 10:11 AM ET), https://www.npr.org/2020/07/24/894322040/trump-sued-for-attempt-to-omitunauthorized-immigrants-from-a-key-census-count.

101. When asked at a recent congressional hearing how the Census Bureau intends to calculate the number of undocumented immigrants in each State, the Bureau's current Director, Defendant Dillingham, responded that its "experts" would "look at our administrative data and any [other] data that we have," including data obtained from outside sources, then "determine . . . the [President's desired] statistic" by "appl[ying]" unspecified "methodologies" to that data. Oversight Committee, *Counting Every Person: Hearing on Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks*, YouTube (July 29, 2020), https://www.youtube.com/watch?v=SKXS8e1Ew7c.

102. Because actual enumeration of undocumented immigrants is not possible, any quantification of undocumented immigrants that the Secretary of Commerce would provide to

the President pursuant to the Apportionment Exclusion Order, or that the President would thereafter rely upon in preparing the apportionment base for transmission to Congress, would violate 13 U.S.C. § 195 or 2 U.S.C. § 2a(a) and the Enumeration Clause of the U.S. Constitution.

G. Harm to Plaintiffs

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

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

105. The voting power of Plaintiffs Sam Liccardo, Rodney Ellis, Zerihoun Yilma, Lovette Kargbo-Thompson, and Santcha Etienne will be diluted by the Apportionment Exclusion Order because, by excluding millions of persons from the apportionment count, it will likely cause their home states of California, Texas, Florida, and possibly Georgia to have fewer Representatives. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-33 (1999) (state's expected loss of a Representative following reapportionment conferred standing on the state's voters).

106. BAJI is harmed because the Apportionment Exclusion Order already has caused, and absent relief in this action will continue to cause, BAJI to divert resources—including time and money—from other important matters that it ordinarily would be addressing through presentations, workshops, publications, technical assistance, and trainings. As another federal court has already found, and the Supreme Court upheld on review, undocumented immigrants already have a high nonresponse rate to the census. *See New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 578-85 (S.D.N.Y. 2019), aff'd in relevant part, rev'd in part and remanded *sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). The Administration's announced decision to exclude all undocumented persons from the apportionment calculations, and to require that the Department of Commerce and by extension the Census Bureau report such information to the President, will further discourage undocumented immigrants from responding to the ongoing 2020 Census, because of fear that the government will identify and retaliate against undocumented persons who fill out the census. BAJI has spent and, absent relief in this action will continue to spend, additional time and

resources educating and encouraging its partners and constituents to appropriately fill out the census in order to counteract the chilling effect of the Apportionment Exclusion Order.

107. The exclusion of undocumented persons from the Representatives apportionment among the States also will frustrate and undermine BAJI's core mission of promoting equal and just laws through building coalitions and initiating campaigns with African Americans and Black immigrants, and fostering racial, economic, and social equality for the communities it serves. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *see also Fair Hous. of Marin v. Combs,* 285 F.3d 899, 905 (9th Cir. 2002); *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585, at *9 (9th Cir. July 6, 2020).

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

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

CLAIMS FOR RELIEF

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

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

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

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

113. Constitutional text, history, and precedent recognize undocumented immigrants as persons, and millions of them reside in the United States.

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

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

SECOND CLAIM FOR RELIEF
Violation of the Fifth and Fourteenth Amendments—Malapportionment (U.S. Const., amend. V, XIV)

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

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

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

119. The Equal Protection Clause prohibits malapportioned congressional districts. *See Evenwel*, 136 S. Ct. at 1123-24; *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

120. The Apportionment Exclusion Order adopts an apportionment scheme that excludes all undocumented immigrants, and therefore will lead to malapportionment by providing fewer Representatives to States with higher populations of such persons.

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

THIRD CLAIM FOR RELIEF
Violation of Census Act—Ultra Vires
(2 U.S.C. § 2a; 13 U.S.C. § 141)

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

123. The Census Act, 13 U.S.C. § 141(b), requires the Secretary to administer the decennial census and thereafter report to the President a "tabulation of total population by States . . . as required for apportionment of Representatives in Congress."

124. Title 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions."

125. The Apportionment Exclusion Order violates these statutory mandates by directing the Secretary to report to the President apportionment data that is not based on the "total population" or the actual Enumeration of each State.

126. The Apportionment Exclusion Order violates these statutory mandates by determining that the President will transmit to Congress apportionment data that is not based on "the whole number of persons in each State" or "the method known as the method of equal proportions" and directing the Secretary of Commerce and other Defendants to facilitate this unlawful course of action.

127. Defendants' actions beyond the scope of statutory authority are *ultra vires* pursuant to 2 U.S.C. § 2a(a) and 13 U.S.C. § 141, and thereby unlawful.

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

FOURTH CLAIM FOR RELIEF
Violation of Apportionment and Enumeration Clauses—
Prohibition on Use of Inaccurate and Incomplete Data and Statistical Sampling
(U.S. Const. art. I, § 2, cl. 3)

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

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

3. The Supreme Court has recognized that the Enumeration Clause embodies a "strong constitutional interest in accuracy," and that to the extent methods other than a person-by-person headcount are used, "it may be argued that the Framers did not believe that the Constitution authorized their use." *Utah*, 536 U.S. at 478-77.

4. Because it has no means to accurately enumerate the total population *excluding* undocumented immigrants, the Apportionment Exclusion Order will necessitate the use of incomplete and inaccurate administrative records or statistical sampling to estimate the number of undocumented immigrants in order to exclude such persons from the "actual Enumeration" that forms the basis for apportionment of Representatives among the several States.

5. Reliance on incomplete and inaccurate administrative records or statistical sampling to exclude undocumented immigrants from the "the whole number of persons in each State" violates the Constitution's requirement that an "*actual* Enumeration shall be made." U.S. Const. art. I, § 2, cl. 3 (emphasis added).

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

FIFTH CLAIM FOR RELIEF
Violation of Census Act—Prohibition on Statistical Sampling
(13 U.S.C. § 195)

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

8. The Apportionment Exclusion Order also violates the Census Act's prohibition on the use of statistical sampling for the determination of population for purposes of apportionment of Representatives in Congress. *See* 13 U.S.C. § 195.

9. The Census Act states, "*Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States*, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. §195 (emphasis added).

10. The Supreme Court has interpreted this language to prohibit the use of statistical sampling in determining the population count for purposes of apportionment. *See U.S. House of Representatives*, 525 U.S. 316.

11. Pursuant to federal law, "Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." Pub. L. No. 105-119, § 209(b), 111 Stat. 2440, 2481 (1997) (13 U.S.C. § 141 note(b)). An "aggrieved person" is defined to include "any resident of a State whose congressional representation or district *could* be changed as a result of the use of a statistical method." *Id.* § 209(d)(1) (emphasis added).

12. Neither the Census Bureau nor any other Government agency has ever undertaken an actual enumeration of undocumented immigrants in each State. And the Census Bureau is not inquiring as to citizenship status in the 2020 Census, having been permanently enjoined from

doing so. Accordingly, the only way Defendants could exclude undocumented immigrants from the enumerated count of the "the whole number of persons in each State" is by relying on incomplete and inaccurate data or extrapolating the characteristics of the entire population from a sample.

13. Any such "sampling," which seeks to extrapolate the features of an entire population from a small segment thereof, is distinguishable from "imputation," which simply seeks to fill in missing data as part of an effort to count individuals one by one. *See Utah*, 536 U.S. at 466-73.

14. Excluding undocumented immigrants from the "the whole number of persons in each State" on the basis of statistical sampling violates the statutory prohibition against use of "the statistical method known as 'sampling'" for "purposes of apportionment of Representatives in Congress." 13 U.S.C. § 195.

15. Congress has directed that challenges to use to sampling for purposes of the apportionment should be heard and resolved as soon as possible, including prior to the actual apportionment of the House of Representatives: "It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to *expedite to the greatest possible extent the disposition of any such matter*." Pub. L. No. 105-119, § 209(e)(2), 111 Stat. 2440, 2481 (1997) (13 U.S.C. § 141 note(e)(2)) (emphasis added).

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

SIXTH CLAIM FOR RELIEF
Violation of the Fifth and Fourteenth Amendments—Intentional Discrimination (U.S. Const., amend. V, XIV)

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

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

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

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

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

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

23. The history here—culminating in the Apportionment Exclusion Order—is extensive. There is widespread public coverage of the President making numerous statements indicating animosity toward communities of color. *See, e.g.*, Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries [Haiti, El Salvador, African countries]*, Washington Post (Jan. 12, 2018, 4:52 AM PST), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html; Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015) https://web.archive.org/web/20160204082711/https:/www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration; Eugene Scott, *Trump's History of Making Offensive Comments about Nonwhite Immigrants*, Washington Post, Jan. 11, 2018; Julia Hirschfeld Davis et al, *Trump Alarms Lawmakers with Disparaging Words for Haiti*

and Africa, NY Times (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html; Matthew Choi, *Trump focuses on white people killed by police, defends Confederate flag*, Politico (July 14, 2020, 5:45 PM EDT), https://www.politico.com/news/2020/07/14/trump-racism-confederate-flag-police-361205.

24. The general statements then turned to attempts by President Trump to weaken these communities. For example, in 2018, the President referred to Sanctuary laws and policies as a "ridiculous, crime infested & *breeding* concept," likening undocumented immigrants protected by such laws and policies to animals. Z. Byron Wolf, *Trump blasts 'breeding' in sanctuary cities. That's a racist term* (last updated, April 24, 2018, 11:58 PM ET), https://www.cnn.com/2018/04/18/politics/donald-trump-immigrants-california/index.html (emphasis added); *see also* Remarks by President Trump at a California Sanctuary State Roundtable (May 16, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/. And President Trump repeatedly tried to withhold federal funding from such states and cities, and continues to do so today, even in the midst of a global pandemic that has significantly harmed undocumented immigrants. *See, e.g.*, Keya Vakil, Trump to States: Crack Down on Sanctuary Cities or I'll Hold Back Coronavirus Aid (last updated, May 12, 2020, 9:14 AM EDT), https://couriernewsroom.com/2020/04/30/trump-to-states-crack-down-on-sanctuary-cities-or-ill-hold-back-coronavirus-aid/; Louise Radnofsky & Rebecca Ballhaus, *Trump Revives Idea on 'Sanctuary Cities' Amid Stepped Up Immigration Push*, Wall Street Journal (Apr. 12, 2019), https://www.wsj.com/articles/trump-giving-strong-considerations-to-proposal-to-place-immigrants-who-enter-u-s-illegally-in-sanctuary-cities-only-11555087547.

25. In 2019, the President's focus turned to limiting and diluting the voting power of these groups—by seeking to add a question about citizenship to the 2020 Census. When challenged about the propriety of this sudden addition, Secretary Ross claimed it was necessary to enforce the Voting Rights Act. But the courts saw through this. Secretary Ross's decision was enjoined by three district courts, and one of those cases ended up before the Supreme Court, which vacated Secretary Ross's decision because his stated rationale was "contrived" and

"pretextual." *Dep't of Commerce v. New York*, 139 S. Ct. at 2575-76.

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

27. President Trump himself weighed in, so as to leave no question about what had driven him to add the census question struck down by the Supreme Court. On July 5, 2019, just eight days after the Supreme Court's decision, the President publically confirmed that he had sought to add the citizenship question *not* to enforce the Voting Rights Act, but rather "for districting" and "for appropriations," consistent with his attempts to withhold funding from Sanctuary states and cities. Remarks by President Trump Before Marine One Departure (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

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

29. That leads to the present. In the last two weeks alone, President Trump has noted

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

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

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

32. In light of the above, the Apportionment Exclusion Order issued by President Trump is predicated on intentional discrimination against non-white, non-European

undocumented immigrants and has caused, is causing, and absent relief in this action will continue to cause harm to Plaintiffs as alleged above. The acts of the other Defendants have been and will be necessarily tainted by the President's animosity toward communities of color. *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1123-24 (N.D. Cal. 2018).

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

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that the Apportionment Exclusion Order's directive to exclude undocumented persons from the apportionment base violates the U.S. Constitution;

2. Declare that the Apportionment Exclusion Order's directive to exclude undocumented persons from the apportionment base is *ultra vires* and violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141;

3. Declare that any statement from the President to the Congress under 2 U.S.C. § 2a(a) that excludes undocumented persons residing in the United States from the apportionment base is null and void;

4. Declare that the use of statistical sampling and/or other incomplete or inaccurate methods for calculating the population for purposes of apportionment of Representatives among the States is not an "actual Enumeration" and thus violates the U.S. Constitution;

5. Declare that the use of statistical sampling to determine the population for purposes of apportionment of Representatives among the several States violates 13 U.S.C. § 195;

6. Enjoin Defendants Department of Commerce, Census Bureau, Ross, and Dillingham from excluding undocumented persons from the apportionment base following the 2020 Census, or from acting in any capacity to assist the President in excluding undocumented persons from the apportionment base following the 2020 Census;

7. Enjoin Defendants Department of Commerce, Census Bureau, Ross, and Dillingham from modeling, using, or relying on statistical sampling and/or other incomplete or inaccurate methods for calculating the population for purposes of apportionment of Representatives among the States, or from acting in any capacity to assist the President in doing

so;

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

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

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

Dated: August 18, 2020

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

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS; and ADRIAN GARCIA,

Plaintiffs,

v.

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; and U.S. CENSUS BUREAU,

Defendants.

CASE NO. 20-cv-5799

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau (the "Bureau") Director Steven Dillingham, to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic.

2. The Census Bureau's staff spent most of the past decade developing a final operational plan for the 2020 Census that reflected the Bureau's understanding of the best methods for counting everyone once and in the right place (the "Final Operational Plan"). In April 2020, as the COVID-19 pandemic spread throughout the country, the Census Bureau revised its plan to account for both the difficulties of census-taking during a pandemic and the Bureau's constitutional and statutory obligation to achieve a fair and accurate count (the "COVID-19 Plan"). To achieve both ends, the Department of Commerce and the Census Bureau delayed the counting process, shifted the timeframe for conducting and completing its data-collection operation, and increased the time for conducting data-processing, while, crucially, preserving the same amount of time for each step of those operations.

3. On August 3, 2020, the Department of Commerce and the Census Bureau suddenly and without explanation reversed course and replaced the Bureau's COVID-19 Plan with a new one (the "Rush Plan"). The Bureau's Rush Plan requires the Bureau to complete eight and a half months of data-collection and data-processing in half the time. It ignores the multi-month delay in census data-collection that the COVID-19 pandemic caused. It compels a final date for delivering apportionment data to the President that Bureau officials have repeatedly asserted they cannot meet. And it threatens a massive undercount of the country's communities of color and the municipalities, cities, counties, and states where they live. Under these circumstances, the Bureau's new plan to rush the 2020 Census violates, among other things, the federal government's legal obligations to secure an accurate count and statutory prohibitions on arbitrary, capricious, and pretextual federal government action.

4. The federal government's attempt to rush the census count poses a grave threat to

all the vital functions that rely on census data, from reapportioning the United States House of Representatives and redrawing state and local electoral districts, to equitably distributing over $1.5 trillion annually in federal funds that support basic needs such as food, health care, and education. Undercounted cities, counties, and municipalities will lose representation in Congress and tens of millions of dollars in funding. And communities of color will lose core political power and vital services. In contrast to these dire stakes, the immediate solution to this problem is simple: set aside and enjoin implementation of the impossibly-shortened Rush Plan, which is based on an unexplained change of position, and allow the Census Bureau to implement the plan that it had designed to fulfill its constitutional duties during the pandemic.

5. The COVID-19 pandemic upended all 2020 Census field operations, many of which the Census Bureau designed to enumerate populations that it has long struggled to count, including racial and ethnic minorities, non-English speakers, and undocumented persons. Among the disrupted census operations was the largest, most time-consuming operation undertaken to count the country's hard-to-count communities—the "Non-Response Follow Up" operation. During Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census and perform other vital data-collecting functions.

6. The Bureau's staff responded to the pandemic—and the impossibility of conducting house visits during widespread lockdowns—by making necessary adjustments to the timeline in the Final Operational Plan. This revised operational plan, the COVID-19 Plan issued on April 13, 2020, was intended to ensure that hard-to-count communities would be enumerated and the health and safety of Bureau employees and the public would be protected. This plan adjusted the deadlines of, but did not shorten the time for, critical operations. Under this plan—which experts and census stakeholders alike endorsed as a scientifically sound approach for minimizing the pandemic's potential damage to the accuracy of the count—the Bureau extended its data-collection deadlines to October 31, 2020 and its data-processing deadlines into the second quarter of 2021. Critically, the COVID-19 Plan delayed door-knocking by three months, pushing it from May–July 2020 to August–October 2020. But the COVID-19 Plan

acknowledged that the Bureau must spend the same amount of time—around eleven and a half weeks—on door-knocking, just as it had planned to do before the pandemic. The COVID-19 Plan also incorporated the same methods and techniques contemplated in the Final Operational Plan that the Bureau had spent years developing. Indeed, the only respect in which the COVID-19 Plan altered the amount of time devoted to operations set out in the Final Operational Plan was a requirement that the Bureau spend *more* time than originally planned *processing* the data it collected—that is, performing the necessary work to transform over 100 million individual census forms into high-quality, reliable, and legitimate data. This additional investment in data-processing reflected daunting new challenges the COVID-19 pandemic posed to an accurate count, including massive displacements of people that would introduce problems of duplicate responses, responses without unique census identifiers, and other complex data issues.

7. The Department of Commerce and the Census Bureau also recognized that the impact of COVID-19 had made it impossible to meet certain statutory deadlines for reporting census results to Congress. Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham announced that the Bureau was seeking relief from Congress to formally extend two statutory deadlines: first, the deadline for reporting the state-population totals used to calculate the congressional apportionment to the President, which Congress was asked to extend from December 31, 2020 to April 30, 2021; and, second, the deadline for reporting redistricting data to the states, which Congress was asked to extend from March 31, 2021, to July 31, 2021. Commenting on the statutory-deadline extensions, President Trump publicly stated on April 13, 2020, "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

8. Recognizing that more time was necessary to complete an accurate census, and consistent with the President's statement, the Bureau proceeded immediately under its COVID-19 Plan. The Bureau delayed its door-knocking operation to late summer, with the declared

intention of completing it by October 31, 2020. And recognizing that a successful census is dependent on all levels of government working together, the Bureau publicized this plan to the public, as well as to government and non-profit partners involved in the years-long and multi-million-dollar public education campaign to ensure public trust and encourage public participation in the census.

9. Throughout the summer, Bureau officials repeatedly stated that the pandemic had rendered it impossible for the Bureau to complete a reasonably accurate count by December 31, 2020. But to comply with its constitutional obligations, the Bureau continued collecting data on the timelines set in the COVID-19 Plan, which itself extended the Bureau's data-processing timelines into 2021.

10. On August 3, 2020—in the face of a pandemic that has only grown worse and in disregard of the Census Bureau's constitutional and statutory duties to conduct an actual enumeration of the entire population—Secretary Ross and Director Dillingham abruptly abandoned the COVID-19 Plan. Without explanation, they announced the new Rush Plan for the 2020 Census, including shortening the Bureau's data-collection operation by one month to September 30, 2020, and requiring the Bureau to process and report the apportionment data to President Trump by December 31, 2020. The Rush Plan cuts a crucial four weeks from the data-collection operation. And it disregards the Bureau's own prior conclusions that such rushed processing renders it impossible to fulfil its constitutional obligation to ensure reasonable quality and accuracy of 2020 Census data.

11. Defendants' decision to abandon the COVID-19 Plan in favor of the Rush Plan does not satisfy the Supreme Court's clear command that any decision relating to the census bear a "reasonable relationship" to producing an accurate count. *See Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). As demonstrated by Defendants' own prior statements, the challenged decision cannot be justified by any legitimate interest in conducting an accurate census, and in fact will introduce several inaccuracies in the count, chief among them major undercounts of communities of color.

12. The reason for this abrupt change of position is not apparent on the face of the

press release announcing the Rush Plan or any other subsequently issued statements or publications from the federal government. The Bureau has refused requests from Congress and at least one Plaintiff in this action to provide one.

13. The announcement of the Rush Plan did reference two developments that occurred between the adoption of the COVID-19 Plan and the announcement of the Bureau's intent to adopt the Rush Plan. But neither of these developments can justify Defendants' actions. First, the announcement refers to the Secretary of Commerce's direction to the Bureau to comply with the statutory deadline of December 31, 2020 for completing the apportionment count. But this statutory deadline cannot justify an unconstitutional decision to cut short crucial operations and fail to satisfy its constitutional obligation. A statutory deadline, particularly one that was set without a global pandemic in mind, cannot override the federal government's constitutional duty to accomplish an accurate census; there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980). Moreover, the Bureau was cognizant of this deadline even as it designed and implemented the COVID-19 Plan, including delaying crucial field operations by several months. And Bureau officials have repeatedly made clear that because of the impediments introduced by COVID-19, together with the multi-month delay, it is *already* too late to satisfy these pre-COVID-19 deadlines.

14. Second, both the text of the Rush Plan announcement and the timing of the decision suggest that the federal government's motivation for the Rush Plan is to facilitate another illegal act: suppressing the political power of communities of color by excluding undocumented people from the final apportionment count. On July 21, 2020—just a few weeks earlier—President Trump issued a Presidential Order titled "Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Apportionment Exclusion Order")—which expressly stated the President's determination to exclude undocumented people from the population count used for apportionment. To increase the chance that the President can fully effectuate the Apportionment Exclusion Order, he must receive the population totals while he is still in office, and he ordered the Secretary of Commerce to provide

him with 2020 decennial census information by December 31, 2020 to carry out his objective.

15. The President's Apportionment Exclusion Order (currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District) represents only the most recent of Defendants' serial attempts to manipulate the 2020 Census to suppress the political power of communities of color. These attempts started with a campaign to introduce a historically unprecedented and untested citizenship question onto the 2020 Census questionnaire to advantage—in the words of a deceased Republican redistricting consultant—"Republicans and non-Hispanic whites." Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. Since the Supreme Court blocked the question, Defendants have looked for other means to achieve that same end, including collecting data on citizenship from administrative records and, now, cutting the census short.

16. Plaintiffs are local governments, civil rights and civic organizations, and individuals whose communities will almost certainly be inaccurately represented and underrepresented in the final census count if the administration succeeds in truncating census data-collection and data-processing.

17. Plaintiffs seek declaratory relief affirming that Defendants' actions violate the Enumeration Clause and the Administrative Procedure Act. Plaintiffs additionally seek to set aside and enjoin implementation of the illegal Rush Plan, thereby permitting the Bureau to implement the preexisting COVID-19 Plan it carefully designed to ensure a complete and accurate count. This relief will allow the Bureau to conduct the 2020 Census on the timeline it has repeatedly asserted is necessary to complete a full, fair, and accurate count.

18. Without such relief, Plaintiffs and the communities they represent will suffer irreparable harm for at least another decade, until the next census is conducted.

JURISDICTION AND VENUE

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

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

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

22. The proper intradistrict assignment for this action is the San Jose Division, in light of the location of Plaintiffs City of San Jose and members of the League of Women Voters.

PARTIES

I. Plaintiffs

23. The National Urban League ("Urban League") is a civil-rights organization with over 90 affiliates serving 300 communities in 37 states and the District of Columbia. Founded in 1910, the National Urban League is headquartered in New York City. The mission of the National Urban League is to help African Americans and others in underserved communities achieve their highest human potential and secure economic self-reliance, parity, power, and civil rights.

24. For the 2020 Census, the Urban League has expended substantial resources developing programs designed to encourage self-response and cooperation with Census Bureau offices in historically undercounted communities. Specifically, the organization has engaged in efforts to educate the public about the census through various methods, including virtual town halls, production and distribution of toolkits, workshops for locally based get-out-the-count organizations, and publication and upkeep of a website, www.MakeBlackCount.org, to disseminate critical information about the census. The Urban League has also worked with Census Bureau regional offices to encourage enumerator recruitment, and the organization uses social media to encourage 2020 Census participation.

25. Plaintiff Black Alliance for Just Immigration ("BAJI") is a nonprofit organization organized and existing under the laws of California, with offices and members across the country, including in Oakland, California, Miami, Florida, Atlanta, Georgia, and New York City.

BAJI collaborates with African Americans and Black immigrants to organize and advocate for equal and just laws in their communities. BAJI campaigns to advance racial justice and provides partner organizations with varied assistance—particularly on immigration policy—and it spends significant resources educating its partner organizations, individuals, and other constituents through presentations, workshops, publications, technical assistance, and trainings. BAJI is a membership organization, and its members either pay dues or volunteer their time to support the organization. Members also actively participate in BAJI's self-governance and decision-making at the local level.

26. For the 2020 Census, BAJI has worked to ensure non-responsive households in Black and immigrant communities are counted. BAJI has hired additional staff dedicated to engaging local communities on the census, and has engaged in outreach using social media and mailers to bolster self-response. In addition, since the outbreak of the COVID-19 pandemic, BAJI staff regularly participate in webinars and virtual events to provide the public more information about the census, with a specific focus on encouraging participation in Black and immigrant communities.

27. The League of Women Voters is a nonprofit civic organization that encourages informed and active participation in government. Founded in 1920, the League of Women Voters is headquartered in Washington, D.C. The League of Women Voters has over 800 state and local affiliates, located in all 50 states and in 764 specific communities, including affiliates with members in San Francisco and Monterey County, California, Detroit, Michigan, Miami, Florida, Philadelphia, Pennsylvania, and New York City. The League of Women Voters seeks to empower voters and defend democracy. The League of Women Voters has over 65,000 members nationwide, and its members either pay dues or volunteer their time to support the organization.

28. The League of Women Voters has engaged in significant efforts to ensure historically undercounted communities are enumerated during the 2020 Non-Response Follow Up operation. Prior to the outbreak of COVID-19 in the United States, the League of Women Voters and its affiliates participated in public events across the country aimed at providing information about the census to undercounted communities. Since March of this year, the League

of Women Voters has shifted to a digital public-education campaign, encouraging education and participation through social media, email listservs, webinars, and blog posts. Affiliates in Kansas, South Carolina and Maine are also participating in state Complete Count Committees that seek to increase awareness of the 2020 Census, improve participation, and coordinate with Census Bureau officials.

29. Harris County, Texas is a political subdivision of the State of Texas. With over 4.7 million residents, Harris County is the third largest county in the United States. The county's population is over 43% Latino, 20% Black, over 7% Asian, and over 28% non-Hispanic White. During the 2010 Census, 65.1% of households in Harris County self-responded to the census. As of August 14, 2020, 58.3% of households in Harris County had self-responded to the 2020 Census. This response rate in Harris County was well below the national response rate on that date, 63.6%.

30. For the 2020 Census, officials in Harris County engaged in extensive efforts to encourage participation in the County. County officials formed a Complete Count Committee with city officials in Houston that engaged in public education about the census, and built partnerships with local Census Bureau officials to coordinate outreach efforts. In addition, in 2019, the County approved a budget of nearly $4 million dollars to conduct outreach during the 2020 Census. To that end, the County has contracted with vendors to conduct surveys about the opinions and attitudes of non-responsive populations and develop a digital advertising campaign on Facebook and Instagram to encourage 2020 Census participation. And the County receives substantial federal funding tied to census data.

31. King County is a political subdivision of the State of Washington. Over 2.2 million people live in King County, making it the most populous county in Washington. As of August 14, 2020, 26.1% of households in King County had not responded to the 2020 Census. The county has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, King County had nearly 12,000 residents experiencing homelessness, the third highest total of any locale in the country. The Seattle metro area, which includes King County, is estimated to have 140,000

undocumented immigrant residents.

32. King County worked in partnership with local cities to provide $1.17 million to community-based organizations serving historically undercounted communities. Specifically, King County sought to fund organizations that work with communities that are Limited English Proficient. Through this funding, these organizations produced public education materials related to the 2020 Census, and developed campaigns to get-out-the-count. And King County, too, receives substantial federal funding tied to census data.

33. The City of Los Angeles, California is a municipal corporation organized and existing under the laws of the State of California, and is a charter city pursuant to Article XI of the California Constitution. The City is home to roughly 4 million people, and is located in the county recognized by the Census Bureau as the hardest to count in the nation. The city's population is a large contributor to the County's hard-to-count status as more than half of the City's residents live in census tracts that are hard to count. As of August 14, 2020, only 53.8% of the City's households had responded to the 2020 Census—well below the statewide average of 65.1% and even further below the City's own 2010 self-response rate of 68 percent.

34. As a result of its hard-to-count status, Los Angeles has engaged in years of planning and devoted significant resources to developing a strategy for an accurate count, tailored to the unique challenges of the City's population. To fund these efforts, the City has overseen distribution of roughly $2 million dollars to community-based organizations and the investment of almost $1.5 million of both City general fund and grant money in its own efforts. And the City of Los Angeles also receives substantial federal funding tied to census data.

35. The City of Salinas, California is a political subdivision of the State of California. Salinas is the most populous city in and the government seat of the County of Monterey. The city is home to more than 150,000 people, including 38.5% of the county's "hard-to-count" population. As of August 14, 2020, 57.2% of all households in Salinas have responded to the 2020 Census, which is 422nd out of all 482 California cities. The current response rate is 7.9 percentage points below California's statewide average for self-responses and more than 10 percentage points below Salinas's self-response rate from the 2010 Census.

36. Salinas has dedicated significant resources to funding and staffing its "Census Action Team," which is composed of city staff and representatives from the County of Monterey's "Complete Count Committee," as well as community-based organizations, school districts, and local businesses. The city's population is more than 75% Latino, and more than 1 in 5 households have limited English-language proficiency. As part of its outreach, the Salinas Census Action Team engages religious and community organizations, such as local food banks, to assist with enumeration efforts in the Latino community and all communities of color as these organizations are able to assist with trust and communication barriers that can make these groups hard to count. The City of Salinas also receives substantial federal funding tied to census data.

37. The City of San Jose is a political subdivision of the State of California. San Jose has over 1 million residents, making it the largest city in Northern California, and the tenth largest city in the United States. San Jose's population is 32% Latino, and 35% Asian, and nearly 40% of residents are foreign born. As of August 14, 2020, 28% of households in San Jose had not responded to the census. San Jose has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, in 2019, San Jose had over 6,000 residents experiencing homeless. In addition, the San Jose metro area is estimated to have over 150,000 undocumented immigrant residents.

38. The City of San Jose has engaged in extensive public-education and get-out-the-count efforts during the 2020 Census. San Jose has formed a Complete Count Committee with Santa Clara County, and nearly 90 community-based organizations. The Committee focuses on raising awareness of the census in historically undercounted communities. San Jose also disseminates information about the census to the public through city departments and offices. San Jose also worked closely with the Census Bureau to recruit qualified bilingual enumerators. The City of San Jose receives substantial federal funding tied to census data.

39. Plaintiff Rodney Ellis is the Commissioner for Precinct One on the Harris County Commissioners Court. He is a resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Ellis regularly drives on roads and highways in Harris County.

40. Plaintiff Adrian Garcia is the Commissioner for Precinct Two on the Harris County Commissioners Court. He is a life-long resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Garcia also regularly drives on roads and highways in Harris County.

II. Defendants

41. Defendant Wilbur L. Ross is the Secretary of the U.S. Department of Commerce and is sued in his official capacity. Secretary Ross oversees the U.S. Department of Commerce and the Census Bureau. Congress has delegated the responsibility for carrying out the decennial census to the Secretary of Commerce. 13 U.S.C. § 141(a).

42. Defendant U.S. Department of Commerce is a cabinet agency within the Executive Branch responsible for administering the decennial census.

43. Defendant Steven Dillingham is the Director of the U.S. Census Bureau and is sued in his official capacity.

44. Defendant U.S. Census Bureau is an agency within the Department of Commerce responsible for planning and administering the decennial census. 13 U.S.C. § 2.

FACTUAL ALLEGATIONS

I. Defendants' Constitutional and Statutory Obligations.

45. Under the United States Constitution, the federal government must conduct an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2.

46. The population totals produced by the decennial enumeration are used to apportion congressional representatives to the various states. *Id.* Census figures are also used in state and local redistricting and in the distribution of federal funds to communities across the United States.

47. The Enumeration Clause requires that decisions relating to the census bear a "reasonable relationship" to the constitutional purpose of the enumeration. *Wisconsin*, 517 U.S. at 20.

48. Similarly, the Census Act imposes a mandatory duty on the Secretary of Commerce to "conduct a census that is accurate and that fairly accounts for the crucial

representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

49. Consequently, the Secretary of Commerce and the Census Bureau are constitutionally obligated to make decisions in conducting the census that are reasonably related to achieving a fair and accurate calculation of the population of the United States.

II. The Census Bureau's Pre-COVID-19 Operational Plans for the 2020 Census.

50. For the 2020 Census, the Census Bureau spent the better part of a decade designing operations to fulfill its constitutional and statutory mandate, including: soliciting and incorporating feedback from seasoned experts, advisors, and community groups; testing various features of its data-collection and data-processing operations; and ensuring that its decisions for conducting the census reflected sound, scientifically based judgment.

51. To this end, the Bureau created an operational plan to guide its efforts, including its efforts to collect data from census respondents and to process that data into usable forms for constitutionally and statutorily mandated purposes, including reapportionment and redistricting.

52. On December 31, 2018, the Bureau promulgated the final version of its operational plan, which the Bureau called "Version 4.0" (hereinafter referred to as the "Final Operational Plan"). *See* U.S. Census Bureau, Final Operational Plan (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf. In the Final Operational Plan, the Census Bureau stated that its goal for the 2020 Census is to "count everyone once, only once, and in the right place."

53. Under the Paperwork Reduction Act, the Office of Management and Budget must review and approve the plans for any federal survey, including the decennial census, to ensure that those surveys meet government standards, minimize respondent burden, and maximize the utility of the collected information. 44 U.S.C. § 3504(c).

54. The Office of Management and Budget formally reviewed and approved the Census Bureau's pre-COVID-19 plans for the decennial census, including the Final Operational Plan.

55. The Final Operational Plan includes over 200 pages of detailed and transparent

conclusions for achieving the 2020 Census's objective of an accurate count.

56. The Final Operational Plan reflects the conclusions of various experts including survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

57. The Final Operational Plan states that it "reflects and supports evidence-based decision-making" about the operations necessary to gather and process census responses from every household in the country.

58. The Final Operational Plan states that it was "informed through research, testing, and analysis conducted from 2012 through 2018."

59. The Bureau conducted at least fifteen tests between 2012 and December 31, 2018, when it published its Final Operational Plan.

60. Career Bureau staff developed the Final Operational Plan following substantial consultation with outside experts and census stakeholders, including members of the Census Scientific Advisory Committee and the National Advisory Committee.

61. The Census Bureau also produced a series of "detailed operational plans," which supplement the Final Operational Plan, and provide more parameters for the individual operations that, together, comprise the 2020 Census.

62. The detailed operational plans likewise reflect the conclusions of various subject-matter experts regarding how to complete an accurate count.

63. The Bureau's Final Operational Plan contains several major categories of operations. Two of those categories are particularly important for purposes of this lawsuit: data-collection and data-processing.

64. "Data-collection" refers to operations through which the Bureau obtains information from and about all the people living in the United States.

65. "Data-processing" refers to operations through which the Bureau fills in any gaps in the personal information that it collects from people, transforms the resulting data into usable forms, checks those results for accuracy and other aspects of data quality, and publishes those results, among other things.

66. The Bureau must thoroughly, fully, and correctly perform both categories of

operations—collection and processing—to achieve its stated goal of counting everyone once, only once, and in the right place.

A. Census Data Collection

67. During the census, the Bureau attempts both to determine the number of people in the country and their characteristics, such as their race and ethnicity.

68. Although the Census Bureau planned to deploy many methods during the 2020 Census to collect counts and characteristics from households around the country, the Bureau contemplated, in both the Final Operational Plan, and in the supplemental detailed operational plans, that three methods would account for the overwhelming majority of census responses: the "Self-Response" method; the "Update Leave" method; and the "Non-Response Follow Up" method. *See* U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Non-Response Follow Up Operation* (July 15, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf.

69. The Self-Response method was the "primary methodology for the 2020 Census." Under this method, heads of households would provide their 2020 Census responses directly to the Census Bureau by mailing back a paper census form, filling out a digital form on the Bureau's online census portal, or calling into telephone hotlines to provide their responses to Bureau employees operating those hotlines.

70. The Update Leave method was the methodology for reaching housing units that could not receive physical mail or did not have verifiable mailing addresses. Under this method, Bureau employees would travel throughout both rural and urban areas, leaving invitations to participate and paper census questionnaires at these housing units, so that the people living in those locations could respond themselves.

71. The Self-Response method and the Update Leave method are crucial for obtaining accurate information about the number of people in the country and their characteristics, because data people report about themselves and the members of their housing units is the highest quality data that the census collects.

72. But for the tens of millions of households that do not report their personal data through the Self-Response or Update Leave method, the Bureau's next-best source of personal data is data it collects directly from people through the Non-Response Follow Up method.

73. As part of the Non-Response Follow Up method, the Bureau sends its employee enumerators directly to housing units so that they can attempt to speak with a person occupying each unit and obtain information about everyone who should be counted in that unit.

74. The Bureau requires enumerators to record their responses for each household through iPhones that the Bureau specifically contracted and customized for this purpose. The enumerators' iPhones include software designed to lead enumerators consistently and reliably to solicit information from people at their doors. The enumerators' iPhones also include software to ensure that any data collected from housing units remains confidential as it is being transmitted to the Bureau. The limited supply of these customized iPhones places a limit on the number of enumerators that the Bureau can deploy in the field.

75. The Bureau's Detailed Operational Plan for Non-Response Follow Up, which supplements the Final Operational Plan, sets out a specific protocol for conducting Non-Response Follow Up.

76. Under the Detailed Operational Plan, each housing unit assigned for a visit from an enumerator was eligible for up to six "contact days." A "contact day" could include more than one attempted contact per day.

77. The Bureau concluded it could pursue less than six contact days only under certain scenarios.

78. One scenario that would allow the Bureau to pursue fewer than six contact days was the existence of high-quality administrative records for the housing unit. The Census Bureau has collected data from federal administrative agencies, such as the Social Security Administration, the Internal Revenue Service, and the Department of Housing and Urban Renewal, among others, as well as data from states, which it uses to provide information about the count and characteristics of non-responsive households.

79. If the Bureau had located administrative data from federal and/or state

administrative records and concluded that those records contained accurate demographic data for the occupants of a housing unit, the Bureau's enumerators would attempt only one contact with that unit. If—during that contact attempt—the enumerator did not succeed in finding a live person at the unit, then the Bureau would use the information in the administrative records to fill in the census responses for that unit during the data-processing phase of the 2020 Census.

80. A second scenario that would allow the Bureau to pursue less than six contact days would arise if the Bureau identified a proxy—a person such as a neighbor or landlord that the enumerator could ask for information about the occupants of the housing unit in question. After a third failed contact attempt, a unit would become eligible for being counted through proxy.

81. Proxies can produce many types of data. For instance, proxies are useful for helping the Bureau identify whether a housing unit is vacant—and thus should be marked "vacant" in the Master Address File that the Bureau uses to keep track of the overwhelming majority of housing units that it must enumerate—or non-existent—and thus should be deleted from the Master Address File. For the 2020 Census, the Bureau is planning to use administrative records, such as the United States Postal Service's directory of non-deliverable addresses, to identify vacant housing, but proxies are generally more accurate for this purpose. Finally, proxies provide vital data for other operations that the Bureau undertakes during its data-processing phase, described further below.

82. If the Bureau is unable to enumerate a household after six contact days, in most cases, it will resort to less accurate methods for determining the count and characteristics of the household during its data-processing phase, described below.

83. The Bureau performs several other vital operations in addition to door-knocking during the Non-Response Follow Up period, including a series of operations to ensure the quality of the data that it collects in the field.

84. During the Non-Response Follow Up process, the Bureau: follows up with people who self-responded to the census online but did not enter their unique census identification number to ensure that they are counted in the right place (a process known as "Field

Verification"); and corrects information reported erroneously or omitted from previously submitted census forms (a process known as "Coverage Improvement").

85. In addition, the Bureau re-collects census responses in select instances to ensure that the original submissions were accurate (a process known as "Self-Response Quality Assurance"). This operation protects against enumerators falsifying the information that they provide to the Bureau. Specifically, the Bureau conducts quality control reinterviews of a sample of households. This component is designed to deter and detect cases where enumerators have provided false information about the housing units they are assigned to canvass.

86. Quality control reinterviews are part of a broader set of protocols that the Bureau has developed to guard against factors that endanger the accuracy of the count. Non-Response Follow Up is thus important not only for collecting information, but also for ensuring that the information that is collected is accurate. These two components—gathering data and ensuring its accuracy—must both occur for the Bureau to get a fair and accurate count.

87. The Bureau anticipated that approximately 60% of housing units nationally would respond to the 2020 Census through Self-Response and Update Leave, potentially making up to 40% of housing units targets for Non-Response Follow Up.

88. A Non-Response Follow Up universe of 40% of the housing units in the country would have been the largest follow up universe on a percentage basis since at least 1970.

89. The Census Bureau did not anticipate that the Non-Response Follow Up universe in 2020 would mirror the demographic makeup of the nation's population as a whole.

90. Instead, the Census Bureau anticipated that the Non-Response Follow Up universe in 2020 would contain a disproportionate number of people who belong to communities that the Bureau calls "hard-to-count."

91. The Final Operational Plan describes hard-to-count populations as including, but not limited to, the following populations: young children; highly mobile persons; racial and ethnic minorities; non-English speakers; low-income persons; persons experiencing homelessness; undocumented immigrants; persons who have distrust in the government; lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) persons; persons with mental and

physical disabilities; and persons who do not live in traditional housing.

92. Historically, these populations have had low self-response rates and have, thus, made up disproportionate shares of households that must receive contact days during Non-Response Follow Up.

93. Consequently, the Final Operational Plan acknowledges, "[t]he NRFU Operation is entirely about hard-to-count populations."

94. The Final Operational Plan also acknowledges that hard-to-count populations may require more outreach than the Non-Response Follow Up method would normally provide, and the Bureau designed its Final Operational Plan accordingly.

95. The Final Operational Plan states that "[w]hile most cases receive a maximum of six attempts, cases in hard-to-count areas may receive more than six attempts to achieve a consistent response rate for all geographic areas."

96. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

B. Census Data-Processing

97. After collection activities are complete, the Census Bureau must process the data.

98. Census data-processing cannot begin until census data-collection concludes.

99. Census data is unusable for its intended purposes until it has been processed.

100. The Census Bureau's data-processing operations transform tens of millions of census responses into usable products, including the population totals used to reapportion seats in the U.S. House of Representatives and to create electoral districts.

101. The Bureau uses its data-processing operations to, among other things, ensure that data received from different data-collection methods are all in a single format allowing them to be processed together.

102. The Bureau uses its data-processing operations to "unduplicate responses"—

meaning to resolve conflicts of information among multiple forms attributable to the same housing unit.

103. The Bureau uses its data-processing operations to determine the final status of a housing unit—such as vacant or inhabited—and determine the total number of people that should be attributed to any apparently inhabited unit that was not counted through Self-Response, Update Leave, or Non-Response Follow Up.

104. The Bureau also uses its data-processing operations to ensure that Bureau data products accurately report respondents' characteristics, such as age, race, and ethnicity.

105. The Bureau uses administrative records and statistical imputation during the data-processing phase to fill in both missing people and their characteristics. But administrative records—especially low-quality administrative records—and statistical imputation are generally less accurate than self-response data.

106. For many households, administrative data provides only low quality information, replete with inaccuracies and incomplete information. This is especially the case for particular communities that are underrepresented in administrative records, including communities of color, immigrants, and low-income families. Use of this low-quality data to fill in missing information for non-responsive households produces less accurate information.

107. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household. Imputation thus assumes the existence of other data points gathered through other data-collection methods—such as self-response, proxies, and administrative records—and generates more accurate results when it can be triangulated against those data points. The processes that the Bureau uses to collect and process self-response data, proxy data, and administrative records are thus critical and inextricably linked to the Bureau's ability to impute data accurately.

108. At various phases of the Bureau's data-processing operations, Census Bureau personnel must review the quality of files in-process before those files can be sent to the subsequent steps in the data-processing operation. These reviews include personnel with subject-matter expertise from several different divisions of the Bureau.

109. The Bureau's data-processing operations help ensure that people are not missed, that other people are not counted multiple times, and that people's characteristics are accurately reported. These processes help eliminate or reduce undercounts, among other kinds of data-quality issues.

C. The Final Operational Plan's Original Timeline for the 2020 Census

110. The Bureau's Final Operational Plan called for data-collection to run from January 21, 2020, to July 31, 2020, for a total of more than six months.

111. In that window, the Self Response method was scheduled to run from March 12, 2020 to July 31, 2020, and the Update Leave method was scheduled for March 15, 2020 to April 17, 2020.

112. The Bureau also scheduled several special operations to occur early in its census taking process. The Service-Based Enumeration, which counts people experiencing homelessness, was scheduled for March 30, 2020 to April 1, 2020, and Group Quarters Enumeration, which counts people living in group housing such as nursing homes, was scheduled from April 2, 2020 to June 5, 2020.

113. The Bureau scheduled the Non-Response Follow Up method to run from May 13, 2020 to July 31, 2020, for a total of approximately eleven and a half weeks.

114. The Bureau scheduled up to five months—from July 31, 2020 to December 31, 2020—to process census data for the congressional reapportionment report.

115. The Bureau also scheduled an additional three months—from January 1, 2021 to March 30, 2021—to process census data for redistricting.

116. The Bureau's timelines for implementing the Final Operational Plan reflect the Bureau's scientifically informed understanding of the time necessary to complete its operations and generate an accurate count.

III. The Census Bureau's COVID-19 Plan.

A. COVID-19 Disrupts the 2020 Census

117. On January 21, 2020, the Bureau began 2020 Census data-collection in remote Alaska.

118. On March 10, 2020, the Bureau began to accept self-responses on its website.

119. Shortly thereafter, many parts of the nation rapidly began to shut down due to the COVID-19 pandemic.

120. The Census Bureau quickly concluded that it could not continue to engage in operations safely. On March 18, 2020, the Bureau announced that it would suspend all field operations for two weeks in order to "help protect the health and safety of the American public." Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/press-releases/2020/operational-update.html.

121. On March 28, 2020, the Bureau announced yet another two-week suspension until April 15, 2020, as the coronavirus pandemic made it impossible to engage in operations.

122. The suspension disrupted several field operations, including Update/Leave method, the Service Based Enumeration counting people experiencing homelessness, and the Group Quarters Enumeration counting people living in group housing.

123. In addition, the Bureau halted all hiring and training of the hundreds of thousands of enumerators it needs to conduct Non-Response Follow Up. This included halting any and all background checks and fingerprinting of enumerators that were conditionally hired at that time.

124. The Bureau also decreased office staff at regional centers responsible for processing mail-in self-response forms and at the Bureau's call centers.

B. Changes to the Final Operational Plan in the COVID-19 Plan

125. On April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the long-term impact of the COVID-19 pandemic. The new plan included a shifted timeline for data-collection and data-processing operations that corresponded with the delays in operations that the pandemic has caused (the "COVID-19 Plan").

126. Adjustments to plans approved by the Office of Management and Budget under the Paperwork Reduction Act must be re-submitted for approval. 44 U.S.C. § 3507(h)(3). The Census Bureau submitted the COVID-19 Plan to the Office of Management and Budget on April 30, 2020. The changes were approved on May 11, 2020.

127. The COVID-19 Plan was designed to "[e]nsure a complete and accurate count of all communities," "[p]rotect the health and safety of the American public and Census Bureau employees," and "[i]mplement guidance from federal, state, and local authorities regarding COVID-19." Press Release, U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19 Fact Sheet* (Apr. 27, 2020).

128. The COVID-19 Plan reflected the conclusions of various experts for how best to proceed with completing an accurate count during the current pandemic. These experts include survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

129. Under the COVID-19 Plan, the Bureau suspended 2020 Census field operations for several months, including those operations that were designed to ensure a full count of traditionally undercounted communities.

130. The COVID-19 Plan provided that the Bureau would start the nationwide Non-Response Follow Up operation on August 11, 2020, and continue the door-knocking process through October 31, 2020.

131. Thus, the COVID-19 Plan delayed the start of most door-knocking by three months while maintaining the same amount of time spent undertaking the process—approximately eleven and a half weeks—as the Final Operational Plan had required.

132. Under the COVID-19 Plan, the Bureau also delayed the start of other operations that enumerate traditionally undercounted populations, including the enumeration of the country's homeless population, which the Bureau shifted from March 30, 2020 to September 22, 2020.

133. And the COVID-19 Plan permitted households to submit self-response data to the Bureau until October 31, 2020, extending the deadline under which private persons were able to submit their responses to be counted by more than one month.

134. The Bureau also granted itself one additional month to process data under its COVID-19 Plan, extending the data-processing leg of its operations to nine months given the pandemic. Under this plan, the Bureau would have up to six months to process the data for the apportionment count (between October 31, 2020 and April 30, 2021) and three months to process

the data for redistricting (between April 30, 2021 and July 31, 2021).

135. The Bureau's timelines for implementing the COVID-19 Plan reflect a scientifically informed understanding of the time necessary to appropriately and fully complete its operations and generate an accurate count.

C. Expert and Stakeholder Response to the COVID-19 Plan

136. The Census Bureau solicited feedback on the COVID-19 Plan from relevant area experts and interested stakeholders, including state and local governments and national and community-based non-profit partners.

137. For instance, four former Census Bureau Directors—who served under both Democratic and Republican administrations—issued a statement saying that they had "discussed these operational and schedule adjustments with senior career leadership at the Census Bureau." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

138. These four former Census Bureau Directors further asserted: "Based on (1) our extensive experience in planning, executing, and often adjusting operations of previous decennial censuses, and (2) our firm conclusion that the extension of the field operations reflect careful analysis by the technical, scientific, and operational staff at the Census Bureau, we support the decision and urge Congress to act in concert with it." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

139. Prominent civil-rights groups endorsed the COVID-19 Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that her organization "support[ed] the Census Bureau's updated timeline." Press Release, Leadership Conference Education Fund, *Census Timeline Must Protect Health, Ensure Fair Count* (Apr. 13, 2020), https://civilrights.org/edfund/2020/04/13/census-timeline-must-protect-health-ensure-fair-count/.

D. Implementation of the COVID-19 Plan

140. When announcing the COVID-19 Plan, Secretary Ross and Director Dillingham issued a statement indicating that the Bureau requested that Congress extend by 120 days the December 31, 2020 statutory deadline for reporting the state-population totals to the President for purposes of calculating the state apportionments, and extend by 120 days the March 30, 2021 statutory deadline for delivering redistricting data to the states.

141. That same day, President Trump suggested this request was unnecessary, stating:

142. "I don't know that you even have to ask them. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

143. Indeed, the Census Bureau did not wait for Congress to act before beginning implementation of the COVID-19 Plan. And the Bureau continued implementation of the COVID-19 Plan for over three months through the end of July 2020.

144. For instance, the Census Bureau field operations remained suspended through May 2020.

145. The Bureau only began re-opening a few limited operations, such as the Update Leave method, on a phased basis through mid-June 2020, over two months after the operation was originally planned to occur in the Final Operational Plan.

146. The Bureau did not undertake any Non-Response Follow Up operations in most of the country between May 13, 2020 and July 31, 2020, the timeframe originally set out in the Final Operational Plan.

147. Instead, while the Bureau "soft-launched" door-knocking in select regions of the country in mid-July 2020, the COVID-19 Plan did not call for door-knocking across the country until August 11, 2020, at the earliest.

148. The Bureau ultimately opened six area census offices for Non-Response Follow Up on July 16, 2020, six more on July 23, 2020, thirty-five on July 30, 2020, and forty additional

offices on August 6, 2020.

149. The remaining 161 stateside offices remained unopened until August 9, 2020, including offices in many states and localities with relatively low response rates such as the entire southeastern United States, Texas, New Mexico, Arizona, and Southern California.

150. All along the Bureau continually communicated to the public, and to important local partners, including local governments and national and community based non-profit organizations, that self-responses would be accepted until October 31, 2020, and that Non-Response Follow Up would continue until at least that date.

151. Census partners, stakeholders, and state and local governments relied on the new deadlines set forth in the COVID-19 Plan to redirect their outreach efforts.

152. For example, Plaintiffs Urban League and BAJI, publicized the October 31, 2020 deadline, letting their constituents, members and local organizations know that households had until that time to self-respond. Urban League representatives informed coalition partners participating in the Black Census Roundtable of the new deadlines, and spoke of the deadlines on webinars and other public events. Officials at BAJI publicized the deadlines at public events, including webinars in July 2020, and as part of the organization's social media campaign.

153. Similarly, officials in City of Los Angeles, Harris County, King County, City of San Jose, and City of Salinas, publicized the new deadline while conducting 2020 Census outreach efforts.

154. These public education efforts were significant because they were directed at the general public and at local non-profits that do not primarily work on census issues. The latter often rely on information about the census provided by Plaintiff national non-profits and local governments when communicating with their constituents. Plaintiffs, by disseminating the October 31, 2020 deadline for nearly three months to the public, were largely successful in spreading the understanding that communities had until at least that time to complete the count.

155. For example, the City of Los Angeles announced this date on its own social media platforms and in a social media toolkit that it developed for partner organizations. Los Angeles is deeply concerned that residents have already received information about the October 31, 2020

self-response date and, as a result, will fail to respond before the newly shortened deadline, especially given the Bureau's own minimal efforts at explanation and outreach around the new deadline.

156. Finally, the level of self-response during the 2020 Census, and the ongoing COVID-19 pandemic, provided further evidence for the necessity of continued implementation of the COVID-19 Plan.

157. Under its Final Operational Plan, for example, the Census Bureau had planned to spend eleven and a half weeks canvassing a Non-Response Follow Up universe comprised of 39.5% of households nationally.

158. As of August 9, 2020, the first date of nationwide Non-Response Follow Up, the national self-response rate was 63.2%, meaning that nearly 37% of households nationwide had not yet responded to the census.

159. Several cities with large percentages of traditionally undercounted populations, have even lower response rates. For instance, as of August 14, 2020, the response rate in the City of Detroit was 48.9%, Miami was 49.9%, Philadelphia was 52.3%, Los Angeles was 53.8%, Houston was 54.4%, and New York City was 55.6%.

160. The United States had 24,156 new coronavirus cases on April 13, 2020, the day the Bureau announced its COVID-19 Plan. On August 3, 2020, the United States had approximately 50,000 new coronavirus cases.

161. With COVID-19 limiting the willingness of people to apply for enumerator positions, the areas where the Bureau can safely send enumerators to knock on doors, and the willingness of the public to interact with enumerators, the Non-Response Follow Up operation continues to face far more complications than the Final Operational Plan anticipated.

162. Given these conditions of low response rates and increased coronavirus spread, the Bureau can reasonably expect that it will need to engage in a Non-Response Follow Up operation at least as comprehensive and time-consuming as the operation laid out in the Final Operational Plan.

163. Due to significant delays in operations resulting from the implementation of the

COVID-19 Plan, the Bureau itself has recognized that it would be impossible to produce fair and accurate apportionment numbers to the President by December 31, 2020.

164. On May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of American Indians that, "[w]e have passed the point where we could even meet the current legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am. Indians, *2020 Census Webinar: American Indian/Alaska Native*, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689.

165. On July 8, 2020, Al Fontenot, Jr., Associate Director for Decennial Census Programs and a top Census Bureau official, affirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

IV. The Census Bureau's New Rush Plan.

A. The Announcement of the Rush Plan

166. On August 3, 2020, at the behest of the Secretary of Commerce, Director Dillingham abruptly and without explanation abandoned the COVID-19 Plan and announced the Rush Plan.

167. The Rush Plan drastically shortens the timelines for multiple operations set out in the COVID-19 Plan.

168. The Rush Plan took the form of a short press release on the Census Bureau's website. The press release included a statement from Director Dillingham, which did not provide an explanation for Defendants' decision to suddenly abandon the COVID-19 Plan that the Bureau had adopted and implemented for approximately three and a half months. Nor did it provide any specifics as to why the Bureau no longer believed the timelines called for in the COVID-19 Plan were necessary to ensure an accurate count.

169. The statement noted that the Bureau was taking this action at the direction of the

Secretary of Commerce. But the Secretary made no statement explaining his reason for giving this directive.

170. The Director's statement was largely silent on specific adjustments the Bureau would need to make in order to reengineer its field operations to meet its new, artificially compressed schedule. The statement included proposals for enumerator "awards" and maximizing enumerators' phone and tablet usage, but it did not provide any details about adjustments to the detailed operations provided in the Final Operational Plan.

171. The only adjustments announced under the Rush Plan were severely truncated timelines for conducting data-collection and data-processing operations.

172. Under the Rush Plan, data-collection is now set to end on September 30, 2020, one month earlier than contemplated in the Bureau's COVID-19 Plan.

173. While the Bureau's pre-COVID-19 Final Operational Plan provided 79 days for the nationwide door-knocking stage of the census, and the COVID-19 Plan provided 81 days, the Rush Plan provides just 52 days of nationwide door-knocking.

174. The Rush Plan also cuts post-collection data processing for the apportionment report from up to 6 months as provided in the COVID-19 Plan, and up to 5 months as originally provided in the Final Operational Plan, to less than 3 months.

175. The Rush Plan also shortened the time under which households can self-respond, providing that self-responses delivered after September 30, 2020—which previously would have been timely under the October 31, 2020 deadline—will no longer be counted.

176. While the Rush Plan requires the Bureau to accelerate its operations to complete the 2020 Census by the same deadline contemplated in the Final Operational Plan, it ignores the multiple-month pause in operations, beginning in mid-March 2020, caused by the initial outbreak of COVID-19 in the United States.

177. The decision to rescind the COVID-19 Plan and adopt the Rush Plan was announced without consultation with important stakeholders.

178. As noted above, as late as July 8, 2020, senior Bureau officials were still confirming that it was impossible to complete an accurate count by December 31, 2020.

179. In addition, until July 30, 2020, just four days before the Bureau announced its decision to abandon the COVID-19 Plan, the Bureau was informing respondents on its website that it would engage in Non-Response Follow-Up until October 31, 2020 and that non-responsive households would have until that date to self-respond. Those references were deleted from the website on or about July 31, 2020 and were replaced with the shortened timeframe after the August 3, 2020 announcement.

180. An official at the Government Accountability Office confirmed that Bureau officials told his office that they were given "hours rather than days or weeks" to adjust their plans to finish counting by September 2020. Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

181. While the Census Bureau's decisions, even during the COVID-19 emergency, have often involved consultations with scientific advisory committees, the Committee on National Statistics in the National Academies of Science, other external experts and local government officials, and the thousands of organizations partnering with the Bureau to conduct crucial outreach to historically undercounted communities, no such consultation was made before the Bureau announced its abandonment of the COVID-19 Plan.

182. Census stakeholders immediately denounced the Rush Plan, including stakeholders who had endorsed the COVID-19 Plan.

183. The same four former Census Bureau Directors who endorsed the COVID-19 Plan issued a statement saying that "our expert opinion is that failing to extend the deadlines to April 30, 2021 will result in seriously incomplete enumerations in many areas across our country." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

184. These four former Census Bureau Directors further asserted: "The Census Bureau

will not be able to carry out the NRFU fully and will be forced to take steps such as fewer in-person visits and rely instead on the use of administrative records or statistical techniques on a much larger scale tha[n] in previous census. The end result will be under-representation of those persons that NRFU was expected to reach and, at even greater rates for traditionally hard-to-count populations and over-representation of all other populations with potentially extreme differential undercounts." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

185. The President of the American Statistical Association, the world's largest professional organization of statisticians, issued a statement saying "[t]here is no scientific rationale to curtail the data-collection period for this constitutionally mandated activity, and the premature cessation of census enumeration will produce flawed counts." Letter from Rob Santos, President of the American Statistical Association, to Mitch McConnell, U.S. Senate Majority Leader (Apr. 5, 2020), https://www.amstat.org/asa/files/pdfs/POL-CensusSenateAugust.pdf.

186. Nearly 450 nonpartisan philanthropic organizations who "rely on accurate census data to help identify community needs and to prioritize grantmaking" issued a letter to Secretary Ross and Director Dillingham urging the Bureau to revert to its COVID-19 Plan. Letter from U.S. Philanthropy Leaders to Wilbur Ross, Secretary of the U.S. Dep't of Commerce (Aug. 5, 2020), https://funderscommittee.org/wp-content/uploads/2020/08/Letter-Philanthropic-Leaders-on-Census-Being-Cut-Short-8-5.pdf.

187. Prominent civil-rights groups condemned the Rush Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that "[c]urtailing operations is an obvious ploy to guarantee the Census Bureau won't be able to finish counting millions of people—especially those hit hardest by the pandemic." Press Release, Leadership Conference on Civil and Human Rights, *Trump Plans to Sabotage 2020 Census by Cutting Short Operations* (July 31, 2020),

https://civilrights.org/2020/07/31/trump-plans-to-sabotage-2020-census-by-cutting-short-operations/.

188. And the Census Bureau's own field workers have confirmed the impossibility of this new timeline, explaining that the Rush Plan means that it will not be an accurate count for the next 10 years.

B. The Rush Plan Fails to Appropriately Account for Key Factors Affecting the 2020 Census

189. The Rush Plan fails to account for several important factors that affect the 2020 Census Non-Response Follow Up operation.

190. *First*, the Rush Plan does not adequately account for the large number of households in the Non-Response Follow Up universe.

191. Under the Rush Plan, the Census Bureau must attempt to count approximately the same number of households during Non-Response Follow Up as it anticipated counting in its pre-COVID-19 Final Operational Plan, but the Bureau will have four weeks less than provided in that plan to complete the operation. In other words, the Bureau must now try to complete the same amount of work in just 65% of the time it had originally scheduled to complete that work.

192. Over 37% of households nationwide are non-responsive, and several states have even higher percentages of households in the Non-Response Follow Up universe, including New Mexico (46.1%), South Carolina (42.4%), Texas (41.3%), and Georgia (40.8%).

193. While soft-launches of Non-Response Follow Up began in select locations in mid-July 2020, the operation did not begin in any of these states, with large amounts of non-responsive households, until August 9, 2020.

194. Within states, and in particular cities and localities, there are even higher Non-Response Follow Up workloads. For instance, in Plaintiff Harris County, enumerators must still visit over 41% of households. In the City of Los Angeles, over 46% of households remain to be enumerated. The self-response rate in Los Angeles is approximately 14 percentage points below the final self-response rate the City attained during the 2010 Census. Counting in these jurisdictions also did not begin until August 9, 2020.

195. Moreover, given the time constraints placed by the Rush Plan, counting will need to be conducted while these jurisdictions, in many places, struggle to control a surge in COVID-19 cases.

196. While the Bureau announced on August 11, 2020 that it is now "training census takers to follow up with households by phone" in light of the pandemic, that change in Non-Response Follow Up operations was not anticipated in the Final Operational Plan. Press Release, U.S. Census Bureau, *Door-to-Door Visits Begin Nationwide for 2020 Census* (Aug. 11, 2020), https://www.census.gov/newsroom/press-releases/2020/door-to-door-visits-begin-nationwide.html.

197. Given the traditionally low response rates for phone surveys in the wireless era, following up by phone is unlikely to materially increase response rates.

198. A recent Census Bureau survey running in parallel with the 2020 Census demonstrates the difficulty in obtaining responses via phone or email. This spring, the Bureau began conducting a "Household Pulse Survey" to measure household experiences under the COVID-19 pandemic. This survey solicited participation through emails and text messages. Over the first twelve weeks of this survey, response rates were meager, ranging from 1.3% to 3.8%.

199. *Second*, the Rush Plan does not account for the staffing challenges that the Bureau is currently experiencing, many of which are directly related to the ongoing pandemic.

200. As demonstrated in the soft-launch of Non-Response Follow Up in select locales, the Bureau is already experiencing staffing shortages and retention problems with enumerators.

201. In the midst of the ongoing pandemic, prospective enumerators, many of whom are elderly and at high risk of contracting a severe COVID-19 related illness, are less willing to engage in the required door-to-door canvassing.

202. Indeed, Tim Olson, head of field operations for the 2020 Census, stated at a July 8, 2020 press briefing that "[a]bout a third of our [enumerator] applicants [are] older persons considered high risk of the virus." U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

203. And Deborah Stempowski, the Census Bureau's Assistant Director for Decennial Programs, noted the Bureau's difficulty retaining enumerators in early August 2020, confirming that potential enumerators were "a little hesitant because of the COVID environment." Mike Schneider, *Census Bureau Drop-Outs Complicate Door-Knocking Efforts*, Associated Press (Aug. 8, 2020), https://www.usnews.com/news/us/articles/2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts.

204. In testimony before Congress on July 28, 2020, Director Dillingham confirmed that the Bureau believed that "the pandemic is estimated to increase the number of no shows to training sessions, as well as the number of employees who complete training but decline to show up for work." *Id.*

205. According to reports from census-operations staff working in the field, these predictions have come to pass. One census field supervisor working in the mid-Atlantic noted that, given the new rushed timeline and lack of sufficient staff, "[w]e're just sending bodies out regardless of whether they're ready or not." Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

206. In addition to enumerator low-count and hesitancy, another source of staffing issues involves delays in processing background checks on enumerator applicants and in enumerator onboarding.

207. A June 2020 GAO report on the 2020 Census delays COVID-19 has caused, and the risks the pandemic has exacerbated, noted that the Bureau "will have to quickly hire and onboard sufficient staff to conduct its operations" to reach adequate staffing levels. U.S. Gov't Accountability Office, *COVID-19 Presents Delays and Risks to Census Count* (June 2020), https://www.gao.gov/assets/710/707456.pdf.

208. That same report also noted that, once potential enumerators accept a job offer from the Bureau, the new hires "must wait a minimum of 60 days before they can begin training, a time period during which they must complete fingerprinting and a background check." *Id.*

209. Reports from recently hired enumerators confirm that the Bureau is facing these

technical challenges as well, under the compressed timeline. One recent hire in Boulder, Colorado noted that he lost six potential days of door-knocking because he was unable to complete the Bureau's online training module.

210. Thus, under the Rush Plan, the Bureau will not be able to hire and train sufficient enumerators.

211. Even if it were possible for the Bureau to hire all of the enumerators it will need, the Bureau would also need time and funding to obtain additional equipment for any additional enumerators it hires beyond its initial estimates of equipment. For example, the Bureau would need more of the iPhones discussed above that the Bureau specifically contracted and customized for 2020 Census enumerators.

212. With fewer enumerators in the field, in addition to training and equipment issues, the Bureau cannot ensure that non-responsive households receive the requisite number of visits, as contemplated in the Final Operational Plan.

213. While the Bureau had a $2 billion contingency fund prior to the existence of the COVID-19 pandemic, it has already used $1.5 billion of that fund addressing pandemic-related issues. The remaining $500 million will be needed to further respond to the pandemic, and, in any event, is nowhere near the $1 billion that the administration claims that the Bureau would need to conduct adequate Non-Response Follow Up operations under the Rush Plan.

214. Thus, instead of providing additional enumerators, the Bureau's Rush Plan will likely result in a smaller number of enumerators shouldering larger-than-planned workloads. Increasing workloads for enumerators over a short period of time can result in errors and inaccuracies in counting but it cannot make up for the time lost to the Rush Plan.

215. *Third*, the Rush Plan fails to account for factors relevant to efficient enumeration, such as the time when enumerators visit households.

216. For instance, under the Final Operational Plan, enumerators visit households at specific times of day and on specific days of the week, depending on when residents are likely to answer.

217. Under the Rush Plan, enumerators will be under pressure to complete their work

in a tightly constrained timeframe. As a result, ensuring that non-responsive households receive the requisite number of enumerator visits at the most opportune times for enumeration may become exceedingly difficult, if not impossible. Instead, the Rush Plan increases the likelihood that households will either receive visits at less opportune times, or simply receive fewer visits altogether.

218. *Fourth*, the Rush Plan fails to account for the additional crucial operations that enumerators must conduct, as contemplated in the Bureau's final plans for the 2020 Census. Apart from visiting households upwards of six times, enumerators also engage in a host of additional quality control activities.

219. As noted above, enumerators are expected to visit the households of persons that self-responded to the census online but did not enter the unique identifier provided on census mailers. This "non-ID processing" is necessary to verify the address information provided by respondents. While this process only requires a single visit to a household, it nevertheless must be completed in the compressed timeline provided for under the Rush Plan.

220. Similarly, the Bureau must conduct quality control reinterviews of a sample of households during Non-Response Follow Up. This operation is designed to deter and detect enumerator falsification. Detecting such falsifications will be especially important under the Rush Plan where individual enumerators must shoulder a heavier workload. The use of enumerators to conduct these reinterviews will, under the Rush Plan, place additional strain on the Bureau's already stretched labor resources.

221. Cutting any one of these functions will cause errors and inaccuracies to affect the final 2020 Census data. By reversing the COVID-19 Plan and shortening the timeframe for conducting Non-Response Follow Up by a month, the Bureau will likely need to make cuts to one or more of these operations.

222. By reducing the amount of time and resources necessary to perform the kinds of quality-control measures that the Bureau originally planned for Non-Response Follow Up, the Rush Plan actively dismantles processes that the Bureau has specifically developed over the course of time as checks against falsified census responses. The Rush Plan thus threatens census

accuracy not only by reducing the Bureau's time to *collect* data, but also by reducing the Bureau's time to ensure that the data it has collected has been collected *properly* and *truthfully*.

223. *Fifth*, the Rush Plan fails to account for the other field operations enumerators will need to conduct at the same time as they attempt to speed through door-knocking operations.

224. Under the Final Operational Plan, the Bureau planned to finish specialized operations for counting people experiencing homelessness, and people living in group housing in April 2020, before engaging in nationwide door-knocking. After suspending operations due to COVID-19, the Bureau moved these operations to September 2020, well-before the October 31, 2020 deadline the Bureau set for completing the Non-Response Follow Up operation.

225. The new Rush Plan requires the Bureau to conduct these specialized operations at the same time as it is scrambling to complete Non-Response Follow Up. This will further stretch the Bureau's limited resources and increase the likelihood of missing information.

C. The Rush Plan Also Fails to Appropriately Account for Factors that Will Affect Post-Collection Data Processing

226. The Rush Plan fails to account for the additional strain on data-processing operations resulting from the consequences of the COVID-19 pandemic.

227. Following the outbreak of COVID-19 in the United States in mid-March 2020, colleges and universities across the country closed, and students moved out of campus and off-campus housing. Similarly, many residents of cities, especially those living in COVID-19 hotspots, moved to locations where the virus was less prevalent. In a recent study, three percent of people surveyed reported that they had moved permanently or temporarily as a result of the pandemic.

228. This significant movement of people coincided with Census Day, April 1, 2020, and will lead to confusion about what residence should be listed on responses.

229. It is likely that the Bureau will receive an increased amount of duplicate responses, which will, in turn, require more time and Bureau resources to review and correct.

230. The Rush Plan also fails to account for the Bureau's inability to timely obtain and process all the administrative-records data crucial for completing an accurate count.

231. The Bureau relies principally on Title 26 data—that is, tax returns that individuals file with the Internal Revenue Service ("IRS")—for the administrative records it uses to fill in missing people and their characteristics.

232. Because this year's tax filing deadline was July 15, 2020, and the IRS generally requires three months to transfer Title 26 data to the Census Bureau, the Bureau will not possess all the Title 26 data it is planning to use until mid-October 2020, at the earliest. Once the Bureau has possession of that Title 26 data, it will have to undertake a time-consuming round of additional review and processing, further delaying its ability to use the data for its planned purposes. These delays will compel the data-processing phase of 2020 Census operations to proceed more slowly than the Rush Plan contemplates or would allow.

233. Ultimately, the solution to alleviate each of these problems was articulated in the COVID-19 Plan: provide the Bureau's limited number of enumerators with additional time to conduct the data-collection operations necessary to ensure a complete and accurate census, and provide Bureau staff with additional time to conduct the data-processing operations necessary to ensuring the same. The Rush Plan fails to address these issues or explain why the Bureau's prior conclusions were incorrect..

D. The Rush Plan Does Not Account for Federal Statistical Guidelines

234. In replacing the COVID-19 Plan with the Rush Plan, Defendants departed from federal government statistical standards that promote the accuracy of information collected and disseminated by the agencies.

235. The Bureau's failure to follow these standards further emphasizes its inability to conduct an adequate count in the time and under the conditions that the Rush Plan provides.

236. Under the Paperwork Reduction Act, the Office of Management and Budget is responsible for coordinating the federal statistical system, including the development and implementation of "Governmentwide policies, principles, standards, and guidelines" "concerning [] statistical collection procedures and methods." 44 U.S.C. § 3504(e)(3) (A).

237. The Office of Management and Budget is responsible for issuing guidelines that provide "procedural guidance to Federal agencies for ensuring and maximizing the quality,

objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies." Consolidated Appropriations Act, FY 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

238. One such guideline issued by the Office of Management and Budget provides specific standards to agencies like the Census Bureau, in ensuring the quality and utility of federal statistical surveys, such as the decennial census. Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2 (2006).

239. Under these standards, agencies are required to develop "realistic timetable[s]" for surveys. *Id.* § 1.2.

240. The Bureau failed to take this basic requirement into account when it decided to implement the Rush Plan. The Rush Plan compresses the timeline for counting operations despite evidence of staffing shortages and heavier workload. The Plan attempts to accomplish a task—speedy delivery of results by December 31, 2020—that the Bureau has already deemed "impossible."

241. The standards also require agencies, including the Census Bureau, to "[e]ncourage respondents to participate to maximize response rates and improve data quality." Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2.3.2. This standard requires that the Census Bureau "[e]nsure that the data collection period is of adequate and reasonable length."

242. Again, the Rush Plan does not account for this standard. The Final Operational Plan and the COVID-19 Plan provided for over eleven weeks of Non-Response Follow Up, and up to five and six months, respectively, of post-collection data processing for the apportionment report. The Rush Plan, on the other hand, cuts the time allotted for counting by four weeks, without explaining how it will encourage more efficiency in collecting responses than the plan it reversed.

243. The standards also require the Bureau to plan for "an adequate number of contact attempts" to the respondent and to establish protocols for minimizing enumerator falsification, including "reinterviewing respondents." Office of Mgmt. & Budget, Standards and Guidelines

for Statistical Surveys, Directive No. 2, § 2.3.3.

244. With the Rush Plan significantly cutting the time available to conduct Non-Response Follow Up, it is expected that the Bureau will need to cut particular Non-Response Follow Up processes. This includes reducing the number of housing unit visits it earlier deemed necessary to enumerate a non-responsive household, or cutting back on enumerator reinterviews. Either decision will conflict with the Bureau's obligation to abide by federal statistical standards.

E. The Rush Plan Will Produce Low Quality and Inaccurate Data

245. Ultimately, Defendants' decision to rush completion of the 2020 Census will produce a significantly less accurate census than the COVID-19 Plan.

246. By cutting down the time allotted for door-knocking, the Rush Plan will result in fewer contact days by enumerators to non-responsive households, and less data collected by enumerators about those households.

247. The concerns about inaccuracy resulting from shortening time for Non-Response Follow Up are real and verified. A GAO review of the 2010 Non-Response Follow Up operation determined that local census offices with "higher percentages" of "less complete house-hold data" were more likely to have completed their Non-Response Follow Up in 53 days or less as compared to those offices that took a longer period of time. U.S. Gov't Accountability Office, *2010 Census: Data Collection Operations Were Generally Completed as Planned, but Long-Standing Challenges Suggest Need for Fundamental Reforms* (Dec. 2010), https://www.gao.gov/new.items/d11193.pdf.

248. As noted above, after the Bureau exhausts attempts to enumerate households through methods that render more accurate results, such as self-response and enumerator interviews, the Bureau turns to less accurate sources of data and statistical methods as a last resort to fill in missing information.

249. By curtailing Non-Response Follow Up, the Rush Plan will force the Bureau to resort to less accurate methods of data collection, well before the exhaustion of more accurate methods. Consequently, the Rush Plan will lead to the production of lower-quality information.

250. For instance, under the Final Operational Plan, the Bureau would not consider

low-quality administrative data before conducting the requisite number of contact days for a particular type of housing unit. By reducing the number of enumerator contact days, the Rush Plan will lead to reliance on these types of lower-quality data sources prior to exhausting the more accurate methods contemplated in the Final Operational Plan. Consequently, the Rush Plan will lead to more inaccuracies in the data.

251. Based upon past practices, the Bureau may also use whole-count imputation to calculate missing household data but to an extent and in ways not used previously. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household.

252. In previous censuses, the Bureau imputed upwards of 2.0% of households left over after exhausting its Non-Response Follow Up efforts. Under the time constraints of the Rush Plan, the Bureau will need to turn to imputation before exhausting its in-person enumeration efforts. One former Census Bureau Director estimates that, under the Rush Plan, the Bureau may end up imputing up to 10% of households.

253. Since data produced through the Bureau's current imputation methods are less accurate than data collected from enumerator interviews, Defendants' decision to rush completion of the 2020 Census will result in significantly less accurate total-population data than would have been produced under the COVID-19 Plan. This decline in accuracy will affect both the census's calculations of the total number of people living in the country and the census's recording of the characteristics of those people, and such inaccurate data will not meet the constitutional minimum for conducting the decennial enumeration or satisfy the "strong constitutional interest in accuracy" of the Census. *Utah v. Evans*, 536 U.S. 452, 478 (2002).

254. The Rush Plan will likely exacerbate the quality problems associated with imputation by compromising the Bureau's ability to collect the other kinds of data—such as self-responses, proxies, and administrative records—that it requires to impute most accurately. As noted above, imputation does not occur in isolation from the Bureau's other data sources, but in concert with them. With less data drawn from these other sources and less accurate data drawn from these other sources, the quality of the Bureau's imputation will decline.

255. The Rush Plan will also disrupt the post-collection data processing operations, described above. As noted by Secretary Ross and Director Dillingham in mid-April 2020, following Non-Response Follow Up the Bureau engages in "lengthy, thorough and scientifically rigorous" data processing, which is essential to ensuring an accurate census.

256. In announcing the new plan to rush the completion of the 2020 Census, Director Dillingham stated that the Bureau would "streamline" these operations in order to meet the December 31, 2020 deadline.

257. While the Director has not specified what this "streamlining" means for post-collection operations, the bottom line is that the Bureau cannot fully engage in the operations as contemplated in its Final Operational Plan on the shortened timeframe. As a result, the Bureau will have to cut or reduce its efforts to review and process collected data to ensure accuracy.

F. The New "Rush" Plan Will Create Confusion that Plaintiffs Will Be Forced to Spend Time and Money Counteracting

258. The new plan to rush completion of the 2020 Census also creates additional confusion about census operations at a critical moment in the census-taking process.

259. The Census Bureau's abrupt change will require groups and local governments engaging in Get Out the Count campaigns, including Plaintiff localities and Plaintiff organizations, to expend resources to correct confusion about the last date for counting in the 2020 Census.

260. As noted above, Plaintiff organizations and localities engaged in extensive public information campaigns that publicized the October 31, 2020 deadline.

261. The Rush Plan requires Plaintiffs to expend additional resources in order to update existing public materials, distribute new materials, and engage in more public-facing efforts to educate the public, their constituents, their members and/or constituents, and local organizations that the self-response period for the census ends on September 30, 2020.

262. For instance, in Harris County, officials ordered a mailing to constituents informing them that they had until October 31, 2020 to respond to the census. That order occurred before the August 3, 2020 decision to implement the Rush Plan. In light of the new

plan, the officials were forced to order stickers to cover the reference to October 31, 2020 on the mailer and to dedicate office staff to spend time affixing those stickers and updating the mailer. Similarly, Plaintiffs the City of Los Angeles, BAJI, and Urban League must update advertisements on social media to correct previous communications that referenced the October 31, 2020 deadline.

263. Apart from correcting misinterpretations arising from earlier statements Plaintiffs made in reliance on the Bureau's COVID-19 Plan, Plaintiffs must now also engage in more, unanticipated outreach to educate the public about the Census Bureau's Rush Plan decision. With one month less of counting, there is now increased urgency for non-responsive households to self-respond. As a result, Plaintiffs are developing new plans to reach more households and encourage more census participation.

G. The New "Rush" Plan Will Lead to Undercounting of Minorities

264. The new plan to rush completion of the 2020 Census will exacerbate undercounting of Black, Latino, and Native American communities.

265. As noted above, Non-Response Follow Up, is specifically designed to ensure that traditionally hard-to-count communities, including Black, Latino, and Native American communities are fully counted. By cutting Non-Response Follow Up short, the administration is disrupting the operation most essential to ensuring an accurate count for these communities.

266. For the 2020 Census, Black, Latino and Native American populations make up a disproportionate share of the population in tracts with the lowest self-response rates in the United States. For instance, as of July 23, 2020, one in five residents living in census tracts with the lowest self-response rates was Black, and one in four was Hispanic, far larger proportions than Black and Hispanic shares of the general population.

267. Consequently, Black, Latino, and Native American households will make up a disproportionate share of the Non-Response Follow Up universe.

268. Given the challenges of the shortened Non-Response Follow Up timeline, Black, Latino, and Native American households have a high likelihood of being missed, or inaccurately enumerated through administrative records and imputation. As noted above, these alternative

methods for enumeration will result in lower quality data for these groups.

269. The problem, however, is even more serious because it replicates and exacerbates problems the Census Bureau has found in prior censuses and has striven to correct in subsequent censuses. Data from previous censuses shows that Black, Latino, and Native Americans have historically been undercounted. Over-reliance on alternative methods of data to enumerate a disproportionate share of the population in these groups will further exacerbate potential undercounting in these groups during the 2020 Census.

270. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

271. Truncating Non-Response Follow Up will exacerbate undercounts of communities of color in at least two ways: first, by missing members of those communities entirely; or, second, by recording their characteristics incorrectly, such that the census results will not register them as members of communities of color. In either instance, data regarding communities of color will be inaccurate. This inaccuracy then deprives communities of color of federal funding, all the material support that flows from federal funding, the protections of the law, and political power at the federal, state, and local levels.

H. The New Rush Plan Has No Legitimate Justification

272. In announcing the Rush Plan, Defendants provided no express justification. Defendants stated in passing, however, that reporting of apportionment data to the President by December 31, 2020 is required by statute.

273. But there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980).

274. The Supreme Court thus determined that the government can and should substitute apportionment counts that have already been filed and certified with "newer, more

accurate version[s]." *Utah v. Evans*, 536 U.S. 452, 462 (2002).

275. Defendants have also recognized that, in the event of a conflict between the two, the constitutional requirement of a fair and accurate enumeration, rather than the statutory deadline, is the controlling legal requirement. With the COVID-19 pandemic threatening the health and safety of communities across the country, Defendants adjusted 2020 Census operations in the COVID-19 Plan, shifting the timeline by several months. Defendants did not wait for Congress to act to implement this plan, recognizing that the Plan was necessary to protect enumerators and respondents, and to ensure an accurate count.

276. Because of those delays, as the Bureau itself recognized, it was no longer possible for Defendants to produce data by December 31, 2020 that fulfilled their constitutional and statutory mandate. Specifically, the Bureau could not simultaneously pursue an accurate 2020 Census, and speed through completion of census-taking in order to report numbers to the President by the end of the year.

277. Several senior officials charged with actually conducting the 2020 Census confirmed the impossibility of this task throughout the summer, including approximately four weeks before Defendants' abruptly announced their decision to adopt the Rush Plan.

278. The statutory deadline at issue is not mandated by the Constitution. Taking the modest additional time necessary to ensure an accurate census, should not prevent a timely reapportionment, as elections for congressional seats impacted by reapportionment will not occur until 2022.

279. Ultimately, Defendants cannot sacrifice their mandatory *constitutional* obligation to make decisions reasonably related to producing an accurate count in order to comply with a pro forma *statutory* deadline. Congress clearly could not, for instance, satisfy its constitutional obligations by providing the Census Bureau with a single week in which to conduct the census. Strictly adhering to the December 31, 2020 deadline, as applied in extraordinary circumstances of the ongoing pandemic, would be equally unconstitutional.

I. Implementation of the Apportionment Exclusion Order

280. Defendants have not yet sought to justify their motivation for adopting the Rush

Plan, and it cannot be justified on the basis of artificial statutory deadlines. Instead, the timing of the abandonment suggests that the decision was influenced by a desire to implement the President's Executive Memorandum excluding undocumented immigrants from the apportionment count, thereby undercutting the contribution of communities of color to the calculations for equal representation for purposes of congressional apportionment (the "Apportionment Exclusion Order").

281. In late June 2020, the White House took the unprecedented step of adding two political appointees to Census Bureau staff with unspecified job duties. Neither appointee had an expertise in statistics, and both had a demonstrated history of partisan activity. These unusual appointees had previously engaged with the Census Bureau on questions about changing operations and methodology.

282. In mid-July 2020, White House officials reportedly asked congressional appropriators to include $1 billion in the next coronavirus stimulus bill for the purpose of completing the 2020 Census by the December 31, 2020 deadline.

283. This abrupt change in policy coincided with and was motivated by the President's July 21, 2020 issuance of the unconstitutional Apportionment Exclusion Order declaring that it is the policy of the United States to remove undocumented persons from the apportionment count, and requiring the Secretary of Commerce to produce estimates of the number of undocumented persons in the United States when reporting total population counts to the President. As noted, the Apportionment Exclusion Order is currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District.

284. Shortening the census timeline increases the likelihood that, regardless of the outcome of the November 2020 election, this President will have the opportunity to implement his Apportionment Exclusion Order. Delaying reporting until spring—as the COVID-19 Plan issued by the Census Bureau and Department of Commerce previously did—leaves open the possibility that the President will no longer be in office when data is provided, and thus will be unable to effectuate the Apportionment Exclusion Order.

285. Defendants did not justify their sudden, unexplained reversal of position with any evidence that Bureau officials had been wrong in stating, repeatedly, that it would be impossible to produce accurate counts by December 31, 2020. There is also no evidence that the decision to cut short counting operations was driven by the scientifically based judgment of Bureau personnel or external experts.

286. To the extent that Defendants' are motivated by a desire to implement the President's Apportionment Exclusion Order, that motivation is improper. It bears no reasonable relationship to the achievement of a fair and accurate census, and, under the circumstances currently facing the count, implementing the Apportionment Exclusion Order will undermine that goal.

287. Moreover, that Memorandum is just the latest attempt by the President and Secretary Ross to manipulate the census along racial and ethnic lines. Beginning in 2017, Secretary Ross attempted to add an untested citizenship question to the 2020 Census, claiming that the question was necessary to better enforce the Voting Rights Act. In reality, the administration was seeking block-level citizenship data so states could draw district lines in a manner that would disadvantage Black and Latino communities.

288. Defendant Ross's decision was litigated, and enjoined by three district courts. One of those cases ultimately ended up before the Supreme Court. There the Court found that Defendant Ross's stated Voting Rights Act rationale to support the addition of a citizenship question to the 2020 Census was "contrived" and vacated Defendant Ross's decision. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

289. On July 5, 2019, following the Supreme Court's decision, President Trump confirmed the real rationale—and fully justified the Supreme Court's holding that the administration's rationale for this census decision was pretextual—when he stated that the administration sought a citizenship question, not to enforce the Voting Rights Act, but rather "for districting" and "for appropriations." Remarks by President Trump Before Marine One Departure (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

290. Indeed, further evidence that Defendants' actions were pretextual arose from files of a prominent redistricting strategist, Thomas Hofeller. In 2015, Hofeller prepared a study titled "The Use of Citizen Voting Age Population in Redistricting." In the study, Hofeller recommended adding a citizenship question to the census so that states could use citizen voting-age population rather than total population to redistrict. This change in the redistricting base, in Hofeller's words, would be advantageous to "Non-Hispanic Whites" and would undercut the political power of Hispanics.

291. It was later revealed that Hofeller was involved in drafting portions of the memorandum from the Department of Justice to Defendant Commerce seeking addition of a citizenship question on the 2020 Census, including sections relating to the pretextual reason for requesting the question. *See* Ex. 8 to NYIC Pls.' Mot. for Sanctions at 124-31, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. July 16, 2019), ECF No. 635-1; Defs.' Opp. to Letter Mot. to Compel at 3, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Oct. 30, 2018), ECF No. 451.

292. Shortly after the Supreme Court's decision, President Trump issued an executive order, demanding executive agencies provide the Census Bureau with administrative records sufficient to allow the Bureau to determine "the number of citizens and noncitizens in the country." Exec. Order No. 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order explicitly states that the reason this data is necessary is to design "legislative districts based on the population of voter-eligible citizens," instead of total population. *Id.* at 33,823-84.

293. In light of that history, the Apportionment Exclusion Order, and the near-contemporaneous decision to cut counting operations short represent yet another attempt by the administration to manipulate the 2020 Census and potentially undercut the political power of communities of color. Defendants cannot rely on this memorandum as justification to support their decision to undermine the accuracy of the census.

V. Harm to Plaintiffs.

294. Plaintiffs and Plaintiff non-profits' members and/or constituents reside in locales

that will suffer harm as a result of Defendants' decision because that decision is very likely to cause these locales to be more disproportionately undercounted in the 2020 Census than they otherwise would have been.

295. On August 9, 2020, at the beginning of the Non-Response Follow Up operation, Plaintiff City of Los Angeles, had a response rate of just 53.1%, which was significantly lower than the 64.5% statewide response rate in California on that same date.

296. The Urban League, League of Women Voters, and BAJI have affiliates, constituents, and members in major cities across the United States. This includes cities where response rates were lower than their corresponding statewide response rates on the first day of Non-Response Follow Up including San Francisco (61.4%) and Monterey (60.5%) as compared to California (64.5%), Miami (49.6%) as compared to Florida (60.1%), Philadelphia (52%) as compared to Pennsylvania (65.5%), Detroit (48.7%) as compared to Michigan (68.9%), and New York City (54.9%) as compared to New York State (58.9%).

297. Plaintiffs Ellis and Garcia are residents of Houston, Texas. The response rate in Houston at the beginning of Non-Response Follow Up was 54%, which was lower than the statewide response rate for Texas on that date, 58.2%.

298. As noted above, Defendants' decision will result in fewer enumerations through Non-Response Follow Up, increased reliance on low-quality administrative data, and increased imputation. Consequently, Defendants' decision will result in cities' with higher rates of non-response (1) having less accurate data; and (2) experiencing higher rates of undercounting.

299. Because these cities have a higher proportion of households in the Non-Response Follow Up universe than their corresponding states, these cities have a substantially higher likelihood of being undercounted because of Defendants' decision than surrounding communities in their states. These disproportionate undercounts will cause Plaintiffs to suffer both fiscal and representational harm.

A. Funding Harms

300. The Rush Plan will result in loss of federal funding for Plaintiffs Harris County, City of Salinas, and the City of Los Angeles and the communities where members of Plaintiff

non-profits reside, including Miami, Detroit, Philadelphia and New York.

301. Over 130 programs and 675 billion dollars are allocated to states and localities on the basis of census-derived information. This includes funding to states for federal transportation planning purposes, education, and healthcare.

302. Many important federal programs, including Title I Grants under the Every Student Succeeds Act, require states to distribute funds to localities on the basis of census-derived information.

303. State Education Agencies must allocate Title I Grants, at least in part, on the number of children aged 5-17 living in poverty in a local education agency's jurisdiction.

304. Given that members of Plaintiff non-profits reside in cities that are likely to be more undercounted under the Rush Plan relative to surrounding communities in their states, including San Francisco, Miami, Detroit, Philadelphia, and New York City, Defendants' decision will likely deprive the communities where these members reside of Title I Grant funding they would have otherwise received. Similarly, Defendants' decision places Plaintiffs Ellis and Garcia's community at higher risk of deprivation of Title I Grant funding.

305. Several additional federal programs require states to use census-derived information to distribute funds directly to cities and counties, based on their share of a relevant population. For instance, the Low Income Home Energy Assistance Program, the Workforce Innovation and Opportunity Act program, and the Community Services Block Grant Program, all require states to distribute funds to cities and counties, at least in part, on the proportion of a state's low-income residents living in those cities and counties. This data is derived from information collected during the decennial census.

306. Both Harris County and the City of Los Angeles receive funds under these programs. Consequently, disproportionate undercounting of Harris County and the City of Los Angeles, as compared to their states, is likely to result in loss of funds under these and similar programs.

307. Several federal funding programs provide funding directly to cities and counties based on census-derived information. For instance, the Community Development Block Grant

program, and the Emergency Solutions Grant, allocate funding to cities and counties based, at least in part, on their share of the overall population count relative to other metropolitan areas.

308. Of cities with over 500,000 people, the City of Los Angeles had the fourth lowest response rate in the country, just behind Detroit and Philadelphia. Consequently, Los Angeles will likely lose Community Development Block Grant funds because of Defendants' decision.

309. Similarly, members of Plaintiff non-profits live in major metropolitan areas with some of the lowest response rates in the country, such as Miami, Detroit and Philadelphia. Defendants' decision will likely deprive these members' communities of funding under the Community Development Block Grant program.

310. Finally, the allocation of federal transportation including the Surface Transportation Block Grant Program, and the Metropolitan and Statewide Nonmetropolitan Transportation Planning Programs are based on the population of urbanized areas in a state compared to those of other states, as determined by the decennial census.

311. Plaintiffs Ellis and Garcia regularly drive on highways and roads in Texas. Disproportionate undercounting of urbanized areas in Texas during the 2020 Census will result in reduced transportation funding for Texas under federal transportation programs.

B. Representational Harm

312. Defendants' decision will also likely result in representational harm to individual Plaintiffs and to the members of Plaintiff organizations.

313. Plaintiffs Ellis and Garcia reside in Houston, Texas. In terms of self-response rates, Texas ranks 39th in the United States. Approximately four million Texas households are in the Non-Response Follow Up universe, which is more households than any state other than California.

314. Consequently, Defendants' decision will not only cause a substantial undercount in Texas, but that undercount will likely be disproportionate as compared to other states. Texas will likely be deprived of its fair share of representation in the next congressional apportionment.

315. As a result, Defendants' decision is likely to result in reduction of voting power and representation for Plaintiffs Ellis and Garcia, because it will likely cause the loss of a seat in

Texas, and will result in fewer Representatives spread out over the state of Texas.

316. As for Plaintiff City of Los Angeles, at least one study has predicted that, were California to lose a congressional seat because of the final census count, that seat is very likely to come from a district that includes portions of South Los Angeles, thus reducing the city's representational delegation.

317. Defendants' decision will also cause Plaintiff Ellis and members of Plaintiff non-profits to experience a loss of intrastate voting power.

318. By causing disproportionate undercounting of communities in Houston, Detroit, Philadelphia, and Miami, as compared to their corresponding states, Defendants' decision will result in drawing of district lines that do not accurately represent the population of the state, and disadvantage Plaintiffs Ellis and Garcia, and members of Plaintiff organizations that live in undercounted communities.

C. Inaccurate Data

319. Plaintiff local governments will suffer harm from the adverse impact Defendants' decision will have the accuracy of population counts produced by the Census Bureau. Plaintiff local governments often rely on accurate information collected by the Census Bureau for crucial public planning purposes, including planning for how to respond to emergencies.

320. For example, local governments often rely on a Social Vulnerability Index to identify communities that are at high risk during a particular emergency. Government officials rely on this index to determine where to allocate resources before and during emergencies. A Social Vulnerability Index use census data to identify specific populations that may be vulnerable to a particular emergency, including data relating to age, housing density, income status, and race and ethnicity. Inaccurate census data would make disaster planning and emergency response more difficult, and could disrupt important public programs.

321. In Harris County, officials used the Center for Disease Control's Social Vulnerability Index to inform decisions about proper distribution of COVID-19 Relief Funds. The funds were allocated to provide relief to Harris County residents most impacted by the global pandemic. That Social Vulnerability Index, which was based on census data, was used to

identify census tracts with the most vulnerable residents, and applications from residents from those tracts were prioritized and given higher chances of acceptance for funds. Without accurate census data, Harris County would struggle to ensure that crucial relief funds were reaching the communities most in need of them.

322. Similarly, King County relies on accurate census data to inform its public-policy decision making. For instance, the county uses census data to plan public-transit service, and to ensure priority populations have transit access, and to site public health clinics.

323. The low-quality data and undercounting that Defendants' decision will cause will also harm Plaintiffs. For instance, undercounting of Black, Latino, Native American, and immigrant communities will negatively affect the Urban League, League of Women Voters and BAJI by undermining these organizations' core missions of promoting equal and just laws and empowering vulnerable communities through building coalitions and initiating campaigns with African Americans and Black immigrants, and fostering racial, economic, and social equality for the communities they serve.

D. Expending Additional Resources

324. Plaintiff organizations, the Urban League, the League of Women Voters, and BAJI, and Plaintiff local governments, City of San Jose, Harris County, King County, City of Salinas, and City of Los Angeles will need to expend additional resources and divert resources from planned programs and projects in order to address the adverse consequences of Defendants' decision to abandon the COVID-19 Plan, and implement the Rush Plan.

325. Plaintiffs' planned efforts to ensure the effective enumeration of historically undercounted communities were based on the understanding that the Census Bureau would implement the Non-Response Follow Up operation contemplated in the Final Operational Plan and adjusted in the COVID-19 Plan.

326. The abrupt reversal of the COVID-19 Plan, and the implementation of curtailed Non-Response Follow Up in the Bureau's Rush Plan will adversely affect Plaintiffs' plans.

327. Plaintiff organizations and local governments will likely need to adjust plans, and divert resources from other planned activities and programs in order to ensure the communities

they serve are adequately counted. Specifically, Plaintiffs will need to recruit and train staff to engage in increased and expanded outreach to potential non-responsive households in order to make up for fewer enumerator visits, or to other aspects of the Non-Response Follow Up program, such as the reinterview process.

328. For instance, Plaintiff BAJI is planning significant adjustments to its 2020 Census outreach plans in light of Defendants' decision, that include diversion of resources from other sources, and significant expenditures. In order to engage in effective outreach, BAJI needs organizing staff dedicated to civic engagement. With Non-Response Follow Up occurring from August 11, 2020 through October 31, 2020, BAJI anticipated that it could spread its staffing resources over that timeframe to ensure it was meeting its goals within the organization's budget. However, on a shorter timeframe, BAJI needs additional staff on a shorter timeframe, which will require adjusting the organization's budget and priorities for the next several months.

329. The adjustment is also challenging for BAJI as the organization caters to immigrant communities with a variety of language needs. Increasing staffing on a short timeframe poses significant challenges for the organization, because it must locate staff that can communicate with the particular community that the organization is targeting for outreach efforts.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of the Enumeration Clause, and Fourteenth Amendment
(U.S. Const. art. I, § 2; U.S. Const. amend. XIV, § 2)

330. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

331. Under the Enumeration Clause of the U.S. Constitution, Congress, and, by delegation, the Secretary of Commerce, must conduct an "actual Enumeration" of the population. This clause requires that decisions relating to census-taking "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996).

332. The COVID-19 pandemic severely disrupted the 2020 Census, resulting in

months of suspended operations and significant delays in crucial counting processes. Moreover, the public-health crisis continues to impact census operations, as the Bureau struggles to retain enumerators and engage in door-knocking in communities experiencing surges of the virus.

333. To navigate this emergency, the Bureau took necessary action to adjust its operational timelines in the COVID-19 Plan while seeking to maintain the operations and processes included in the Final Operational Plan that had been designed to help ensure a complete and accurate count.

334. Abruptly and without explanation, on August 3, 2020, Defendants abandoned the COVID-19 Plan and implemented the Rush Plan. The Rush Plan does not "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." After delaying all operations for months, the Bureau and its staff repeatedly recognized that it was impossible to produce counts consistent with their duties to ensure a full, fair, and accurate count by December 31, 2020. Indeed, current conditions demonstrate that it is infeasible to obtain a fair and accurate count by the end of the year. Nevertheless, the Defendants abandoned their constitutionally mandated pursuit of fair and accurate data, in favor of the speed of the Rush Plan, and the inaccurate data it will produce.

335. Under these circumstances, the decision to curtail crucial 2020 Census operations violates the Enumeration Clause of the United States Constitution.

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

SECOND CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Arbitrary and Capricious
(5 U.S.C. § 706(2)(A))

337. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

338. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Rush Plan is final agency action because it marks the consummation

of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).

339. In determining whether an action violates the APA, courts consider whether the agency examined relevant data and articulated a satisfactory explanation for its decision, including formulating a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency wishes to depart from an earlier decision, it must acknowledge that change and any reliance interests its previous actions engendered. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105-06 (2015).

340. The Bureau spent several years developing its Final Operational Plan for the 2020 Census. That plan carefully determined the required length of each operation, including the appropriate length for data-collection and data-processing. It also included details about the implementation of the various operations.

341. The COVID-19 pandemic disrupted census operations, and the Bureau responded by adjusting its operations in its COVID-19 Plan. That plan involved retaining the details and the length of time of various operations laid out in the Final Operational Plan, but shifting the timeline for counting several months into the future to account for both the necessity of those operations and the public-health emergency.

342. The Bureau began implementing the plan, and critical operations were suspended and delayed through the summer. Bureau officials publicly and expressly recognized that it was no longer possible to comply with the December 31, 2020 deadline if the Bureau intended to fulfill its constitutional and statutory obligation of producing reasonably accurate population counts.

343. Without explanation and without citing any evidence, Defendants suddenly changed their position and issued a new plan with shortened timelines. Among other things, that change conclusively changed the legal rights and obligations of private households, who now have substantially less time to respond if they wish to be counted in the 2020 Census. Defendants

have provided no evidence to support rescinding the COVID-19 Plan, have failed to acknowledge or explain their departure from their previous conclusions as to the length of time necessary for an accurate census, and have cited no evidence that they could obtain accurate counts on the shortened timeframe. Defendants' unexplained and unjustifiable reversal is precisely the sort of arbitrary and capricious agency action that the Administrative Procedure Act forbids.

344. Defendants' decision also fails to account for several factors relevant to the decision, including the multiple-month long suspension in operations and delay of crucial census operations, the staffing shortages facing the Bureau, the meticulously designed and tested technical requirements for effective enumeration included in the Bureau's Final Operational Plan, and the various quality-control measures the Bureau must engage in to ensure that its reported data is accurate.

345. Consequently, Defendants' action is arbitrary and capricious.

346. This unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

THIRD CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Pretext
(5 U.S.C. § 706)

347. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

348. Under the Administrative Procedure Act, agencies are required to disclose the "genuine justification[] for important decisions." *Dep't of Commerce*, 139 S. Ct. at 2569, 2575-76. Courts will not accept "contrived reasons" provided by agencies as that would defeat the purpose of judicial review. *Id.* at 2576. Moreover, agencies cannot simply avoid providing reasoning for their decision-making altogether.

349. Defendants have decided to cut crucial operations in order to produce 2020 Census population results to the President by December 31, 2020. In announcing that decision, Defendants provided no legitimate justification for abandoning the COVID-19 Plan and

implementing the Rush Plan.

350. Any attempt by the Defendants to rely on the reporting deadline provided under the Census Act as justification for their decision is mere pretext. 13 U.S.C § 141(b).

351. For months, Defendants implemented the COVID-19 Plan, the timeline for which necessarily assumed the statutory deadlines could not defeat the constitutional duty to conduct an accurate enumeration, as applied to the extraordinary circumstances at hand. Defendants made significant adjustments, including months-long delays of census operations, on the assumption that the Bureau could and would conduct a full and robust count through the end of October 31, 2020. Since mid-April 2020, Defendants have expressly and publicly recognized that the Bureau could not provide a complete and accurate count by December 31, 2020. And President Trump maintained that the statutory deadlines need not be followed.

352. Defendants' reversal of position on the 2020 Census timeline appears driven by Defendants' efforts to ensure implementation of the President's unconstitutional Apportionment Exclusion Order, which attempts to exclude undocumented persons from the apportionment count and continues a long-running pattern of racially discriminatory and improperly politically motivated conduct of the 2020 Census.

353. In light of these considerations, Defendants' purported justification is pretextual and, thus, arbitrary and capricious under the Administrative Procedure Act.

354. Defendants' unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

PRAYER FOR RELIEF

355. Plaintiffs respectfully request that this Court:

356. Declare that Defendants' promulgation of the Rush Plan, and corresponding revocation of the COVID-19 Plan is unconstitutional under the Enumeration Clause, and unlawful under the Administrative Procedure Act.

357. Vacate the Rush Plan, thereby reinstating the COVID-19 Plan.

358. Enjoin Defendants from implementing the Rush Plan or otherwise unlawfully

interfering with the COVID-19 Plan.

359. Award Plaintiffs costs, expenses, and reasonable attorneys' fees.

360. Award any other relief the Court deems just and proper.

Dated: August 18, 2020

LATHAM & WATKINS LLP

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: August 18, 2020

LATHAM & WATKINS LLP

By: */s/ Sadik Huseny*
Sadik Huseny

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
NATIONAL URBAN LEAGUE; BLACK ALLIANCE FOR JUST IMMIGRATION; LEAGUE OF WOMEN VOTERS; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; and CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS, and ADRIAN GARCIA

DEFENDANTS
WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau

(b) County of Residence of First Listed Plaintiff New York City, NY
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Washington County, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
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II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment Of Veteran's Benefits
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury -Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury – Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities–Employment
- ☐ 446 Amer. w/Disabilities–Other
- ☐ 448 Education

PRISONER PETITIONS

HABEAS CORPUS
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

OTHER
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee–Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC § 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC § 158
- ☐ 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent—Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC § 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation–Transfer ☐ 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Administrative Procedure Act, 5 U.S.C. 701 et seq.

Brief description of cause:
Action to set aside unlawful agency action as arbitrary, capricious, and not in accordance with law, and declare Defendants' actions unconstitutional.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S), IF ANY *(See instructions):*

JUDGE Judge Lucy H. Koh DOCKET NUMBER 5:20-cv-05167-LHK; 5:20-cv-05169-LHK

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) ☐ **SAN FRANCISCO/OAKLAND** ☒ **SAN JOSE** ☐ **EUREKA-MCKINLEYVILLE**

DATE 08/18/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Sadik Huseny

To: DiGiacomo, Brian (Federal)[bDiGiaco@doc.gov]; Brebbia, Sean (Federal)[SBrebbia@doc.gov]; Heller, Megan (Federal)[MHeller@doc.gov]; Bogomolny, Michael (Federal)[MBogomolny@doc.gov]; Craig, Russell (Federal)[rCraig2@doc.gov]; Nowell, Laura (Federal)[LNowell@doc.gov]; Herbert, Stephanie (Federal)[SHerbert@doc.gov]; Zimmerman, Paul (Federal)[PZimmerman@doc.gov]; Ryan, Miles F III[miles.f.ryan.iii@census.gov]
Cc: Cannon, Michael (Federal)[MCannon@doc.gov]; Olson, Stephanie (Federal)[SOlson@doc.gov]
From: Sharma, Sapna (Federal b(6)
b(6)
Sent: Fri 5/8/2020 3:32:06 PM (UTC-04:00)
Subject: Draft Response - Congressional Inquiry
05-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880 v2 + MC.docx
2020-04-14 Tri-Caucus to Ross, Dillingham re EO 13880.pdf

Colleagues:

Please review the attached draft response to the Tri-Caucus congressional inquiry, and send me any edits you have by **COB Monday, May 11th**. I've also attached the inquiry to this email for your reference.

Sapna

CUI//PRIV//FED ONLY

Sapna Sharma
Attorney
General Litigation Division
Office of the Assistant General Counsel for Employment, Litigation, and Information
Office of the General Counsel
U.S. Department of Commerce
Room 5889

O: (202) 482-5550 | M: b(6) | F: (202) 482-5858
ssharma@doc.gov

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20-069532

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

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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?

[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

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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-0000030294

de la Vara, Hunter (Federal)

From: McGaan, Duncan (Federal)
Sent: Monday, February 24, 2020 9:45 AM
To: McDermott, Ryan (Federal); Jones, Sarah (Federal); Missouri Johnson, Marcellina (Federal); de la Vara, Hunter (Federal)
Subject: FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Attachments: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf; ATT00001.htm

Incoming letter to the Secretary and Census Director Dillingham. Thank you!

Duncan A. McGaan
b(6)

From: Mason, Jacque (Federal) <JMason1@doc.gov>
Sent: Sunday, February 23, 2020 5:51 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; McGaan, Duncan (Federal) <DMcGaan@doc.gov>
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Sent from my iPhone

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:52 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" b(6) @census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
> Attached is a new congressional letter from the Tri-Caucus regarding EO-13880.
>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
> Sent from my iPhone
>
> Begin forwarded message:

From: "Palencia, Stephanie" <Stephanie.Palencia@mail.house.gov>
Date: February 21, 2020 at 6:37:38 PM EST
To: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
Cc: "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

Please confirm receipt and we look forward to your response by Wednesday March 4, 2020.

Sincerely,
Stephanie Palencia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, -v- UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-2921 (JMF) OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In these consolidated cases, two groups of Plaintiffs — the first, a coalition of states and other government entities (the "Governmental Plaintiffs"); and the second, a coalition of non-governmental organizations (the "NGO Plaintiffs") — challenged Secretary of Commerce Wilbur L. Ross, Jr.'s decision to add a question about citizenship status to the 2020 decennial census questionnaire. After more than a year of hard-fought litigation, which included an eight-day bench trial, Plaintiffs ultimately prevailed: This Court granted an injunction barring the question's inclusion, *see New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), and the Supreme Court affirmed on the ground that Secretary Ross's stated rationale — that adding the citizenship question was necessary to help enforce the Voting Rights Act of 1965 — was "pretextual" and "contrived," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573, 2575 (2019). Defendants then consented to entry of a permanent injunction barring any inclusion of a citizenship question on the 2020 census questionnaire.

Normally, that would be the end of the matter. But while the case was pending before the Supreme Court, Plaintiffs obtained new evidence that, they claim, suggests Secretary Ross's true

motive in adding a citizenship question to the census questionnaire was to facilitate redistricting strategies to benefit Republicans and non-Hispanic whites. Shortly after the Supreme Court affirmed this Court's judgment, the NGO Plaintiffs filed a motion for sanctions and other relief based on that newly discovered evidence. Before the Court could issue a ruling on that motion, even more evidence emerged. First, Plaintiffs obtained documents that were produced to Congress in connection with its investigation of the citizenship question. Second, in November 2019, Defendants revealed that, in the course of responding to congressional inquiries, they had discovered "a number of documents . . . that were inadvertently not produced in discovery in this matter." ECF No. 669-1, at 1. A more thorough investigation eventually revealed that the "number" of documents erroneously withheld from production exceeded 2,000. *See* ECF No. 676, at 2. Defendants have since remedied these failings, and the NGO Plaintiffs' motion for sanctions, updated to reflect all of these developments, is finally ripe for the Court's resolution.

For the reasons stated below, the Court concludes that the NGO Plaintiffs' motion should be granted in part and denied in part. First, the Court concludes that sanctions and further inquiry are not warranted with respect to the NGO Plaintiffs' most serious allegations — that Defendants concealed evidence and that two witnesses provided false testimony. To be clear, that conclusion is not based on a finding that Plaintiffs' troubling allegations are wrong; the Court intimates no view on that question. Instead, the conclusion is based primarily on the fact that, even if Plaintiffs' allegations are accurate, that would not have changed the outcome of this litigation. As Defendants themselves acknowledge, Plaintiffs prevailed at trial and in the Supreme Court on precisely the theory that the NGO Plaintiffs seek to reinforce here: that Secretary Ross's stated reasons for adding the citizenship question were contrived and pretextual. By contrast, the Court concludes that sanctions *are* justified with respect to

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Defendants' admitted failure to review and produce hundreds of documents that should have been disclosed prior to trial — a failure that may well have been inadvertent, but is nevertheless unacceptable for any litigant, and particularly for the Department of Justice ("DOJ"). Specifically, the Court orders Defendants to reimburse the NGO Plaintiffs for the costs and fees that they incurred as a result of Defendants' violations of their obligations.

BACKGROUND

The Court presumes familiarity with the background and procedural history of these cases, which are set forth — at some length — in the Court's prior Opinions. In short, Plaintiffs sought review of Secretary Ross's decision principally under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* At an early stage of the case, the Court found that the Administrative Record submitted by Defendants was incomplete. *See New York*, 351 F. Supp. 3d at 529. Thereafter, the Court ordered Defendants to complete the Administrative Record and authorized "extra-record" discovery on the ground that Plaintiffs had made a "strong preliminary showing . . . that they [would] find material beyond the Administrative Record indicative of bad faith or pretext." *Id.* (internal quotation marks omitted). The Court then held an eight-day bench trial on Plaintiffs' claims. On January 15, 2019, the Court issued findings of fact and conclusions of law, holding that the Secretary's decision was arbitrary and capricious, contrary to law, and pretextual — a "veritable smorgasbord of classic, clear-cut APA violations." *Id.* at 516; *see id.* at 635-64. For all these reasons, the Court vacated Secretary Ross's decision, enjoined its implementation, and remanded the matter to the Secretary. *Id.* at 671-80. Because questions about the proper scope of the record had been the subject of significant controversy throughout the litigation — generating an unprecedented, largely unsuccessful effort by Defendants to halt the proceedings and obtain extraordinary relief from higher courts — the

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Court carefully bifurcated its findings and reasoning to make clear which conclusions were supported solely by what the parties agreed was the Administrative Record and which conclusions were further supported by extra-record evidence. *See id.* at 530. Defendants — Secretary Ross, the United States Department of Commerce, the Director of the Census, and the Bureau of the Census — filed a notice of appeal and a petition for certiorari before judgment in the Supreme Court. The Supreme Court granted their petition and, as noted, affirmed on the ground that Secretary Ross's stated rationale was pretextual on the basis of the entire record — including the evidence beyond the Administrative Record adduced at trial. *See Dep't of Commerce*, 139 S. Ct. at 2573.

In the days after the Supreme Court's decision, Defendants vacillated over whether to persist in their efforts to include a citizenship question on the 2020 census questionnaire — presumably on the basis of a new (or at least newly disclosed) rationale. *See* ECF Nos. 613, 627. The uncertainty came to an end on July 11, 2019, when the President announced in a Rose Garden address that, in lieu of a question on the census questionnaire, he was directing the Department of Commerce to use administrative records (such as databases maintained by the Department of Homeland Security and the Social Security Administration) to collect citizenship data on those living in the United States. *See* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/ ("POTUS Tr."); *see also* ECF No. 627-1 ("EO 13880"). Notably, that decision seemed to recognize what Plaintiffs had been arguing all along, over Defendants' strenuous objections: that collecting citizenship data in that manner would be "far more accurate" than adding a citizenship question to the census questionnaire and would yield "an even more complete count of citizens than through asking the single question alone." POTUS Tr. 3; *cf.* ECF No. 545-1 ("Pls.' Proposed Conclusions of Law"), ¶ 229 (arguing that

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"the use of administrative records alone" to collect citizenship data "is better by every metric that the Secretary purports to value"); *New York*, 351 F. Supp. 3d at 533-39 (discussing evidence in the Administrative Record indicating that using administrative records would yield the most accurate citizenship data). Days later, Defendants consented to entry of a permanent injunction barring them from adding a citizenship question to the 2020 census questionnaire. *See* ECF No. 634. Thereafter, the NGO Plaintiffs and Defendants reached a settlement with respect to the NGO Plaintiffs' attorney's fees and costs. *See* ECF No. 647. Thus, as Defendants rightly concede, Plaintiffs "prevailed" and "obtained all the relief they sought when they brought this case." ECF No. 648 ("Defs.' Opp'n"), at 1.

In the meantime, while the case was pending before the Supreme Court, the NGO Plaintiffs acquired new evidence that, in their view, shed more light on the genesis of Secretary Ross's decision and cast doubt on certain representations made, and testimony given, in this case. Most significantly, they obtained documents through an unrelated lawsuit suggesting that a redistricting specialist named Dr. Thomas Hofeller may have provided a paragraph to Mark Neuman, an outside advisor to Secretary Ross, for use in a draft letter that Neuman then provided to John Gore, then the Assistant Attorney General for Civil Rights. Gore, in turn, drafted the letter (known as the "Gary Letter" after its signatory) that DOJ sent to the Department of Commerce purporting to request the addition of a citizenship question on the decennial census questionnaire. ECF No. 635 ("NGO Pls.' Mem."), at 4-5; *see New York*, 351 F. Supp. 3d at 530-32. The paragraph in question, like the final version of the Gary Letter that DOJ sent to the Department of Commerce, argued that adding a citizenship question to the decennial census questionnaire would help DOJ enforce the Voting Rights Act. Other evidence obtained by the NGO Plaintiffs, however, suggested that Dr. Hofeller's true motive in promoting a census

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citizenship question was to facilitate redistricting strategies that would, in his words, be "advantageous to Republicans and non-Hispanic Whites." NGO Pls.' Mem. 4. The NGO Plaintiffs argued that this and other evidence revealed that two of Defendants' witnesses, Neuman and Gore, "provided false testimony" in their depositions and concealed evidence in discovery. *Id.* at 7-11.

After the NGO Plaintiffs brought their concerns to the Court's attention via letter motion, *see* ECF No. 595, the Court held a conference on June 5, 2019 and set a schedule for more formal motion practice, *see* ECF No. 605. Consistent with that schedule, the NGO Plaintiffs filed a motion in July 2019 — after the Supreme Court had resolved the merits of this case in their favor — seeking sanctions and other relief against Defendants, including additional discovery. Before the Court addressed that motion, however, the plot thickened twice, causing the Court to defer judgment: First, on November 14, 2019, the NGO Plaintiffs sought and obtained leave to file a sur-reply in support of their sanctions motion, in order to bring to the Court's attention several documents included in a report issued by the U.S. House of Representatives' Committee on Oversight and Reform. ECF Nos. 663, 664; ECF No. 665 ("NGO Pls.' Sur-Reply"). In their sur-reply, the NGO Plaintiffs argued that the newly discovered documents reinforced their contentions that Neuman had concealed his relationship with Dr. Hofeller and that Defendants had improperly withheld documents that should have been disclosed in discovery. NGO Pls.' Sur-Reply 2-6. In response, Defendants acknowledged that their "discovery searches in this case may not have been perfect," ECF No. 667 ("Defs.' Sur-Sur-Reply"), at 7, but argued that the NGO Plaintiffs were "leap[ing] to unsubstantiated conclusions to promote a false narrative of litigation misconduct" by Defendants, *id.* at 2.

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Second, several days after filing that response, Defendants notified Plaintiffs and the Court that they had discovered a batch of documents that, in fact, should have been but were not produced to Plaintiffs in the course of discovery. *See* ECF No. 669. Defendants represented that these documents "were collected in the course of responding to discovery in this litigation, [and were] loaded into [a] document review platform for that purpose." ECF No. 669-1, at 1. Nevertheless, Defendants claimed that they had "inadvertently" failed to produce them to Plaintiffs. *Id.* Defendants further represented that they were "still investigating the cause of the error" and "whether any other documents were similarly inadvertently omitted from production." *Id.* at 2. In the exchange of letters that followed, the NGO Plaintiffs asked that the Court order a "full . . . accounting of Defendants' search protocols," including "production of all litigation hold notices and document collection certifications." ECF No. 673, at 3-4. Defendants maintained that such relief was not warranted, and represented that although they had "attempted to ascertain why, having been collected," the omitted documents "were not thereupon produced," Defendants were "[r]egrettably[] . . . unable to discover the cause." ECF No. 674 ("Defs.' Dec. 12, 2019 Letter"), at 4. The Court stopped short of granting Plaintiffs' full request, but ordered Defendants to provide a more complete update regarding their investigation into whether other documents might have been omitted from their earlier productions, *see* ECF No. 675, and on December 19, 2019, Defendants filed a letter advising that their investigation had revealed "480 potentially responsive emails . . . , which including attachments total[ed] 2,062 documents" that had not been produced to Plaintiffs in discovery. ECF No. 676, at 2. After another exchange of letters, the Court ordered Defendants to review and produce any non-privileged materials from among these documents by February 21, 2020 — noting that if that deadline imposed a burden

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on Defendants, they had "no one but themselves to blame since the documents at issue should have been produced a year and a half" earlier. ECF No. 682, at 4.

Defendants have now completed their review and produced the non-privileged materials that were improperly withheld, ultimately totaling at least 900 previously unproduced documents. *See* ECF No. 693 ("Defs.' Suppl. Reply"), at 2 n.1. Since then, the parties — including the Government Plaintiffs — have filed letters detailing their respective positions on what, if any, effect the newly produced materials should have on the NGO Plaintiffs' underlying motion for sanctions. *See* ECF No. 690 ("NGO Pls.' Suppl. Letter"); ECF No. 691; ECF No. 692 ("Defs.' Suppl. Letter"); Defs.' Suppl. Reply. The motion is, thus, finally ripe for decision.

DISCUSSION

The NGO Plaintiffs contend that sanctions are, or may be, warranted pursuant to two Federal Rules of Civil Procedure — Rule 26(g)(3) and Rule 37(b)(2) — and the Court's "inherent authority." NGO Pls.' Mem. 19-21. Significantly, however, although they frame their motion as a motion for sanctions, it is really a motion for discovery first, and sanctions only second. That is, the NGO Plaintiffs first seek additional discovery in aid of their sanctions motion, after which they would "more specifically identify the sanctions sought" from among "three categories of likely appropriate sanctions," including additional findings of fact, waivers of Defendants' deliberative-process privilege against disclosure of certain materials, and monetary sanctions (including attorney's fees and costs). *Id.* at 32-33. Arguably implicit in this ordering is a concession that, on its own, the newly discovered evidence does not support the

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imposition of sanctions on any particular individual or party. Be that as it may, the Court will address each of the NGO Plaintiffs' arguments in turn.

A. Rule 26(g)(3)

Rule 26(g)(1) of the Federal Rules of Civil Procedure provides that "[e]very" discovery "disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record" and that, by signing, the attorney "certifies," among other things, that the disclosure "is complete and correct as of the time it is made." Rule 26(g)(3) provides, in turn, that, "[i]f a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Significantly, although the Rule is phrased in mandatory terms, and states that a court "must" impose sanctions for any violation "without substantial justification," courts have interpreted the Rule to include a prejudice requirement. *See, e.g.*, *Wisser v. Vox Media, Inc.*, No. 19-CV-1445 (LGS), 2020 WL 1547381, at *3 (S.D.N.Y. Apr. 1, 2020); *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, No. 99-CV-0275 (RWS), 2004 WL 1811427, at *23 (S.D.N.Y. Aug. 12, 2004); *Clark v. Westchester Cty.*, No. 96-CV-8381 (DLC), 1998 WL 709834, at *9 (S.D.N.Y. Oct. 9, 1998) (collecting cases). Put another way, "sanctions under Rule 26(g) are not appropriate when a party has not been harmed" by the violation. *Kara Holding Corp.*, 2004 WL 1811427, at *23.

For that reason, the Court concludes that sanctions under Rule 26(g) are unwarranted and, by extension, that there is no basis under the Rule to authorize discovery. *See id.* For one thing, the NGO Plaintiffs are clear that their primary allegations of wrongdoing are directed at "senior Commerce and DOJ officials — not the career DOJ line attorneys who litigated this case on behalf of Defendants." NGO Pls.' Mem. 3. But Rule 26(g)(3) does not provide a basis to

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impose sanctions for those officials' conduct; the Rule authorizes sanctions for "certifications" that violate Rule 26(g)(1), and it is the line attorneys who provided the relevant certifications here. *See, e.g.*, *Omega SA v. 375 Canal, LLC*, 324 F.R.D. 47, 56 (S.D.N.Y. 2018) (holding that Rule 26(g)(3) applies to discovery responses and objections, not to "false declarations" more generally). But more fundamentally, to the extent Defendants committed any misconduct that would fall within the scope of the Rule, it plainly did not cause the NGO Plaintiffs any substantive harm. As noted, the NGO Plaintiffs prevailed on the merits and obtained all of the relief that they sought in their pleadings, and they negotiated a settlement with Defendants for the fees and costs that they incurred during the primary stage of this litigation. In these circumstances, and regardless of whatever facts further discovery might uncover, the Court concludes that Rule 26(g)((3) sanctions are inappropriate.

B. Inherent Authority

Whether to impose sanctions pursuant to the Court's inherent powers is a closer call. The NGO Plaintiffs' seek such sanctions for what they describe as a "fraud on the court," and identify six instances of alleged "false or misleading testimony, statements, and conduct by Defendants and those acting on their behalf," NGO Pls.' Mem. 21 — most notably, Neuman and Gore — as a basis for sanctions under the Court's inherent powers, *id.* at 19-22. It is well established that, "[e]ven in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). In the first place, "a finding of bad faith" is a prerequisite "for the imposition of sanctions" pursuant to a court's inherent

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powers. *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 136 (2d Cir. 1998). Because of that "bad faith" requirement, a court exercising its inherent powers will often have to overlook statements that are merely false, even suspiciously so. Instead, a court will impose sanctions pursuant to its inherent powers only where a person "has made a false statement to the court *and* has done so in bad faith." *SEC v. Smith*, 710 F.3d 87, 97 (2d Cir. 2013) (emphasis added).

Notably, the Court's inherent sanctioning authority is even more limited with respect to the alleged misconduct of a non-party witness. In particular, mere "[u]ntruthful testimony," "perjury," and "nondisclosure" by a non-party witness is insufficient to warrant sanctions under the Court's inherent powers unless it is part of a larger scheme amounting to a fraud on the Court. *Rybner v. Cannon Design, Inc.*, No. 95-CV-0279 (SS), 1996 WL 470668, at *3 (S.D.N.Y. Aug. 20, 1996) (Sotomayor, J.) (internal quotation marks omitted). "In short, neither perjury nor nondisclosure, by itself, amounts to anything more than fraud involving injury to a single litigant." *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988). Thus, "[u]ntruthful testimony by a witness, which has not been suborned by his lawyer, does not, standing alone, constitute fraud upon the court," particularly where "the testimony is given during a pretrial deposition." *In re Grievance Comm. of U.S. Dist. Court, Dist. of Conn.*, 847 F.2d 57, 64 (2d Cir. 1988) (Van Graafeiland, J., concurring). "Only when a fraud seriously affects the integrity of the normal process of adjudication, does the conduct amount to a fraud upon the court," as "where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Rybner*, 1996 WL 470668, at *3 (citations and internal quotation marks omitted).

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In light of these standards, the Court concludes that Neuman's testimony, however troubling, could merit sanctions pursuant to the Court's inherent powers only if it were part of a broader scheme orchestrated by Defendants or their attorneys to intentionally mislead the Court. But the record as it stands does not contain "clear and convincing" evidence of such a scheme. *Rybner*, 1996 WL 470668, at *4. Gore's situation is more complicated because he was both a witness and (until August 2019) a high-level attorney at DOJ, which represented Defendants in this litigation. Thus, although Gore did not appear on behalf of Defendants, he occupied a gray area — he was a participant in the decision-making process, a witness to the underlying events, and an official at the government agency tasked with representing Defendants in court. In theory, therefore, evidence that Gore knowingly misled the Court could support a finding that Defendants and their counsel engaged in a scheme to defraud the Court. But the evidence as it stands does not support such a conclusion. According to the NGO Plaintiffs, Gore "provided false testimony about drafting the DOJ letter to Commerce" — that is, the Gary Letter on which Secretary Ross allegedly relied. NGO Pls.' Mem. 9. In his deposition, Gore testified that he "drafted the initial draft of the letter to request the citizenship question." *New York*, 351 F. Supp. 3d at 555; *see* ECF No. 635-1, Ex. 7, at 127. The NGO Plaintiffs now say that this was false; instead, before Gore drafted his letter, *Neuman* "gave Gore a draft letter that would request reinstatement of the citizenship question on the census questionnaire." NGO Pls.' Mem. 10 (internal quotation marks omitted). Thus, according to the NGO Plaintiffs, it was Neuman, not Gore, who wrote the "initial" draft of what became the Gary Letter.

At the heart of this dispute is a semantic, if not philosophical, question. Neuman drafted a letter requesting the inclusion of a citizenship question on the decennial census and then gave that draft to Gore. Gore, in turn, drafted a letter making the same request, a letter that was then

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edited by others. The final version — the Gary Letter — was then transmitted to the Department of Commerce. On these facts, who authored the "initial" draft of the Gary Letter? To be sure, Neuman's letter preceded Gore's in time. But how similar would Neuman's effort have to have been to Gore's, or to the final document, for Neuman's draft to be considered the "initial" version of the Gary letter? For present purposes, it suffices to say that there is no evidence in the record that Gore relied on Neuman's draft at all in preparing his own draft of what became the Gary Letter. Nor are the Neuman drafts and any of Gore's early drafts of the Gary Letter in the record so similar as to compel an inference that he did.[1] Notably, the similarity upon which the NGO Plaintiffs' hang their hat — and, admittedly, it is a striking one — is between *Neuman*'s draft and a paragraph discovered on Dr. Hofeller's computer. *Compare* ECF No. 635-1, at 133-34, *with id.* at 136. That similarity suggests a degree of coordination between Neuman and Dr. Hofeller that might undermine any claim that *Neuman* was the initial "author" of his own draft. But it does not suggest that *Gore* intentionally misled the Court when he testified that it was he who authored the "initial draft" of what became the Gary Letter. And it certainly does not amount to "clear and convincing" evidence of bad faith. Accordingly, the Court declines to exercise its inherent authority to sanction Gore.

The remaining instances of allegedly misleading statements or conduct concern the behavior of Defendants and their counsel throughout the discovery process. NGO Pls.' Mem. 21-22. The NGO Plaintiffs acknowledge, however, that "discovery and further inquiry [would] be necessary to ascertain the extent of individuals' knowledge" of each alleged falsehood. *Id.* at 21. But the broad scope of discovery in this litigation was already unusual for an APA action,

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[1] Before trial, the Court reviewed *in camera* four early drafts of the Gary Letter (bearing Bates Numbers 2722, 2736, 2739, and 2786), which remain under seal. *See* ECF No. 369, at 5-6.

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see New York v. U.S. Dep't of Commerce, 345 F. Supp. 3d 444, 451-53 (S.D.N.Y. 2018), and discovery must ultimately be "proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1). Here, assessment of whether additional discovery would be "proportional" must take stock of the unusual posture of this litigation and the appropriate role of a court in these circumstances. Put simply, the needs of the case have changed. Discovery serves the goals of litigation, not the other way around. And a federal court is not an investigative body charged with government oversight. The degree of discovery in this litigation was amply justified by the substance of Plaintiffs' claims and the Court's responsibility to resolve them. *See New York v. U.S. Dep't of Commerce*, 339 F. Supp. 3d 144, 149-51 (S.D.N.Y. 2018). But the same considerations are no longer present in this case, precisely because Plaintiffs prevailed on their claims and obtained all the substantive relief they sought. Moreover, there are actual oversight bodies better suited to the task of investigating and evaluating the process that led to Secretary Ross's decision — most notably, Congress — as some of the events that gave rise to this motion illustrate.

The Court accordingly declines to order further discovery in aid of the NGO Plaintiffs' contention that sanctions are appropriate under the Court's inherent authority, even though that means stopping short of a full accounting of the conduct of Neuman, Gore, and others in the evidence-gathering stages of this litigation (and even though stopping short also denies these people the possibility of exoneration that might have come from further discovery). Instead, the Court concludes that "restraint and discretion" counsel against the further expense of judicial resources in pursuit of these matters, at least in this case. *Chambers*, 501 U.S. at 44.

C. Rule 37

That leaves the NGO Plaintiffs' requests for sanctions pursuant to Rule 37(b)(2), which provides in relevant part that "[i]f a party . . . fails to obey an order to provide or permit

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discovery . . . , the court where the action is pending may issue further just orders." Such orders, the Rule continues, "may include the following":

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings until the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
>
> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). A district court has "wide discretion in imposing sanctions under Rule 37," and may consider a wide variety of factors in deciding whether and how to do so — the Rule's bottom-line requirement, as its text indicates, is "only that the district court's orders be just." *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 144 (2d Cir. 2010) (internal quotation marks omitted). Moreover, a party's willfulness in disobeying a discovery order is not a prerequisite to Rule 37 sanctions; instead, it is merely one of several factors to be considered in selecting a sanction. *See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067-68 (2d Cir. 1979). Indeed, the Second Circuit has recognized that "gross professional incompetence no less than deliberate tactical intransigence" may cause discovery violations and is worthy of deterrence through sanctions. *Id.* at 1067.

The NGO Plaintiffs' Rule 37 motion centers on what they describe as Defendants' failure to provide a complete Administrative Record and their "delay" in producing documents in the

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course of the initial round of litigation (that is, before the present motion was filed). However meritorious these claims may be, the sanctions enumerated in Rule 37(b)(2)(A) would be largely pointless at this stage of litigation, where the party seeking sanctions has already won a final judgment and successfully defended it on appeal. To the extent any of those sanctions could even be brought to bear, moreover, the Court concludes that they would be unwarranted in the unique circumstances of this case. That is not the end of the matter, however, because Rule 37(b) also provides that, "*[i]nstead of or in addition to the orders above*, the court *must* order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C) (emphases added). An order pursuant to Rule 37(b)(2)(C) "to reimburse the opposing party for expenses caused by the failure to cooperate" is the "mildest" Rule 37 sanction available to a court faced with a party's failure to comply with a discovery order. *Cine Forty-Second St. Theatre Corp.*, 602 F.2d at 1066.

Plaintiffs' efforts to obtain discovery in advance of trial — both in this Court and in opposing Defendants' various "emergency" interlocutory appeals to higher authorities — were certainly burdensome. *See New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 6060304, at *1 (S.D.N.Y. Nov. 20, 2018) (discussing Defendants' multiple attempts "to halt the orderly progress of this litigation" with meritless stay requests and interlocutory appeals). But the NGO Plaintiffs were already compensated for those efforts — they settled their claims for fees and costs arising from the main phase of this case, *see* ECF No. 647 — and that moots most of the relief the Court might otherwise have granted pursuant to Rule 37(b)(2)(C). But not all. As it turned out, developments outside this litigation — in other litigation and in Congress

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— revealed that Defendants may not have been entirely forthcoming in their productions in this case. The NGO Plaintiffs accordingly had compelling reasons to file this motion, reasons that became only more compelling when Defendants confirmed that there were still more documents that should have been, but were not, produced in the course of discovery. All told, it turned out that Defendants had failed to produce at least 900 documents excluding duplicates, totaling 3,700 pages — "roughly 11 percent . . . of the approximately 32,500 pages of documents that [Defendants] produced in the administrative record and discovery." Defs.' Suppl. Reply 2 n.1.[2] Notably, Defendants do not attempt to argue that their failure to produce these documents was "substantially justified." Fed. R. Civ. P. 37(b)(2)(C). To the contrary, Defendants have explained that their non-production was due to a "technical error": Although the documents had been collected and loaded onto Defendants' document-review platform, a coding error in the "custodian" field led to searches that returned incomplete results for production. ECF No. 676, at 2. In other words, Defendants' failure to produce the documents was caused by a lapse that would make a first-year litigation associate wince.

Instead, Defendants oppose the NGO Plaintiffs' request for Rule 37 sanctions on a purely technical ground. In their view, although Rule 37 permits sanctions for a party's "fail[ure] to obey an order to provide or permit discovery," there was "no such order with which Defendants failed to comply" here. Defs.' Opp'n 3 (internal quotation marks omitted). That is because, they continue, the order at issue was the Court's July 5, 2018 Order directing Defendants to complete

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[2] The parties dispute the scale of Defendants' non-production in proportion to the overall record, but that disagreement ultimately comes down to whether the missing documents amount to eleven percent or twenty percent of that record. *Compare* NGO Pls.' Suppl. Letter 1-2, *with* Defs.' Suppl. Reply 2 n.1. The Court is uninterested in whether Defendants managed eighty or eighty-nine percent compliance with their obligations; either way, the NGO Plaintiffs are obviously correct that "[t]hese major omissions are more than a few documents 'falling through the cracks.'" NGO Pls.' Suppl. Letter 1-2 (quoting Defs.' Dec. 12, 2019 Letter 4).

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the Administrative Record and, "[a]s the Court recognized earlier in this litigation, [p]roperly understood . . . an order directing completion of an administrative record is not the same thing as ordering 'discovery.'" *Id.* at 4 (quoting *New York*, 351 F. Supp. 3d at 633). To be sure, the lines dividing orders to "complete" an administrative record from orders to "supplement" an administrative record and orders for discovery "beyond" an administrative record can be blurry. *See New York*, 351 F. Supp. 3d at 631-35. That is particularly true here because the parties eventually stipulated that a large number of materials produced in extra-record discovery were actually part of the Administrative Record. *See id.* at 518 n.4, 630; ECF No. 523. As a result, it is hard (if not impossible) to tell in retrospect, simply on the basis of terminology, whether any given order should be classified as an order to "complete" the Administrative Record or to provide discovery "beyond" it. *Compare* ECF No. 676, at 2 (explaining that the production errors at issue occurred in the course of resolving Plaintiffs' fifth motion to compel), *with* ECF No. 293, at 2 (Plaintiffs' fifth motion to compel, seeking, among other relief, an order compelling Defendants "to undertake reasonable searches of all material custodians to complete the Administrative Record"). Presumably for the same reasons, Defendants' own terminology is not always consistent with their arguments. *See* Defs.' Suppl. Letter 1 (explaining that "the newly produced documents include e-mails and attachments thereto that inadvertently were not produced during the *discovery* stage of this case" (emphasis added)).

In any event, the Court is unpersuaded by Defendants' contention that an order to complete an administrative record — although "not the same thing as ordering discovery *beyond* the record," *New York*, 351 F. Supp. 3d at 633 — is different from an "order to provide or permit discovery" within the meaning of Rule 37. By its terms, Rule 37(b)(2)(A)'s list of orders whose violation may trigger sanctions is non-exclusive. *See Daval Steel Prods., a Div. of Francosteel*

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Corp. v. M/V Fakredine, 951 F.2d 1357, 1363 (2d Cir. 1991); Fed. R. Civ. P. 37(b)(2)(A) (authorizing a court to impose sanctions for a party's "fail[ure] to obey an order to provide or permit discovery, *including* an order under Rule 26(f), 35, or 37(a)" (emphasis added)); Fed. R. Civ. P. 37 advisory committee's note to 1970 amendments (explaining that Rule 37(b)(2) had been "broadened by extending it to include any order 'to provide or permit discovery'"). Moreover, the fact that it is clarifying for some purposes to distinguish orders to complete an administrative record from orders authorizing traditional "discovery" does not mean that the Court's power to enter either type of order derives from different sources. As the Court had occasion to confront earlier in this case, the APA and the Federal Rules do not always speak with a unified voice about the procedures governing APA challenges. In this type of APA case, the "form of proceeding for judicial review" pursuant to 5 U.S.C. § 702 is "any applicable form of legal action . . . in a court of competent jurisdiction." 5 U.S.C. § 703. And, with exceptions that do not apply here, the Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1. Thus, while the Court's obligation to review the "whole record" in an APA case is derived from the APA itself, 5 U.S.C. § 706, its power to order production or completion of that record is derived from the Federal Rules of Civil Procedure.

At this level, then, the distinction between orders that carry the label "discovery" and those that order completion of the administrative record disappears. Sure enough, at least one Court of Appeals has held that a prior court order to produce or complete an administrative record can be the basis for Rule 37 sanctions — even, as in that case, where the obligation to produce the record arises in the first instance from a governing statute. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 26 (1st Cir. 2006). Indeed, absent a specialized statutory framework

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for production of an administrative record, *see id.* (discussing such a framework in the context of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2)(C)(i)), the administrative record is normally produced, as it was in this case, pursuant to a scheduling order issued by the reviewing court, *see* ECF No. 199; *see generally New York*, 351 F. Supp. 3d at 631-33. Given that context, the Court sees little reason to depart from the usual rule even where an administrative record is at issue: "Provided that there is a clearly articulated order of the court requiring specified discovery, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order." *Daval Steel Prods.*, 951 F.2d at 1363. Here, there was such an order — the Court's Order of July 5, 2018 directing Defendants to "produce the complete [Administrative] [R]ecord." ECF No. 199. And as Defendants themselves concede, the documents at issue here were improperly withheld in the course of resolving a dispute over whether Defendants had fully complied with that order in the first place. *See* ECF No. 676, at 2; ECF No. 293, at 2. It follows that sanctions are appropriate.

Accordingly, the Court will — and arguably "must," Fed. R. Civ. P. 37(b)(2)(C) — order Defendants to pay the reasonable costs and attorney's fees caused by their lapse. The Court will therefore order Defendants to reimburse the NGO Plaintiffs for the expenses, including attorney's fees and costs, they reasonably incurred in addressing Defendants' production failures. *See, e.g.*, *Shanchun Yu v. Diguojiaoyu, Inc.*, No. 18-CV-7303 (JMF), 2019 WL 6174204, at *6 (S.D.N.Y. Nov. 20, 2019). More specifically, the Court awards any costs and fees reasonably incurred by the NGO Plaintiffs since Defendants' letter to the Court of November 25, 2019, in which they revealed the fact of (but not the explanation for) the discovery lapses described above. *See* ECF No. 669. As discussed in more detail below, the Court will direct the parties to confer in an effort to reach agreement on the relevant figure.

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CONCLUSION

At the end of the day, the NGO Plaintiffs' allegations of misconduct merely reinforce their overall theory of this case: that Secretary Ross's decision to add a citizenship question to the 2020 decennial census questionnaire was not made for the reasons he gave. With newly discovered evidence in hand, the NGO Plaintiffs now argue that Secretary Ross's decision was even more pretextual than they had been able to show in the first instance. But even if these allegations are true, and even if Defendants' misconduct would otherwise have been sanctionable, this is a case in which, for the most part, "the proper remedy is exactly what happened at trial." *Ideal Steel Supply Corp. v. Anza*, No. 02-CV-4788 (RMB), 2013 WL 6912681, at *4 (S.D.N.Y. Dec. 23, 2013) (citation and internal quotation marks omitted). Plaintiffs tested the credibility of Defendants' explanations, including the testimony of Defendants' witnesses; persuaded the Court that Defendants' official story concealed their true reasons for acting; and — on that basis — ultimately prevailed. *See, e.g.*, *New York*, 351 F. Supp. 3d at 565 (finding the testimony of one witness "materially misleading"); *id.* at 556 (noting Gore's admission that he did not believe adding the citizenship question was necessary to improve Voting Rights Act enforcement efforts, the stated rationale for doing so). Indeed, evidence that apportionment effects might have been a reason for Secretary Ross's decision supported the Court's conclusion that improving Voting Rights Act enforcement was *not* his actual reason. *See id.* at 568, ¶ 170. Thus, not only did the NGO Plaintiffs ultimately "obtain[] all the relief they sought when they brought this case," but they did so in part for the same reasons they now seek further sanctions against Defendants. In the final analysis, although the NGO Plaintiffs' allegations are troubling, so too were the facts that won them a victory at trial

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and in the Supreme Court. Plaintiffs' theory of the case could hardly need more judicial vindication than that.

To be sure, this was not DOJ's finest hour. At best, DOJ failed to produce more than ten percent of the documents that Defendants were required to produce as part of this litigation. But the Court cannot conclude from the record before it that further investigation into possible sanctionable conduct is warranted in the circumstances of this case. Accordingly, and as an exercise of the Court's "wide discretion," *S. New England Tel. Co.*, 624 F.3d at 144 (internal quotation marks omitted), the Court will not impose sanctions on Defendants beyond the litigation defeat they have already suffered, or the fee award in which they have acquiesced — except to order that Defendants pay the costs and fees associated with a portion of this motion and its embedded disputes. Nor will the Court invite further discovery in order to determine exactly who did what and when with respect to the decision to add a citizenship question to the decennial census. NGO Pls.' Mem. 32-33. Litigation, despite its truth-seeking function, sometimes produces an incomplete or unsatisfying version of the facts. In this case, however, the facts that Plaintiffs were able to prove at trial won them complete relief in this Court and in the Supreme Court of the United States. If there is more to the story, principles of judicial restraint counsel in favor of letting it be uncovered and told somewhere else.

For the reasons given and to the extent set forth above, the NGO Plaintiffs' motion for discovery and sanctions is GRANTED in part and DENIED in part. In particular, pursuant to its authority under Rule 37(b)(2)(C), the Court orders Defendants to reimburse the NGO Plaintiffs for the fees and costs they incurred in addressing Defendants' admittedly incomplete productions. Within **three weeks** of this Opinion and Order, Defendants and the NGO Plaintiffs shall meet and confer in an effort to resolve any disputes over the amount of attorney's fees

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reasonably incurred by the NGO Plaintiffs' in the course of litigating their motion for sanctions and, if successful, shall promptly file a joint stipulation in accordance with the Court's Individual Rules and Practices. Within **thirty days** of this Opinion and Order, the NGO Plaintiffs shall file a supplemental application for any fees remaining in dispute, in the form of a letter-motion not to exceed three pages, supported by contemporaneous time records or other appropriate documentation. *See M.D. v. N.Y.C. Dep't of Educ.*, No. 17-CV-2417 (JMF), 2018 WL 4386086, at *6 (S.D.N.Y. Sept. 14, 2018). Defendants shall file any opposition within **two weeks** of the NGO Plaintiffs' submission. No reply may be filed absent leave of Court.

The Clerk of Court is directed to terminate ECF No. 635.

SO ORDERED.

Dated: May 21, 2020
New York, New York

JESSE M. FURMAN
United States District Judge

BC-DOC-0000030325

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

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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

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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

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

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS; and ADRIAN GARCIA,

Plaintiffs,

v.

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; and U.S. CENSUS BUREAU,

Defendants.

CASE NO. 20-cv-5799

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau (the "Bureau") Director Steven Dillingham, to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic.

2. The Census Bureau's staff spent most of the past decade developing a final operational plan for the 2020 Census that reflected the Bureau's understanding of the best methods for counting everyone once and in the right place (the "Final Operational Plan"). In April 2020, as the COVID-19 pandemic spread throughout the country, the Census Bureau revised its plan to account for both the difficulties of census-taking during a pandemic and the Bureau's constitutional and statutory obligation to achieve a fair and accurate count (the "COVID-19 Plan"). To achieve both ends, the Department of Commerce and the Census Bureau delayed the counting process, shifted the timeframe for conducting and completing its data-collection operation, and increased the time for conducting data-processing, while, crucially, preserving the same amount of time for each step of those operations.

3. On August 3, 2020, the Department of Commerce and the Census Bureau suddenly and without explanation reversed course and replaced the Bureau's COVID-19 Plan with a new one (the "Rush Plan"). The Bureau's Rush Plan requires the Bureau to complete eight and a half months of data-collection and data-processing in half the time. It ignores the multi-month delay in census data-collection that the COVID-19 pandemic caused. It compels a final date for delivering apportionment data to the President that Bureau officials have repeatedly asserted they cannot meet. And it threatens a massive undercount of the country's communities of color and the municipalities, cities, counties, and states where they live. Under these circumstances, the Bureau's new plan to rush the 2020 Census violates, among other things, the federal government's legal obligations to secure an accurate count and statutory prohibitions on arbitrary, capricious, and pretextual federal government action.

4. The federal government's attempt to rush the census count poses a grave threat to

all the vital functions that rely on census data, from reapportioning the United States House of Representatives and redrawing state and local electoral districts, to equitably distributing over $1.5 trillion annually in federal funds that support basic needs such as food, health care, and education. Undercounted cities, counties, and municipalities will lose representation in Congress and tens of millions of dollars in funding. And communities of color will lose core political power and vital services. In contrast to these dire stakes, the immediate solution to this problem is simple: set aside and enjoin implementation of the impossibly-shortened Rush Plan, which is based on an unexplained change of position, and allow the Census Bureau to implement the plan that it had designed to fulfill its constitutional duties during the pandemic.

5. The COVID-19 pandemic upended all 2020 Census field operations, many of which the Census Bureau designed to enumerate populations that it has long struggled to count, including racial and ethnic minorities, non-English speakers, and undocumented persons. Among the disrupted census operations was the largest, most time-consuming operation undertaken to count the country's hard-to-count communities—the "Non-Response Follow Up" operation. During Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census and perform other vital data-collecting functions.

6. The Bureau's staff responded to the pandemic—and the impossibility of conducting house visits during widespread lockdowns—by making necessary adjustments to the timeline in the Final Operational Plan. This revised operational plan, the COVID-19 Plan issued on April 13, 2020, was intended to ensure that hard-to-count communities would be enumerated and the health and safety of Bureau employees and the public would be protected. This plan adjusted the deadlines of, but did not shorten the time for, critical operations. Under this plan—which experts and census stakeholders alike endorsed as a scientifically sound approach for minimizing the pandemic's potential damage to the accuracy of the count—the Bureau extended its data-collection deadlines to October 31, 2020 and its data-processing deadlines into the second quarter of 2021. Critically, the COVID-19 Plan delayed door-knocking by three months, pushing it from May–July 2020 to August–October 2020. But the COVID-19 Plan

acknowledged that the Bureau must spend the same amount of time—around eleven and a half weeks—on door-knocking, just as it had planned to do before the pandemic. The COVID-19 Plan also incorporated the same methods and techniques contemplated in the Final Operational Plan that the Bureau had spent years developing. Indeed, the only respect in which the COVID-19 Plan altered the amount of time devoted to operations set out in the Final Operational Plan was a requirement that the Bureau spend *more* time than originally planned *processing* the data it collected—that is, performing the necessary work to transform over 100 million individual census forms into high-quality, reliable, and legitimate data. This additional investment in data-processing reflected daunting new challenges the COVID-19 pandemic posed to an accurate count, including massive displacements of people that would introduce problems of duplicate responses, responses without unique census identifiers, and other complex data issues.

7. The Department of Commerce and the Census Bureau also recognized that the impact of COVID-19 had made it impossible to meet certain statutory deadlines for reporting census results to Congress. Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham announced that the Bureau was seeking relief from Congress to formally extend two statutory deadlines: first, the deadline for reporting the state-population totals used to calculate the congressional apportionment to the President, which Congress was asked to extend from December 31, 2020 to April 30, 2021; and, second, the deadline for reporting redistricting data to the states, which Congress was asked to extend from March 31, 2021, to July 31, 2021. Commenting on the statutory-deadline extensions, President Trump publicly stated on April 13, 2020, "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

8. Recognizing that more time was necessary to complete an accurate census, and consistent with the President's statement, the Bureau proceeded immediately under its COVID-19 Plan. The Bureau delayed its door-knocking operation to late summer, with the declared

intention of completing it by October 31, 2020. And recognizing that a successful census is dependent on all levels of government working together, the Bureau publicized this plan to the public, as well as to government and non-profit partners involved in the years-long and multi-million-dollar public education campaign to ensure public trust and encourage public participation in the census.

9. Throughout the summer, Bureau officials repeatedly stated that the pandemic had rendered it impossible for the Bureau to complete a reasonably accurate count by December 31, 2020. But to comply with its constitutional obligations, the Bureau continued collecting data on the timelines set in the COVID-19 Plan, which itself extended the Bureau's data-processing timelines into 2021.

10. On August 3, 2020—in the face of a pandemic that has only grown worse and in disregard of the Census Bureau's constitutional and statutory duties to conduct an actual enumeration of the entire population—Secretary Ross and Director Dillingham abruptly abandoned the COVID-19 Plan. Without explanation, they announced the new Rush Plan for the 2020 Census, including shortening the Bureau's data-collection operation by one month to September 30, 2020, and requiring the Bureau to process and report the apportionment data to President Trump by December 31, 2020. The Rush Plan cuts a crucial four weeks from the data-collection operation. And it disregards the Bureau's own prior conclusions that such rushed processing renders it impossible to fulfil its constitutional obligation to ensure reasonable quality and accuracy of 2020 Census data.

11. Defendants' decision to abandon the COVID-19 Plan in favor of the Rush Plan does not satisfy the Supreme Court's clear command that any decision relating to the census bear a "reasonable relationship" to producing an accurate count. *See Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). As demonstrated by Defendants' own prior statements, the challenged decision cannot be justified by any legitimate interest in conducting an accurate census, and in fact will introduce several inaccuracies in the count, chief among them major undercounts of communities of color.

12. The reason for this abrupt change of position is not apparent on the face of the

press release announcing the Rush Plan or any other subsequently issued statements or publications from the federal government. The Bureau has refused requests from Congress and at least one Plaintiff in this action to provide one.

13. The announcement of the Rush Plan did reference two developments that occurred between the adoption of the COVID-19 Plan and the announcement of the Bureau's intent to adopt the Rush Plan. But neither of these developments can justify Defendants' actions. First, the announcement refers to the Secretary of Commerce's direction to the Bureau to comply with the statutory deadline of December 31, 2020 for completing the apportionment count. But this statutory deadline cannot justify an unconstitutional decision to cut short crucial operations and fail to satisfy its constitutional obligation. A statutory deadline, particularly one that was set without a global pandemic in mind, cannot override the federal government's constitutional duty to accomplish an accurate census; there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980). Moreover, the Bureau was cognizant of this deadline even as it designed and implemented the COVID-19 Plan, including delaying crucial field operations by several months. And Bureau officials have repeatedly made clear that because of the impediments introduced by COVID-19, together with the multi-month delay, it is *already* too late to satisfy these pre-COVID-19 deadlines.

14. Second, both the text of the Rush Plan announcement and the timing of the decision suggest that the federal government's motivation for the Rush Plan is to facilitate another illegal act: suppressing the political power of communities of color by excluding undocumented people from the final apportionment count. On July 21, 2020—just a few weeks earlier—President Trump issued a Presidential Order titled "Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Apportionment Exclusion Order")—which expressly stated the President's determination to exclude undocumented people from the population count used for apportionment. To increase the chance that the President can fully effectuate the Apportionment Exclusion Order, he must receive the population totals while he is still in office, and he ordered the Secretary of Commerce to provide

him with 2020 decennial census information by December 31, 2020 to carry out his objective.

15. The President's Apportionment Exclusion Order (currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District) represents only the most recent of Defendants' serial attempts to manipulate the 2020 Census to suppress the political power of communities of color. These attempts started with a campaign to introduce a historically unprecedented and untested citizenship question onto the 2020 Census questionnaire to advantage—in the words of a deceased Republican redistricting consultant—"Republicans and non-Hispanic whites." Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. Since the Supreme Court blocked the question, Defendants have looked for other means to achieve that same end, including collecting data on citizenship from administrative records and, now, cutting the census short.

16. Plaintiffs are local governments, civil rights and civic organizations, and individuals whose communities will almost certainly be inaccurately represented and underrepresented in the final census count if the administration succeeds in truncating census data-collection and data-processing.

17. Plaintiffs seek declaratory relief affirming that Defendants' actions violate the Enumeration Clause and the Administrative Procedure Act. Plaintiffs additionally seek to set aside and enjoin implementation of the illegal Rush Plan, thereby permitting the Bureau to implement the preexisting COVID-19 Plan it carefully designed to ensure a complete and accurate count. This relief will allow the Bureau to conduct the 2020 Census on the timeline it has repeatedly asserted is necessary to complete a full, fair, and accurate count.

18. Without such relief, Plaintiffs and the communities they represent will suffer irreparable harm for at least another decade, until the next census is conducted.

JURISDICTION AND VENUE

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

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

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

22. The proper intradistrict assignment for this action is the San Jose Division, in light of the location of Plaintiffs City of San Jose and members of the League of Women Voters.

PARTIES

I. Plaintiffs

23. The National Urban League ("Urban League") is a civil-rights organization with over 90 affiliates serving 300 communities in 37 states and the District of Columbia. Founded in 1910, the National Urban League is headquartered in New York City. The mission of the National Urban League is to help African Americans and others in underserved communities achieve their highest human potential and secure economic self-reliance, parity, power, and civil rights.

24. For the 2020 Census, the Urban League has expended substantial resources developing programs designed to encourage self-response and cooperation with Census Bureau offices in historically undercounted communities. Specifically, the organization has engaged in efforts to educate the public about the census through various methods, including virtual town halls, production and distribution of toolkits, workshops for locally based get-out-the-count organizations, and publication and upkeep of a website, www.MakeBlackCount.org, to disseminate critical information about the census. The Urban League has also worked with Census Bureau regional offices to encourage enumerator recruitment, and the organization uses social media to encourage 2020 Census participation.

25. Plaintiff Black Alliance for Just Immigration ("BAJI") is a nonprofit organization organized and existing under the laws of California, with offices and members across the country, including in Oakland, California, Miami, Florida, Atlanta, Georgia, and New York City.

BAJI collaborates with African Americans and Black immigrants to organize and advocate for equal and just laws in their communities. BAJI campaigns to advance racial justice and provides partner organizations with varied assistance—particularly on immigration policy—and it spends significant resources educating its partner organizations, individuals, and other constituents through presentations, workshops, publications, technical assistance, and trainings. BAJI is a membership organization, and its members either pay dues or volunteer their time to support the organization. Members also actively participate in BAJI's self-governance and decision-making at the local level.

26. For the 2020 Census, BAJI has worked to ensure non-responsive households in Black and immigrant communities are counted. BAJI has hired additional staff dedicated to engaging local communities on the census, and has engaged in outreach using social media and mailers to bolster self-response. In addition, since the outbreak of the COVID-19 pandemic, BAJI staff regularly participate in webinars and virtual events to provide the public more information about the census, with a specific focus on encouraging participation in Black and immigrant communities.

27. The League of Women Voters is a nonprofit civic organization that encourages informed and active participation in government. Founded in 1920, the League of Women Voters is headquartered in Washington, D.C. The League of Women Voters has over 800 state and local affiliates, located in all 50 states and in 764 specific communities, including affiliates with members in San Francisco and Monterey County, California, Detroit, Michigan, Miami, Florida, Philadelphia, Pennsylvania, and New York City. The League of Women Voters seeks to empower voters and defend democracy. The League of Women Voters has over 65,000 members nationwide, and its members either pay dues or volunteer their time to support the organization.

28. The League of Women Voters has engaged in significant efforts to ensure historically undercounted communities are enumerated during the 2020 Non-Response Follow Up operation. Prior to the outbreak of COVID-19 in the United States, the League of Women Voters and its affiliates participated in public events across the country aimed at providing information about the census to undercounted communities. Since March of this year, the League

of Women Voters has shifted to a digital public-education campaign, encouraging education and participation through social media, email listservs, webinars, and blog posts. Affiliates in Kansas, South Carolina and Maine are also participating in state Complete Count Committees that seek to increase awareness of the 2020 Census, improve participation, and coordinate with Census Bureau officials.

29. Harris County, Texas is a political subdivision of the State of Texas. With over 4.7 million residents, Harris County is the third largest county in the United States. The county's population is over 43% Latino, 20% Black, over 7% Asian, and over 28% non-Hispanic White. During the 2010 Census, 65.1% of households in Harris County self-responded to the census. As of August 14, 2020, 58.3% of households in Harris County had self-responded to the 2020 Census. This response rate in Harris County was well below the national response rate on that date, 63.6%.

30. For the 2020 Census, officials in Harris County engaged in extensive efforts to encourage participation in the County. County officials formed a Complete Count Committee with city officials in Houston that engaged in public education about the census, and built partnerships with local Census Bureau officials to coordinate outreach efforts. In addition, in 2019, the County approved a budget of nearly $4 million dollars to conduct outreach during the 2020 Census. To that end, the County has contracted with vendors to conduct surveys about the opinions and attitudes of non-responsive populations and develop a digital advertising campaign on Facebook and Instagram to encourage 2020 Census participation. And the County receives substantial federal funding tied to census data.

31. King County is a political subdivision of the State of Washington. Over 2.2 million people live in King County, making it the most populous county in Washington. As of August 14, 2020, 26.1% of households in King County had not responded to the 2020 Census. The county has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, King County had nearly 12,000 residents experiencing homelessness, the third highest total of any locale in the country. The Seattle metro area, which includes King County, is estimated to have 140,000

undocumented immigrant residents.

32. King County worked in partnership with local cities to provide $1.17 million to community-based organizations serving historically undercounted communities. Specifically, King County sought to fund organizations that work with communities that are Limited English Proficient. Through this funding, these organizations produced public education materials related to the 2020 Census, and developed campaigns to get-out-the-count. And King County, too, receives substantial federal funding tied to census data.

33. The City of Los Angeles, California is a municipal corporation organized and existing under the laws of the State of California, and is a charter city pursuant to Article XI of the California Constitution. The City is home to roughly 4 million people, and is located in the county recognized by the Census Bureau as the hardest to count in the nation. The city's population is a large contributor to the County's hard-to-count status as more than half of the City's residents live in census tracts that are hard to count. As of August 14, 2020, only 53.8% of the City's households had responded to the 2020 Census—well below the statewide average of 65.1% and even further below the City's own 2010 self-response rate of 68 percent.

34. As a result of its hard-to-count status, Los Angeles has engaged in years of planning and devoted significant resources to developing a strategy for an accurate count, tailored to the unique challenges of the City's population. To fund these efforts, the City has overseen distribution of roughly $2 million dollars to community-based organizations and the investment of almost $1.5 million of both City general fund and grant money in its own efforts. And the City of Los Angeles also receives substantial federal funding tied to census data.

35. The City of Salinas, California is a political subdivision of the State of California. Salinas is the most populous city in and the government seat of the County of Monterey. The city is home to more than 150,000 people, including 38.5% of the county's "hard-to-count" population. As of August 14, 2020, 57.2% of all households in Salinas have responded to the 2020 Census, which is 422nd out of all 482 California cities. The current response rate is 7.9 percentage points below California's statewide average for self-responses and more than 10 percentage points below Salinas's self-response rate from the 2010 Census.

36. Salinas has dedicated significant resources to funding and staffing its "Census Action Team," which is composed of city staff and representatives from the County of Monterey's "Complete Count Committee," as well as community-based organizations, school districts, and local businesses. The city's population is more than 75% Latino, and more than 1 in 5 households have limited English-language proficiency. As part of its outreach, the Salinas Census Action Team engages religious and community organizations, such as local food banks, to assist with enumeration efforts in the Latino community and all communities of color as these organizations are able to assist with trust and communication barriers that can make these groups hard to count. The City of Salinas also receives substantial federal funding tied to census data.

37. The City of San Jose is a political subdivision of the State of California. San Jose has over 1 million residents, making it the largest city in Northern California, and the tenth largest city in the United States. San Jose's population is 32% Latino, and 35% Asian, and nearly 40% of residents are foreign born. As of August 14, 2020, 28% of households in San Jose had not responded to the census. San Jose has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, in 2019, San Jose had over 6,000 residents experiencing homeless. In addition, the San Jose metro area is estimated to have over 150,000 undocumented immigrant residents.

38. The City of San Jose has engaged in extensive public-education and get-out-the-count efforts during the 2020 Census. San Jose has formed a Complete Count Committee with Santa Clara County, and nearly 90 community-based organizations. The Committee focuses on raising awareness of the census in historically undercounted communities. San Jose also disseminates information about the census to the public through city departments and offices. San Jose also worked closely with the Census Bureau to recruit qualified bilingual enumerators. The City of San Jose receives substantial federal funding tied to census data.

39. Plaintiff Rodney Ellis is the Commissioner for Precinct One on the Harris County Commissioners Court. He is a resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Ellis regularly drives on roads and highways in Harris County.

40. Plaintiff Adrian Garcia is the Commissioner for Precinct Two on the Harris County Commissioners Court. He is a life-long resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Garcia also regularly drives on roads and highways in Harris County.

II. Defendants

41. Defendant Wilbur L. Ross is the Secretary of the U.S. Department of Commerce and is sued in his official capacity. Secretary Ross oversees the U.S. Department of Commerce and the Census Bureau. Congress has delegated the responsibility for carrying out the decennial census to the Secretary of Commerce. 13 U.S.C. § 141(a).

42. Defendant U.S. Department of Commerce is a cabinet agency within the Executive Branch responsible for administering the decennial census.

43. Defendant Steven Dillingham is the Director of the U.S. Census Bureau and is sued in his official capacity.

44. Defendant U.S. Census Bureau is an agency within the Department of Commerce responsible for planning and administering the decennial census. 13 U.S.C. § 2.

FACTUAL ALLEGATIONS

I. Defendants' Constitutional and Statutory Obligations.

45. Under the United States Constitution, the federal government must conduct an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2.

46. The population totals produced by the decennial enumeration are used to apportion congressional representatives to the various states. *Id.* Census figures are also used in state and local redistricting and in the distribution of federal funds to communities across the United States.

47. The Enumeration Clause requires that decisions relating to the census bear a "reasonable relationship" to the constitutional purpose of the enumeration. *Wisconsin*, 517 U.S. at 20.

48. Similarly, the Census Act imposes a mandatory duty on the Secretary of Commerce to "conduct a census that is accurate and that fairly accounts for the crucial

representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

49. Consequently, the Secretary of Commerce and the Census Bureau are constitutionally obligated to make decisions in conducting the census that are reasonably related to achieving a fair and accurate calculation of the population of the United States.

II. The Census Bureau's Pre-COVID-19 Operational Plans for the 2020 Census.

50. For the 2020 Census, the Census Bureau spent the better part of a decade designing operations to fulfill its constitutional and statutory mandate, including: soliciting and incorporating feedback from seasoned experts, advisors, and community groups; testing various features of its data-collection and data-processing operations; and ensuring that its decisions for conducting the census reflected sound, scientifically based judgment.

51. To this end, the Bureau created an operational plan to guide its efforts, including its efforts to collect data from census respondents and to process that data into usable forms for constitutionally and statutorily mandated purposes, including reapportionment and redistricting.

52. On December 31, 2018, the Bureau promulgated the final version of its operational plan, which the Bureau called "Version 4.0" (hereinafter referred to as the "Final Operational Plan"). *See* U.S. Census Bureau, Final Operational Plan (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf. In the Final Operational Plan, the Census Bureau stated that its goal for the 2020 Census is to "count everyone once, only once, and in the right place."

53. Under the Paperwork Reduction Act, the Office of Management and Budget must review and approve the plans for any federal survey, including the decennial census, to ensure that those surveys meet government standards, minimize respondent burden, and maximize the utility of the collected information. 44 U.S.C. § 3504(c).

54. The Office of Management and Budget formally reviewed and approved the Census Bureau's pre-COVID-19 plans for the decennial census, including the Final Operational Plan.

55. The Final Operational Plan includes over 200 pages of detailed and transparent

conclusions for achieving the 2020 Census's objective of an accurate count.

56. The Final Operational Plan reflects the conclusions of various experts including survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

57. The Final Operational Plan states that it "reflects and supports evidence-based decision-making" about the operations necessary to gather and process census responses from every household in the country.

58. The Final Operational Plan states that it was "informed through research, testing, and analysis conducted from 2012 through 2018."

59. The Bureau conducted at least fifteen tests between 2012 and December 31, 2018, when it published its Final Operational Plan.

60. Career Bureau staff developed the Final Operational Plan following substantial consultation with outside experts and census stakeholders, including members of the Census Scientific Advisory Committee and the National Advisory Committee.

61. The Census Bureau also produced a series of "detailed operational plans," which supplement the Final Operational Plan, and provide more parameters for the individual operations that, together, comprise the 2020 Census.

62. The detailed operational plans likewise reflect the conclusions of various subject-matter experts regarding how to complete an accurate count.

63. The Bureau's Final Operational Plan contains several major categories of operations. Two of those categories are particularly important for purposes of this lawsuit: data-collection and data-processing.

64. "Data-collection" refers to operations through which the Bureau obtains information from and about all the people living in the United States.

65. "Data-processing" refers to operations through which the Bureau fills in any gaps in the personal information that it collects from people, transforms the resulting data into usable forms, checks those results for accuracy and other aspects of data quality, and publishes those results, among other things.

66. The Bureau must thoroughly, fully, and correctly perform both categories of

operations—collection and processing—to achieve its stated goal of counting everyone once, only once, and in the right place.

A. Census Data Collection

67. During the census, the Bureau attempts both to determine the number of people in the country and their characteristics, such as their race and ethnicity.

68. Although the Census Bureau planned to deploy many methods during the 2020 Census to collect counts and characteristics from households around the country, the Bureau contemplated, in both the Final Operational Plan, and in the supplemental detailed operational plans, that three methods would account for the overwhelming majority of census responses: the "Self-Response" method; the "Update Leave" method; and the "Non-Response Follow Up" method. *See* U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Non-Response Follow Up Operation* (July 15, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf.

69. The Self-Response method was the "primary methodology for the 2020 Census." Under this method, heads of households would provide their 2020 Census responses directly to the Census Bureau by mailing back a paper census form, filling out a digital form on the Bureau's online census portal, or calling into telephone hotlines to provide their responses to Bureau employees operating those hotlines.

70. The Update Leave method was the methodology for reaching housing units that could not receive physical mail or did not have verifiable mailing addresses. Under this method, Bureau employees would travel throughout both rural and urban areas, leaving invitations to participate and paper census questionnaires at these housing units, so that the people living in those locations could respond themselves.

71. The Self-Response method and the Update Leave method are crucial for obtaining accurate information about the number of people in the country and their characteristics, because data people report about themselves and the members of their housing units is the highest quality data that the census collects.

72. But for the tens of millions of households that do not report their personal data through the Self-Response or Update Leave method, the Bureau's next-best source of personal data is data it collects directly from people through the Non-Response Follow Up method.

73. As part of the Non-Response Follow Up method, the Bureau sends its employee enumerators directly to housing units so that they can attempt to speak with a person occupying each unit and obtain information about everyone who should be counted in that unit.

74. The Bureau requires enumerators to record their responses for each household through iPhones that the Bureau specifically contracted and customized for this purpose. The enumerators' iPhones include software designed to lead enumerators consistently and reliably to solicit information from people at their doors. The enumerators' iPhones also include software to ensure that any data collected from housing units remains confidential as it is being transmitted to the Bureau. The limited supply of these customized iPhones places a limit on the number of enumerators that the Bureau can deploy in the field.

75. The Bureau's Detailed Operational Plan for Non-Response Follow Up, which supplements the Final Operational Plan, sets out a specific protocol for conducting Non-Response Follow Up.

76. Under the Detailed Operational Plan, each housing unit assigned for a visit from an enumerator was eligible for up to six "contact days." A "contact day" could include more than one attempted contact per day.

77. The Bureau concluded it could pursue less than six contact days only under certain scenarios.

78. One scenario that would allow the Bureau to pursue fewer than six contact days was the existence of high-quality administrative records for the housing unit. The Census Bureau has collected data from federal administrative agencies, such as the Social Security Administration, the Internal Revenue Service, and the Department of Housing and Urban Renewal, among others, as well as data from states, which it uses to provide information about the count and characteristics of non-responsive households.

79. If the Bureau had located administrative data from federal and/or state

administrative records and concluded that those records contained accurate demographic data for the occupants of a housing unit, the Bureau's enumerators would attempt only one contact with that unit. If—during that contact attempt—the enumerator did not succeed in finding a live person at the unit, then the Bureau would use the information in the administrative records to fill in the census responses for that unit during the data-processing phase of the 2020 Census.

80. A second scenario that would allow the Bureau to pursue less than six contact days would arise if the Bureau identified a proxy—a person such as a neighbor or landlord that the enumerator could ask for information about the occupants of the housing unit in question. After a third failed contact attempt, a unit would become eligible for being counted through proxy.

81. Proxies can produce many types of data. For instance, proxies are useful for helping the Bureau identify whether a housing unit is vacant—and thus should be marked "vacant" in the Master Address File that the Bureau uses to keep track of the overwhelming majority of housing units that it must enumerate—or non-existent—and thus should be deleted from the Master Address File. For the 2020 Census, the Bureau is planning to use administrative records, such as the United States Postal Service's directory of non-deliverable addresses, to identify vacant housing, but proxies are generally more accurate for this purpose. Finally, proxies provide vital data for other operations that the Bureau undertakes during its data-processing phase, described further below.

82. If the Bureau is unable to enumerate a household after six contact days, in most cases, it will resort to less accurate methods for determining the count and characteristics of the household during its data-processing phase, described below.

83. The Bureau performs several other vital operations in addition to door-knocking during the Non-Response Follow Up period, including a series of operations to ensure the quality of the data that it collects in the field.

84. During the Non-Response Follow Up process, the Bureau: follows up with people who self-responded to the census online but did not enter their unique census identification number to ensure that they are counted in the right place (a process known as "Field

Verification"); and corrects information reported erroneously or omitted from previously submitted census forms (a process known as "Coverage Improvement").

85. In addition, the Bureau re-collects census responses in select instances to ensure that the original submissions were accurate (a process known as "Self-Response Quality Assurance"). This operation protects against enumerators falsifying the information that they provide to the Bureau. Specifically, the Bureau conducts quality control reinterviews of a sample of households. This component is designed to deter and detect cases where enumerators have provided false information about the housing units they are assigned to canvass.

86. Quality control reinterviews are part of a broader set of protocols that the Bureau has developed to guard against factors that endanger the accuracy of the count. Non-Response Follow Up is thus important not only for collecting information, but also for ensuring that the information that is collected is accurate. These two components—gathering data and ensuring its accuracy—must both occur for the Bureau to get a fair and accurate count.

87. The Bureau anticipated that approximately 60% of housing units nationally would respond to the 2020 Census through Self-Response and Update Leave, potentially making up to 40% of housing units targets for Non-Response Follow Up.

88. A Non-Response Follow Up universe of 40% of the housing units in the country would have been the largest follow up universe on a percentage basis since at least 1970.

89. The Census Bureau did not anticipate that the Non-Response Follow Up universe in 2020 would mirror the demographic makeup of the nation's population as a whole.

90. Instead, the Census Bureau anticipated that the Non-Response Follow Up universe in 2020 would contain a disproportionate number of people who belong to communities that the Bureau calls "hard-to-count."

91. The Final Operational Plan describes hard-to-count populations as including, but not limited to, the following populations: young children; highly mobile persons; racial and ethnic minorities; non-English speakers; low-income persons; persons experiencing homelessness; undocumented immigrants; persons who have distrust in the government; lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) persons; persons with mental and

physical disabilities; and persons who do not live in traditional housing.

92. Historically, these populations have had low self-response rates and have, thus, made up disproportionate shares of households that must receive contact days during Non-Response Follow Up.

93. Consequently, the Final Operational Plan acknowledges, "[t]he NRFU Operation is entirely about hard-to-count populations."

94. The Final Operational Plan also acknowledges that hard-to-count populations may require more outreach than the Non-Response Follow Up method would normally provide, and the Bureau designed its Final Operational Plan accordingly.

95. The Final Operational Plan states that "[w]hile most cases receive a maximum of six attempts, cases in hard-to-count areas may receive more than six attempts to achieve a consistent response rate for all geographic areas."

96. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

B. Census Data-Processing

97. After collection activities are complete, the Census Bureau must process the data.

98. Census data-processing cannot begin until census data-collection concludes.

99. Census data is unusable for its intended purposes until it has been processed.

100. The Census Bureau's data-processing operations transform tens of millions of census responses into usable products, including the population totals used to reapportion seats in the U.S. House of Representatives and to create electoral districts.

101. The Bureau uses its data-processing operations to, among other things, ensure that data received from different data-collection methods are all in a single format allowing them to be processed together.

102. The Bureau uses its data-processing operations to "unduplicate responses"—

meaning to resolve conflicts of information among multiple forms attributable to the same housing unit.

103. The Bureau uses its data-processing operations to determine the final status of a housing unit—such as vacant or inhabited—and determine the total number of people that should be attributed to any apparently inhabited unit that was not counted through Self-Response, Update Leave, or Non-Response Follow Up.

104. The Bureau also uses its data-processing operations to ensure that Bureau data products accurately report respondents' characteristics, such as age, race, and ethnicity.

105. The Bureau uses administrative records and statistical imputation during the data-processing phase to fill in both missing people and their characteristics. But administrative records—especially low-quality administrative records—and statistical imputation are generally less accurate than self-response data.

106. For many households, administrative data provides only low quality information, replete with inaccuracies and incomplete information. This is especially the case for particular communities that are underrepresented in administrative records, including communities of color, immigrants, and low-income families. Use of this low-quality data to fill in missing information for non-responsive households produces less accurate information.

107. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household. Imputation thus assumes the existence of other data points gathered through other data-collection methods—such as self-response, proxies, and administrative records—and generates more accurate results when it can be triangulated against those data points. The processes that the Bureau uses to collect and process self-response data, proxy data, and administrative records are thus critical and inextricably linked to the Bureau's ability to impute data accurately.

108. At various phases of the Bureau's data-processing operations, Census Bureau personnel must review the quality of files in-process before those files can be sent to the subsequent steps in the data-processing operation. These reviews include personnel with subject-matter expertise from several different divisions of the Bureau.

109. The Bureau's data-processing operations help ensure that people are not missed, that other people are not counted multiple times, and that people's characteristics are accurately reported. These processes help eliminate or reduce undercounts, among other kinds of data-quality issues.

C. The Final Operational Plan's Original Timeline for the 2020 Census

110. The Bureau's Final Operational Plan called for data-collection to run from January 21, 2020, to July 31, 2020, for a total of more than six months.

111. In that window, the Self Response method was scheduled to run from March 12, 2020 to July 31, 2020, and the Update Leave method was scheduled for March 15, 2020 to April 17, 2020.

112. The Bureau also scheduled several special operations to occur early in its census taking process. The Service-Based Enumeration, which counts people experiencing homelessness, was scheduled for March 30, 2020 to April 1, 2020, and Group Quarters Enumeration, which counts people living in group housing such as nursing homes, was scheduled from April 2, 2020 to June 5, 2020.

113. The Bureau scheduled the Non-Response Follow Up method to run from May 13, 2020 to July 31, 2020, for a total of approximately eleven and a half weeks.

114. The Bureau scheduled up to five months—from July 31, 2020 to December 31, 2020—to process census data for the congressional reapportionment report.

115. The Bureau also scheduled an additional three months—from January 1, 2021 to March 30, 2021—to process census data for redistricting.

116. The Bureau's timelines for implementing the Final Operational Plan reflect the Bureau's scientifically informed understanding of the time necessary to complete its operations and generate an accurate count.

III. The Census Bureau's COVID-19 Plan.

A. COVID-19 Disrupts the 2020 Census

117. On January 21, 2020, the Bureau began 2020 Census data-collection in remote Alaska.

118. On March 10, 2020, the Bureau began to accept self-responses on its website.

119. Shortly thereafter, many parts of the nation rapidly began to shut down due to the COVID-19 pandemic.

120. The Census Bureau quickly concluded that it could not continue to engage in operations safely. On March 18, 2020, the Bureau announced that it would suspend all field operations for two weeks in order to "help protect the health and safety of the American public." Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/press-releases/2020/operational-update.html.

121. On March 28, 2020, the Bureau announced yet another two-week suspension until April 15, 2020, as the coronavirus pandemic made it impossible to engage in operations.

122. The suspension disrupted several field operations, including Update/Leave method, the Service Based Enumeration counting people experiencing homelessness, and the Group Quarters Enumeration counting people living in group housing.

123. In addition, the Bureau halted all hiring and training of the hundreds of thousands of enumerators it needs to conduct Non-Response Follow Up. This included halting any and all background checks and fingerprinting of enumerators that were conditionally hired at that time.

124. The Bureau also decreased office staff at regional centers responsible for processing mail-in self-response forms and at the Bureau's call centers.

B. Changes to the Final Operational Plan in the COVID-19 Plan

125. On April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the long-term impact of the COVID-19 pandemic. The new plan included a shifted timeline for data-collection and data-processing operations that corresponded with the delays in operations that the pandemic has caused (the "COVID-19 Plan").

126. Adjustments to plans approved by the Office of Management and Budget under the Paperwork Reduction Act must be re-submitted for approval. 44 U.S.C. § 3507(h)(3). The Census Bureau submitted the COVID-19 Plan to the Office of Management and Budget on April 30, 2020. The changes were approved on May 11, 2020.

127. The COVID-19 Plan was designed to "[e]nsure a complete and accurate count of all communities," "[p]rotect the health and safety of the American public and Census Bureau employees," and "[i]mplement guidance from federal, state, and local authorities regarding COVID-19." Press Release, U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19 Fact Sheet* (Apr. 27, 2020).

128. The COVID-19 Plan reflected the conclusions of various experts for how best to proceed with completing an accurate count during the current pandemic. These experts include survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

129. Under the COVID-19 Plan, the Bureau suspended 2020 Census field operations for several months, including those operations that were designed to ensure a full count of traditionally undercounted communities.

130. The COVID-19 Plan provided that the Bureau would start the nationwide Non-Response Follow Up operation on August 11, 2020, and continue the door-knocking process through October 31, 2020.

131. Thus, the COVID-19 Plan delayed the start of most door-knocking by three months while maintaining the same amount of time spent undertaking the process—approximately eleven and a half weeks—as the Final Operational Plan had required.

132. Under the COVID-19 Plan, the Bureau also delayed the start of other operations that enumerate traditionally undercounted populations, including the enumeration of the country's homeless population, which the Bureau shifted from March 30, 2020 to September 22, 2020.

133. And the COVID-19 Plan permitted households to submit self-response data to the Bureau until October 31, 2020, extending the deadline under which private persons were able to submit their responses to be counted by more than one month.

134. The Bureau also granted itself one additional month to process data under its COVID-19 Plan, extending the data-processing leg of its operations to nine months given the pandemic. Under this plan, the Bureau would have up to six months to process the data for the apportionment count (between October 31, 2020 and April 30, 2021) and three months to process

the data for redistricting (between April 30, 2021 and July 31, 2021).

135. The Bureau's timelines for implementing the COVID-19 Plan reflect a scientifically informed understanding of the time necessary to appropriately and fully complete its operations and generate an accurate count.

C. Expert and Stakeholder Response to the COVID-19 Plan

136. The Census Bureau solicited feedback on the COVID-19 Plan from relevant area experts and interested stakeholders, including state and local governments and national and community-based non-profit partners.

137. For instance, four former Census Bureau Directors—who served under both Democratic and Republican administrations—issued a statement saying that they had "discussed these operational and schedule adjustments with senior career leadership at the Census Bureau." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

138. These four former Census Bureau Directors further asserted: "Based on (1) our extensive experience in planning, executing, and often adjusting operations of previous decennial censuses, and (2) our firm conclusion that the extension of the field operations reflect careful analysis by the technical, scientific, and operational staff at the Census Bureau, we support the decision and urge Congress to act in concert with it." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

139. Prominent civil-rights groups endorsed the COVID-19 Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that her organization "support[ed] the Census Bureau's updated timeline." Press Release, Leadership Conference Education Fund, *Census Timeline Must Protect Health, Ensure Fair Count* (Apr. 13, 2020), https://civilrights.org/edfund/2020/04/13/census-timeline-must-protect-health-ensure-fair-count/.

D. Implementation of the COVID-19 Plan

140. When announcing the COVID-19 Plan, Secretary Ross and Director Dillingham issued a statement indicating that the Bureau requested that Congress extend by 120 days the December 31, 2020 statutory deadline for reporting the state-population totals to the President for purposes of calculating the state apportionments, and extend by 120 days the March 30, 2021 statutory deadline for delivering redistricting data to the states.

141. That same day, President Trump suggested this request was unnecessary, stating:

142. "I don't know that you even have to ask them. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

143. Indeed, the Census Bureau did not wait for Congress to act before beginning implementation of the COVID-19 Plan. And the Bureau continued implementation of the COVID-19 Plan for over three months through the end of July 2020.

144. For instance, the Census Bureau field operations remained suspended through May 2020.

145. The Bureau only began re-opening a few limited operations, such as the Update Leave method, on a phased basis through mid-June 2020, over two months after the operation was originally planned to occur in the Final Operational Plan.

146. The Bureau did not undertake any Non-Response Follow Up operations in most of the country between May 13, 2020 and July 31, 2020, the timeframe originally set out in the Final Operational Plan.

147. Instead, while the Bureau "soft-launched" door-knocking in select regions of the country in mid-July 2020, the COVID-19 Plan did not call for door-knocking across the country until August 11, 2020, at the earliest.

148. The Bureau ultimately opened six area census offices for Non-Response Follow Up on July 16, 2020, six more on July 23, 2020, thirty-five on July 30, 2020, and forty additional

offices on August 6, 2020.

149. The remaining 161 stateside offices remained unopened until August 9, 2020, including offices in many states and localities with relatively low response rates such as the entire southeastern United States, Texas, New Mexico, Arizona, and Southern California.

150. All along the Bureau continually communicated to the public, and to important local partners, including local governments and national and community based non-profit organizations, that self-responses would be accepted until October 31, 2020, and that Non-Response Follow Up would continue until at least that date.

151. Census partners, stakeholders, and state and local governments relied on the new deadlines set forth in the COVID-19 Plan to redirect their outreach efforts.

152. For example, Plaintiffs Urban League and BAJI, publicized the October 31, 2020 deadline, letting their constituents, members and local organizations know that households had until that time to self-respond. Urban League representatives informed coalition partners participating in the Black Census Roundtable of the new deadlines, and spoke of the deadlines on webinars and other public events. Officials at BAJI publicized the deadlines at public events, including webinars in July 2020, and as part of the organization's social media campaign.

153. Similarly, officials in City of Los Angeles, Harris County, King County, City of San Jose, and City of Salinas, publicized the new deadline while conducting 2020 Census outreach efforts.

154. These public education efforts were significant because they were directed at the general public and at local non-profits that do not primarily work on census issues. The latter often rely on information about the census provided by Plaintiff national non-profits and local governments when communicating with their constituents. Plaintiffs, by disseminating the October 31, 2020 deadline for nearly three months to the public, were largely successful in spreading the understanding that communities had until at least that time to complete the count.

155. For example, the City of Los Angeles announced this date on its own social media platforms and in a social media toolkit that it developed for partner organizations. Los Angeles is deeply concerned that residents have already received information about the October 31, 2020

self-response date and, as a result, will fail to respond before the newly shortened deadline, especially given the Bureau's own minimal efforts at explanation and outreach around the new deadline.

156. Finally, the level of self-response during the 2020 Census, and the ongoing COVID-19 pandemic, provided further evidence for the necessity of continued implementation of the COVID-19 Plan.

157. Under its Final Operational Plan, for example, the Census Bureau had planned to spend eleven and a half weeks canvassing a Non-Response Follow Up universe comprised of 39.5% of households nationally.

158. As of August 9, 2020, the first date of nationwide Non-Response Follow Up, the national self-response rate was 63.2%, meaning that nearly 37% of households nationwide had not yet responded to the census.

159. Several cities with large percentages of traditionally undercounted populations, have even lower response rates. For instance, as of August 14, 2020, the response rate in the City of Detroit was 48.9%, Miami was 49.9%, Philadelphia was 52.3%, Los Angeles was 53.8%, Houston was 54.4%, and New York City was 55.6%.

160. The United States had 24,156 new coronavirus cases on April 13, 2020, the day the Bureau announced its COVID-19 Plan. On August 3, 2020, the United States had approximately 50,000 new coronavirus cases.

161. With COVID-19 limiting the willingness of people to apply for enumerator positions, the areas where the Bureau can safely send enumerators to knock on doors, and the willingness of the public to interact with enumerators, the Non-Response Follow Up operation continues to face far more complications than the Final Operational Plan anticipated.

162. Given these conditions of low response rates and increased coronavirus spread, the Bureau can reasonably expect that it will need to engage in a Non-Response Follow Up operation at least as comprehensive and time-consuming as the operation laid out in the Final Operational Plan.

163. Due to significant delays in operations resulting from the implementation of the

COVID-19 Plan, the Bureau itself has recognized that it would be impossible to produce fair and accurate apportionment numbers to the President by December 31, 2020.

164. On May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of American Indians that, "[w]e have passed the point where we could even meet the current legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am. Indians, *2020 Census Webinar: American Indian/Alaska Native*, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689.

165. On July 8, 2020, Al Fontenot, Jr., Associate Director for Decennial Census Programs and a top Census Bureau official, affirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

IV. The Census Bureau's New Rush Plan.

A. The Announcement of the Rush Plan

166. On August 3, 2020, at the behest of the Secretary of Commerce, Director Dillingham abruptly and without explanation abandoned the COVID-19 Plan and announced the Rush Plan.

167. The Rush Plan drastically shortens the timelines for multiple operations set out in the COVID-19 Plan.

168. The Rush Plan took the form of a short press release on the Census Bureau's website. The press release included a statement from Director Dillingham, which did not provide an explanation for Defendants' decision to suddenly abandon the COVID-19 Plan that the Bureau had adopted and implemented for approximately three and a half months. Nor did it provide any specifics as to why the Bureau no longer believed the timelines called for in the COVID-19 Plan were necessary to ensure an accurate count.

169. The statement noted that the Bureau was taking this action at the direction of the

Secretary of Commerce. But the Secretary made no statement explaining his reason for giving this directive.

170. The Director's statement was largely silent on specific adjustments the Bureau would need to make in order to reengineer its field operations to meet its new, artificially compressed schedule. The statement included proposals for enumerator "awards" and maximizing enumerators' phone and tablet usage, but it did not provide any details about adjustments to the detailed operations provided in the Final Operational Plan.

171. The only adjustments announced under the Rush Plan were severely truncated timelines for conducting data-collection and data-processing operations.

172. Under the Rush Plan, data-collection is now set to end on September 30, 2020, one month earlier than contemplated in the Bureau's COVID-19 Plan.

173. While the Bureau's pre-COVID-19 Final Operational Plan provided 79 days for the nationwide door-knocking stage of the census, and the COVID-19 Plan provided 81 days, the Rush Plan provides just 52 days of nationwide door-knocking.

174. The Rush Plan also cuts post-collection data processing for the apportionment report from up to 6 months as provided in the COVID-19 Plan, and up to 5 months as originally provided in the Final Operational Plan, to less than 3 months.

175. The Rush Plan also shortened the time under which households can self-respond, providing that self-responses delivered after September 30, 2020—which previously would have been timely under the October 31, 2020 deadline—will no longer be counted.

176. While the Rush Plan requires the Bureau to accelerate its operations to complete the 2020 Census by the same deadline contemplated in the Final Operational Plan, it ignores the multiple-month pause in operations, beginning in mid-March 2020, caused by the initial outbreak of COVID-19 in the United States.

177. The decision to rescind the COVID-19 Plan and adopt the Rush Plan was announced without consultation with important stakeholders.

178. As noted above, as late as July 8, 2020, senior Bureau officials were still confirming that it was impossible to complete an accurate count by December 31, 2020.

179. In addition, until July 30, 2020, just four days before the Bureau announced its decision to abandon the COVID-19 Plan, the Bureau was informing respondents on its website that it would engage in Non-Response Follow-Up until October 31, 2020 and that non-responsive households would have until that date to self-respond. Those references were deleted from the website on or about July 31, 2020 and were replaced with the shortened timeframe after the August 3, 2020 announcement.

180. An official at the Government Accountability Office confirmed that Bureau officials told his office that they were given "hours rather than days or weeks" to adjust their plans to finish counting by September 2020. Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

181. While the Census Bureau's decisions, even during the COVID-19 emergency, have often involved consultations with scientific advisory committees, the Committee on National Statistics in the National Academies of Science, other external experts and local government officials, and the thousands of organizations partnering with the Bureau to conduct crucial outreach to historically undercounted communities, no such consultation was made before the Bureau announced its abandonment of the COVID-19 Plan.

182. Census stakeholders immediately denounced the Rush Plan, including stakeholders who had endorsed the COVID-19 Plan.

183. The same four former Census Bureau Directors who endorsed the COVID-19 Plan issued a statement saying that "our expert opinion is that failing to extend the deadlines to April 30, 2021 will result in seriously incomplete enumerations in many areas across our country." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

184. These four former Census Bureau Directors further asserted: "The Census Bureau

will not be able to carry out the NRFU fully and will be forced to take steps such as fewer in-person visits and rely instead on the use of administrative records or statistical techniques on a much larger scale tha[n] in previous census. The end result will be under-representation of those persons that NRFU was expected to reach and, at even greater rates for traditionally hard-to-count populations and over-representation of all other populations with potentially extreme differential undercounts." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

185. The President of the American Statistical Association, the world's largest professional organization of statisticians, issued a statement saying "[t]here is no scientific rationale to curtail the data-collection period for this constitutionally mandated activity, and the premature cessation of census enumeration will produce flawed counts." Letter from Rob Santos, President of the American Statistical Association, to Mitch McConnell, U.S. Senate Majority Leader (Apr. 5, 2020), https://www.amstat.org/asa/files/pdfs/POL-CensusSenateAugust.pdf.

186. Nearly 450 nonpartisan philanthropic organizations who "rely on accurate census data to help identify community needs and to prioritize grantmaking" issued a letter to Secretary Ross and Director Dillingham urging the Bureau to revert to its COVID-19 Plan. Letter from U.S. Philanthropy Leaders to Wilbur Ross, Secretary of the U.S. Dep't of Commerce (Aug. 5, 2020), https://funderscommittee.org/wp-content/uploads/2020/08/Letter-Philanthropic-Leaders-on-Census-Being-Cut-Short-8-5.pdf.

187. Prominent civil-rights groups condemned the Rush Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that "[c]urtailing operations is an obvious ploy to guarantee the Census Bureau won't be able to finish counting millions of people—especially those hit hardest by the pandemic." Press Release, Leadership Conference on Civil and Human Rights, *Trump Plans to Sabotage 2020 Census by Cutting Short Operations* (July 31, 2020),

https://civilrights.org/2020/07/31/trump-plans-to-sabotage-2020-census-by-cutting-short-operations/.

188. And the Census Bureau's own field workers have confirmed the impossibility of this new timeline, explaining that the Rush Plan means that it will not be an accurate count for the next 10 years.

B. The Rush Plan Fails to Appropriately Account for Key Factors Affecting the 2020 Census

189. The Rush Plan fails to account for several important factors that affect the 2020 Census Non-Response Follow Up operation.

190. *First*, the Rush Plan does not adequately account for the large number of households in the Non-Response Follow Up universe.

191. Under the Rush Plan, the Census Bureau must attempt to count approximately the same number of households during Non-Response Follow Up as it anticipated counting in its pre-COVID-19 Final Operational Plan, but the Bureau will have four weeks less than provided in that plan to complete the operation. In other words, the Bureau must now try to complete the same amount of work in just 65% of the time it had originally scheduled to complete that work.

192. Over 37% of households nationwide are non-responsive, and several states have even higher percentages of households in the Non-Response Follow Up universe, including New Mexico (46.1%), South Carolina (42.4%), Texas (41.3%), and Georgia (40.8%).

193. While soft-launches of Non-Response Follow Up began in select locations in mid-July 2020, the operation did not begin in any of these states, with large amounts of non-responsive households, until August 9, 2020.

194. Within states, and in particular cities and localities, there are even higher Non-Response Follow Up workloads. For instance, in Plaintiff Harris County, enumerators must still visit over 41% of households. In the City of Los Angeles, over 46% of households remain to be enumerated. The self-response rate in Los Angeles is approximately 14 percentage points below the final self-response rate the City attained during the 2010 Census. Counting in these jurisdictions also did not begin until August 9, 2020.

195. Moreover, given the time constraints placed by the Rush Plan, counting will need to be conducted while these jurisdictions, in many places, struggle to control a surge in COVID-19 cases.

196. While the Bureau announced on August 11, 2020 that it is now "training census takers to follow up with households by phone" in light of the pandemic, that change in Non-Response Follow Up operations was not anticipated in the Final Operational Plan. Press Release, U.S. Census Bureau, *Door-to-Door Visits Begin Nationwide for 2020 Census* (Aug. 11, 2020), https://www.census.gov/newsroom/press-releases/2020/door-to-door-visits-begin-nationwide.html.

197. Given the traditionally low response rates for phone surveys in the wireless era, following up by phone is unlikely to materially increase response rates.

198. A recent Census Bureau survey running in parallel with the 2020 Census demonstrates the difficulty in obtaining responses via phone or email. This spring, the Bureau began conducting a "Household Pulse Survey" to measure household experiences under the COVID-19 pandemic. This survey solicited participation through emails and text messages. Over the first twelve weeks of this survey, response rates were meager, ranging from 1.3% to 3.8%.

199. *Second*, the Rush Plan does not account for the staffing challenges that the Bureau is currently experiencing, many of which are directly related to the ongoing pandemic.

200. As demonstrated in the soft-launch of Non-Response Follow Up in select locales, the Bureau is already experiencing staffing shortages and retention problems with enumerators.

201. In the midst of the ongoing pandemic, prospective enumerators, many of whom are elderly and at high risk of contracting a severe COVID-19 related illness, are less willing to engage in the required door-to-door canvassing.

202. Indeed, Tim Olson, head of field operations for the 2020 Census, stated at a July 8, 2020 press briefing that "[a]bout a third of our [enumerator] applicants [are] older persons considered high risk of the virus." U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

203. And Deborah Stempowski, the Census Bureau's Assistant Director for Decennial Programs, noted the Bureau's difficulty retaining enumerators in early August 2020, confirming that potential enumerators were "a little hesitant because of the COVID environment." Mike Schneider, *Census Bureau Drop-Outs Complicate Door-Knocking Efforts*, Associated Press (Aug. 8, 2020), https://www.usnews.com/news/us/articles/2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts.

204. In testimony before Congress on July 28, 2020, Director Dillingham confirmed that the Bureau believed that "the pandemic is estimated to increase the number of no shows to training sessions, as well as the number of employees who complete training but decline to show up for work." *Id.*

205. According to reports from census-operations staff working in the field, these predictions have come to pass. One census field supervisor working in the mid-Atlantic noted that, given the new rushed timeline and lack of sufficient staff, "[w]e're just sending bodies out regardless of whether they're ready or not." Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

206. In addition to enumerator low-count and hesitancy, another source of staffing issues involves delays in processing background checks on enumerator applicants and in enumerator onboarding.

207. A June 2020 GAO report on the 2020 Census delays COVID-19 has caused, and the risks the pandemic has exacerbated, noted that the Bureau "will have to quickly hire and onboard sufficient staff to conduct its operations" to reach adequate staffing levels. U.S. Gov't Accountability Office, *COVID-19 Presents Delays and Risks to Census Count* (June 2020), https://www.gao.gov/assets/710/707456.pdf.

208. That same report also noted that, once potential enumerators accept a job offer from the Bureau, the new hires "must wait a minimum of 60 days before they can begin training, a time period during which they must complete fingerprinting and a background check." *Id.*

209. Reports from recently hired enumerators confirm that the Bureau is facing these

technical challenges as well, under the compressed timeline. One recent hire in Boulder, Colorado noted that he lost six potential days of door-knocking because he was unable to complete the Bureau's online training module.

210. Thus, under the Rush Plan, the Bureau will not be able to hire and train sufficient enumerators.

211. Even if it were possible for the Bureau to hire all of the enumerators it will need, the Bureau would also need time and funding to obtain additional equipment for any additional enumerators it hires beyond its initial estimates of equipment. For example, the Bureau would need more of the iPhones discussed above that the Bureau specifically contracted and customized for 2020 Census enumerators.

212. With fewer enumerators in the field, in addition to training and equipment issues, the Bureau cannot ensure that non-responsive households receive the requisite number of visits, as contemplated in the Final Operational Plan.

213. While the Bureau had a $2 billion contingency fund prior to the existence of the COVID-19 pandemic, it has already used $1.5 billion of that fund addressing pandemic-related issues. The remaining $500 million will be needed to further respond to the pandemic, and, in any event, is nowhere near the $1 billion that the administration claims that the Bureau would need to conduct adequate Non-Response Follow Up operations under the Rush Plan.

214. Thus, instead of providing additional enumerators, the Bureau's Rush Plan will likely result in a smaller number of enumerators shouldering larger-than-planned workloads. Increasing workloads for enumerators over a short period of time can result in errors and inaccuracies in counting but it cannot make up for the time lost to the Rush Plan.

215. *Third*, the Rush Plan fails to account for factors relevant to efficient enumeration, such as the time when enumerators visit households.

216. For instance, under the Final Operational Plan, enumerators visit households at specific times of day and on specific days of the week, depending on when residents are likely to answer.

217. Under the Rush Plan, enumerators will be under pressure to complete their work

in a tightly constrained timeframe. As a result, ensuring that non-responsive households receive the requisite number of enumerator visits at the most opportune times for enumeration may become exceedingly difficult, if not impossible. Instead, the Rush Plan increases the likelihood that households will either receive visits at less opportune times, or simply receive fewer visits altogether.

218. *Fourth*, the Rush Plan fails to account for the additional crucial operations that enumerators must conduct, as contemplated in the Bureau's final plans for the 2020 Census. Apart from visiting households upwards of six times, enumerators also engage in a host of additional quality control activities.

219. As noted above, enumerators are expected to visit the households of persons that self-responded to the census online but did not enter the unique identifier provided on census mailers. This "non-ID processing" is necessary to verify the address information provided by respondents. While this process only requires a single visit to a household, it nevertheless must be completed in the compressed timeline provided for under the Rush Plan.

220. Similarly, the Bureau must conduct quality control reinterviews of a sample of households during Non-Response Follow Up. This operation is designed to deter and detect enumerator falsification. Detecting such falsifications will be especially important under the Rush Plan where individual enumerators must shoulder a heavier workload. The use of enumerators to conduct these reinterviews will, under the Rush Plan, place additional strain on the Bureau's already stretched labor resources.

221. Cutting any one of these functions will cause errors and inaccuracies to affect the final 2020 Census data. By reversing the COVID-19 Plan and shortening the timeframe for conducting Non-Response Follow Up by a month, the Bureau will likely need to make cuts to one or more of these operations.

222. By reducing the amount of time and resources necessary to perform the kinds of quality-control measures that the Bureau originally planned for Non-Response Follow Up, the Rush Plan actively dismantles processes that the Bureau has specifically developed over the course of time as checks against falsified census responses. The Rush Plan thus threatens census

accuracy not only by reducing the Bureau's time to *collect* data, but also by reducing the Bureau's time to ensure that the data it has collected has been collected *properly* and *truthfully*.

223. *Fifth*, the Rush Plan fails to account for the other field operations enumerators will need to conduct at the same time as they attempt to speed through door-knocking operations.

224. Under the Final Operational Plan, the Bureau planned to finish specialized operations for counting people experiencing homelessness, and people living in group housing in April 2020, before engaging in nationwide door-knocking. After suspending operations due to COVID-19, the Bureau moved these operations to September 2020, well-before the October 31, 2020 deadline the Bureau set for completing the Non-Response Follow Up operation.

225. The new Rush Plan requires the Bureau to conduct these specialized operations at the same time as it is scrambling to complete Non-Response Follow Up. This will further stretch the Bureau's limited resources and increase the likelihood of missing information.

C. The Rush Plan Also Fails to Appropriately Account for Factors that Will Affect Post-Collection Data Processing

226. The Rush Plan fails to account for the additional strain on data-processing operations resulting from the consequences of the COVID-19 pandemic.

227. Following the outbreak of COVID-19 in the United States in mid-March 2020, colleges and universities across the country closed, and students moved out of campus and off-campus housing. Similarly, many residents of cities, especially those living in COVID-19 hotspots, moved to locations where the virus was less prevalent. In a recent study, three percent of people surveyed reported that they had moved permanently or temporarily as a result of the pandemic.

228. This significant movement of people coincided with Census Day, April 1, 2020, and will lead to confusion about what residence should be listed on responses.

229. It is likely that the Bureau will receive an increased amount of duplicate responses, which will, in turn, require more time and Bureau resources to review and correct.

230. The Rush Plan also fails to account for the Bureau's inability to timely obtain and process all the administrative-records data crucial for completing an accurate count.

231. The Bureau relies principally on Title 26 data—that is, tax returns that individuals file with the Internal Revenue Service ("IRS")—for the administrative records it uses to fill in missing people and their characteristics.

232. Because this year's tax filing deadline was July 15, 2020, and the IRS generally requires three months to transfer Title 26 data to the Census Bureau, the Bureau will not possess all the Title 26 data it is planning to use until mid-October 2020, at the earliest. Once the Bureau has possession of that Title 26 data, it will have to undertake a time-consuming round of additional review and processing, further delaying its ability to use the data for its planned purposes. These delays will compel the data-processing phase of 2020 Census operations to proceed more slowly than the Rush Plan contemplates or would allow.

233. Ultimately, the solution to alleviate each of these problems was articulated in the COVID-19 Plan: provide the Bureau's limited number of enumerators with additional time to conduct the data-collection operations necessary to ensure a complete and accurate census, and provide Bureau staff with additional time to conduct the data-processing operations necessary to ensuring the same. The Rush Plan fails to address these issues or explain why the Bureau's prior conclusions were incorrect..

D. The Rush Plan Does Not Account for Federal Statistical Guidelines

234. In replacing the COVID-19 Plan with the Rush Plan, Defendants departed from federal government statistical standards that promote the accuracy of information collected and disseminated by the agencies.

235. The Bureau's failure to follow these standards further emphasizes its inability to conduct an adequate count in the time and under the conditions that the Rush Plan provides.

236. Under the Paperwork Reduction Act, the Office of Management and Budget is responsible for coordinating the federal statistical system, including the development and implementation of "Governmentwide policies, principles, standards, and guidelines" "concerning [] statistical collection procedures and methods." 44 U.S.C. § 3504(e)(3) (A).

237. The Office of Management and Budget is responsible for issuing guidelines that provide "procedural guidance to Federal agencies for ensuring and maximizing the quality,

objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies." Consolidated Appropriations Act, FY 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

238. One such guideline issued by the Office of Management and Budget provides specific standards to agencies like the Census Bureau, in ensuring the quality and utility of federal statistical surveys, such as the decennial census. Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2 (2006).

239. Under these standards, agencies are required to develop "realistic timetable[s]" for surveys. *Id.* § 1.2.

240. The Bureau failed to take this basic requirement into account when it decided to implement the Rush Plan. The Rush Plan compresses the timeline for counting operations despite evidence of staffing shortages and heavier workload. The Plan attempts to accomplish a task—speedy delivery of results by December 31, 2020—that the Bureau has already deemed "impossible."

241. The standards also require agencies, including the Census Bureau, to "[e]ncourage respondents to participate to maximize response rates and improve data quality." Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2.3.2. This standard requires that the Census Bureau "[e]nsure that the data collection period is of adequate and reasonable length."

242. Again, the Rush Plan does not account for this standard. The Final Operational Plan and the COVID-19 Plan provided for over eleven weeks of Non-Response Follow Up, and up to five and six months, respectively, of post-collection data processing for the apportionment report. The Rush Plan, on the other hand, cuts the time allotted for counting by four weeks, without explaining how it will encourage more efficiency in collecting responses than the plan it reversed.

243. The standards also require the Bureau to plan for "an adequate number of contact attempts" to the respondent and to establish protocols for minimizing enumerator falsification, including "reinterviewing respondents." Office of Mgmt. & Budget, Standards and Guidelines

for Statistical Surveys, Directive No. 2, § 2.3.3.

244. With the Rush Plan significantly cutting the time available to conduct Non-Response Follow Up, it is expected that the Bureau will need to cut particular Non-Response Follow Up processes. This includes reducing the number of housing unit visits it earlier deemed necessary to enumerate a non-responsive household, or cutting back on enumerator reinterviews. Either decision will conflict with the Bureau's obligation to abide by federal statistical standards.

E. The Rush Plan Will Produce Low Quality and Inaccurate Data

245. Ultimately, Defendants' decision to rush completion of the 2020 Census will produce a significantly less accurate census than the COVID-19 Plan.

246. By cutting down the time allotted for door-knocking, the Rush Plan will result in fewer contact days by enumerators to non-responsive households, and less data collected by enumerators about those households.

247. The concerns about inaccuracy resulting from shortening time for Non-Response Follow Up are real and verified. A GAO review of the 2010 Non-Response Follow Up operation determined that local census offices with "higher percentages" of "less complete house-hold data" were more likely to have completed their Non-Response Follow Up in 53 days or less as compared to those offices that took a longer period of time. U.S. Gov't Accountability Office, *2010 Census: Data Collection Operations Were Generally Completed as Planned, but Long-Standing Challenges Suggest Need for Fundamental Reforms* (Dec. 2010), https://www.gao.gov/new.items/d11193.pdf.

248. As noted above, after the Bureau exhausts attempts to enumerate households through methods that render more accurate results, such as self-response and enumerator interviews, the Bureau turns to less accurate sources of data and statistical methods as a last resort to fill in missing information.

249. By curtailing Non-Response Follow Up, the Rush Plan will force the Bureau to resort to less accurate methods of data collection, well before the exhaustion of more accurate methods. Consequently, the Rush Plan will lead to the production of lower-quality information.

250. For instance, under the Final Operational Plan, the Bureau would not consider

low-quality administrative data before conducting the requisite number of contact days for a particular type of housing unit. By reducing the number of enumerator contact days, the Rush Plan will lead to reliance on these types of lower-quality data sources prior to exhausting the more accurate methods contemplated in the Final Operational Plan. Consequently, the Rush Plan will lead to more inaccuracies in the data.

251. Based upon past practices, the Bureau may also use whole-count imputation to calculate missing household data but to an extent and in ways not used previously. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household.

252. In previous censuses, the Bureau imputed upwards of 2.0% of households left over after exhausting its Non-Response Follow Up efforts. Under the time constraints of the Rush Plan, the Bureau will need to turn to imputation before exhausting its in-person enumeration efforts. One former Census Bureau Director estimates that, under the Rush Plan, the Bureau may end up imputing up to 10% of households.

253. Since data produced through the Bureau's current imputation methods are less accurate than data collected from enumerator interviews, Defendants' decision to rush completion of the 2020 Census will result in significantly less accurate total-population data than would have been produced under the COVID-19 Plan. This decline in accuracy will affect both the census's calculations of the total number of people living in the country and the census's recording of the characteristics of those people, and such inaccurate data will not meet the constitutional minimum for conducting the decennial enumeration or satisfy the "strong constitutional interest in accuracy" of the Census. *Utah v. Evans*, 536 U.S. 452, 478 (2002).

254. The Rush Plan will likely exacerbate the quality problems associated with imputation by compromising the Bureau's ability to collect the other kinds of data—such as self-responses, proxies, and administrative records—that it requires to impute most accurately. As noted above, imputation does not occur in isolation from the Bureau's other data sources, but in concert with them. With less data drawn from these other sources and less accurate data drawn from these other sources, the quality of the Bureau's imputation will decline.

255. The Rush Plan will also disrupt the post-collection data processing operations, described above. As noted by Secretary Ross and Director Dillingham in mid-April 2020, following Non-Response Follow Up the Bureau engages in "lengthy, thorough and scientifically rigorous" data processing, which is essential to ensuring an accurate census.

256. In announcing the new plan to rush the completion of the 2020 Census, Director Dillingham stated that the Bureau would "streamline" these operations in order to meet the December 31, 2020 deadline.

257. While the Director has not specified what this "streamlining" means for post-collection operations, the bottom line is that the Bureau cannot fully engage in the operations as contemplated in its Final Operational Plan on the shortened timeframe. As a result, the Bureau will have to cut or reduce its efforts to review and process collected data to ensure accuracy.

F. The New "Rush" Plan Will Create Confusion that Plaintiffs Will Be Forced to Spend Time and Money Counteracting

258. The new plan to rush completion of the 2020 Census also creates additional confusion about census operations at a critical moment in the census-taking process.

259. The Census Bureau's abrupt change will require groups and local governments engaging in Get Out the Count campaigns, including Plaintiff localities and Plaintiff organizations, to expend resources to correct confusion about the last date for counting in the 2020 Census.

260. As noted above, Plaintiff organizations and localities engaged in extensive public information campaigns that publicized the October 31, 2020 deadline.

261. The Rush Plan requires Plaintiffs to expend additional resources in order to update existing public materials, distribute new materials, and engage in more public-facing efforts to educate the public, their constituents, their members and/or constituents, and local organizations that the self-response period for the census ends on September 30, 2020.

262. For instance, in Harris County, officials ordered a mailing to constituents informing them that they had until October 31, 2020 to respond to the census. That order occurred before the August 3, 2020 decision to implement the Rush Plan. In light of the new

plan, the officials were forced to order stickers to cover the reference to October 31, 2020 on the mailer and to dedicate office staff to spend time affixing those stickers and updating the mailer. Similarly, Plaintiffs the City of Los Angeles, BAJI, and Urban League must update advertisements on social media to correct previous communications that referenced the October 31, 2020 deadline.

263. Apart from correcting misinterpretations arising from earlier statements Plaintiffs made in reliance on the Bureau's COVID-19 Plan, Plaintiffs must now also engage in more, unanticipated outreach to educate the public about the Census Bureau's Rush Plan decision. With one month less of counting, there is now increased urgency for non-responsive households to self-respond. As a result, Plaintiffs are developing new plans to reach more households and encourage more census participation.

G. The New "Rush" Plan Will Lead to Undercounting of Minorities

264. The new plan to rush completion of the 2020 Census will exacerbate undercounting of Black, Latino, and Native American communities.

265. As noted above, Non-Response Follow Up, is specifically designed to ensure that traditionally hard-to-count communities, including Black, Latino, and Native American communities are fully counted. By cutting Non-Response Follow Up short, the administration is disrupting the operation most essential to ensuring an accurate count for these communities.

266. For the 2020 Census, Black, Latino and Native American populations make up a disproportionate share of the population in tracts with the lowest self-response rates in the United States. For instance, as of July 23, 2020, one in five residents living in census tracts with the lowest self-response rates was Black, and one in four was Hispanic, far larger proportions than Black and Hispanic shares of the general population.

267. Consequently, Black, Latino, and Native American households will make up a disproportionate share of the Non-Response Follow Up universe.

268. Given the challenges of the shortened Non-Response Follow Up timeline, Black, Latino, and Native American households have a high likelihood of being missed, or inaccurately enumerated through administrative records and imputation. As noted above, these alternative

methods for enumeration will result in lower quality data for these groups.

269. The problem, however, is even more serious because it replicates and exacerbates problems the Census Bureau has found in prior censuses and has striven to correct in subsequent censuses. Data from previous censuses shows that Black, Latino, and Native Americans have historically been undercounted. Over-reliance on alternative methods of data to enumerate a disproportionate share of the population in these groups will further exacerbate potential undercounting in these groups during the 2020 Census.

270. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

271. Truncating Non-Response Follow Up will exacerbate undercounts of communities of color in at least two ways: first, by missing members of those communities entirely; or, second, by recording their characteristics incorrectly, such that the census results will not register them as members of communities of color. In either instance, data regarding communities of color will be inaccurate. This inaccuracy then deprives communities of color of federal funding, all the material support that flows from federal funding, the protections of the law, and political power at the federal, state, and local levels.

H. The New Rush Plan Has No Legitimate Justification

272. In announcing the Rush Plan, Defendants provided no express justification. Defendants stated in passing, however, that reporting of apportionment data to the President by December 31, 2020 is required by statute.

273. But there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980).

274. The Supreme Court thus determined that the government can and should substitute apportionment counts that have already been filed and certified with "newer, more

accurate version[s]." *Utah v. Evans*, 536 U.S. 452, 462 (2002).

275. Defendants have also recognized that, in the event of a conflict between the two, the constitutional requirement of a fair and accurate enumeration, rather than the statutory deadline, is the controlling legal requirement. With the COVID-19 pandemic threatening the health and safety of communities across the country, Defendants adjusted 2020 Census operations in the COVID-19 Plan, shifting the timeline by several months. Defendants did not wait for Congress to act to implement this plan, recognizing that the Plan was necessary to protect enumerators and respondents, and to ensure an accurate count.

276. Because of those delays, as the Bureau itself recognized, it was no longer possible for Defendants to produce data by December 31, 2020 that fulfilled their constitutional and statutory mandate. Specifically, the Bureau could not simultaneously pursue an accurate 2020 Census, and speed through completion of census-taking in order to report numbers to the President by the end of the year.

277. Several senior officials charged with actually conducting the 2020 Census confirmed the impossibility of this task throughout the summer, including approximately four weeks before Defendants' abruptly announced their decision to adopt the Rush Plan.

278. The statutory deadline at issue is not mandated by the Constitution. Taking the modest additional time necessary to ensure an accurate census, should not prevent a timely reapportionment, as elections for congressional seats impacted by reapportionment will not occur until 2022.

279. Ultimately, Defendants cannot sacrifice their mandatory *constitutional* obligation to make decisions reasonably related to producing an accurate count in order to comply with a pro forma *statutory* deadline. Congress clearly could not, for instance, satisfy its constitutional obligations by providing the Census Bureau with a single week in which to conduct the census. Strictly adhering to the December 31, 2020 deadline, as applied in extraordinary circumstances of the ongoing pandemic, would be equally unconstitutional.

I. Implementation of the Apportionment Exclusion Order

280. Defendants have not yet sought to justify their motivation for adopting the Rush

Plan, and it cannot be justified on the basis of artificial statutory deadlines. Instead, the timing of the abandonment suggests that the decision was influenced by a desire to implement the President's Executive Memorandum excluding undocumented immigrants from the apportionment count, thereby undercutting the contribution of communities of color to the calculations for equal representation for purposes of congressional apportionment (the "Apportionment Exclusion Order").

281. In late June 2020, the White House took the unprecedented step of adding two political appointees to Census Bureau staff with unspecified job duties. Neither appointee had an expertise in statistics, and both had a demonstrated history of partisan activity. These unusual appointees had previously engaged with the Census Bureau on questions about changing operations and methodology.

282. In mid-July 2020, White House officials reportedly asked congressional appropriators to include $1 billion in the next coronavirus stimulus bill for the purpose of completing the 2020 Census by the December 31, 2020 deadline.

283. This abrupt change in policy coincided with and was motivated by the President's July 21, 2020 issuance of the unconstitutional Apportionment Exclusion Order declaring that it is the policy of the United States to remove undocumented persons from the apportionment count, and requiring the Secretary of Commerce to produce estimates of the number of undocumented persons in the United States when reporting total population counts to the President. As noted, the Apportionment Exclusion Order is currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District.

284. Shortening the census timeline increases the likelihood that, regardless of the outcome of the November 2020 election, this President will have the opportunity to implement his Apportionment Exclusion Order. Delaying reporting until spring—as the COVID-19 Plan issued by the Census Bureau and Department of Commerce previously did—leaves open the possibility that the President will no longer be in office when data is provided, and thus will be unable to effectuate the Apportionment Exclusion Order.

285. Defendants did not justify their sudden, unexplained reversal of position with any evidence that Bureau officials had been wrong in stating, repeatedly, that it would be impossible to produce accurate counts by December 31, 2020. There is also no evidence that the decision to cut short counting operations was driven by the scientifically based judgment of Bureau personnel or external experts.

286. To the extent that Defendants' are motivated by a desire to implement the President's Apportionment Exclusion Order, that motivation is improper. It bears no reasonable relationship to the achievement of a fair and accurate census, and, under the circumstances currently facing the count, implementing the Apportionment Exclusion Order will undermine that goal.

287. Moreover, that Memorandum is just the latest attempt by the President and Secretary Ross to manipulate the census along racial and ethnic lines. Beginning in 2017, Secretary Ross attempted to add an untested citizenship question to the 2020 Census, claiming that the question was necessary to better enforce the Voting Rights Act. In reality, the administration was seeking block-level citizenship data so states could draw district lines in a manner that would disadvantage Black and Latino communities.

288. Defendant Ross's decision was litigated, and enjoined by three district courts. One of those cases ultimately ended up before the Supreme Court. There the Court found that Defendant Ross's stated Voting Rights Act rationale to support the addition of a citizenship question to the 2020 Census was "contrived" and vacated Defendant Ross's decision. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

289. On July 5, 2019, following the Supreme Court's decision, President Trump confirmed the real rationale—and fully justified the Supreme Court's holding that the administration's rationale for this census decision was pretextual—when he stated that the administration sought a citizenship question, not to enforce the Voting Rights Act, but rather "for districting" and "for appropriations." Remarks by President Trump Before Marine One Departure (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

290. Indeed, further evidence that Defendants' actions were pretextual arose from files of a prominent redistricting strategist, Thomas Hofeller. In 2015, Hofeller prepared a study titled "The Use of Citizen Voting Age Population in Redistricting." In the study, Hofeller recommended adding a citizenship question to the census so that states could use citizen voting-age population rather than total population to redistrict. This change in the redistricting base, in Hofeller's words, would be advantageous to "Non-Hispanic Whites" and would undercut the political power of Hispanics.

291. It was later revealed that Hofeller was involved in drafting portions of the memorandum from the Department of Justice to Defendant Commerce seeking addition of a citizenship question on the 2020 Census, including sections relating to the pretextual reason for requesting the question. *See* Ex. 8 to NYIC Pls.' Mot. for Sanctions at 124-31, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. July 16, 2019), ECF No. 635-1; Defs.' Opp. to Letter Mot. to Compel at 3, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Oct. 30, 2018), ECF No. 451.

292. Shortly after the Supreme Court's decision, President Trump issued an executive order, demanding executive agencies provide the Census Bureau with administrative records sufficient to allow the Bureau to determine "the number of citizens and noncitizens in the country." Exec. Order No. 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order explicitly states that the reason this data is necessary is to design "legislative districts based on the population of voter-eligible citizens," instead of total population. *Id.* at 33,823-84.

293. In light of that history, the Apportionment Exclusion Order, and the near-contemporaneous decision to cut counting operations short represent yet another attempt by the administration to manipulate the 2020 Census and potentially undercut the political power of communities of color. Defendants cannot rely on this memorandum as justification to support their decision to undermine the accuracy of the census.

V. Harm to Plaintiffs.

294. Plaintiffs and Plaintiff non-profits' members and/or constituents reside in locales

that will suffer harm as a result of Defendants' decision because that decision is very likely to cause these locales to be more disproportionately undercounted in the 2020 Census than they otherwise would have been.

295. On August 9, 2020, at the beginning of the Non-Response Follow Up operation, Plaintiff City of Los Angeles, had a response rate of just 53.1%, which was significantly lower than the 64.5% statewide response rate in California on that same date.

296. The Urban League, League of Women Voters, and BAJI have affiliates, constituents, and members in major cities across the United States. This includes cities where response rates were lower than their corresponding statewide response rates on the first day of Non-Response Follow Up including San Francisco (61.4%) and Monterey (60.5%) as compared to California (64.5%), Miami (49.6%) as compared to Florida (60.1%), Philadelphia (52%) as compared to Pennsylvania (65.5%), Detroit (48.7%) as compared to Michigan (68.9%), and New York City (54.9%) as compared to New York State (58.9%).

297. Plaintiffs Ellis and Garcia are residents of Houston, Texas. The response rate in Houston at the beginning of Non-Response Follow Up was 54%, which was lower than the statewide response rate for Texas on that date, 58.2%.

298. As noted above, Defendants' decision will result in fewer enumerations through Non-Response Follow Up, increased reliance on low-quality administrative data, and increased imputation. Consequently, Defendants' decision will result in cities' with higher rates of non-response (1) having less accurate data; and (2) experiencing higher rates of undercounting.

299. Because these cities have a higher proportion of households in the Non-Response Follow Up universe than their corresponding states, these cities have a substantially higher likelihood of being undercounted because of Defendants' decision than surrounding communities in their states. These disproportionate undercounts will cause Plaintiffs to suffer both fiscal and representational harm.

A. Funding Harms

300. The Rush Plan will result in loss of federal funding for Plaintiffs Harris County, City of Salinas, and the City of Los Angeles and the communities where members of Plaintiff

non-profits reside, including Miami, Detroit, Philadelphia and New York.

301. Over 130 programs and 675 billion dollars are allocated to states and localities on the basis of census-derived information. This includes funding to states for federal transportation planning purposes, education, and healthcare.

302. Many important federal programs, including Title I Grants under the Every Student Succeeds Act, require states to distribute funds to localities on the basis of census-derived information.

303. State Education Agencies must allocate Title I Grants, at least in part, on the number of children aged 5-17 living in poverty in a local education agency's jurisdiction.

304. Given that members of Plaintiff non-profits reside in cities that are likely to be more undercounted under the Rush Plan relative to surrounding communities in their states, including San Francisco, Miami, Detroit, Philadelphia, and New York City, Defendants' decision will likely deprive the communities where these members reside of Title I Grant funding they would have otherwise received. Similarly, Defendants' decision places Plaintiffs Ellis and Garcia's community at higher risk of deprivation of Title I Grant funding.

305. Several additional federal programs require states to use census-derived information to distribute funds directly to cities and counties, based on their share of a relevant population. For instance, the Low Income Home Energy Assistance Program, the Workforce Innovation and Opportunity Act program, and the Community Services Block Grant Program, all require states to distribute funds to cities and counties, at least in part, on the proportion of a state's low-income residents living in those cities and counties. This data is derived from information collected during the decennial census.

306. Both Harris County and the City of Los Angeles receive funds under these programs. Consequently, disproportionate undercounting of Harris County and the City of Los Angeles, as compared to their states, is likely to result in loss of funds under these and similar programs.

307. Several federal funding programs provide funding directly to cities and counties based on census-derived information. For instance, the Community Development Block Grant

program, and the Emergency Solutions Grant, allocate funding to cities and counties based, at least in part, on their share of the overall population count relative to other metropolitan areas.

308. Of cities with over 500,000 people, the City of Los Angeles had the fourth lowest response rate in the country, just behind Detroit and Philadelphia. Consequently, Los Angeles will likely lose Community Development Block Grant funds because of Defendants' decision.

309. Similarly, members of Plaintiff non-profits live in major metropolitan areas with some of the lowest response rates in the country, such as Miami, Detroit and Philadelphia. Defendants' decision will likely deprive these members' communities of funding under the Community Development Block Grant program.

310. Finally, the allocation of federal transportation including the Surface Transportation Block Grant Program, and the Metropolitan and Statewide Nonmetropolitan Transportation Planning Programs are based on the population of urbanized areas in a state compared to those of other states, as determined by the decennial census.

311. Plaintiffs Ellis and Garcia regularly drive on highways and roads in Texas. Disproportionate undercounting of urbanized areas in Texas during the 2020 Census will result in reduced transportation funding for Texas under federal transportation programs.

B. Representational Harm

312. Defendants' decision will also likely result in representational harm to individual Plaintiffs and to the members of Plaintiff organizations.

313. Plaintiffs Ellis and Garcia reside in Houston, Texas. In terms of self-response rates, Texas ranks 39th in the United States. Approximately four million Texas households are in the Non-Response Follow Up universe, which is more households than any state other than California.

314. Consequently, Defendants' decision will not only cause a substantial undercount in Texas, but that undercount will likely be disproportionate as compared to other states. Texas will likely be deprived of its fair share of representation in the next congressional apportionment.

315. As a result, Defendants' decision is likely to result in reduction of voting power and representation for Plaintiffs Ellis and Garcia, because it will likely cause the loss of a seat in

Texas, and will result in fewer Representatives spread out over the state of Texas.

316. As for Plaintiff City of Los Angeles, at least one study has predicted that, were California to lose a congressional seat because of the final census count, that seat is very likely to come from a district that includes portions of South Los Angeles, thus reducing the city's representational delegation.

317. Defendants' decision will also cause Plaintiff Ellis and members of Plaintiff non-profits to experience a loss of intrastate voting power.

318. By causing disproportionate undercounting of communities in Houston, Detroit, Philadelphia, and Miami, as compared to their corresponding states, Defendants' decision will result in drawing of district lines that do not accurately represent the population of the state, and disadvantage Plaintiffs Ellis and Garcia, and members of Plaintiff organizations that live in undercounted communities.

C. Inaccurate Data

319. Plaintiff local governments will suffer harm from the adverse impact Defendants' decision will have the accuracy of population counts produced by the Census Bureau. Plaintiff local governments often rely on accurate information collected by the Census Bureau for crucial public planning purposes, including planning for how to respond to emergencies.

320. For example, local governments often rely on a Social Vulnerability Index to identify communities that are at high risk during a particular emergency. Government officials rely on this index to determine where to allocate resources before and during emergencies. A Social Vulnerability Index use census data to identify specific populations that may be vulnerable to a particular emergency, including data relating to age, housing density, income status, and race and ethnicity. Inaccurate census data would make disaster planning and emergency response more difficult, and could disrupt important public programs.

321. In Harris County, officials used the Center for Disease Control's Social Vulnerability Index to inform decisions about proper distribution of COVID-19 Relief Funds. The funds were allocated to provide relief to Harris County residents most impacted by the global pandemic. That Social Vulnerability Index, which was based on census data, was used to

identify census tracts with the most vulnerable residents, and applications from residents from those tracts were prioritized and given higher chances of acceptance for funds. Without accurate census data, Harris County would struggle to ensure that crucial relief funds were reaching the communities most in need of them.

322. Similarly, King County relies on accurate census data to inform its public-policy decision making. For instance, the county uses census data to plan public-transit service, and to ensure priority populations have transit access, and to site public health clinics.

323. The low-quality data and undercounting that Defendants' decision will cause will also harm Plaintiffs. For instance, undercounting of Black, Latino, Native American, and immigrant communities will negatively affect the Urban League, League of Women Voters and BAJI by undermining these organizations' core missions of promoting equal and just laws and empowering vulnerable communities through building coalitions and initiating campaigns with African Americans and Black immigrants, and fostering racial, economic, and social equality for the communities they serve.

D. Expending Additional Resources

324. Plaintiff organizations, the Urban League, the League of Women Voters, and BAJI, and Plaintiff local governments, City of San Jose, Harris County, King County, City of Salinas, and City of Los Angeles will need to expend additional resources and divert resources from planned programs and projects in order to address the adverse consequences of Defendants' decision to abandon the COVID-19 Plan, and implement the Rush Plan.

325. Plaintiffs' planned efforts to ensure the effective enumeration of historically undercounted communities were based on the understanding that the Census Bureau would implement the Non-Response Follow Up operation contemplated in the Final Operational Plan and adjusted in the COVID-19 Plan.

326. The abrupt reversal of the COVID-19 Plan, and the implementation of curtailed Non-Response Follow Up in the Bureau's Rush Plan will adversely affect Plaintiffs' plans.

327. Plaintiff organizations and local governments will likely need to adjust plans, and divert resources from other planned activities and programs in order to ensure the communities

they serve are adequately counted. Specifically, Plaintiffs will need to recruit and train staff to engage in increased and expanded outreach to potential non-responsive households in order to make up for fewer enumerator visits, or to other aspects of the Non-Response Follow Up program, such as the reinterview process.

328. For instance, Plaintiff BAJI is planning significant adjustments to its 2020 Census outreach plans in light of Defendants' decision, that include diversion of resources from other sources, and significant expenditures. In order to engage in effective outreach, BAJI needs organizing staff dedicated to civic engagement. With Non-Response Follow Up occurring from August 11, 2020 through October 31, 2020, BAJI anticipated that it could spread its staffing resources over that timeframe to ensure it was meeting its goals within the organization's budget. However, on a shorter timeframe, BAJI needs additional staff on a shorter timeframe, which will require adjusting the organization's budget and priorities for the next several months.

329. The adjustment is also challenging for BAJI as the organization caters to immigrant communities with a variety of language needs. Increasing staffing on a short timeframe poses significant challenges for the organization, because it must locate staff that can communicate with the particular community that the organization is targeting for outreach efforts.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of the Enumeration Clause, and Fourteenth Amendment
(U.S. Const. art. I, § 2; U.S. Const. amend. XIV, § 2)

330. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

331. Under the Enumeration Clause of the U.S. Constitution, Congress, and, by delegation, the Secretary of Commerce, must conduct an "actual Enumeration" of the population. This clause requires that decisions relating to census-taking "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996).

332. The COVID-19 pandemic severely disrupted the 2020 Census, resulting in

months of suspended operations and significant delays in crucial counting processes. Moreover, the public-health crisis continues to impact census operations, as the Bureau struggles to retain enumerators and engage in door-knocking in communities experiencing surges of the virus.

333. To navigate this emergency, the Bureau took necessary action to adjust its operational timelines in the COVID-19 Plan while seeking to maintain the operations and processes included in the Final Operational Plan that had been designed to help ensure a complete and accurate count.

334. Abruptly and without explanation, on August 3, 2020, Defendants abandoned the COVID-19 Plan and implemented the Rush Plan. The Rush Plan does not "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." After delaying all operations for months, the Bureau and its staff repeatedly recognized that it was impossible to produce counts consistent with their duties to ensure a full, fair, and accurate count by December 31, 2020. Indeed, current conditions demonstrate that it is infeasible to obtain a fair and accurate count by the end of the year. Nevertheless, the Defendants abandoned their constitutionally mandated pursuit of fair and accurate data, in favor of the speed of the Rush Plan, and the inaccurate data it will produce.

335. Under these circumstances, the decision to curtail crucial 2020 Census operations violates the Enumeration Clause of the United States Constitution.

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

SECOND CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Arbitrary and Capricious
(5 U.S.C. § 706(2)(A))

337. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

338. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Rush Plan is final agency action because it marks the consummation

of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).

339. In determining whether an action violates the APA, courts consider whether the agency examined relevant data and articulated a satisfactory explanation for its decision, including formulating a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency wishes to depart from an earlier decision, it must acknowledge that change and any reliance interests its previous actions engendered. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105-06 (2015).

340. The Bureau spent several years developing its Final Operational Plan for the 2020 Census. That plan carefully determined the required length of each operation, including the appropriate length for data-collection and data-processing. It also included details about the implementation of the various operations.

341. The COVID-19 pandemic disrupted census operations, and the Bureau responded by adjusting its operations in its COVID-19 Plan. That plan involved retaining the details and the length of time of various operations laid out in the Final Operational Plan, but shifting the timeline for counting several months into the future to account for both the necessity of those operations and the public-health emergency.

342. The Bureau began implementing the plan, and critical operations were suspended and delayed through the summer. Bureau officials publicly and expressly recognized that it was no longer possible to comply with the December 31, 2020 deadline if the Bureau intended to fulfill its constitutional and statutory obligation of producing reasonably accurate population counts.

343. Without explanation and without citing any evidence, Defendants suddenly changed their position and issued a new plan with shortened timelines. Among other things, that change conclusively changed the legal rights and obligations of private households, who now have substantially less time to respond if they wish to be counted in the 2020 Census. Defendants

have provided no evidence to support rescinding the COVID-19 Plan, have failed to acknowledge or explain their departure from their previous conclusions as to the length of time necessary for an accurate census, and have cited no evidence that they could obtain accurate counts on the shortened timeframe. Defendants' unexplained and unjustifiable reversal is precisely the sort of arbitrary and capricious agency action that the Administrative Procedure Act forbids.

344. Defendants' decision also fails to account for several factors relevant to the decision, including the multiple-month long suspension in operations and delay of crucial census operations, the staffing shortages facing the Bureau, the meticulously designed and tested technical requirements for effective enumeration included in the Bureau's Final Operational Plan, and the various quality-control measures the Bureau must engage in to ensure that its reported data is accurate.

345. Consequently, Defendants' action is arbitrary and capricious.

346. This unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

THIRD CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Pretext
(5 U.S.C. § 706)

347. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

348. Under the Administrative Procedure Act, agencies are required to disclose the "genuine justification[] for important decisions." *Dep't of Commerce*, 139 S. Ct. at 2569, 2575-76. Courts will not accept "contrived reasons" provided by agencies as that would defeat the purpose of judicial review. *Id.* at 2576. Moreover, agencies cannot simply avoid providing reasoning for their decision-making altogether.

349. Defendants have decided to cut crucial operations in order to produce 2020 Census population results to the President by December 31, 2020. In announcing that decision, Defendants provided no legitimate justification for abandoning the COVID-19 Plan and

implementing the Rush Plan.

350. Any attempt by the Defendants to rely on the reporting deadline provided under the Census Act as justification for their decision is mere pretext. 13 U.S.C § 141(b).

351. For months, Defendants implemented the COVID-19 Plan, the timeline for which necessarily assumed the statutory deadlines could not defeat the constitutional duty to conduct an accurate enumeration, as applied to the extraordinary circumstances at hand. Defendants made significant adjustments, including months-long delays of census operations, on the assumption that the Bureau could and would conduct a full and robust count through the end of October 31, 2020. Since mid-April 2020, Defendants have expressly and publicly recognized that the Bureau could not provide a complete and accurate count by December 31, 2020. And President Trump maintained that the statutory deadlines need not be followed.

352. Defendants' reversal of position on the 2020 Census timeline appears driven by Defendants' efforts to ensure implementation of the President's unconstitutional Apportionment Exclusion Order, which attempts to exclude undocumented persons from the apportionment count and continues a long-running pattern of racially discriminatory and improperly politically motivated conduct of the 2020 Census.

353. In light of these considerations, Defendants' purported justification is pretextual and, thus, arbitrary and capricious under the Administrative Procedure Act.

354. Defendants' unlawful action has caused, is causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

PRAYER FOR RELIEF

355. Plaintiffs respectfully request that this Court:

356. Declare that Defendants' promulgation of the Rush Plan, and corresponding revocation of the COVID-19 Plan is unconstitutional under the Enumeration Clause, and unlawful under the Administrative Procedure Act.

357. Vacate the Rush Plan, thereby reinstating the COVID-19 Plan.

358. Enjoin Defendants from implementing the Rush Plan or otherwise unlawfully

interfering with the COVID-19 Plan.

359. Award Plaintiffs costs, expenses, and reasonable attorneys' fees.

360. Award any other relief the Court deems just and proper.

Dated: August 18, 2020

LATHAM & WATKINS LLP

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: August 18, 2020

LATHAM & WATKINS LLP

By: */s/ Sadik Huseny*
Sadik Huseny

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
NATIONAL URBAN LEAGUE; BLACK ALLIANCE FOR JUST IMMIGRATION; LEAGUE OF WOMEN VOTERS; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; and CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS, and ADRIAN GARCIA

(b) County of Residence of First Listed Plaintiff New York City, NY
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DEFENDANTS
WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau

County of Residence of First Listed Defendant Washington County, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment Of Veteran's Benefits
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury -Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury – Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities–Employment
- ☐ 446 Amer. w/Disabilities–Other
- ☐ 448 Education

PRISONER PETITIONS

HABEAS CORPUS
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

OTHER
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee–Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC § 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC § 158
- ☐ 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent—Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC § 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation–Transfer ☐ 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Administrative Procedure Act, 5 U.S.C. 701 et seq.

Brief description of cause:
Action to set aside unlawful agency action as arbitrary, capricious, and not in accordance with law, and declare Defendants' actions unconstitutional.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S), IF ANY *(See instructions):*

JUDGE Judge Lucy H. Koh DOCKET NUMBER 5:20-cv-05167-LHK; 5:20-cv-05169-LHK

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) ☐ **SAN FRANCISCO/OAKLAND** ☒ **SAN JOSE** ☐ **EUREKA-MCKINLEYVILLE**

DATE 08/18/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Sadik Huseny

From: Zimmerman, Paul (Federal) b(6) b(6)

Attendees: Brebbia, Sean (Federal); Olson, Stephanie (Federal); Nowell, Laura (Federal)

Location: OSP Conference Line

Importance: Normal

Subject: Tri-Caucus Response

Start Time: Thur 5/14/2020 12:30:00 PM (UTC-04:00)

End Time: Thur 5/14/2020 1:00:00 PM (UTC-04:00)

Required Attendees: Brebbia, Sean (Federal); Olson, Stephanie (Federal)

Optional Attendees: Nowell, Laura (Federal)

Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf

05-XX-2020 DRAFT RESPONSE to Castro et al on EO 13880 v2 + MC + mb + as.docx

CUI/PRIV

Stephanie,

Sean and I would like to have a call with you to discuss b(5) - DP/AC

b(5) - DP/AC

Please let me know if this time works or if there is another time tomorrow that would work better.

Conference Call Dial-In: b(6)
Participant Code: b(6)
Leader Code: b(6)

Thanks,

Paul

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-0000030398

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?

[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-0000030399

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-0000030400

To: Olson, Stephanie (Federal)[SOlson@doc.gov]
From: Foti, Anthony b(6)
b(6)
Sent: Wed 8/12/2020 3:23:18 PM (UTC-04:00)
Subject: Fwd: Letter for The Honorable Dr. Steven Dillingham, Director, United States Census Bureau
2020-08-12.CBM to Dillingham-Census re TIs.pdf
ATT00001.htm

With attachment.

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: "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>
Date: August 12, 2020 at 2:47:30 PM EDT
To: "Brebbia, Sean (Federal)" <SBrebbia@doc.gov>, "Ahmad, Ali M" <ali.m.ahmad@census.gov>, "Foti, Anthony (Federal)" <AFoti@doc.gov>
Subject: Fw: Letter for The Honorable Dr. Steven Dillingham, Director, United States Census Bureau

Next letter from Maloney b(5) - DP just came in.

From: Goss, Trinity <Trinity.Goss@mail.house.gov>
Sent: Wednesday, August 12, 2020 2:31 PM
To: Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>
Cc: Kim, Janet <Janet.Kim@mail.house.gov>; Anderson, Tori <Tori.Anderson@mail.house.gov>; LaNier, Elisa <Elisa.LaNier@mail.house.gov>; Jones, Taylor <Taylor.Jones@mail.house.gov>; MacPherson, Cameron <Cameron.MacPherson@mail.house.gov>; Bush, Anthony <Anthony.Bush@mail.house.gov>
Subject: Letter for The Honorable Dr. Steven Dillingham, Director, United States Census Bureau

Hello—

Please see the letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to The Honorable Dr. Steven Dillingham, Director, United States Census Bureau.

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

August 12, 2020

The Honorable Dr. Steven Dillingham
Director
United States Census Bureau
4600 Silver Hill Road
Washington, D.C. 20233

Dear Dr. Dillingham:

On August 4, 2020, the Committee requested the voluntary appearance of eight senior Census Bureau officials for transcribed interviews regarding the Trump Administration's recent efforts to rush the 2020 Census after previously requesting legislation to delay deadlines for operations and reporting due to the coronavirus pandemic.[1]

On August 7, 2020, you responded by declining to make a single official available for a transcribed interview.[2] In that letter, and in subsequent conversations with staff, the Census Bureau has provided inadequate justifications for declining to make these individuals available to the Committee.

The 2020 Decennial Census is the largest and most complex in history. You have testified under oath that the Census Bureau has undertaken a decade of field-tested preparation to ensure an accurate and complete count,[3] but that the coronavirus pandemic has added "unprecedented" operational difficulties to the Census Bureau's mission.[4]

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[1] Letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to Dr. Steven Dillingham, Director, U.S. Census Bureau (Aug. 4, 2020) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-08-04.CBM%20to%20Dillingham%20re%20Transcribed%20Interviews.pdf).

[2] Letter from Dr. Steven Dillingham, Director, U.S. Census Bureau, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Aug. 7, 2020) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Response%20to%20Chairwoman%20Maloney%20Aug%208%202020.pdf).

[3] Committee on Oversight and Reform, *Hearing with Census Bureau Director, Dr. Steven Dillingham* (Feb. 12, 2020) (online at www.govinfo.gov/content/pkg/CHRG-116hhrg39929/pdf/CHRG-116hhrg39929.pdf).

[4] Committee on Oversight and Reform, *Hearing on Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks* (July 29, 2020).

On April 13, 2020, you and Commerce Secretary Wilbur Ross warned that extensions to various statutory deadlines were necessary "to ensure the completeness and accuracy of the 2020 census."[5] That same day, Secretary Ross informed several Members of Congress, including me, that the Trump Administration was planning to push the deadline for field operations from July 21, 2020, to October 31, 2020. He also sought legislation to extend the statutory deadline to deliver apportionment data to the President from December 31, 2020, to April 30, 2021, and an extension in the statutory deadline to deliver redistricting data to the states from March 30, 2021, to July 31, 2021.

Subsequent statements by Census Bureau officials underscored the urgency of these legislative changes. On May 26, 2020, Tim Olson, Associate Director for Field Operations, said publicly: "We have passed the point where we could even meet the current legislative requirement of December 31. We can't do that anymore."[6]

The Committee has worked in good faith to accommodate the Trump Administration's request. On April 18, 2020, the Census Bureau provided proposed legislative language for securing the statutory extensions. The Committee included extension provisions in the HEROES Act (H.R. 6800), which the House of Representatives passed on May 15, 2020.

In a stark reversal, on August 3, 2020, you announced that the Census Bureau will cut short follow-up operations by a full month, despite significant delays in starting follow-up operations because of the coronavirus pandemic. You also announced that, with respect to the reporting requirement, the Census Bureau would aim to meet "our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce."[7] These reversals were announced after President Trump installed two additional political appointees at the Census Bureau—for a total of six political appointees, which is more than the Census Bureau has had in decades.[8]

At the same time, the Trump Administration has proposed significant changes to the Census Bureau's methodology and field operations. On July 21, 2020, President Trump issued a memorandum ordering the Secretary of Commerce to provide information that would allow him to exclude undocumented immigrants from the apportionment count. At the Committee's July

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[5] U.S. Census Bureau, *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* (Apr. 13, 2020) (online at www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html).

[6] *Republicans Signal They're Willing to Cut Census Counting Short*, National Public Radio (July 28, 2020) (online at www.npr.org/2020/07/28/895744449/republicans-signal-theyre-willing-to-cut-short-census-counting).

[7] U.S. Census Bureau, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020) (online at www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html).

[8] Letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, et al., to Wilbur L. Ross, Jr., Secretary, Department of Commerce (July 13, 2020) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-07-13.CBM%20Gomez%20Raskin%20Connolly%20Clarke%20to%20Ross-DOC%20re%20Cogley%20and%20Korzeniewski.pdf).

29, 2020, hearing, you testified that this directive came without any discussions or input from you—despite the fact that the memorandum seeks to change a highly sensitive and apolitical task that the Census Bureau has historically performed.[9]

The Committee is seeking interviews with Census Bureau staff to understand these current—and ongoing—efforts to change timelines and methodologies midstream, and what impact these changes will have on the accuracy, objectivity, and completeness of the Census. The Committee is also seeking to understand how and when these changes were proposed, as well as what role career Census Bureau officials played in these moves, in order to inform our legislative efforts on these matters.

This is an urgent matter that requires immediate compliance. The Trump Administration announced these unprecedented actions—which are projected to have a direct impact on the completeness and accuracy of the census count—just weeks before the end of the Census. Our investigation is critical to ensuring that the 2020 Census adheres to the constitutional requirement to enumerate every person.

For all of these reasons, I respectfully urge you to make these officials available to the Committee on a voluntary basis. Please confirm by close of business on August 14, 2020, whether you will cooperate with the Committee's investigation or whether the Committee should secure these officials' appearance through compulsory measures.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. In addition, the Committee has jurisdiction over "Population and demography generally, including the Census."[10]

Sincerely,

Carolyn B. Maloney
Chairwoman

Enclosure

cc: The Honorable James R. Comer, Ranking Member

[9] Committee on Oversight and Reform, *Hearing on Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks* (July 29, 2020).

[10] House rule X, clause 1(n)(8).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

LA UNIÓN PUEBLO ENTERO, *et al.*, *

Plaintiffs, *

v. **Case No.: GJH-19-2710**

*

WILBUR L. ROSS, *et al.*,

*

Defendants.

*

* * * * * * * * * * * * * *

MEMORANDUM OPINION

Plaintiffs La Unión del Public Entero ("LUPE"), Promise Arizona, Lydia Camarillo, Juanita Valdez-Cox, Rogene Gee Calvert, Zeenat Nisha Hasan, and Candy L. Gutierrez (collectively "Plaintiffs") brought this action alleging four violations of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, a Fifth Amendment Equal Protection violation, and a conspiracy to violate civil rights pursuant to 42 U.S.C. § 1985 against Defendants Wilbur L. Ross, United States Secretary of Commerce; Steven Dillingham, Director of the United States Census Bureau; the United States Department of Commerce; and the United States Census Bureau (collectively "Defendants"). ECF No. 41. The action stems from the issuance of Executive Order 13800 regarding the collection and distribution of citizenship data. *Id.* Pending before the Court is Defendants' Motion to Un-Relate and Reassign this Case. ECF No. 44. No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2016). For the following reasons, Defendants' Motion to Un-Relate and Reassign this Case is granted.

BC-DOC-0000030416

I. BACKGROUND

In March 2018, Secretary Ross issued a memorandum directing the Census Bureau to include a citizenship question on the 2020 Census. *See Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 693 (D. Md. 2019). "He asserted that the decision was prompted by a December 12, 2017 letter from [the Department of Justice (DOJ)], requesting the addition of a citizenship question to facilitate enforcement of Section 2 of the Voting Rights Act (VRA)." *Id.* Specifically, Secretary Ross explained that "DOJ needed to obtain [citizen voting age population (CVAP)] block level data from Decennial Census data because 'current data collected under the [American Community Survey (ACS)] are insufficient in scope, detail, and certainty to meet its purpose.'" *Id.* A number of individuals and organizations, including Plaintiff LUPE, filed suit in this Court challenging Secretary Ross' decision to add the citizenship question. *Id.* at 691. They alleged that the decision violated the APA and the Constitution, and that it was part of a conspiracy to violate the plaintiffs' civil rights in violation of 42 U.S.C. § 1985. *Id.* The case was randomly assigned to the undersigned judge.

The Court eventually granted the plaintiffs' requested relief and enjoined Defendants from including a citizenship question on the 2020 Census. It found that "the decision to add a citizenship question to the 2020 Census was arbitrary and capricious in violation of the APA," and that "the Secretary's articulated reason for adding a citizenship question to the 2020 Census—responding to DOJ's request—was not his real reason." *Id.* at 749–50. The Court also found that the Secretary's decision violated "the Constitution by unreasonably compromising the distributive accuracy of the Census contrary to the Enumeration Clause's mandate." *Id.* at 691. The Court rejected the plaintiffs' Equal Protection-based claims, concluding that the plaintiffs "did not meet their burden to prove Defendants' actions violate the Due Process Clause or

BC-DOC-0000030417

amount to conspiracy to violate civil rights because [p]laintiffs failed to show that the addition of the citizenship question was motivated by invidious racial discrimination." *Id.* However, newly discovered evidence led the Court to issue an Order indicating its willingness to reconsider that conclusion and the Fourth Circuit remanded the case for that purpose. *See La Union Del Pueblo Entero v. Ross*, 771 F. App'x 323 (4th Cir. 2019).

Meanwhile, parallel cases arising from other jurisdictions reached the Supreme Court. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). The Supreme Court vacated the Secretary's decision under the APA, concluding that there was a "significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575. The Supreme Court also found, however, that "[t]he Enumeration Clause of the Constitution d[id] not provide a basis to set aside the Secretary's decision," and that the Secretary's decision was not arbitrary or capricious because he "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision." *Id.* at 2566, 2570.

Shortly after the Supreme Court issued its decision, President Trump announced that the administration would no longer seek to place a citizenship question on the 2020 Census and instead issued Executive Order 13880, Collecting Information about Citizenship Status in Connection with the Decennial Census, which directs: (1) Secretary Ross to instruct the Census Bureau to create an inter-agency working group to collect citizenship data in connection with the 2020 decennial census for redistricting; (2) the Department of Commerce to "strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship"; and (3) all federal agencies to provide citizenship data via administrative records to the Census Bureau. ECF No. 41 ¶ 1. On July 12, 2019, the Census Bureau published a notice dated July 3,

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2019 stating that Secretary Ross had directed the Census Bureau to collect and produce CVAP information prior to April 1, 2021 that states may use in redistricting. *Id.*

On September 13, 2019, Plaintiffs filed a Complaint in this Court challenging Executive Order 13880 and Secretary Ross' directive. ECF No. 1. They amended their Complaint on October 9, 2019. ECF No. 41. They allege that Secretary Ross' directive has no adequate rationale, is contrary to law, and was made in excess of legal authority and without following proper procedure in violation of the APA, violates the Equal Protection Clause of the Fifth Amendment, and is part of a conspiracy to violate civil rights under 42 U.S.C. § 1985. ECF No. 41. On the Civil Cover Sheet, Plaintiffs indicated that this case is related to *Kravitz v. U.S. Dep't of Commerce*, Case No. GJH–18–1570 (D. Md.), the citizenship question case previously litigated in this Court, and, as a result, the Clerk specially assigned this case to the undersigned judge. *See* ECF No. 1.

On October 11, 2019, Defendants filed a Motion to Un-Relate and Reassign this Case. ECF No. 43.[1] Defendants object to Plaintiffs' designation of this case as related to *Kravitz* and request that the Court allow the case to be randomly assigned. ECF No. 44. Plaintiffs filed an opposition to Defendants' Motion on October 25, 2019. ECF No. 47.

II. DISCUSSION

The "general rule" is that all new cases "are randomly assigned in order to ensure greater public confidence in the integrity of the judicial process, guarantee fair and equal distribution of cases to all judges, avoid public perception or appearance of favoritism in assignments, and reduce opportunities for judge-shopping." *Comm. on Judiciary v. McGahn*, 391 F. Supp. 3d 116,

[1] Defendants filed a Corrected Motion to Un-Relate and Reassign this Case later that same day. ECF No. 44.

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118 (D.D.C. 2019). Related cases are the exception to this general rule. *Id.* Local Rule 103.1(b) provides:

> If counsel for a plaintiff in a civil action believes that the action being filed and one (1) or more other civil actions or proceedings previously decided or pending in this Court (1) arise from the same or identical transactions, happenings, or events; (2) involve the identical parties or property; (3) involve the same patent or trademark; or (4) for any other reason would entail substantial duplication of labor if heard by different judges, counsel shall indicate that fact by designating the case as a 'related case' on the civil cover sheet.

"In determining whether cases are related, the paramount consideration is whether assigning them to the same district judge will further the efficient administration of justice." *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 396 (E.D. Wisc. 2008). "The party requesting the related-case designation bears the burden of showing that the cases are related." *McGahn*, 391 F. Supp. 3d at 119 (citations omitted) (applying the local rules of the United States District Court for the District of Columbia).

The Court concludes that this case is not related to *Kravitz*. First, these cases do not "arise from the same or identical transactions, happenings, or events." *Kravitz* was based on Secretary Ross' decision to include a citizenship question on the 2020 Census, *see* 366 F. Supp. 3d at 691, while this case is based on the President and Secretary Ross' decision to gather citizenship information from administrative records and distribute that data to states for redistricting purposes. Thus, the Court would not be required to examine "the same or identical transactions, happenings, or events" in resolving this case. *Compare Singh v. McConville*, 187 F. Supp. 3d 152, 156–57 (D.D.C. 2016) (finding that cases arose out of a common event or transaction where plaintiffs challenged the same Department of Defense and Army regulations and policies governing requests for religious accommodations), *with Sellers v. Philadelphia Police Comm'r*

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Timoney, Case Nos. Civ.A. 01-3760, Civ.A. 01-3804, Civ.A. 01-3888, 2002 WL 32348499, *2–3 (E.D. Pa. Feb. 7, 2002) (finding that cases based on arrests at the Republican National Convention were not related where multiple arrests occurred during a warehouse raid and an unrelated arrest occurred two days later at a different time and place and under different circumstances). This case also cannot be said to "involve the identical parties or property" as *Kravitz* because, even though some Plaintiffs and Defendants are the same, there is not complete overlap between the parties. Finally, there will be no "substantial duplication of labor" if a different judge hears this case. Although Plaintiffs contend that the predicate events for these two cases are part of a larger conspiracy, this requires the Court to view the cases at a high level of generality. In actuality, this case would require the Court to evaluate a different administrative record, resolve different factual questions regarding the intent behind Executive Order 13880 and Secretary Ross' directive, and eventually, if Plaintiffs succeed, order different relief. These tasks would not *substantially* duplicate any efforts from *Kravitz*. *See Singh*, 187 F. Supp. 3d at 157 (finding cases were related where plaintiffs sought "the same relief"); *Kimbell*, 250 F.R.D. at 396 (finding cases based on two separate projects were related where "the administrative records of the projects substantially overlap"); *Assiniboine and Sioux Tribe of Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 158 (D.D.C. 2002) (finding cases were related because they were

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"replete with common issues of fact"). Thus, this case is unrelated to *Kravitz* and should be randomly assigned.[2]

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Un-Relate and Reassign this Case is granted. A separate Order shall issue.

Date: November 13, 2019

/s/
GEORGE J. HAZEL
United States District Judge

[2] Also pending is Plaintiffs' Motion for Leave to Conduct Expedited Discovery. ECF No. 40. Plaintiffs request leave to serve a subpoena on a third-party records custodian to prevent destruction of evidence that they claim is relevant to their claims. *Id.* Defendants have indicated that they take no position on Plaintiffs' request to serve the subpoena. ECF No. 45. Because the Court has determined that this case should not have automatically been assigned to the undersigned judge, it is not appropriate for the undersigned judge to rule on Plaintiffs' Motion at this time; that Motion should be decided by the judge to whom this case is reassigned. The Court will note that the issue of whether the requested documents are protected (and therefore whether they will likely be destroyed) is currently being litigated in a North Carolina state court. *See Common Cause v. Lewis*, Case No. 19 CVS 014001 (N.C. Super.). The North Carolina court has set a briefing schedule that will end on December 18, 2019. *See* ECF No. 48 at 2. There is no danger of the documents being destroyed until that date, so there is sufficient time for this case to be reassigned and for the new judge to consider Plaintiffs' Motion.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, and JUANITA VALDEZ-COX, *Plaintiffs*, v. WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce, STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau, U.S. DEPARTMENT OF COMMERCE, and U.S. CENSUS BUREAU, *Defendants*.	Civil Action No. 8:19-cv-02710-GJH Hon. George J. Hazel

INTRODUCTION

Legislative defendants and third parties in *Common Cause v. Lewis*, No. 19 CVS 014001 (N.C. Super.) have asked the state court in that case to designate as "Highly Confidential/Outside Attorneys' Eyes Only" documents recovered from the storage devices of deceased Republican operative and demographer, Dr. Thomas Hofeller (the "Hofeller documents"). The legislative defendants have also asked that the Hofeller Documents be destroyed. The Hofeller Documents are relevant to Plaintiffs' claims in this case, and because the fate of these documents is uncertain, Plaintiffs would be irreparably harmed if the documents are destroyed before Plaintiffs can subpoena them.

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Accordingly, Plaintiffs move *ex parte* under Federal Rule of Civil Procedure 26(d) for leave to conduct limited expedited discovery in the form of a subpoena on a third-party records custodian that has possession of the Hofeller documents to prevent destruction of evidence that is relevant to Plaintiffs' claims.

BACKGROUND

On July 11, 2019, President Trump issued Executive Order 13880, Collecting Information about Citizenship Status in Connection with the Decennial Census ("EO 13880"). Among other things, the Executive Order directs Secretary Ross to instruct the Census Bureau to create an inter-agency working group to collect citizenship data in connection with the 2020 decennial census for states to use in redistricting. On July 12, 2019, the Census Bureau published a notice dated July 3, 2019, stating that Secretary Ross had directed the Census Bureau to collect and produce Citizenship Voting Age Population ("CVAP") information prior to April 1, 2021 that states may use in redistricting.

On September 13, 2019, Plaintiffs filed this lawsuit, alleging that the President's order and Secretary Ross's directive that the Department of Commerce provide states with CVAP information for redistricting is motivated by a racially discriminatory scheme to reduce Latino political representation and increase the over-representation of non-Latino Whites, unlawfully advantaging White voters at Latino voters' expense.

Plaintiffs allege that EO 13880 and Secretary Ross's directive should be set aside because they violate the Administrative Procedure Act ("APA"), and that Defendants' actions should be enjoined because they are motivated by racial animus, are discriminatory toward Latinos and non-citizens, and are the result of a partisan conspiracy intended to dilute the representation of

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non-citizens and Latinos, in violation of the equal protection guarantee of the Fifth Amendment of the U.S. Constitution, and 42 U.S.C. § 1985(3).

The *Common Cause v. Lewis* Case

Dr. Thomas Hofeller was a demographer for the Republican National Committee ("RNC") and a partisan operative involved in redistricting processes for decades.[1] Prior to his death in August 2018, Dr. Hofeller was a partner at Geographic Strategies LLC. Geographic Strategies was formed in 2011 and was jointly owned by Dr. Hofeller and Dalton Lamar Oldham, Esq. Geographic Strategies provides "legal and Voting Rights Act compliance advice to the [RNC], the Republican State Leadership Committee ("RSLC"), and their allies." Request for Judicial Notice ("RJN"), Exh. 5 at 1 (Memorandum In Support of Geographic Strategies' Response to Court Order of 7/12/19).

One of Dr. Hofeller's clients was the North Carolina General Assembly during the 2011 redistricting. The plaintiffs in *Common Cause v. Lewis* challenge the maps drawn by Dr. Hofeller for the North Carolina General Assembly as unconstitutional partisan gerrymanders.

On February 13, 2019, the plaintiffs in *Common Cause* subpoenaed documents from third-party Stephanie Hofeller, the daughter of Dr. Hofeller, regarding, among other things, Dr. Hofeller's work related to state legislative redistricting in North Carolina. RJN, Exh. 2 at 2-3 (Plaintiffs' Motion for the Court to Issue Direction to Legislative Defendants). In response to that subpoena, Ms. Hofeller produced four external hard drives and eighteen thumb drives that contained thousands of Dr. Hofeller's map-drawing and consulting documents. *Id.* at 3. Among the Hofeller documents were files from Dr. Hofeller that confirmed his involvement in

[1] *See, e.g.*, Reid Wilson, *Pioneer of Modern Redistricting Dies*, THE HILL (Aug. 18, 2018), *available at* https://thehill.com/homenews/state-watch/402489-pioneer-of-modern-redistricting-dies-at-75.

orchestrating Defendants' efforts to add a citizenship question to the 2020 decennial census for the advantage of, in his own words, "Republicans and Non-Hispanic Whites." Pellegrini Decl., ¶ 2, Exh. A (*La Unión Del Pueblo Entero v. Ross*, No 18-cv-01570-GJH (hereinafter, "*LUPE v. Ross*"), ECF No. 137-3, Grant Decl. Exh. 1 at Ex. D, p. 9) (hereinafter, "Use of CVAP in Redistricting Report").

On or about May 31, 2019, legislative defendants in *Common Cause v. Lewis* sought to unilaterally designate the Hofeller documents as "Highly Confidential/Outside Attorneys' Eyes Only" under the consent protective order in that case, and demanded that plaintiffs in *Common Cause v. Lewis* return and destroy the Hofeller documents in their entirety. RJN, Exh. 2 at 5.

On June 6, 2019, plaintiffs in *Common Cause* filed a motion requesting that the state court direct legislative defendants to stop pursuing the return or destruction of the Hofeller documents or the unilateral designation of materials produced by third parties as confidential or highly confidential under the consent protective order. RJN, Exh. 2 at 2.

On June 15, 2019, Geographic Strategies, a non-party to the *Common Cause* case, sought leave to intervene for the limited purpose of urging the court to designate all of the Hofeller documents as "Highly Confidential." RJN, Exh. 3 at 1-3 (Geographic Strategies LLC's Motion For Leave to Request An Order of Protection, And in The Alternative, To Intervene Under Rules 45 and/or 24). Geographic Strategies alleged that it owned "confidential and privileged documents" contained in the Hofeller documents. *Id.*

On July 12, 2019, Judge Paul Ridgeway, Judge Alma L. Hinton, and Judge Joseph N. Crosswhite (hereinafter, "the *Common Cause* court") issued, as an interim measure, an order that gave Geographic Strategies time to review the Hofeller documents and assert any specific claims of ownership, privileges, or other rights to any of the Hofeller documents, and extended the

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"CONFIDENTIAL" designation of the documents, consistent with the parties' consent protective order, until September 10, 2019. RJN, Exh. 4 at 3-4 (Order on Geographic Strategies LLC's Motion to Designate Hoffeler Files as Highly Confidential and to Compel Production). The order also confirmed that it was "not intended to preclude or impair any other courts of competent jurisdiction from exercising its discretion and compelling the inspection, production or dissemination of any of the Hofeller files in connection with any other matter." *Id.* at 5.

On August 30, 2019, Geographic Strategies filed a response to the *Common Cause* court's order and filed under seal portions of the Hofeller documents over which it claims ownership. RJN, Exh. 5 (Memorandum In Support of Geographic Strategies' Response to Court Order of 7/12/19). Geographic Strategies also asserts that some of the documents contain trade secrets, attorney-client privilege communications, attorney work product, and other confidential material. *Id.* at 9-11. That same day, legislative defendants also filed under seal portions of the Hofeller documents that they assert are covered by either the attorney-client privilege or attorney work-product doctrine and asked the court to order those documents destroyed. RJN, Exh. 7 at 1-4 (Motion for the Court to Issue Direction to Plaintiffs Regarding Privileged Documents Within Their Possession and Control).

On September 5, 2019, the *Common Cause* court extended both the "CONFIDENTIAL" designation of the Hofeller documents and the deadline for plaintiffs and all interested parties to respond to Geographic Strategies' submissions to September 13, 2019. RJN, Exh. 8 at 1 (Order on Unopposed Motion for One-Week Extension of Time for Plaintiffs' Response to Geographic Strategies' August 30 submissions).

On September 13, 2019, counsel for Plaintiffs in this case, Mexican American Legal Defense and Educational Fund ("MALDEF") and Asian Americans Advancing Justice | AAJC

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("Advancing Justice-AAJC") submitted an *amicus curiae* brief in support of the *Common Cause* plaintiffs that, among other things, informed the court that they were filing this present action and that the Plaintiffs in this case would suffer irreparable harm if the Hofeller documents are destroyed because of their importance to proving Plaintiffs' intentional discrimination and conspiracy claims. RJN, Exh. 9 (MALDEF and Advancing Justice-AAJC *amicus curiae* brief).

On September 24, 2019, the *Common Cause* court extended the "CONFIDENTIAL" designation of the Hofeller documents through October 27, 2019. RJN, Exh. 10 at 1.

LEGAL STANDARD

Federal Rule of Civil Procedure 26(d) states that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)," except when authorized by court order. District courts have "wide latitude in controlling discovery and . . . its rulings will not be overturned absent a showing of clear abuse of discretion." *Rowland v. Am. Gen. Fin., Inc.*, 340 F. 3d 187, 195 (4th Cir. 2003) (citing *Ardrey v. United Parcel Service*, 798 F. 2d 679, 682 (4th Cir. 1986)).

"Although the Federal Rules do not provide a standard for the court to use in exercising its authority to order expedited discovery, it is generally accepted that courts use" either (1) the "preliminary-injunction-style analysis,"[2] or (2) the "good cause" standard.[3] *St. Louis Group, Inc. v. Metals and Additives Corp.*, Inc., 275 F.R.D. 236, 239 (S.D. Tex. 2011) (citations omitted).

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[2] Under the "preliminary-injunction-style" approach, as set out in *Notaro v. Koch*, 95 F.R.D. 403 (S.D.N.Y. 1982), a court analyzes the following factors: "(1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and the avoidance of the irreparable injury; and (4) some evidence that the injury that will result without expedited discovery is greater than the injury the party will suffer if the expedited relief is granted." *Notaro*, 95 F.R.D. at 405.

[3] An increasing majority of courts throughout the country use the "good cause" standard to authorize expedited discovery. *St. Louis Group*, 275 F.R.D. at 239-41 (collecting cases); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill.

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Most district courts in the Fourth Circuit apply a "good cause" analysis when determining whether expedited discovery is warranted. *See, e.g.*, *Diretto v. Country Inn & Suites By Carlson*, No. 1:16CV1037(JCC/IDD), 2017 WL 449315, at *3 (E.D. Va. Feb. 2, 2017) (applying the good cause standard); *Chryso, Inc. v. Innovative Concrete Sols. of the Carolinas, LLC*, No. 5:15-CV-115-BR, 2015 WL 12600175, at *3 (E.D.N.C. June 30, 2015) (finding that it is "more appropriate to apply the reasonableness-based test when a party seeks to conduct discovery prior to the Rule 26(f) conference" rather than the preliminary injunction style approach); *Me2 Prods., Inc. v. Does 1-16*, No. 4:16-CV-279-FL, 2016 WL 7017268, at *1 (E.D.N.C. Dec. 1, 2016) ("This court agrees with the courts in this circuit that have applied the reasonableness or good cause standard to requests for expedited discovery."); *Dimension Data N. Am., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 531 (E.D.N.C. 2005) (determining that "a standard based upon reasonableness or good cause, taking into account the totality of the circumstances, is more in keeping with discretion bestowed upon the court in the [FRCP]"); *Carter v. Ozoeneh*, No. CIV. 3:08CV614, 2009 WL 1383307, at *3 (W.D.N.C. May 14, 2009) ("Generally speaking, the Court may authorize expedited discovery upon a showing of good cause.") (citing *Dimension Data N. A., Inc.*, 226 F.R.D. at 531-32).[4]

2000) (declining to apply the *Notaro* test and finding that "it makes sense to examine the discovery request, as we have done, on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances."); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002) (rejecting "the rigid *Notaro* standard" and finding "that the more flexible good cause standard . . . is the appropriate standard under Rule 26(d)").

[4] Some courts apply either a combination of the two approaches or neither standard. *See, e.g.*, *Synthes USA, LLC v. Davis*, No. 4:17-CV-02879-RBH, 2017 WL 5972705, at *10 (D.S.C. Dec. 1, 2017) (finding that "expedited discovery is warranted under either of the two standards for expedited discovery"); *Lewis v. Alamance Cnty. Dep't of Soc. Servs.*, No. 1:15CV298, 2015 WL 2124211, at *2 (M.D.N.C. May 6, 2015) (finding that "the Court need not determine which test to apply, because . . . Plaintiff has failed to satisfy either standard"); *Malon v. Franklin Fin. Corp.*, No. 3:14CV671 HEH-RCY, 2014 WL 5795730, at *3 (E.D. Va. Nov. 6, 2014) (allowing

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Under the "good cause" analysis, a court examines the request "on the entirety of the record to date and the reasonableness of the request in light of the surrounding circumstances." *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 194 F.R.D. at 624). A court may find good cause where, under the totality of circumstances, "the need for expedited discovery in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool*, 208 F.R.D. at 276; *see also Energy Prod. Corp. v. Northfield Ins. Co.*, 2010 WL 3184232, at *3 (E.D. La. Aug. 6, 2010); *Fimab–Finanziaria Maglificio Biellese Fratelli Fila, S.p.A. v. Helio Import/Export, Inc.*, 601 F. Supp. 1, 3 (S.D. Fla.1983) (finding that immediate discovery "should be granted when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time") (citing *Gibson v. Bagas Restaurants*, 87 F.R.D. 60, 62 (W.D. Mo. 1980)).

Courts often find good cause and grant expedited discovery when there is the potential for the loss or destruction of evidence. *See*, *e.g.*, *Gaming v. W.G. Yates & Sons Constr. Co.*, No. 1:16CV30, 2016 WL 3450829, at *3-*4 (W.D.N.C. June 16, 2016) (finding good cause for expedited discovery "to obtain information that may be lost to [the defendant] if the discovery is not allowed"). For example, in *Hard Drive Prods., Inc. v. Does 1-30*, No. 2:11CV345, 2011 WL 2634166 (E.D. Va. July 1, 2011), the district court allowed plaintiffs expedited discovery to "immediately serve Rule 45 subpoenas" to acquire contact information associated with IP

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expedited discovery where plaintiff "made a sufficiently colorable claim under Section 14(a) of the Securities and Exchange Act" and a showing of irreparable harm). A more limited number of courts have endorsed using some variation of the *Notaro* preliminary injunction test. *See ForceX, Inc. v. Tech. Fusion, LLC*, No. 4:11CV88, 2011 WL 2560110, at *5 (E.D. Va. June 27, 2011) (finding that "[i]n the absence of an endorsement from the Fourth Circuit as to the proper test for expedited discovery . . . this Court finds that it is more reliable to continue to use a formulation of the preliminary injunction test.").

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addresses from internet service providers ("ISPs") because IP addresses change over time and ISPs only keep the customer names attached to the IP addresses for a short period of time. Likewise, in *Chryso, Inc.*, 2015 WL 12600175, at *1, the court found that Chryso was entitled to conduct limited expedited discovery "primarily" due "to the potential for the loss or destruction of electronically stored information."

Last, "leave to file subpoenas for early discovery should be granted if there is a showing of irreparable harm and need to proceed ex parte. When these factors are proven, expedited discovery is needed to ensure that 'justice is done to end the alleged harm.'" *Hard Drive Prods., Inc.*, No. 2:11CV345, 2011 WL 2634166, at *2 (citing *McMann v. Doe*, 460 F. Supp. 2d 259, 265-66 (D. Mass. Oct. 31, 2006)). Here, Defendants were served with the complaint on September 18 and 19, 2019, ECF Nos. 11-15, and have 60 days from date of service to file a responsive pleading, Fed. R. Civ. P. 12 (a)(2)-(3). Plaintiffs notified the Department of Justice ("DOJ") of their motion on September 26, 2019, and met and conferred with DOJ attorney, Stephen Ehrlich on September 30, 2019 who informed Plaintiffs that Defendants take no position on Plaintiffs' motion.[5] However, this motion must proceed ex parte because Defendants have not yet appeared. Moreover, there is no prejudice to Defendants because the early discovery sought is directed at a third-party records custodian, not the Defendants. Rather, as described below, Plaintiffs would be irreparably injured if they are forced to wait until after Defendants make an appearance and after the Rule 26(f) conference to serve the subpoena *duces tecum* for the Hofeller documents.

[5] Mr. Ehrlich further noted that "Defendants do not concede that the documents sought by Plaintiffs are relevant to this action, or that any discovery would be appropriate if this case survives Defendants' forthcoming motion to dismiss. Defendants also reserve their right to challenge the relatedness of this case with 18-cv-1570-GJH under Local Rule 103.1." Pellegrini Decl., ¶ 3, Exh. B at 1.

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ARGUMENT

I. Good Cause Exists To Allow Plaintiffs' Limited Expedited Discovery.

Most district courts in the Fourth Circuit apply the good cause analysis as the proper standard because, "taking into account the totality of the circumstances, [it] is more in keeping with the discretion bestowed upon the court in the Federal Rules of Civil Procedure." *Dimension Data N. Am. Inc.*, 226 F.R.D. at 531. Indeed, the cases that apply the preliminary-injunction style approach are distinguishable from the present case, and from cases where a party seeks expedited discovery to preserve evidence, because they generally involve situations where the moving party seeks discovery in connection with a preliminary injunction motion. *See*, *e.g.*, *ForceX, Inc.*, 2011 WL 2560110, at *5 (finding that when the moving party seeks expedited discovery in connection with a motion for preliminary injunction, and absent guidance from the Fourth Circuit, it "is most logical to treat the motion for expedited discovery under a similar standard as to the preliminary injunction standard"). Because Plaintiffs' request for expedited discovery is to preserve evidence that may otherwise be unavailable under the current schedule, and is not in connection with a concurrent motion for a preliminary injunction, case law supports a good cause analysis of Plaintiffs' request for expedited discovery.

Plaintiffs' request for limited and narrow expedited discovery satisfies the good cause analysis. Under the good cause analysis, factors that courts consider "include the procedural posture of the case, whether the discovery requested is narrowly tailored, whether the party seeking the information would be irreparably harmed by waiting until after the parties conduct their Rule 26(f) conference, and whether the information sought would be unavailable or subject to destruction in the absence of expedited production." *Me2 Prods.*, 2016 WL 7017268, at *1.

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Good cause exists for expedited discovery because Plaintiffs would be irreparably harmed if they are unable to subpoena relevant portions of the Hofeller documents immediately because the legislative defendants in the *Common Cause* case and Geographic Strategies seek to have all of the Hofeller documents permanently shielded as confidential and/or destroyed.

a. The Documents Sought Are Relevant To Plaintiffs' Claims.

Plaintiffs here allege that Defendants conspired to discriminate against Latinos and non-U.S. citizens when they instructed the Census Bureau to collect CVAP data and to produce the data, either within or alongside the Public Law 94-171 Redistricting Data File, to states who wish to exclude non-U.S. citizens from the population base used for redistricting. Plaintiffs assert that Defendants' actions violate the equal protection guarantee of the Fifth Amendment and constitute a conspiracy to violate civil rights under 42 U.S.C. § 1985(3).

The Hofeller documents are relevant to the *Arlington Heights* factors that constitute the mosaic of evidence that gives rise to an inference of discrimination. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).[6] Indeed, the Hofeller documents that have thus far been made public demonstrate that the presidential directive that the Census Bureau collect citizenship data and produce this data for use with the P.L. 94-171 Redistricting Data File was motivated by a racially discriminatory scheme to reduce Latino representation and increase over-representation of non-Latino Whites, thereby serving Republican political ends at the expense of Latinos. For example, using the Texas State House of Representatives as a case study, Dr. Hofeller detailed how a switch from drawing equipopulous legislative districts based

[6] The non-exhaustive list of factors include: (1) disparate impact, i.e., whether the action "bears more heavily on one race than another"; (2) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) [d]epartures from the normal procedural sequence" and "[s]ubstantive departures. . ." "particularly if the factors usually considered important. . . favor a decision contrary to the one reached," and (4) "contemporary statements" by those deciding the issue. *Arlington Heights*, 429 U.S. at 266-68.

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on total population, as required by Supreme Court precedent, *see, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964), to drawing districts based on CVAP would reduce the number of districts in South Texas, El Paso, and the Rio Grande Valley. He explained that this reduction in the number of districts would occur because a "considerable population would have to be added to a majority of the Latino districts to bring their population up to acceptable levels." Pellegrini Decl., ¶ 2, Exh. A (Use of CVAP in Redistricting Report at pp. 6-8, Tables 4-8). Dr. Hofeller concluded that using CVAP as an apportionment base would eliminate five of the current thirty-five Latino-majority House districts. *Id.* at 8-9; *see also id.* at Table 2 (demonstrating that the areas experiencing the greatest losses in districts generally had the highest Hispanic population). Dr. Hofeller acknowledged that the shift from redistricting based on total population to CVAP was a "radical departure"—one that would alienate Hispanic voters. *Id.* at 8. But, he concluded, "[a] switch to the use of citizen voting age population as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites." *Id.* at 9.

The work Dr. Hoffeller performed for the RNC in the 2000 redistricting cycle included analysis that allowed Geographic Strategies to advise affiliated Republican groups in many states, not just North Carolina, and Geographic Strategies resumed those analytic and advisory roles for the RNC in 2010. RJN, Exh. 6 at 4-5 (Oldham Decl., ¶¶ 5-7). Dr. Hofeller acquired as many redistricting proposals as possible across the country in connection with his work. His review and analysis included not only maps, but also census and election data that would allow him to provide comprehensive strategic advice to meet his clients' political requirements.[7] *Id.* at 6-7 (Oldham Decl., ¶ 12). It is reasonable to assume, then, that the documents at issue are likely

[7] Any litigation expertise or work would be provided separate and apart from such analyses, and would be contracted separately. *Id.* at 6-7 (Oldham Decl., ¶ 12).

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to contain analysis similar to the analysis of Texas districts contained in the already-public Hofeller report. Pellegrini Decl., ¶ 2, Exh. A (Use of CVAP in Redistricting Report).

Throughout the litigation challenging the addition of a citizenship question to the decennial census, including before the Supreme Court, Defendant Ross maintained that he decided to add the citizenship question to the 2020 decennial census so that the Department of Justice could better enforce the Voting Rights Act of 1965. The documents produced during that litigation revealed instead that Defendant Ross, members of the Trump Administration, A. Mark Neuman, then-Kansas Secretary of State Kris Kobach, members of the DOJ, including then-Attorney General Jefferson Sessions ("AG Sessions") and head of the DOJ's Civil Rights Division John Gore, and Republican strategist Dr. Thomas Hofeller conspired to add a citizenship question to the 2020 census to reduce the response rates of people of color and immigrants, and exclude them from congressional apportionment and redistricting to achieve the objective of reducing their political power. *See generally LUPE v. Ross*, ECF No. 137.

As evidence of Plaintiffs' claims, Plaintiffs seek to subpoena Hofeller's work related to the use of CVAP in redistricting, similar to the Use of CVAP in Redistricting Report discussed above, that was discovered in the Hofeller documents in the *Common Cause* case and any other documents contained in Dr. Hofeller's files that confirm the racially discriminatory motive for collecting and reporting CVAP for states to use for redistricting.[8]

[8] Staff at The New Yorker have copies of the Hofeller documents and confirmed that the Hofeller documents contain files that document Dr. Hofeller's and other Republican efforts to add a citizenship question to the census so that states could use that data for redistricting to "make it easier to pack Democrats and minorities into fewer districts, giving an advantage to Republicans." David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, THE NEW YORKER (Sept. 6, 2019), *available at* https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering.

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b. Plaintiffs' Request For Limited Expedited Discovery Is Narrowly Tailored In Scope.

Plaintiffs' request for expedited discovery is narrowly tailored in scope and is limited to a request to serve a Rule 45 subpoena *duces tecum* on *Common Cause* plaintiffs and/or Stephanie Hofeller for the Hofeller documents. Plaintiffs do not request any other expedited discovery and believe that all other discovery can proceed under the regular schedule as set forth under Rule 26(d).

c. Plaintiffs Would Be Irreparably Injured If The Hofeller Documents Are Destroyed Before Plaintiffs Can Subpoena Them.

"Allowing [plaintiffs] to engage in discovery at this early stage would ensure that data is preserved so that it can be utilized by the parties throughout the course of this litigation." *Chryso*, 2015 WL 12600175, at *5. The Hofeller documents are a direct insight into Defendants' motivations for collecting and reporting CVAP data so that states can use it for redistricting, and Plaintiffs would be irreparably injured if that vital information is not preserved.

Under *Arlington Heights*, one of the factors that a court considers is the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. Dr. Hofeller's 2015 Use of CVAP in Redistricting Report, his communications with members of the Trump Administration and the Trump transition team, and his involvement in the DOJ letter are part of a racially discriminatory scheme to dilute the representation of Latinos and increase overrepresentation of non-Hispanic Whites. The Hofeller documents provide the direct link between the explicitly discriminatory purpose behind both adding a citizenship question and now collecting citizenship data and Defendants' actions. Therefore, destruction of the Hofeller documents would result in the

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destruction of key evidence that establishes Defendants' motivations behind collecting and reporting CVAP. Plaintiffs would be irreparable harmed if this important evidence is destroyed.

d. Absent Expedited Discovery, The Hofeller Documents May Be Unavailable Or Subject To Destruction.

Due to unusual circumstances, Plaintiffs cannot wait until after the Rule 26(f) conference to subpoena the Hofeller documents because they may be subject to destruction or otherwise unavailable at that time. "[W]hen some unusual circumstances or conditions exist that would likely prejudice the party if [they] were required to wait the normal time," expedited discovery should be granted. *Fimab–Finanziaria Maglificio Biellese Fratelli Fila*, 601 F. Supp. at 3.

The legislative defendants in *Common Cause* and Geographic Strategies seek to have the Hofeller documents destroyed or marked "Highly Confidential/Outside Attorneys' Eyes Only" which would effectively require the *Common Cause* plaintiffs to imminently destroy the Hofeller documents. *See*, *e.g.*, RJN Exhs. 1 at 8 (Consent Protective Order ¶ 17), 3, 5 & 7. The *Common Cause* court has temporarily extended the designation of "Confidential" through October 27, 2019, but has yet to issue a definitive ruling on the future of these important documents. To ensure that Plaintiffs are able to subpoena these documents, they must be able to do so right away. Any significant delay could result in Plaintiffs' inability to subpoena them in the future. This is precisely the type of unusual circumstances that warrant expedited discovery. *See*, *e.g.*, *Hard Drive Prods., Inc.*, No. 2011 WL 2634166, at *3 (allowing plaintiffs to "immediately serve Rule 45 subpoenas" to preserve evidence that would possibly be destroyed without expedited discovery).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an order granting them leave for the narrow purpose of serving a Rule 45 subpoena on third-party records custodian *Common*

Cause plaintiffs and/or Stephanie Hofeller.

Dated: October 1, 2019

Respectfully submitted,

By /s/ Terry Ao Minnis

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* Pro hac vice *applications forthcoming*
** *Application for admission forthcoming*
° *Not admitted in DC.*

BC-DOC-0000030438

CERTIFICATE OF SERVICE

I certify that on this 1st day of October, 2019, I caused a copy of the Motion for Leave to Conduct Early Discovery to be sent to all parties receiving CM/ECF notices in this case.

/s/ Terry Ao Minnis
Terry Ao Minnis

BC-DOC-0000030439

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, and JUANITA VALDEZ-COX,

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce,

STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau,

U.S. DEPARTMENT OF COMMERCE, and

U.S. CENSUS BUREAU,

Defendants.

Civil Action No. 8:19-cv-02710-GJH

***EX PARTE* MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY**

Plaintiffs La Unión Del Pueblo Entero ("LUPE"), Promise Arizona ("PAZ"), Lydia Camarillo, and Juanita Valdez-Cox (collectively, "Plaintiffs"), by and through their undersigned counsel, move the Court *ex parte* for relief from Federal Rule of Civil Procedure 26(d)(1) and Local Rule 104(4) and request leave to serve a subpoena pursuant to Federal Rule of Civil Procedure 45 on a third-party records custodian to prevent destruction of evidence that is relevant to Plaintiffs' claims. Plaintiffs' arguments in support of this motion are fully set forth in the attached Memorandum of Law.

BC-DOC-0000030440

Dated: October 1, 2019

Respectfully submitted,

By /s/ Terry Ao Minnis

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* Pro hac vice *applications forthcoming*
*** Application for admission forthcoming*
° *Not admitted in DC.*

BC-DOC-0000030441

CERTIFICATE OF SERVICE

I certify that on this 1st day of October, 2019, I caused a copy of the Motion for Leave to Conduct Early Discovery to be sent to all parties receiving CM/ECF notices in this case.

/s/ Terry Ao Minnis
Terry Ao Minnis

BC-DOC-0000030442

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

DEFENDANTS' CORRECTED MOTION TO
UN-RELATE AND REASSIGN THIS CASE

Defendants Wilbur L. Ross, Jr., 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 reject Plaintiffs' designation of "related" cases and allow this case to be randomly assigned. Defendants' arguments in support of this motion are fully set forth in the attached Memorandum of Law.

DATED: October 11, 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

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

CORRECTED MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO UN-RELATE AND REASSIGN THIS CASE

INTRODUCTION

Despite varying parties alleging new claims against a different governmental decision with different consequences, Plaintiffs have nonetheless designated this case as "related" to the prior litigation concerning a citizenship question on the 2020 Census. The Court should not allow Plaintiffs to undermine the judicial-assignment process and eschew the "general rule" that all new cases "are randomly assigned in order to ensure greater public confidence in the integrity of the judicial process, guarantee fair and equal distribution of cases to all judges, avoid public perception or appearance of favoritism in assignments, and reduce opportunities for judge-shopping." *Comm. on Judiciary v. McGahn*, 391 F. Supp. 3d 116, 118–19 (D.D.C. 2019) (citations omitted).

BACKGROUND

I. Prior Citizenship-Question Litigation

This Court is intimately familiar with the prior citizenship-question litigation. In March 2018, Secretary of Commerce Wilbur Ross issued a memorandum directing the Census Bureau to include a citizenship question on the 2020 Census. *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 693 (D. Md. 2019). "He asserted that the decision was prompted by a December 12, 2017 letter from DOJ, requesting the addition of a citizenship question to facilitate enforcement of Section 2 of the Voting Rights Act." *Id.* Specifically, the Secretary explained that "DOJ needed to obtain [citizen voting age population (CVAP)] block level data from Decennial Census data because current data

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collected under the [American Community Survey (ACS)] are insufficient in scope, detail, and certainty to meet its purpose." *Id.* (quotation omitted).

After several months and five other lawsuits, 26 advocacy organizations and seven individuals filed a sixth lawsuit "challeng[ing] Commerce Secretary Wilbur Ross's decision to include a citizenship question on the 2020 Census."[1] *Id.* at 691; *see generally* Ex. A, First Am. Compl., *LUPE v. Ross*, No. 18-cv-1570 (D. Md. July 9, 2018), ECF No. 42 at ¶¶ 1–392. There, the plaintiffs alleged that "[t]he addition of a citizenship question to the decennial Census survey sent to every household in the country will result in an undercount of Latinos, African Americans, Asian Americans, Native Americans, immigrants, and other hard-to-count populations and will compromise the overall accuracy of the Census." Ex. A ¶ 1; *see e.g.*, *id.* ¶ 275 ("AZLLC and PAZ will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because AZLLC has constituents and PAZ has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question."), ¶ 331 ("LUPE will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because LUPE has members who are Latinos and/or non-U.S.

[1] Before trial, the Court consolidated that case with *Kravitz v. U.S. Dep't of Commerce*, No. 8:18-cv-01041 (D. Md.), ECF No. 90, which raised nearly-identical issues. Four other cases challenging the citizenship question—two in the Southern District of New York and two in the Northern District of California—were litigated simultaneously. *See Kravitz*, 366 F. Supp. 3d at 691–92.

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citizens who will be deterred from responding to the 2020 Census because of the citizenship question.").

The citizenship-question plaintiffs alleged five claims. First, that the Secretary's "inclusion of a citizenship question in the 2020 Census questionnaire violates the 'actual enumeration' clause of the Constitution because the question will cause a disproportionate undercount of non-U.S. citizens, the U.S. citizen family members of non-U.S. citizens, Asian Americans, and Latinos." Ex. A ¶ 366. Second, that the Secretary's "addition of a citizenship question to the decennial Census will result in an undercount of the whole number of persons and inaccurate Census data for the purposes of congressional district apportionment" in violation of the Apportionment Clause. Ex. A ¶¶ 379–80. Third, that "[t]he inclusion of a citizenship question in the decennial Census violates the equal protection guarantee of the Fifth Amendment because it is motivated by racial animus towards Latinos, Asian Americans, and animus towards non-U.S. citizens and foreign-born persons." Ex. A ¶ 371. Fourth, that "Defendant Ross, Defendant Jarmin, President Donald Trump, John Gore, Arthur Gary, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to include a citizenship question in the 2020 decennial Census" in violation of 42 U.S.C. § 1985(3). Ex. A ¶ 375–77. Fifth and finally, that the Secretary's inclusion of a citizenship question violated the Administrative Procedure Act (APA) because, among other things, it "failed to provide any independent analysis or support to justify the DOJ's position that citizenship data is

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required from the decennial Census in order to enforce the Voting Rights Act" and "Defendants failed to complete any studies or tests to research the impact a citizenship question on the decennial Census might have on response rates and accuracy among hard-to-count populations." Ex. A ¶¶ 383–91.

The Court eventually granted the citizenship-question plaintiffs' requested relief. After a year-long litigation and a six-day bench trial, this Court not only found that "the decision to add a citizenship question to the 2020 Census was arbitrary and capricious in violation of the APA," but that "the Secretary's articulated reason for adding a citizenship question to the 2020 Census—responding to DOJ's request—was not his real reason" in violation of the APA. *Kravitz*, 366 F. Supp. 3d at 691, 749–50. The Court also found that the Secretary's decision violated "the Constitution by unreasonably compromising the distributive accuracy of the Census contrary to the Enumeration Clause's mandate." *Id.* at 691. In rejecting the other claims, however, the Court concluded that the plaintiffs "did not meet their burden to prove Defendants' actions violate the Due Process Clause or amount to a conspiracy to violate civil rights because [p]laintiffs failed to show that the addition of the citizenship question was motivated by invidious racial discrimination." *Id.*

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II. The Supreme Court's Decision and Executive Order 13880

While this Court's decision was pending on appeal, parallel cases challenging the citizenship question reached the Supreme Court.[2] Addressing the lawfulness of the Secretary's decision, the Supreme Court held that "[t]he Enumeration Clause of the Constitution does not provide a basis to set [it] aside," and that the Secretary's decision was not arbitrary or capricious because he "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566, 2570 (2019). The Supreme Court nonetheless vacated and remanded the Secretary's decision under the APA, concluding that there was a "significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575.

Several weeks later, 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,"

[2] During the appeal's pendency, but before the Supreme Court's ruling, the plaintiffs moved for relief from judgment and sought an indicative ruling based on "newly discovered evidence" from the late Dr. Thomas Hofeller, which purportedly "provide[d] the link between the explicitly discriminatory purpose behind the citizenship question and the Commerce Department's actions." *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. June 3, 2019), ECF No. 162-1 at 1. The Court concluded that the "newly discovered evidence" raised a "substantial issue" because it suggested "that Dr. Hofeller was motivated to recommend the addition of a citizenship question to the 2020 Census to advantage Republicans by diminishing Hispanics' political power." *Kravitz*, No. 18-cv-1041 (D. Md. June 24, 2019), ECF No. 175 at 8, 13. The Fourth Circuit later remanded the case in light of the Court's ruling, *Kravitz*, No. 18-cv-1041 (D. Md. June 24, 2019), ECF No. 177, but the issue was mooted by subsequent events.

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the President explained that "[t]he Court's ruling . . . has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire."[3] Exec. Order No. 13880 at § 1. But to "ensure that accurate citizenship data is compiled," the President ordered "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, 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 ordered "the establishment of an interagency working group to improve access to administrative records, with a goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." *Id.*

III. The New Case

Nearly three months after EO 13880, Plaintiffs—two organizations and one individual who challenged the citizenship question, plus four additional individuals—now sue the Secretary of Commerce, the Director of the Census Bureau, and their respective agencies. But gone are 24 organizations and six individuals that brought the prior citizenship-question lawsuit. Gone are all allegations that there will be an inaccurate census. Gone are all allegations that Plaintiffs will be harmed by a loss of

[3] *Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census* (July 11, 2019), *available at* https://www.whitehouse.gov/presidentialactions/executive-order-collecting-information-citizenship-status-connection-decennial-census/.

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census-based funding. Gone are all allegations that Plaintiffs will be deprived of "representation in the U.S. House of Representatives as well as in state and local redistricting" due to a "disproportionate undercount" in the census.[4] Gone are all Enumeration Clause and Apportionment Clause claims. Gone are all claims based on the Secretary's decision to include a citizenship question on the 2020 Census. And gone are all allegations that "the Secretary's decision [to include a citizenship question] was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *Kravitz*, 366 F. Supp. 3d at 754.

Instead, Plaintiffs now take issue with the exact decision some of them previously desired—the use of administrative records to gather citizenship data. Their complaint advances six claims: three discrimination-based claims under the Fifth Amendment, the APA, and 42 U.S.C. § 1985(3); an APA claim for supposedly exceeding statutory authority; and two APA claims based on Defendants' purported failure to follow certain procedures and provide "any independent analysis or support to justify collecting citizenship data to produce this data for use with the population tabulations provided to states in the 2020 Census P.L. 94-171 Redistricting Data File." First Am. Compl. ("FAC") ¶ 88–117, ECF No. 41. Plaintiffs' requested relief also has nothing to do with a citizenship question. They request, among other things, an injunction barring Defendants "from

[4] *See, e.g.*, Ex. A ¶ 368.

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collecting data as dictated by EO 13380 and from producing tabulations of citizenship population for use alongside the P.L. 94-171 Redistricting Data File and population tabulations or including citizenship data in the File." FAC at 31–32.

In filing their complaint, Plaintiffs attached a civil cover sheet indicating that this case is "related" to the prior citizenship-question lawsuit (*LUPE v. Ross*, No. 18-cv-1570 (D. Md.)). *See* Civil Cover Sheet at 1, ECF No. 1-1. Defendants oppose that relatedness designation, and this motion follows.

LEGAL STANDARDS

"[I]t has been said that 'attempts to manipulate the random case assignment process are subject to universal condemnation.'" *In re BellSouth Corp.*, 334 F.3d 941, 958 (11th Cir. 2003) (quoting *United States v. Phillips*, 59 F. Supp. 2d 1178, 1180 (D. Utah 1999)). That is because "randomly assigned" cases "ensure greater public confidence in the integrity of the judicial process, guarantee fair and equal distribution of cases to all judges, avoid public perception or appearance of favoritism in assignments, and reduce opportunities for judge-shopping." *McGahn*, 391 F. Supp. 3d at 118–19 (citations omitted).

Indeed, allowing litigants to exploit the case-assignment system would "contravene the very purpose of random assignment, which is to 'prevent judge-shopping by any party, thereby enhancing public confidence in the assignment process.'" *Vaqueria Tres Monjitas, Inc. v. Rivera Cubano*, 341 F. Supp. 2d 69, 72–73 (D.P.R. 2004)

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(quoting *United States v. Mavroules*, 798 F. Supp. 61 (D. Mass. 1992)). So "judges do not choose their cases, and litigants do not choose their judges. We all operate on a blind draw system." *United States v. Kelly*, 519 F. Supp. 1029, 1031 (D. Mass. 1981). Sometimes, "both litigants and judges are disappointed by the luck of the draw. But the possibility of such disappointment is a risk judges and litigants alike must assume if we are to have a blind draw system that is characterized by its integrity." *Id.*

Related cases are the exception to this crucial "general rule." *McGahn*, 391 F. Supp. 3d at 118. The civil cover sheet filed with every complaint, *see* Local Civ. R. 103.1(a), asks plaintiffs to indicate the "related case(s) if any," which it describes as only "related pending cases." *See* Civil Cover Sheet at 1–2, ECF No. 1-1. The District of Maryland Local Rules provide more guidance:

> If counsel for a plaintiff in a civil action believes that the action being filed and one (1) or more other civil actions or proceedings previously decided or pending in this Court (1) arise from the same or identical transactions, happenings, or events; (2) involve the identical parties or property; (3) involve the same patent or trademark; or (4) for any other reason would entail substantial duplication of labor if heard by different judges, counsel shall indicate that fact by designating the case as a "related case" on the civil cover sheet.

Local Civ. R. 103.1(b)(i).

"Any disputes regarding the designation of a case as being related to another case shall be presented by motion to the judge to whom the new or later case has been assigned." Local Civ. R. 103.1(b)(iii). "The party requesting the related-case designation bears the burden of showing that the cases are related." *McGahn*, 391 F. Supp. 3d at 119

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(citations omitted) (applying the local rules of the U.S. District Court for the District of Columbia). "The burden on the party claiming relation is heavy as random assignment of cases is essential to the public's confidence in an impartial judiciary." *Id.*

ARGUMENT

Plaintiffs cannot meet their heavy burden of showing that this case is "related" to the prior citizenship-question case. They satisfy none of the Local Rules' three relevant criteria,[5] and nothing in either case would justify assigning this case to the same judge that heard challenges to a citizenship question unrelated in facts, law, or parties. The Court should therefore reject Plaintiffs' designation of "related" cases and allow this case to be randomly assigned.

I. The citizenship-question case and this case do not "arise from the same or identical transactions, happenings, or events."

Even a cursory glance at the citizenship-question litigation and the new complaint reveals that they do not "arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). For starters, the prior case "ar[o]se from" the Secretary's decision to include a citizenship question on the 2020 Census; this case "arise[s] from" the President's decision to gather citizenship information from administrative records. The Court would not be examining "the same or identical

[5] The citizenship-question case and this case do not "involve the same patent or trademark." Local Civ. R. 103.1(b)(i).

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transactions, happenings, or events" to assess the lawfulness of those incongruent decisions.

For instance, all factual development that occurred in the prior year-long litigation concerned two issues: (1) the process preceding, and the reasons for, the Secretary's decision to include a citizenship question;[6] and (2) whether a citizenship question would cause an inaccurate census count after the Census Bureau's extensive Non-response Follow-up operations and imputation. *See Kravitz*, 366 F. Supp. 3d at 706–12 (recounting extra-record evidence of the Secretary's decision); *id.* at 712–33 (findings of fact related to plaintiffs' standing, including whether the census count would capture individuals deterred from responding to the census because of a citizenship question).

Neither of those factual issues have any relevance here. The series of events leading the Secretary to include a citizenship question on the 2020 Census (and his reasons for doing so) have nothing to do with the compilation of administrative records under a presidential directive. *Compare Kravitz*, 366 F. Supp. 3d at 751 (holding that "the Secretary failed to disclose the true basis for his decision" because "the VRA-enforcement rationale . . . was manufactured to 'get [ ] in place' Secretary Ross's 'months old request'

[6] This Court, like other district courts, allowed discovery beyond the administrative record because "Plaintiffs [ ] made a strong preliminary showing that Defendants [ ] acted in bad faith, and that Defendants' stated reason for adding the citizenship question—to further enforce the VRA—was pretextual." *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 570 (D. Md. 2018). The Supreme Court later held that this was "premature," but "ultimately justified in light of the expanded administrative record." *Dep't of Commerce*, 139 S. Ct. at 2574.

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that a citizenship question be included on the 2020 Census," (citations omitted)) *with* FAC ¶¶ 59–60 (describing reasons for compiling administrative records unrelated to the Voting Rights Act). And census accuracy—the primary focus of the citizenship-question litigation—is irrelevant here because the Complaint does not (and could not) advance any allegation that simply gathering citizenship information from other agencies would affect the census count. *See Dep't of Commerce*, 139 S. Ct. at 2565 (explaining that all of the plaintiffs' injuries "turn[ed] on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count"). The lack of factual overlap alone should resolve this motion in Defendants' favor. *See Cassells v. Hill*, 2008 WL 11336886, at *2 (N.D. Ga. June 24, 2008) ("[A] case is *not* related if it has the same *legal* issue; if any issue of fact is only similar rather than identical; or if the event or transaction is only similar rather than identical.").

But there is also no overlap in legal issues. Unlike the citizenship-question case, Plaintiffs advance no Enumeration or Apportionment Clause claims. And all of Plaintiffs' claims challenge the decision to gather citizenship data from other agencies, not a citizenship question. Take Plaintiffs' primary APA claim: that "Defendants failed to provide any independent analysis or support to justify collecting citizenship data to produce this data for use with the population tabulations provided to states in the 2020 Census P.L. 94-171 Redistricting Data File." FAC ¶ 91. This is not only dissimilar, but antithetical to the citizenship-question plaintiffs' APA argument that "[t]he

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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." 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; *Kravitz*, 366 F. Supp. 3d at 745–47 (holding that the Secretary violated the APA because "the addition of the citizenship question will result in *less* accurate and *less* complete citizenship data").

Plaintiffs' other APA claims follow the same pattern. They allege that "Defendant Ross has exceeded his statutory authority over the conduct of the decennial census by following EO 13880." FAC ¶ 102. This claim has nothing to do with the citizenship-question case, where EO 18880 did not yet exist, and no party questioned the Secretary's authority to alter census questions. *See* 13 U.S.C. § 141(a), (f); *Dep't of Commerce*, 139 S. Ct. at 2572; *Kravitz*, 366 F. Supp. 3d at 734. Plaintiffs also allege that "Defendants departed from statutory and regulatory requirements . . . to collect and produce specific tabulations of population other than total population, race, and Hispanic/non-Hispanic origin for use along with the 2020 Census P.L. 94-171 Redistricting Data File." FAC ¶ 108. But this is a far cry from the previous litigation, where the citizenship-question plaintiffs alleged (and the Court found) that the Secretary violated the APA by "deviating from the Bureau's

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rigorous pretesting standards" for census questions. *Kravitz*, 366 F. Supp. 3d at 748; Ex. A ¶ 386–87. No such claim appears in this case because no census question is at issue.

Plaintiffs' three discrimination-based claims similarly fail to show any relatedness between this case and the citizenship-question case. Here, Plaintiffs theorize that there is a discriminatory motive behind collecting citizenship data from agencies and producing it "for use along with the P.L. 94-171 Redistricting Data File." FAC ¶¶ 96, 112, 115–16. But even if these were cognizable claims, they are entirely distinct from the prior litigation. There, in stark contrast, the citizenship-question plaintiffs argued that "the Secretary's decision [to include a citizenship question] was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *Kravitz* 366 F. Supp. 3d at 754. Neither "depressing immigrant response" nor including a citizenship question are at issue here.

Plaintiffs' requested relief demonstrates the obvious dissimilarity between these cases. While Plaintiffs here request, among other things, an injunction barring Defendants "from collecting data as dictated by EO 13380 and from producing tabulations of citizenship population," FAC at 31–32, the citizenship-question plaintiffs sought an injunction barring "Defendants and their agents from including a citizenship question on the 2020 Census questionnaire and from taking any irreversible steps to include a citizenship question on the 2020 Census questionnaire," Ex. A at 110. It is difficult to see how two cases "aris[ing] from the same or identical transactions,

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happenings, or events," Local Civ. R. 103.1(b)(i), would request entirely disparate relief. *See Singh v. McConville*, 187 F. Supp. 3d 152, 157 (D.D.C. 2016) (finding related cases where "the plaintiffs in both cases seek the same relief").

The "transactions, happenings, or events" at issue—as well as attendant legal questions—are not similar, much less "the same or identical." Local Civ. R. 103.1(b)(i); *see* Oxford English Dictionary, https://www.oed.com/ (last visited Oct. 11, 2019) (defining "identical" as "[b]eing the same in identity; the very same, selfsame: said of one thing (or set of things) viewed at different times or in different relations"). Plaintiffs therefore cannot meet their heavy burden of showing that their case and the citizenship-question case "arise from the same or identical transactions, happenings, or events."

II. The citizenship-question case and this case do not "involve the identical parties or property."

This case and the prior citizenship-question lawsuit do not "involve the identical parties or property." Local Civ. R. 103.1(b)(i). No "property" is at issue. And while three plaintiffs appear in both cases (La Unión del Pueblo Entero, Promise Arizona, and Juanita Valdez-Cox), this case adds four plaintiffs (Lydia Camarillo, Rogene Gee Calvert, Zeenat Nisha Hasan, and Candy L. Gutierrez) and subtracts 24 organizations and six individuals that previously challenged the citizenship question. *Compare* FAC ¶¶ 6–14 *with* Ex. A

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¶¶ 3–130. Even the defendants do not fully overlap.[7] So Plaintiffs cannot show that the two cases "involve the identical parties or property." Local Civ. R. 103.1(b)(i); *see* Oxford English Dictionary, https://www.oed.com/ (last visited Oct. 11, 2019) (defining "identical" as "[b]eing the same in identity; the very same, selfsame: said of one thing (or set of things) viewed at different times or in different relations").

III. There would be no "duplication of labor," let alone a "substantial duplication of labor," if a different judge heard this case.

With little to no overlap in "transactions, happenings, or events," parties, or legal issues, there would be no "substantial duplication of labor" if a different judge heard this case. Local Civ. R. 103.1(b)(i). To begin, this case can (and should) be decided on Defendants' forthcoming motion dismiss, which will present legal arguments tailored to the unique claims in *this* litigation. Since this case alleges new claims against a different governmental decision with different consequences, not even the motion-to-dismiss legal issues will duplicate the citizenship-question case. *See, e.g.*, *LUPE v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018) (finding standing at the motion-to-dismiss stage because, among other

[7] Secretary Ross, the Department of Commerce, and the Census Bureau were defendants in both cases. *Compare* FAC ¶¶ 15–18 *with* Ex. A ¶¶ 131–34. And Ron Jarmin was previously sued in his official capacity as Acting Director of the Census Bureau, while Steven Dillingham is now sued in his official capacity as Director of the Census Bureau. *Compare* FAC ¶ 16 *with* Ex. A ¶ 132. Although this would normally make little difference, *see* Fed. R. Civ. P. 25(d), plaintiffs in the citizenship-question case specifically alleged that, "[m]otivated by their racial and class-based animus . . . Defendant Ross, Defendant Jarmin, President Donald Trump, John Gore, Arthur Gary, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to *include a citizenship question in the 2020 decennial Census*." Ex. A ¶ 375 (emphasis added). No such allegation is leveled against Dr. Dillingham in this case, *see, e.g.*, FAC ¶ 115, and Dr. Jarmin is absent from all allegations in the complaint.

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reasons, the plaintiffs plausibly plead that "the citizenship question would have a coercive effect on individuals' decisions not to respond to the Census"); *id.* at 392–93 (concluding that the citizenship-question plaintiffs plausibly alleged a violation of the Enumeration Clause at the motion-to-dismiss stage); *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 568 (D. Md. 2018) (holding that "the standard of review set forth in § 706(a)(2) can be applied to the Secretary's decision to add the citizenship question").

To the extent this case survives Defendants' motion to dismiss, there would still be no "substantial duplication of labor." Local Civ. R. 103.1(b)(i). As explained above, this case concerns factual and legal claims entirely distinct from the citizenship question, so this case would be no easier for this Court to handle based on its familiarity with the prior litigation. *Molinari v. Bloomberg*, 2008 WL 4876847, at *2 (E.D.N.Y. Nov. 12, 2008) (refusing to relate cases because there was not "the kind of factual—or even legal—overlap between the supposedly related cases that will make it easier for [the prior judge] to get up to speed in the new case based on any familiarity with its predecessors."); *see also Singh*, 187 F. Supp. 3d at 156 (concluding two cases were related, in part because "the Court will be required to make similar factual determinations in both cases"); *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010) (finding related cases where "there is substantial overlap in both the factual underpinning and the legal matters in dispute in each of these hospice cap cases."); *Assiniboine & Sioux Tribe of Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 159 (D.D.C. 2002) (finding relation

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appropriate where there were "many" overlapping "factual issues that this Court must resolve" in both cases).

Assigning this case to a different judge would not hinder judicial economy; it would simply reinforce the tenet that "litigants do not choose their judges." *Kelly*, 519 F. Supp. at 1031. But a contrary ruling would "contravene the very purpose of random assignment, which is to 'prevent judge-shopping by any party, thereby enhancing public confidence in the assignment process.'" *Vaqueria Tres Monjitas*, 341 F. Supp. 2d at 72–73 (quoting *Mavroules*, 798 F. Supp. 61).

CONCLUSION

For the reasons set forth above, the Court should un-relate this case from *LUPE v. Ross*, No. 18-cv-1570 (D. Md.), so that it may be randomly assigned.

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DATED: October 11, 2019

Respectfully submitted,

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b(6)

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO; TEXAS SENATE HISPANIC CAUCUS; TEXAS HOUSE OF REPRESENTATIVES MEXICAN AMERICAN LEGISLATIVE CAUCUS; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; CALIFORNIA LATINO LEGISLATIVE CAUCUS; COALITION FOR HUMANE IMMIGRANT RIGHTS; DOLORES HUERTA FOUNDATION; MI FAMILIA VOTA EDUCATION FUND; SOMOS UN PUEBLO UNIDO; GEORGIA ASSOCIATION OF LATINO ELECTED OFFICIALS; LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT; PROMISE ARIZONA; EL PUEBLO, INC.; MARYLAND LEGISLATIVE LATINO CAUCUS; ASIAN AMERICANS ADVANCING JUSTICE-CHICAGO; ASIA SERVICES IN ACTION, INC.; MINKWON CENTER FOR COMMUNITY ACTION, INC.; CHELSEA COLLABORATIVE; CHICANOS POR LA CAUSA; LATINO COMMUNITY FUND OF WASHINGTON; ARIZONA LATINO LEGISLATIVE CAUCUS; CALIFORNIA ASIAN PACIFIC ISLANDER LEGISLATIVE CAUCUS; CALIFORNIA LEGISLATIVE BLACK CAUCUS; OCA-GREATER HOUSTON; FRIENDLY HOUSE; FOUR DIRECTIONS, INC.; MIA GREGERSON; RAJ MUKHERJI; CINDY RYU; SHARON SANTOS; OLIVER SEMANS, SR.; GENE WU; and JUANITA VALDEZ-COX;

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce;

RON JARMIN, sued in his official capacity as Performing the Non-Exclusive Functions and Duties of the Director, U.S. Census Bureau;

U.S. DEPARTMENT OF COMMERCE; and

U.S. CENSUS BUREAU;

Defendants.

Civil Action No. 8:18-cv-01570-GJH

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COMPLAINT

INTRODUCTION

1. On March 26, 2018, U.S. Department of Commerce Secretary Wilbur Ross directed the Census Bureau to add a citizenship question to the 2020 decennial Census questionnaire and to collect federal and state administrative records for verification of Census respondent information on citizenship. The addition of a citizenship question to the decennial Census survey sent to every household in the country will result in an undercount of Latinos, African Americans, Asian Americans, Native Americans, immigrants, and other hard-to-count populations and will compromise the overall accuracy of the Census.

2. Plaintiffs seek declaratory and injunctive relief in order to preserve the integrity of the decennial Census and prevent Defendants from violating the equal protection guarantee and Apportionment and Enumeration Clauses of the U.S. Constitution as well as the federal Administrative Procedure Act ("APA").

PARTIES

Plaintiffs

3. Plaintiff La Union del Pueblo Entero ("LUPE") is a nonprofit membership organization founded by labor rights activists César Chávez and Dolores Huerta. LUPE's mission is to build strong, healthy communities in the Texas Rio Grande Valley through community organizing and civic engagement. To promote civic engagement in the communities it serves, LUPE conducts know-your-rights discussions and membership meetings, participates in issue-focused advocacy, connects its members to social services, conducts Census outreach, and conducts voter registration, education, and non-partisan get-out-the-vote campaigns. LUPE

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relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, service delivery, and advocacy.

4. LUPE is headquartered in San Juan, Texas, and its members primarily reside in Hidalgo, Cameron, Willacy, and Starr Counties, Texas. LUPE has over 8,000 members, including Latinos, U.S. citizens, and non-U.S. citizens. Some LUPE members are immigrants not authorized to be present in the United States. LUPE has members that live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Texas and the United States.

5. LUPE's membership includes individuals that use programs and services whose funding is distributed based on Census data. For example, LUPE's members receive and rely on funds from Medicaid, Medicare, Supplemental Nutrition Assistance Program ("SNAP"), Supplemental Nutrition for Women, Infants, and Children ("WIC"), and Section 8 Housing voucher programs. LUPE's membership includes individuals whose children attend Title I schools and schools that receive federal special education grants. LUPE's membership also includes individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

6. Prior to the 2010 Census, LUPE provided feedback to national and regional Census officials on the draft Census questionnaire and proposed solutions to operational problems. LUPE provided recommendations to the Census Bureau about residents in Texas *colonias*—low income, unincorporated communities in rural areas that lack access to basic municipal infrastructure and services—that the Census Bureau could hire to mitigate an undercount in the *colonias*. LUPE also implemented an outreach plan in which its members distributed community education materials about the Census to residents of Texas's *colonias*,

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where many non-U.S. citizens live. For example, LUPE produced flyers designed to mitigate an undercount caused by the wariness that many undocumented residents feel when they encounter government workers. As part of its advocacy efforts, LUPE has lobbied the Census Bureau to open a local Census office in Hidalgo County.

7. In preparation for the 2020 Census, LUPE employees and members serve on Hidalgo County's Census Coalition Committee to mitigate the historic undercount of the Latino, non-U.S. citizen, and rural populations in the Rio Grande Valley. As a member of that coalition, LUPE works to strengthen the trust between LUPE's members and government workers.

8. Plaintiff Dolores Huerta Foundation ("DHF"), founded by civil rights leader Dolores Huerta, is a direct action organization and training center for community organizing, leadership development, and policy advocacy. DHF's mission is to organize and empower communities to pursue social justice through systemic and structural transformation. To promote civic engagement in the communities it serves, DHF hosts candidate fora and conducts Census outreach, voter registration, voter education, and get-out-the-vote campaigns. DHF conducts its organizing work through the implementation of a community organizing model that engages residents in California's Central Valley in a process to determine and prioritize their community needs, trains them to speak directly with organizational leaders and public officials, and provides them with a platform to advocate for desired changes. DHF relies on the accuracy of decennial Census data for purposes of strategic planning, communications, resource allocation, mapping of small rural communities, and advocacy.

9. DHF is headquartered in Bakersfield, California and serves agricultural communities in California's Central Valley, including the rural communities of Lamont, Arvin, Weedpatch, Greenfield, Bakersfield, California City, Woodlake, Lindsay, Sanger, Parlier, and

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the counties of Kern, Tulare, and Fresno. The local residents DHF serves include Latinos, U.S. citizens, and non-U.S. citizens. DHF serves some individuals who are immigrants not authorized to be present in the United States. DHF serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to California and the United States.

10. DHF serves individuals that use programs and services whose funding is distributed based on Census data. Some of the individuals that DHF serves receive and rely on funds from Medicaid, Medicare, SNAP, and WIC. DHF serves individuals with children who participate in the National School Lunch Program and the School Breakfast Program.

11. In 2010, the U.S. Census Bureau and the California Endowment enlisted the help of DHF to conduct outreach in hard-to-count communities—groups that the Census Bureau identifies as difficult to fully enumerate—within the Central Valley, specifically Latinos, immigrants, residents in rural and agricultural communities, and non-Spanish and non-English speaking indigenous communities. DHF staff and volunteers canvassed door-to-door to encourage residents to fill out their Census forms. DHF hosted 15 community presentations, trained 200 volunteers, and knocked on over 3,000 doors.

12. Because of the addition of the citizenship question to the 2020 decennial Census, DHF will be forced to increase its grassroots organizing of hard-to-count residents and begin its outreach efforts earlier than it did in preparation for the 2010 Census. DHF plans to increase its grassroots volunteer efforts and trainings to ensure that local community members are engaged in outreach to hard-to-count populations in the Central Valley.

13. Plaintiff Southwest Voter Registration Education Project ("SVREP") is a nonprofit organization whose mission is to build political power among Latinos and other

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minority groups by increasing their participation in the U.S. democratic process. To achieve that mission, SVREP develops Latino leaders and trains and organizes voters around issues that reflect their values. To promote civic engagement in the communities it serves, SVREP conducts the following programs: get-out-the-vote; voter registration; voter turnout; and other programs designed to educate voters. Since it was founded in 1974, SVREP has registered over 2.6 million voters. SVREP relies on the accuracy of Census data for purposes of strategic planning and communication, resource allocation, service delivery, and advocacy.

14. SVREP is headquartered in San Antonio, Texas and delivers services to individuals in Arizona, California, Colorado, Nevada, New Mexico, Texas, Utah, Florida, North Carolina, Georgia, Virginia, Washington, Oregon, and Idaho. SVREP serves Latinos, U.S. citizens, and non-U.S. citizens. SVREP serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to the population statewide and in United States.

15. SVREP serves individuals who use programs and services whose funding is based on Census data. SVREP serves individuals who receive and rely on funds from Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. SVREP serves individuals whose children attend Title I schools and schools that receive federal special education grants. SVREP serves individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

16. Prior to the 2010 decennial Census, SVREP worked with Latino-serving organizations to raise awareness of the historic undercount of the Latino community and its implications for Latino political power. SVREP provided Census officials with feedback on the Census questionnaire—particularly on questions of race and ethnicity—and encouraged the

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Census Bureau to hire more bilingual workers to better serve the Latino community by addressing the undercount of the Latino population SVREP serves.

17. In preparation for the 2020 Census, SVREP plans to use its social media platforms to disseminate information to the public about the Census and the addition of the citizenship question.

18. Plaintiff Mi Familia Vota Education Fund ("MFV") is a national nonprofit organization whose mission is to expand the Latino electorate and increase justice for Latinos through increased civic participation. To promote civic engagement in the communities it serves, MFV conducts citizenship assistance, voter registration, voter education, Census outreach, get-out-the-vote, and other issue-based campaigns. MFV relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

19. MFV is headquartered in Phoenix, Arizona and serves individuals in Arizona, California, Colorado, Florida, Nevada, and Texas. MFV serves Latinos, U.S. citizens, and non-U.S. citizens. MFV serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to the states in which MFV is active and the United States.

20. MFV serves individuals that use programs and services whose funding is based on Census data. Some of the individuals that MFV serves receive and rely on Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. MFV also serves individuals whose children attend Title I schools and schools that receive federal special education grants. MFV serves individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

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21. During the 2010 Census, MFV conducted door-to-door outreach in Nevada to encourage community members to complete the Census form. In preparation for the 2020 Census, MFV plans to run door-to-door programs, hold phone banks, and conduct media outreach to educate the public about the citizenship question to promote a complete count of the population. MFV plans to create educational materials about the Census to raise awareness about the citizenship question.

22. Plaintiff the Coalition for Humane Immigrant Rights ("CHIRLA") is a nonprofit membership organization whose mission is to advance the human and civil rights of immigrants and refugees through outreach, education, advocacy, civic engagement, and direct legal services. CHIRLA relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

23. CHIRLA is headquartered in Los Angeles, California and its members reside throughout California. CHIRLA has approximately 13,000 members, including Latinos, U.S. citizens, and non-U.S. citizens. Some CHIRLA members are immigrants not authorized to be present in the U.S. Many of CHIRLA's members live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to California and the United States.

24. CHIRLA conducted extensive outreach around the 2010 decennial Census. CHIRLA staff and volunteers canvassed door-to-door, conducted fieldwork, community outreach, community education, and policy efforts to encourage hard-to-count populations to respond to the Census.

25. In preparation for the 2020 decennial Census, CHIRLA plans to increase its outreach and advocacy efforts. In light of the addition of the citizenship question, CHIRLA will

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be forced to increase the number of staff and volunteers who canvass door-to-door, community outreach, community education, and policy efforts to encourage hard-to-count populations to respond to the 2020 decennial Census.

26. Plaintiff Georgia Association of Latino Elected Officials ("GALEO") is a nonprofit organization whose mission is to increase Latino civic engagement and Latino leadership in Georgia. To promote civic engagement in the communities it serves, GALEO conducts leadership programs, citizenship services, voter registration, voter education, Census outreach, know-your-rights, and get-out-the-vote campaigns. GALEO relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

27. GALEO is headquartered in Norcross, Georgia and is active across the state. GALEO's membership is predominantly Latino. GALEO members reside across the state of Georgia, with many in metropolitan Atlanta, Gainesville, Dalton, Savannah, Columbus, Lyons, and in rural areas. GALEO has members who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Georgia and the United States.

28. GALEO members regularly drive on public highways and roads in their communities.

29. In preparation for the 2010 Census, GALEO directed the Georgia Latino Complete Count Committee ("GLCCC"), a committee of over one hundred organizations that worked to ensure a complete count of the Latino population. GALEO hosted community meetings across the state to promote participation in the 2010 Census. GALEO also worked with local governments and businesses to promote increased participation in the Census. GALEO

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volunteers canvassed neighborhoods in Latino communities, provided information designed to promote increased participation in the 2010 Census, and stressed that responses to the Census are confidential. GALEO conducted media outreach through radio, print, and television, and it partnered with Spanish-language media to run public service announcements to increase Latino participation in the Census.

30. GALEO will lead the GLCCC for the 2020 decennial Census. In light of the addition of the citizenship question, GALEO plans to increase community meetings, canvass neighborhoods, conduct media outreach, and provide public educational resources to the community about the importance of participation in the Census.

31. Plaintiff Labor Council for Latin American Advancement ("LCLAA") is a national nonprofit membership organization whose mission is to educate, organize and mobilize Latinos in the labor movement and increase the political influence of Latino workers through civic engagement. To promote civic engagement in the communities it serves, LCLAA conducts citizenship drives, voter registration, voter education, Census outreach, and get-out-the-vote campaigns. LCLAA relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

32. LCLAA is headquartered in Washington, DC and has members and chapters in Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Illinois, Indiana, Kansas, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Puerto Rico, Texas, Washington, and Wisconsin. LCLAA members include Latinos, U.S. citizens, and non-U.S. citizens. Some LCLAA members are immigrants not authorized to be present in the U.S. LCLAA has members who live in neighborhoods, cities,

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counties and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to the states in which LCLAA is active and the United States.

33. LCLAA has members who use programs or services with funding distributed based on Census data. LCLAA's membership includes individuals who receive and rely on funds from Medicaid and Medicare. LCLAA's membership includes individuals whose children attend Title I schools and participate in the National School Lunch Program and Head Start programs.

34. For the 2010 decennial Census, LCLAA provided support to its chapters to help Latinos fill out the Census form. In 2010, LCLAA provided education on the Census at its national convention. LCLAA urged Latinos to participate in the Census and worked to promote a complete count of the Latino community. LCLAA's executive director published an opinion article and appeared on television to encourage Latinos to respond to the 2010 Census.

35. Because of the addition of the citizenship question to the 2020 decennial Census, LCLAA plans to engage in increased public education and outreach efforts. It will be forced to provide support to its chapters that provide education to the community about the significance of the addition of the citizenship question and the importance of responding to the Census.

36. Plaintiff Somos Un Pueblo Unido ("Somos") is an immigrant-led nonprofit membership organization whose mission is to promote civic engagement and worker justice by connecting community members to social services, training its members on legislative advocacy and legal rights, and conducting Census outreach, voter registration, get-out-the-vote, and naturalization campaigns. Somos relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, service delivery, and advocacy.

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37. Somos is headquartered in Santa Fe, New Mexico and its approximately 2,500 members live throughout New Mexico. Somos members live in at least eight counties in New Mexico, including: Santa Fe, San Juan, Rio Arriba, Chaves, Curry, Roosevelt, Lea, and McKinley. Somos members include Latinos, U.S. citizens, and non-U.S. citizens. Some Somos members are immigrants not authorized to be present in the United States. Somos has members who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to New Mexico and the United States.

38. Somos has members who use programs and services whose funding is based on Census data. Somos's membership includes individuals who receive and rely on funds from Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Somos's membership includes individuals whose children attend Title I schools and schools that receive federal special education grants. Somos members include individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

39. Prior to the 2010 Census, Somos identified potential operational problems for local Census coordinators and offered recommendations on how to reduce the historic undercount of the Latino, immigrant, and rural communities that Somos serves.

40. In preparation for the 2020 decennial Census, and to promote a full count of the Latino, immigrant, and rural communities that Somos serves, Somos plans to conduct know-your-rights campaigns, weekly radio shows, and outreach through social media, earned media, an email alert system and a text alert system, both of which have approximately 4,000 recipients.

41. Plaintiff Texas Senate Hispanic Caucus ("SHC") is a nonprofit, nonpartisan organization whose mission is to promote the economic development, health, education, civic

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engagement, and civil rights of the Latino communities in Texas. To achieve its mission, SHC monitors legislation, works to build Latino political power, and elevates the public dialogue on issues that affect the Latino community. SHC relies on the accuracy of decennial census data for purposes of strategic planning and communication, resource allocation, and advocacy.

42. SHC is headquartered in Austin, Texas and is comprised of eleven members of the Texas Senate. SHC includes Latino senators as well as non-Latino senators who represent Latino and majority-minority districts and who support policies important to Latinos in Texas. SHC members have constituents who reside in 46 Texas counties, including: Atascosa, Bastrop, Bee, Bexar, Brewster, Brooks, Caldwell, Cameron, Crockett, Dallas, Dimmit, Duval, Edwards, El Paso, Fort Bend, Frio, Guadalupe, Harris, Hays, Hidalgo, Jim Hogg, Jim Wells, Karnes, Kenedy, Kinney, Kleberg, La Salle, Live Oak, Maverick, McMullen, Medina, Nueces, Pecos, Real, Reeves, San Patricio, Starr, Terrell, Travis, Uvalde, Val Verde, Webb, Willacy, Wilson, Zapata, and Zavala. Constituents of SHC members include Latinos, U.S. citizens, and non-U.S. citizens. Some of those constituents are immigrants not authorized to be present in the United States. Many SHC members and their constituents live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Texas and the United States.

43. SHC members serve constituents who use programs and services whose funding is based on Census data. SHC members serve constituents who receive and rely on funds from the Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Their constituents include individuals whose children attend Title I schools and schools that receive federal special education grants. SHC members also serve constituents with children who

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participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

44. Because of the addition of the citizenship question to the 2020 decennial Census, SHC members will be forced to increase Census outreach to their constituents to address the impact of the citizenship question and the importance of achieving an accurate count. SHC has partnered with organizations focused on Latino political access and representation to convene multiple briefings for its members and their staff. SHC members and their staff are involved in building a legislative agenda that provides resources to communities that may receive less funding as a result of a Census undercount. SHC members are working to alleviate their constituents' fears that the Census Bureau will share the citizenship information it gathers with Immigration and Customs Enforcement ("ICE").

45. Plaintiff Texas House of Representatives Mexican American Legislative Caucus ("MALC") is a nonprofit, nonpartisan organization whose mission is to address issues of particular importance to Latinos across Texas. To achieve its mission, MALC works to build Latino political power, monitors legislation and organizes voting blocs among MALC members on legislation consequential to Latino and immigrant Texans. MALC members sit on all but three committees in the Texas House of Representatives. MALC relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

46. MALC is headquartered in Austin, Texas and is composed of 41 members of the Texas House of Representatives of any race or ethnicity who represent majority-Latino constituencies. MALC members have constituents who reside in 42 Texas counties, including: Atascosa, Bee, Bexar, Brewster, Brooks, Cameron, Culberson, Dallas, Dimmit, Duval, El Paso,

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Frio, Harris, Hidalgo, Hudspeth, Jeff Davis, Jim Hogg, Jim Wells, Kenedy, Kinney, Kleberg, La Salle, Live Oak, Loving, Maverick, McMullen, Nueces, San Patricio, Starr, Tarrant, Terrell, Travis, Willacy, Uvalde, Val Verde, Webb, Zapata, and Zavala. MALC primarily conducts its activities in those counties.

47. MALC members serve constituents that include Latinos, U.S. citizens and non-U.S. citizens. Some constituents are immigrants not authorized to be present in the United States. MALC has members and constituents who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Texas and the United States.

48. MALC members serve constituents who use programs and services whose funding is based on Census data. MALC members serve constituents who receive and rely on funds from the Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Their constituents also include individuals whose children attend Title I schools and schools that receive federal special education grants. MALC members also serve constituents with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

49. For the 2010 decennial Census, MALC promoted a complete count of the Latino population of its constituent communities by distributing community outreach materials designed to encourage Latino Texans to accurately complete the Census questionnaire.

50. In preparation for the 2020 Census, MALC partnered with organizations focused on Latino political access and representation to discuss the risk of a Census undercount as a result of the citizenship question and implemented potential prevention and mitigation strategies. In April 2018, MALC held a Texas Redistricting Forum at the Texas Capitol for legislative staff,

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community leaders, and attorneys to discuss the 2020 decennial Census and to educate participants about the consequences of the citizenship question.

51. Plaintiff California Latino Legislative Caucus ("CLLC") is a partisan organization whose mission is to protect and preserve the rights of Latinos throughout California with a focus on improving the quality of life for California working-class families and integrating immigrant communities into society. To accomplish its mission, CLLC monitors various legislative issues that affect the Latino community and members often vote as a bloc on consequential legislation for Latino and immigrant Californians. CLLC relies on the accuracy of decennial Census data to inform its strategic planning, legislative advocacy, and the allocation of state resources.

52. CLLC is comprised of 26 members of the California State Senate and Assembly and two auxiliary members (constitutional officers), who identify as Latino and/or Hispanic. CLLC members represent constituents in numerous counties throughout California, including: Alameda, Colusa, Contra Costa, Fresno, Imperial, Kern, Kings, Lake, Los Angeles, Monterey, Napa, Orange, Riverside, San Benito, San Bernardino, San Diego, San Joaquin, Santa Barbara, Santa Clara, Santa Cruz, Solano, Sonoma, Ventura, and Yolo. CLLC members and constituents include Latinos, U.S. citizens and non-U.S. citizens. Some constituents are immigrants not authorized to be present in the U.S. CLLC has members and constituents who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to California and the United States.

53. CLLC members serve constituents who use programs and services whose funding is based on Census data. CLLC members serve constituents who receive and rely on funds from the Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Their constituents include individuals whose children attend Title I schools and schools that receive

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federal special education grants. CLLC members also serve constituents with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

54. One of CLLC's highest priorities is to ensure an accurate count of California residents for the 2020 decennial Census. In response to the addition of a citizenship question to the 2020 Census, CLLC members and their staff are heavily involved in expanding the California budget for Census outreach and advocacy to ensure that there will be adequate funding for activities designed to ensure a complete count.

55. Plaintiff California Legislative Black Caucus ("CLBC") is a partisan organization whose mission is to protect and preserve the rights of Black Americans throughout California with a focus on improving the quality of life for African-American families, eliminating the disparities between racial groups, and increasing African-American participation and representation at all levels of government. To accomplish its mission, CLBC monitors various legislative issues that affect the African-American community and members often vote as a bloc on consequential legislation for Black and Afro-Latino Californians. CLBC relies on the accuracy of decennial Census data to inform its strategic planning, legislative advocacy, and the allocation of state resources.

56. CLBC is comprised of 11 African-American members of the California State Senate and Assembly. CLBC members represent constituents in several counties throughout California, including: Alameda, Contra Costa, Los Angeles, Sacramento, San Bernardino, San Diego, San Joaquin, and Yolo. CLBC members and constituents include African Americans, Afro-Latinos, U.S. citizens and non-U.S. citizens. Some constituents are immigrants not authorized to be present in the United States. CLBC has members and constituents who live in

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neighborhoods, cities, counties, and voting districts with relatively larger African-American, Latino, and non-U.S. citizen populations when compared to California and/or the United States.

57. CLBC members serve constituents who use programs and services whose funding is based on Census data. CLBC members serve constituents who receive and rely on funds from the Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Their constituents include individuals whose children attend Title I schools and schools that receive federal special education grants. CLBC members also serve constituents with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

58. One of CLBC's priorities is to ensure an accurate count of California residents for the 2020 decennial Census. In response to the addition of a citizenship question to the 2020 Census, CLBC members and their staff are heavily involved in expanding the California budget for Census outreach and advocacy to ensure that there will be adequate funding for activities designed to ensure a complete count.

59. Plaintiff California Asian and Pacific Islander Legislative Caucus ("API Legislative Caucus") is an organization within the California State Legislature whose mission is to represent and advocate for the interests of the diverse Asian American and Pacific Islander communities throughout California. It seeks to increase their participation and representation at all levels of government. API Legislative Caucus's members author and support a wide array of legislation benefiting the API community, including in the areas of civil rights, language access, health disparities, hate crime prevention, consumer protection, and cultural preservation. Members of Plaintiff API Legislative Caucus serve in key leadership positions in the Assembly that allow them to have maximum influence on the State's policymaking process and its

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subsequent impact on the Asian American and Pacific Islander community. API Legislative Caucus also serves as a resource to the community and assists with advocacy efforts, convenes the annual API Policy Summit, holds joint briefings and hearings with other ethnic Caucuses and community groups on issues of common interest, and supports the activities of the Commission on Asian Pacific Islander American Affairs. API Legislative Caucus relies on the accuracy of the decennial Census data to inform its strategic planning, legislative advocacy, and the allocation of state resources.

60. API Legislative Caucus is comprised of 12 members of the California State Senate and Assembly. API Legislative Caucus members represent constituents in 8 counties throughout California, including: Alameda, Los Angeles, Sacramento, San Diego, San Francisco, San Mateo, Santa Clara, and Yolo. API Legislative Caucus members and constituents include Asian Americans, Pacific Islanders, U.S. citizens and non-U.S. citizens. Some constituents are immigrants not authorized to be present in the United States. API Legislative Caucus has members and constituents who live in neighborhoods, cities, counties, and voting districts with relatively larger Asian American and non-U.S. citizen populations when compared to California and the United States.

61. API Legislative Caucus members serve constituents who use programs and services whose funding is based on Census data. API Legislative Caucus members serve constituents who receive and rely on funds from the Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Their constituents include individuals whose children attend Title I schools and schools that receive federal special education grants. API Legislative Caucus members also serve constituents with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

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62. For the 2010 decennial Census, API Legislative Caucus partnered with the Congressional Asian Pacific American Caucus, the United States Census Bureau, and Asian Pacific Islander Counts to hold press conferences across California with the goal of increasing Asian American and Pacific Islander participation in the decennial Census. API Legislative Caucus held an API Policy Summit in 2010 that featured a workshop on the Census, which brought together more than 280 community leaders and activists.

63. To help direct API Legislative Caucus's planning for the 2020 Census, one member, State Senator Richard Pan, is the Chair of the Senate Select Committee on the Census, and another member, Assemblyman Ed Chau, is part of the Assembly Select Committee on the Census. In response to the addition of a citizenship question to the 2020 Census, API Legislative Caucus members and their staff are heavily involved in expanding the California budget for Census outreach and advocacy to ensure that there will be adequate funding for activities designed to ensure a complete count.

64. Plaintiff Promise Arizona ("PAZ") is a nonprofit, faith-based membership organization founded in 2010 in response to the passage of Arizona Senate Bill 1070. PAZ's mission is to build Latino and immigrant political power to ensure family unity, a path to citizenship, worker protections, and a path to equitable educational opportunities for all immigrants. To achieve its mission, PAZ promotes civic engagement, provides scholarships to members and other individuals for immigration-related expenses, partners with community colleges to conduct educational and job training programs, conducts youth leadership programs, and provides assistance with applications for immigration relief. To promote civic engagement, PAZ registers members and individuals to vote, educates members about important voting issues, conducts get-out-the-vote campaigns, and participates in various issue-focused advocacy

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coalitions. PAZ relies on the accuracy of decennial Census data for the purposes of strategic planning and communication, resource allocation, and advocacy.

65. PAZ is headquartered in Phoenix, Arizona. PAZ has members and serves individuals who primarily reside in Maricopa, Pima, Yuma and Pinal Counties in Arizona. PAZ has over 200 members, including Latinos, U.S. citizens, and non-U.S. citizens. Some PAZ members and some of the individuals PAZ serves are immigrants not authorized to be present in the United States. PAZ has members and serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States.

66. PAZ has membership and serves individuals who use programs and services whose funding is based on Census data. For example, these individuals receive and rely on funds from Medicaid, Medicare, SNAP, WIC, and Section 8 Housing voucher programs. PAZ also has members and serves individuals with children that attend Title I schools and who participate in the National School Lunch Program, School Breakfast Program, Head Start and Pell Grant programs.

67. During the 2010 Census, PAZ's Executive Director, Petra Falcon, conducted media outreach designed to encourage community members to complete the 2010 Census questionnaire.

68. PAZ is working with national partners to plan a strategy which ensures that Latino and immigrant communities are educated about the importance of the 2020 decennial Census. PAZ will also host fora on the Census and the citizenship question, conduct media campaigns around the Census and the citizenship question, and organize members and volunteers

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to canvass door-to-door in the communities PAZ serves to educate community members about the citizenship question and encourage community members to complete the 2020 Census.

69. Plaintiff Chicanos Por La Causa ("CPLC") is a nonprofit organization founded in 1969. CPLC's mission is to drive economic and political empowerment in Arizona, and in Nevada and New Mexico through its subsidiary organizations. To achieve its mission, CPLC provides a range of direct services to communities in Arizona in the areas of health and human services, housing, education, and economic development, with a focus on individuals and families with low to moderate income levels. For example, CPLC runs several behavioral health centers throughout Arizona, a domestic violence shelter, an HIV/AIDS program that provides education and supportive services, an emergency aid program, parenting programs, a senior housing and meal program, and a center that provides substance abuse services. CPLC also runs head start programs, after school programs and extracurricular activities for students, two charter high schools in the Tucson area, and has a subsidiary that provides lending to small businesses, among other programs.

70. CPLC is headquartered in Phoenix, Arizona and serves individuals who primarily reside in Coconino, Cochise, Maricopa, Pima, and Yuma Counties. CPLC serves Latinos, U.S. citizens and non-U.S. citizens, some of whom are immigrants not authorized to be present in the U.S. CPLC serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States.

71. CPLC serves individuals that use programs and services whose funding is based on Census data, including programs and services that CPLC provides. CPLC serves individuals that receive and rely on Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher

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programs. CPLC also serves individuals whose children attend Title I schools and schools that receive federal special education grants. CPLC also serves individuals with children who participate in the National School Lunch Program, the School Breakfast Program and Head Start programs.

72. During the 2010 Census, CPLC ran television spots to encourage communities to complete the Census questionnaire. CPLC staff assisted households in the Tucson area in filling out Census questionnaires. CPLC also provided recommendations to the U.S. Census Bureau of individuals throughout Arizona that the Bureau could hire to assist with the 2010 Census.

73. In preparation for the 2020 Census, CPLC has already started to work on building coalitions to encourage Latinos to complete the Census questionnaire. CPLC will work with U.S. Census outreach staff to assist in recruiting temporary Census workers. During the count, CPLC will assist with outreach to the general public in a manner similar to its work in the 2010 census, including television advertisements. CPLC will also work with community coalitions to educate and engage the community on the importance of participating in the Census and will train key staff to assist individuals in completing Census forms at some facilities. In addition to these efforts, CPLC also plans to educate other nonprofits as well as community members about the citizenship question.

74. Plaintiff Arizona Latino Legislative Caucus ("AZLLC") is a nonpartisan organization whose mission is to protect and preserve the rights of Latinos—including Latinos who are immigrants and non-U.S. citizens—throughout Arizona, with a focus on improving the quality of life for Arizona working-class families and integrating immigrant communities into society. AZLLC members hold strategic leadership positions and promote legislation and policies that directly affect Latinos and immigrants in Arizona. AZLLC encourages Latinos to

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engage in the political process through public policy, community events, voter registration, and get-out-the-vote efforts. AZLLC relies on the accuracy of decennial Census data to inform its strategic planning, legislative advocacy and the allocation of state resources.

75. AZLLC is comprised of 17 members of the Arizona House and Senate, as well as a communications and outreach liaison. The members of AZLLC include Latino members as well as members of any race or ethnicity who represent majority-Latino constituencies. AZLLC members represent constituents in 15 counties throughout Arizona, including: Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma. AZLLC members and constituents include Latinos, U.S. citizens, and non-U.S. citizens. Some constituents are immigrants not authorized to be present in the U.S. AZLLC has members and constituents who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States.

76. AZLLC members serve constituents who use programs and services whose funding is based on Census data. AZLLC members serve constituents who receive and rely on funds from the Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Their constituents include individuals whose children attend Title I schools and schools that receive federal special education grants. AZLLC members also serve constituents with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

77. One of AZLLC's highest priorities is to ensure an accurate count of Arizona residents for the 2020 decennial Census. In response to the addition of a citizenship question to the 2020 Census, AZLLC members and their staff are heavily involved in expanding the Arizona

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budget for Census outreach and advocacy to ensure that there will be adequate funding for activities designed to ensure a complete count. AZLLC also holds educational meetings with nonprofit organizations to provide them with information about the Census to then share with community members across Arizona.

78. Plaintiff El Pueblo, Inc. ("El Pueblo") is a nonprofit organization whose mission is to build awareness, capacity, and activism in the Latino community in order to achieve political and social change. To promote civic engagement in the communities it serves, El Pueblo conducts trainings on legislative advocacy and leadership development, voter registration, voter education, Census outreach, know-your-rights, and get-out-the-vote campaigns. El Pueblo relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

79. El Pueblo is headquartered in Raleigh, North Carolina, and serves Latinos who live in and around Raleigh and throughout the state. El Pueblo serves Latinos, U.S. citizens, and non-U.S. citizens. Some of the individuals El Pueblo serves are immigrants not authorized to be present in the United States. El Pueblo serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to North Carolina.

80. El Pueblo serves individuals who use programs and services whose funding is based on Census data. El Pueblo serves individuals who receive and rely on funds from Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. El Pueblo serves individuals whose children attend Title I schools and schools that receive federal special education grants. El Pueblo also serves individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

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81. For the 2010 Census, El Pueblo conducted a media campaign to encourage participation in the Census through advertisements in local newspapers, public service announcements on local Spanish-language news stations, and open letters to the community. El Pueblo also offered support to other local Latino-serving organizations in their efforts to encourage individuals to participate in the 2010 Census.

82. In preparation for the 2020 Census, El Pueblo plans to engage in media outreach through television and newspapers. It will make the Census part of the focus of its annual La Fiesta del Pueblo, which highlights Latin American culture to foster multicultural understanding and cultural appreciation. El Pueblo is also a part of the North Carolina Counts Coalition, formed to encourage complete participation in the Census.

83. Plaintiff Maryland Legislative Latino Caucus ("MLLC") is a nonprofit, nonpartisan organization whose mission is to improve the quality of life of Maryland's Latino communities by advocating on their behalf and promoting greater participation in the political affairs of Maryland. MLLC accomplishes its mission by monitoring issues affecting the Latino community, coordinating votes on these issues among themselves and between other caucuses representing communities of color, and engaging with their constituents on a local level to spread awareness of legislative issues that affect Latino communities. MLLC relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy for their constituents who rely on federal funding based on Census data.

84. MLLC is headquartered in Annapolis, Maryland and is comprised of 25 members of the Maryland State Senate and House of any race or ethnicity who represent majority-Latino constituencies or who are concerned with legislative issues that affect the Latino community. MLLC has members who reside in six Maryland counties and one city: Prince George's,

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Montgomery, Anne Arundel, Baltimore, Baltimore City, Howard, and Frederick. MLLC primarily conducts its activities in those counties.

85. MLLC member constituents include individuals who receive and rely on funds from Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. MLLC member constituents also include individuals whose children attend Title I schools and schools that receive federal special education grants. MLLC member constituents include individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

86. In response to the addition of a citizenship question Census, MLLC members plan to increase Census outreach in their constituent communities to address the impact of the citizenship question and the importance of achieving an accurate count. MLLC members and their staff are involved in building a legislative agenda that provides resources to communities that face less funding as a result of a Census undercount. MLLC members work to break down perceived barriers between their constituents and the government due to fears that citizenship information will be shared with ICE.

87. Plaintiff Latino Community Fund of Washington ("LCF") is a nonprofit organization whose mission is to invest in the Latino Community to cultivate new leaders, support effective nonprofit organizations, and improve the quality of life for all residents of the State of Washington. To achieve its mission, LCF: runs the Healthy Latino Families Initiative, through which LCF provides families with free healthcare counseling; connects underrepresented communities with healthcare-related resources, and provides education on environmental justice issues and labor standards; educates and collaborates with other nonprofit organizations to inform the community about important voting issues and to run get-out-the-vote and voter

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registration campaigns; hosts leadership programs that help participants develop leadership skills to effectively advocate for issues affecting the Latino community in Washington; participates in issue-based coalitions; provides funds for legal aid, counseling, health, and children and youth programs; and invests funds to improve access to benefits for families. LCF relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

88. LCF is headquartered in Seattle, Washington and serves individuals who primarily reside in Yakima, Snohomish, Pierce, and King Counties. LCF serves Latinos, U.S. citizens, and non-U.S. citizens, some of whom are immigrants not authorized to be present in the U.S. LCF serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Washington and the United States.

89. LCF serves individuals who use programs and services whose funding is based on Census data, including, *e.g.*, Medicaid, Medicare, and SNAP. LCF also serves individuals whose children attend Title I schools.

90. In preparation for the 2020 Census, LCF is already conducting coalition work around the 2020 Census and the citizenship question, and plans to increase its outreach efforts to the Latino community and run door-to-door programs, hold phone banks, and conduct media outreach to educate the public about the citizenship question to encourage a complete count of the population.

91. Plaintiff Asian Americans Advancing Justice-Chicago ("Advancing Justice-Chicago") is a pan-Asian, nonprofit organization based in Chicago, Illinois whose mission is to build power through collective advocacy and organizing to achieve racial equity. Advancing

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Justice-Chicago works with the Asian American community to develop grassroots leaders, increase civic participation, and mobilize the community to achieve racial equity. Advancing Justice-Chicago teaches Asian Americans to share their personal stories, speak up for immigrant rights, and lead the community by practicing solidarity and addressing racial inequity. Advancing Justice-Chicago programs include KINETIC, which engages high school English learners during their ESL classes, and I Speak Power, which assists immigrant and refugee adult English learners. Advancing Justice-Chicago relies on the accuracy of decennial Census data for strategic planning, communications, resource allocation, and advocacy.

92. Advancing Justice-Chicago serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Asian American and non-U.S. citizen populations when compared to Illinois and the United States.

93. Advancing Justice-Chicago conducted extensive outreach and engagement activities for the 2010 Census to help reach hard-to-count populations, including minority language communities, new immigrant communities, and mixed immigration status households. Advancing Justice-Chicago trained 362 staff members at partner organizations and 151 volunteers. Advancing Justice-Chicago conducted Census outreach in Chinese, Korean, Farsi, Khmer, Vietnamese, Hindi, Laotian, Gujarati, Nepali, Urdu, Tagalog, Arabic, and other languages. Advancing Justice-Chicago sent out a multi-lingual postcard that asked Asian Americans to complete and timely mail their decennial Census form to over 6,000 households. Advancing Justice-Chicago developed an English-learner curriculum for use by partner organizations during their 2010 Census outreach activities. Advancing Justice-Chicago drafted newspaper articles and Op-Eds to encourage participation in the 2010 Census, which were often translated for ethnic-language media. Advancing Justice-Chicago drafted and delivered

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newsletters to its subscribers, as well as to their partner organizations for translation into multiple languages, and reached over 980 households from traditionally undercounted populations. Advancing Justice-Chicago hosted a "Week of Action" where community partners hosted events to educate community members about the 2010 Census.

94. Because of the addition of the citizenship question to the 2020 decennial Census, Advancing Justice-Chicago will be forced to increase its outreach efforts and spend additional resources, financially as well as with volunteer and staff time to counteract the negative effects of the addition of the citizenship question.

95. Plaintiff Asia Services In Action, Inc. ("ASIA") is a nonprofit corporation. Founded in 1995, ASIA's mission is to provide low-income, multilingual, and underserved Asian Americans with culturally and linguistically appropriate access to civic, health, and social services. To promote civic engagement in the communities it serves, ASIA conducts a statewide civic engagement program which includes voter registration, voter education, and voter turnout. ASIA focuses on reaching underrepresented groups such as young voters, minorities and immigrant voters, and first-time voters. ASIA relies on the accuracy of decennial Census data for purposes of strategic planning, communications, resource allocation, and advocacy.

96. ASIA is headquartered in Cleveland, Ohio. ASIA conducts considerable civic engagement work throughout Ohio, with a particular emphasis in the five economic areas of Ohio with the highest concentrations of Asian Americans, including Dayton, Columbus, Cincinnati, Toledo, and the Cleveland-Akron area. ASIA serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Asian American and non-U.S. citizen populations when compared to Ohio State.

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97. ASIA serves individuals that use programs and services whose funding is distributed based on Census data. Some of the individuals that ASIA serves receive and rely on funds from Medicaid, Medicare, SNAP, and WIC. ASIA serves individuals with children who participate in the National School Lunch Program, School Breakfast Program, and Head Start programs.

98. In 2010, ASIA conducted extensive outreach and engagement activities to ensure census participation by hard-to-count communities, including minority language communities, new immigrant communities, and mixed immigration status households. ASIA distributed subgrants to community organizations serving the Asian American communities in Dayton, Columbus, Toledo, and Cincinnati, and focused on outreach in the Cleveland-Akron area. ASIA developed a "speakers bureau" where it trained its own staff and volunteers, as well those from other organizations, to conduct 2010 Census outreach at community events. ASIA spoke about census participation at community centers and events, including at predominantly Korean churches, Burmese ESL classes, and senior housing centers. ASIA conducted local media outreach such as Op-Eds, developed flyers in Korean and Chinese to promote participation in the 2010 Census. ASIA also planned and organized community briefings across the state.

99. Because of the addition of the citizenship question to the decennial Census, ASIA anticipates that it will need to expend additional resources to educate the Asian American community about the privacy protections that cover information collected by the Census.

100. The MinKwon Center for Community Action, Inc. ("MinKwon") is a nonprofit organization whose mission is to empower the Korean American, Asian American, and immigrant communities to achieve economic and social justice for all. MinKwon accomplishes this mission through its four program areas: social services, advocacy and community

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organizing, civic participation, and youth empowerment. MinKwon's program helps the underserved low income, limited English proficient Korean American, Asian American, and immigrants living in New York City. MinKwon relies on the accuracy of decennial Census data for strategic planning and communication, resource allocation, and advocacy.

101. MinKwon is headquartered in Flushing, Queens and operates across New York City. New York City is home to more than 100,000 Korean Americans. There are more than one million Asian Americans in New York City, and nearly 40 percent of the total population is comprised of foreign-born immigrants. MinKwon serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Asian American and non-U.S. citizen populations when compared to New York and the United States.

102. MinKwon serves individuals who receive and rely on funds from Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. MinKwon serves individuals whose children attend Title I schools and schools that receive federal special education grants. MinKwon serves individuals with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

103. To promote civic engagement, MinKwon registered more than 75,000 new voters, conducts extensive nonpartisan voter education efforts, hosts candidate forums, mails voter guides, and canvasses potential voters. MinKwon is the lead organization and convener of APA VOICE, a coalition of 18 Asian American organizations that work to improve civic participation among Asian Americans. During the 2017 New York City elections, APA VOICE interacted with more than 90,000 Asian American voters.

104. MinKwon's civic participation program was heavily involved in promoting participation in the 2010 Census among the Korean and Asian American community. MinKwon

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performed a door-knocking campaign in hard-to-count census tracts to encourage residents to mail back the Census and answer questions. MinKwon's staff and volunteers had the language capacity to answer questions in Korean, Chinese, and English. In 2010, MinKwon helped increase response rates from 45 percent to 60 percent in a Census tract with a large Korean population.

105. In response to the addition of a citizenship question to the 2020 Census, MinKwon will conduct increased efforts for the 2020 Census. As a result of increased fear among immigrant communities, MinKwon will have to dedicate significant resources to develop materials to educate community members about the citizenship question through workshops, fact sheets, and op-eds in ethnic newspapers.

106. Plaintiff Chelsea Collaborative is a nonprofit membership organization whose mission is: to address persistent issues of inequity which negatively affect the wellbeing of Chelsea, Massachusetts residents, particularly children, immigrants, and refugees; to improve the social and economic health of the community and its people; and hold institutional decision makers accountable to the community. Chelsea Collaborative provides leadership development programs, direct services, and leads community organizing efforts on workers' rights, immigrant rights, housing justice, environmental justice, and other issues. Chelsea Collaborative relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

107. Chelsea Collaborative is headquartered in Chelsea, Massachusetts and its members reside predominantly in the Chelsea region. Chelsea Collaborative's membership includes Latinos, U.S. citizens and non-U.S. citizens. Some Chelsea Collaborative members are immigrants not authorized to be present in the United States. Many of Chelsea Collaborative

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members live in a city and in neighborhoods and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Massachusetts and the United States.

108. The Chelsea Collaborative has members who use programs and services whose funding is based on Census data. The Chelsea Collaborative has members who receive and rely on funds from Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. The Chelsea Collaborative has members whose children attend Title I schools and schools that receive federal special education grants. The Chelsea Collaborative has members with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

109. The Chelsea Collaborative conducted outreach for the 2010 decennial Census. The Chelsea Collaborative encouraged community members to apply for decennial Census jobs so that those helping to conduct the Census would be representative of the community and would help establish trust with hard-to-count members of the community. The Census Bureau hired some of those community members as enumerators.

110. In response to the addition of the citizenship question to the 2020 decennial Census, the Chelsea Collaborative plans to increase the number of staff and volunteers who will conduct community outreach, community education, and policy efforts to encourage hard-to-count populations to respond to the 2020 decennial Census.

111. Plaintiff OCA-Greater Houston ("OCA-GH") is a Texas non-profit corporation that is a local chapter of the Organization of Chinese Americans ("OCA"), a national membership-driven civil rights organization of community advocates dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans. Founded in 1979, OCA-GH's mission is to increase the long-term leadership, civic participation, education and

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engagement of Asian Americans in the Greater Houston metropolitan area. In service of its mission, OCA-GH works on behalf of individuals with limited English proficiency and low-income residents in the Greater Houston area, who often face language, cultural, and economic barriers to political and civic participation. OCA-GH organizes volunteers for non-partisan civic engagement activities including but not limited to phone banking, voter education, candidate forums, voter registration, and voting assistance. OCA-GH relies on the accuracy of decennial Census data for purposes of strategic planning and communication, resource allocation, and advocacy.

112. OCA-GA has both dues-paying and non-dues-paying members, and serves parts of the Greater Houston area with significant Asian American populations, including southwest Houston, Harris and Fort Bend Counties, and the cities of Sugarland, Jersey Village, and Clear Lake. OCA-GH currently has about 160 dues-paying members as well as non-dues-paying members, who are overwhelmingly volunteers and students. Most OCA-GH members are Asian American who are both U.S. and non-U.S. citizens, and live in the greater Houston area which has a relatively larger Asian American population when compared to Texas and the United States.

113. OCA-GH has constituents who use programs and services whose funding is based on Census data. OCA-GH has constituents who receive and rely on funds from Medicaid, Medicare, SNAP, WIC, and Section 8 Housing voucher programs. OCA-GH has constituents whose children attend Title I schools and schools that receive federal special education grants. OCA-GH has constituents with children who participate in the National School Lunch Program, School Breakfast Program, Head Start and the Pell Grant programs.

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114. OCA-GH conducted significant outreach activities around the 2010 Census. Through board members, staff, and volunteers, OCA-GH created promotional materials about participation in the 2010 census, paid for advertisements in Chinese language newspapers, conducted a door-to-door canvas of 384 households, held a community Census briefing for about 120 people, and presented at school district meetings. OCA-GH designed and distributed 11,000 copies of a unique four-page document printed in Chinese and English that served as a reference guide when constituents received their official Census forms. OCA-GH's 2010 Census outreach activities helped reach populations likely to be undercounted during the decennial Census, including minority language communities, new immigrant communities, and mixed immigration status households.

115. Plaintiff Friendly House is a nonprofit organization founded in 1920. Friendly House's mission is to empower Arizona communities through education and human services. To achieve its mission, Friendly House provides a range of direct services to these communities in the areas of education, workforce development, family services, and immigration, with a focus on providing resources to support individual and community growth. Friendly House runs programs in early childhood development, a K-8 charter school, youth education services, adult education, immigration and citizenship services, and family and crisis services such as providing food boxes, utilities and rental assistance, and hygiene boxes.

116. Friendly House is headquartered in Phoenix, Arizona and serves individuals who primarily reside in Maricopa County. Friendly House serves Latinos, U.S. citizens and non-U.S. citizens, some of whom are immigrants not authorized to be present in the United States. Friendly House serves individuals who live in neighborhoods, cities, and voting districts with

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relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States.

117. Friendly House serves individuals who use programs and services whose funding is based on Census data, including programs and services that Friendly House provides. Friendly House serves individuals who receive and rely on Medicaid, Medicare, SNAP, WIC and Section 8 Housing voucher programs. Friendly House also serves individuals with children who participate in the National School Lunch Program and the School Breakfast Program, and also serves individuals who receive Pell Grants.

118. During the 2010 Census, Friendly House assisted Mi Familia Vota in their Census outreach efforts. Friendly House also partnered with the City of Phoenix to provide education about the Census to the community, and provided meeting space for Mi Familia Vota to conduct Census workshops and for the Census Bureau to conduct trainings for new hires. Friendly House also provided the Census Bureau with recommendations on who they could hire to conduct direct outreach.

119. In preparation for the 2020 Census, Friendly House has partnered with City of Phoenix and is participating in their Census Committee. Friendly House plans on hosting educational workshops on the Census, and again providing meeting space for other organizations to conduct workshops and for the Census Bureau to conduct trainings. Friendly House will also provide recommendations to the Census Bureau on potential hires.

120. Plaintiff Four Directions, Inc., was founded in 2002 and is led by Oliver ("OJ") and Barb Semans, members of the Rosebud Sioux Tribe and leading Native voting rights activists. Four Directions is a non-partisan, non-profit organization whose mission is to organize and empower Tribal nations to improve social and economic conditions on reservations across

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the United States. Four Directions' main priorities are: Native voting rights, voter empowerment, voter protections, and voter engagement. To promote civic engagement in Tribal nations, Four Directions conducts voter registration, voter education, get-out-the-vote campaigns, and participates in litigation to secure equal access to the ballot. Four Directions relies on the accuracy of decennial Census data for purposes of strategic planning, program operations, communications, resource allocation, and advocacy. Four Directions uses the Census to identify populations of Native American Indians living on reservations and urban areas to understand the costs of voter education and access.

121. Four Directions is headquartered in the Rosebud Sioux Reservation in South Dakota. Mr. Semans is an enrolled member of the Rosebud Sioux Tribe that receives Tribal benefits based upon the U.S. Census. Four Directions works with tribes and Tribal members living on reservations across the U.S., including in Arizona, Minnesota, Montana, Nebraska, North Carolina, Nevada, North Dakota, South Dakota, and Wyoming. Tribal members are citizens of their tribe, the United States, and the state in which they reside.

122. The Tribal members Four Directions works with live on reservations that use or receive Tribal benefits or services from programs that are based entirely, or in part, on Census data, including but not limited to: Indian Housing Block Grants, Tribal Transportation Programs, certain child welfare programs, special Native American workforce grants, Indian Health Services, Native American Employment and Training, National School Lunch and School Breakfast, WIC, Food Distribution Program, and Low Income Home Energy Assistance Program (LIHEAP). Census data is used to determine funding for transportation, roads, housing, healthcare, schools, and construction on Indian reservations.

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123. During the 2010 Census, Four Directions included Census outreach in its voter registration efforts and encouraged Tribal members to complete the Census form. The addition of the citizenship question to the 2020 decennial Census will create confusion for Tribal members who identify their citizenship with their Tribal nations. Four Directions will be forced to increase its organizing with Tribal nations and Tribal members and begin its outreach efforts earlier than it did for the 2010 Census.

124. Plaintiff Juanita Valdez-Cox is the executive director and a member of LUPE. She is Latina and resides in Donna, Texas. Her neighborhood, city, county, and voting district have higher proportions of Latino and non-U.S. citizen populations than the general population in Texas or the United States. Plaintiff Valdez-Cox regularly drives on highways and roads in her community.

125. Plaintiff Gene Wu is the State Representative for Texas House District 137. He is a Chinese-born American and resides in Houston, Texas. His city, county, and voting district have higher proportions of Asian American and non-U.S. citizen populations than the general population in Texas or the United States, with more than 86,500 individuals in his home district being foreign born. Close to 35 percent of Asian Americans in the Greater Houston area are limited English proficient and many individuals in his community are of limited means; nearly 41,000 Asian Americans in Greater Houston live below the poverty line and nearly 110,000 are low-income. Plaintiff Wu regularly drives on highways and roads in his community.

126. Plaintiff Mia Su-Ling Gregerson is the State Representative for Washington State House District 33, Position 2, which includes all or a portion of Burien, Renton, Kent, SeaTac, Des Moines, Normandy Park and Unincorporated King County, Washington. She was born in Taiwan and adopted from an orphanage by U.S.-born parents. Plaintiff Gregerson lives in

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SeaTac where three generations of her family currently reside. In her district almost 49 percent of the residents speak a language other than English at home, and over 35 percent are foreign born.[1] These communities are disproportionately poorer than the rest of the county and rely on resources such as the free and reduced-price lunch programs, Community Development Block Grant Funds and housing subsidies. Her city, county, and voting district have higher proportions of Asian American and non-U.S. citizen populations than the general population in Washington or the United States. Plaintiff Gregerson regularly drives on highways and roads in her community.

127. Plaintiff Cindy Ryu is the State Representative for Washington State 32nd Legislative District. She is a Korean-born American and resides in Shoreline, Washington. Her city, county, and voting district have higher proportions of Asian American and non-U.S. citizen populations than the general population in Washington or the United States. Plaintiff Ryu's household includes a recipient of Medicare benefits funded by the U.S. Health and Human Services. Plaintiff Ryu's husband receives Medicare benefits. Plaintiff Ryu regularly drives on highways and roads in her community.

128. Plaintiff Sharon Tomiko Santos is the State Representative for Washington State House District 37, Position 1, which includes the historic Chinatown-International District of Seattle, Washington. Her city, county, and voting district have higher proportions of Asian American and non-U.S. citizen populations than the general population in Washington or the United States. Plaintiff Santos and her family are involved as students and volunteers in Seattle public schools, where overall more than one-third of the students qualify for free-and-reduced lunch. Plaintiff Santos regularly drives on highways and roads in her community.

[1] U.S. Census Bureau, Quick Facts, SeaTac City, Washington, *available at* https://www.census.gov/quickfacts/fact/table/seataccitywashington/RHI725216 (last accessed July 6, 2018).

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129. Plaintiff Raj Mukherji is a State Assemblyman in the New Jersey Legislature, representing the 33rd Legislative District, and serves as the Majority Whip of the New Jersey General Assembly. He is an American of Asian-Indian origin and resides in Jersey City, New Jersey. His city, county, and voting district have higher proportions of Asian American and non-U.S. citizen populations than the general population in New Jersey or the United States. Plaintiff Mukherji regularly drives on highways and roads in his community and uses public transportation services.

130. Plaintiff OJ Semans is a member of the Rosebud Sioux Nation and lives on the Rosebud Sioux Reservation, which is located in Todd County, South Dakota. Mr. Semans is the Executive Director of Four Directions. Rosebud, South Dakota has a higher proportion of American Indians than the general population in South Dakota or the United States. Plaintiff Semans lives on the reservation, uses social services provided on the reservation, and drives on highways and roads in his area.

Defendants

131. Defendant Wilbur L. Ross is Secretary of the U.S. Department of Commerce. The Secretary of Commerce carries out the functions and duties imposed on him by the Census Act, issues rules and regulations to carry out his responsibilities, and delegates functions and duties as necessary. 13 U.S.C. § 4. The Secretary of Commerce prepares questionnaires, determines inquiries, and determines the number and form of statistics, surveys, and censuses. 13 U.S.C. § 5. Congress delegated the duty to conduct the Census to the Secretary of Commerce, who must take a census on April 1 every 10 years "in such form and content as he may determine . . . ." 13 U.S.C. § 141 (a); *see also* 13 U.S.C. § 5. In that capacity, Defendant

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Ross issued a memorandum on March 26, 2018, which directed the U.S. Census Bureau to add a question on citizenship to the decennial Census. Defendant Ross is sued in his official capacity.

132. Defendant Ron Jarmin is performing the Non-Exclusive Functions and Duties of the Director for the U.S. Census Bureau. The Director of the U.S. Census Bureau oversees the 2020 Census operations and is responsible for ensuring the accuracy of the 2020 Census count. Defendant Jarmin directs the Census Bureau and performs Census-related duties assigned by law, regulation, or the Secretary of Commerce. 13 U.S.C. § 21. He is sued in his official capacity.

133. Defendant U.S. Department of Commerce is an agency of the U.S. government which oversees the U.S. Census Bureau and its conduct of the decennial Census and other Census programs.

134. Defendant U.S. Census Bureau is an agency within the U.S. Department of Commerce. 13 U.S.C. § 2. The Census Bureau is responsible for conducting all Census programs, including the development and implementation of the 2020 Census.

JURISDICTION AND VENUE

135. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and § 1343 over Plaintiff's causes of action under the United States Constitution and federal statutes. This Court has jurisdiction under 5 U.S.C. §§ 702 and 704 over Plaintiffs' claims under the Administrative Procedure Act ("APA"). This Court may grant Plaintiffs' request for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

136. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1), because: 1) Defendants Jarmin (in his official capacity) and United States Census Bureau reside in Prince George's County within this District, 2) a substantial part of the events or omissions

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giving rise to Plaintiffs' claims occurred in this District, and 3) Plaintiff MLLC resides in Annapolis, Maryland within this District and no real property is involved in this action.

FACTUAL ALLEGATIONS

A. Background on the U.S. Census

137. The U.S. Constitution requires an "actual Enumeration" of every person living in the United States to take place every ten years. U.S. CONST. art. I, § 2, cl. 3.

138. The decennial count of the national population is used to allocate seats in the U.S. House of Representatives to states based on the "whole number" of persons in each state. U.S. CONST. amend. XIV, § 2. Decennial Census data is also used for state legislative redistricting.

139. According to the Census Bureau, federal government agencies use decennial Census data, including population data, to allocate more than $675 billion in federal funds for over 100 different federal programs.[2]

140. Federal programs use Census Bureau data to distribute funds in various ways, including: 1) selection and/or restriction of recipients of federal funds, 2) award or allocation of funds, and 3) monitoring and assessment of program performance.[3] Federal programs use Census Bureau data to define the characteristics of governments and organizations eligible to receive federal funding.[4] Federal programs also use Census Bureau data to determine the amount of funds that will be distributed to eligible recipients and providers.[5]

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[2] MARISA HOTCHKISS & JESSICA PHELAN, USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION 3 (2017), (*available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf).
[3] *Id.* at 8.
[4] *Id.*
[5] *Id.*

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141. State governments use Census population data to allocate funds to local jurisdictions for programs which include healthcare, law enforcement, education, and transportation.

142. The Commerce Secretary reports to the relevant congressional committees the subjects that will be included in the decennial Census no later than three years before the Census date and reports the questions that will appear on the decennial Census no later than two years before the Census date. 13 U.S.C. § 141 (f)(1)-(2).

143. The Commerce Secretary's three-year deadline to report to Congress before the 2020 Census was March 31, 2017 and the two-year deadline was March 31, 2018.

144. The Commerce Secretary, after submitting either the 2017 and 2018 reports to Congress, may only include new subjects or questions through a new report to Congress that outlines the modification and explains that the Secretary "finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in [the] reports . . . be modified[.]" 13 U.S.C. § 141 (f)(3).

145. The Census Bureau's March 2018 report to Congress of the 2020 Census questions constitutes final agency action.

1. Paperwork Reduction Act, the Information Quality Act, and Office of Management and Budget and Census Bureau Standards

146. The Paperwork Reduction Act governs all federal agencies when they conduct a "collection of information" from individuals or other non-federal actors. 44 U.S.C. § 3502(3); *see* 44 U.S.C. §§ 3501(8)-(9), 3504. The Census is a "survey" under the Paperwork Reduction Act. *See* 5 C.F.R. § 1320.3(c)(1).

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147. The Director of the Office of Management Budget ("OMB") sets guidelines and policies for all statistical collection methods across the federal government, which includes the decennial Census. 44 U.S.C. § 3504(e)(3).

148. The Paperwork Reduction Act requires the OMB to "coordinate the activities of the Federal statistical system to ensure the efficiency and effectiveness of the system[] and the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes." 44 U.S.C. § 3504(e)(1).

149. The Information Quality Act requires that the OMB maximize "the objectivity, utility, and integrity of information (including statistical information)" provided to the public. Consolidated Appropriations Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

150. The OMB principles contained in its published policy directives state that "[a]ny loss of trust in the accuracy, objectivity, or integrity of the Federal statistical system and its products causes uncertainty about the validity of measures the Nation uses to monitor and assess its performance, progress, and needs by undermining the public's confidence in the information released by the Government."[6]

151. Under the OMB's Policy Directive No. 1, federal statistical agencies must: 1) provide objective, accurate, and timely information; 2) have credibility with data users; 3) have the trust of the individuals whose information is collected, and 4) be independent from political and other undue external influence in the development, production, and dissemination of statistics.[7]

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[6] Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units ("Policy Directive No.1"), 79 Fed. Reg. 71610 (Dec. 2, 2014), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-12-02/pdf/2014-28326.pdf.

[7] *Id.* at 71611-12.

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152. Policy Directive No.1 states that the Census Bureau is a federal statistical agency. The Directive also states that federal statistical agencies must "seek input regularly from the broadest range of private-and public-sector data users" in any plans for information collection or dissemination and must "apply sound statistical methods to ensure statistical products are accurate."[8]

153. The Census Bureau must also "conduct objective statistical activities," which means that they must "produce data that are impartial, clear, and complete" and make information available on an "equitable, policy-neutral, transparent, timely, and punctual basis."[9] The agency "must seek to avoid even the appearance that agency design, collection, processing, editing, compilation, storage, analysis, release, and dissemination processes may be manipulated."[10]

154. The Information Quality Act requires OMB and federal agencies to issue guidelines under the Paperwork Reduction Act to ensure and maximize the "quality, objectivity, utility, and integrity of information" to fulfill the Paperwork Reduction Act's goal of improving the quality and use of federal data and minimizing cost.[11]

155. OMB Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys, requires agencies to design and administer their data collection in a way that "minimizes respondent burden, while maximizing data quality."[12] The Policy Directive states that "a new survey or major revision of an existing survey must develop a written plan that sets

[8] *Id.* at 71615.
[9] *Id.*
[10] *Id.*
[11] Consolidated Appropriations Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000); *see* 44 U.S.C. §§ 3504, 3506.
[12] Office of Mgmt. & Budget, *Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys*, 11 (2006), *available at* https://goo.gl/83gdr4.

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forth a justification. . . ."[13] The Census Bureau must "ensure that all components of a survey function as intended when implemented in the full-scale survey."[14] OMB guidelines recommend testing "new components of a survey using methods such as cognitive testing, focus groups, and usability testing, prior to a field test of the survey system and incorporate the results from these tests into the final design."[15]

156. Pursuant to the Information Quality Act, the Census Bureau's Information and Quality Guidelines state that the Census Bureau must "provide information that is accurate, reliable, and unbiased."[16]

157. "Since the 1970s, the Census Bureau has conducted content tests to research and improve the design and function of different questions . . ." and to test "the wording of questions to ensure census questionnaires are easily understood and reflect the population accurately."[17]

158. For example, in 2012, the Census Bureau conducted a public opinion poll test to "inform approaches to communication about administrative records, privacy, and confidentiality."[18]

159. The Census Bureau conducted the 2012 National Content Test to assess relative self-response rates and internet self-response rates and its telephone questionnaire assistance operations, as well as "evaluate the performance of combined race and origin questions on the Internet."[19] According to the U.S. Census Bureau, "[i]n the last decade, Census Bureau researchers observed possible confusion about and misreporting of racial or ethnic identity in the

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[13] *Id.* at i.
[14] *Id.* at 9.
[15] *Id.*
[16] *Information Quality Guidelines Objectivity*, U.S. CENSUS BUREAU, https://www.census.gov/about/policies/quality/guidelines/objectivity.html (last visited May 30, 2018).
[17] *2020 Census: Content Research*, U.S. CENSUS BUREAU, *available at* https://www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/content-research.html (last visited May 21, 2018).
[18] U.S. CENSUS BUREAU, 2020 CENSUS OPERATIONAL PLAN: A NEW DESIGN FOR THE 21ST CENTURY 34 (2017), *available at* https://goo.gl/xEKfV1 [hereinafter *Operational Plan*].
[19] *Id.* at 35.

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current questions that asks Hispanic origin and race in two separate questions."[20] Based on the 2012 National Content Test results, the Census Bureau determined that it needed to "further study [] the collection of detailed race and origin groups in a national mail-out test."[21]

160. In 2015, the Census Bureau conducted the 2015 National Content Test which "was designed to compare different questionnaire design strategies for key [C]ensus content areas including race and ethnicity, relationship, and within-household coverage and to provide research for informing content decisions prior to the 2020 Census ."[22]

161. The 2015 National Content Test assessed how the wording of instructions and the terminology affect response accuracy and self-reporting.[23] The test also "included a reinterview operation to further assess the accuracy and reliability of the question alternatives for race and ethnicity."[24] The purpose of the re-interview was to "assess the accuracy and the reliability of the various race and Hispanic origin question designs by exploring responses to a number of probing questions."[25]

162. The Census Bureau's nearly decade-long study of proposed changes to the race and ethnicity question cost millions of dollars and included extensive testing on question content, language, and design.[26] Following tests and research, the Census Bureau decided not to add the

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[20] U.S. Census Bureau, 2020 Census: Content Research, *available at* https://www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/content-research.html (last visited May 21, 2018).
[21] *Operational Plan*, *supra* note 17, at 36.
[22] KELLY MATTHEWS ET AL., 2015 NATIONAL CONTENT TEST RACE AND ETHNICITY ANALYSIS REPORT ix (2017), *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf.
[23] *Id.* at 29-30.
[24] *Id.* at 2.
[25] *Id.* at 33.
[26] *Our Research: Research to Improve Data on Race and Ethnicity*, U.S. CENSUS BUREAU, *available at* https://goo.gl/GjGUJx (last visited May 17, 2018).

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question to the 2018 End-to-End test, which is considered to be the last opportunity to refine operations for the 2020 Census.[27]

163. The Census Bureau's 2013 Statistical Quality Standards require extensive testing of any data collection or supporting materials in order to identify any problems, including those related to "question content," "order," "context effects" or when earlier questions affect responses to later questions, "skip instructions," "formatting,"[28] and to refine the data collection or other materials based on pretest findings.[29] These standards apply to all censuses and surveys conducted by the Census Bureau.[30]

164. The Statistical Quality Standards also state that "[d]ata collection instruments in any languages other than English must be pretested in the languages that will be used to collect data during production."[31]

165. The Census Bureau's Policy and Sensitivity Review Checklist for Division and Office Chiefs, which is used to "determine the suitability for publication and release of Census Bureau information products," asks whether "the information product express[es] views on or discuss[es]" certain topics "in an inappropriate manner or in a way that is inconsistent with laws, Commerce Department policies, or Census Bureau policies[.]"[32] The Checklist topics include: "[i]ssues relating to privacy, confidentiality, data security, or access to and use of administrative records . . . ."[33] The Checklist topics also include "[a]ny issue that is politically sensitive or that

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[27] Memorandum from Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs (Jan. 26, 2018), https://goo.gl/3TKRti. In the absence of modified OMB standards on collection of race and ethnicity data, the Census Bureau "needed to make a decision on the design" of the question and moved forward with the current question format. *Id.*

[28] U.S. CENSUS BUREAU, STATISTICAL QUALITY STANDARDS 12 (2013), *available at* https://goo.gl/NLswcq.

[29] *Id.* at 7-8, 10.

[30] *Id.* at ii.

[31] *Id.* at 10.

[32] *Id.* at 109.

[33] *Id.*

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has been the subject of recent news articles, correspondence, hearings, or current or potential lawsuits."[34] Examples of sensitive issues include "[c]oncerns about the enumeration of sensitive populations (racial or ethnic populations, immigrants . . .)."[35]

166. A Census Bureau official stated in January 2018, "Adding a question or making a change to the [d]ecennial Census or the ACS involves extensive testing, review, and evaluation. This process ensures the change is necessary and will produce quality useful information for the nation."[36] Additionally, "[f]inal proposed questions result from extensive cognitive and field testing to ensure they result in the proper data with an integrity that meets the Census Bureau's high standards."[37]

167. The Census Bureau also stated in an Information Collection Request supporting statement to OMB about the 2018 End-to-End test that:

> [M]ost survey results cannot be directly applied to a decennial census environment. The size, scope, mandatory nature, importance of results (for such things as congressional apportionment, state redistricting efforts, and the allocation of billions of dollars in federal funds each year), and timing constraints (legal deadlines for producing apportionment and redistricting data) of the decennial census are unique. Thus, thorough and separate research and integrated testing must be conducted to ensure that new methods and operations will work in a decennial [C]ensus environment."[38]

2. Citizenship Data in the Current Census

168. A citizenship question last appeared on the decennial Census questionnaire sent to every household in 1950.

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[34] *Id.*
[35] *Id.* at 109-10.
[36] U.S. Census Bureau, Jan. 26, 2018 Program Mgmt. Review Tr. at 20, https://goo.gl/kKpYsR.
[37] *Id.*
[38] U.S. CENSUS BUREAU, SUPPORTING STATEMENT FOR 2018 END-TO-END CENSUS TEST--PEAK OPERATIONS 22 (Jan. 23, 2018), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201801-0607-002 (listed as 2018 E2E Census Test Supporting Statement_A_RHOupdates.docx) (last visited May 22, 2018).

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169. From 1960 to 2000, the Census Bureau included a citizenship question on the decennial "long-form" questionnaire distributed to a sample of the total population.

170. After the 2000 decennial Census, the Census Bureau began the process of replacing the "long-form" questionnaire with the American Community Survey ("ACS"). The ACS does not seek responses from every person, but instead is an ongoing survey of portions of the population. The Census Bureau conducts the ACS annually with approximately 1 in every 38 U.S. households[39] through internet, mail, and telephone surveys as well as in-person interviews.

171. The ACS includes dozens of questions that seek information on social, economic, housing, and demographic characteristics of the U.S. population, including a question about U.S. citizenship.

172. According to the Census Bureau, ACS information about citizenship helps policymakers and agencies better understand the immigrant experience in order to establish or evaluate public policy, enforce anti-discrimination laws, regulations, or policies, and/or tailor services to different groups.[40]

B. Defendants and Co-Conspirators Take Steps to Add a Citizenship Question to the Decennial Census

173. As required by federal law, Defendant Census Bureau submitted the subjects for the 2020 Census, including age, gender, race/ethnicity, relationship, and tenure, to Congress on March 28, 2017—three years before the 2020 Census date. The Census Bureau's March 2017 report to Congress did not include a subject on citizenship.

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[39] U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY INFORMATION GUIDE 3 (2014), *available at* https://goo.gl/jfcVrt.

[40] *American Community Survey: Why We Ask Questions About Place of Birth, Citizenship, Year of Entry*, U.S. CENSUS BUREAU, https://goo.gl/F7JKFB (last visited May 17, 2018).

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174. On July 14, 2017, Kansas Secretary of State Kris Kobach emailed Defendant Ross and said, "I'm following up on our telephone discussion from a few months ago. As you may recall, we talked about the fact that the US census does not currently ask respondents their citizenship. This lack of information impairs the federal government's ability to do a number of things accurately. It also leads to the problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes."[41] He further said, "It is essential that one simple question be added to the upcoming 2020 Census," and recommended the use of the ACS question. He offered a modification to the question to distinguish among non-U.S. citizens that are green card holders and those who are not.

175. On July 21, 2017 Mr. Kobach forwarded his July 14, 2017 email to Wendy Teramoto and said, "Below is the email I sent to Secretary Ross. He and I had spoken briefly on the phone about this issue, at the direction of Steve Bannon, a few months earlier." [42]

176. Upon information and belief, Mr. Kobach, Defendant Ross, and Israel Hernandez had an additional phone call on or around July 25, 2017, regarding the addition of a citizenship question, coordinated by Ms. Teramoto.[43]

177. On February 12, 2018, in a formal request to Defendant Ross, Mr. Kobach requested that the ACS citizenship question be added to the 2020 Census with a slight variation "to separate noncitizens into lawful permanent residents versus all other categories of noncitizens."[44]

178. John Gore, acting head of the U.S. Department of Justice ("DOJ") Civil Rights Division, drafted a letter requesting that a citizenship question be added to the decennial Census.

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[41] Complete Administrative Record, U.S. Dep't of Com. 00764 (June 8, 2018), *available at* https://goo.gl/cWrF8f [hereinafter *Administrative Record*].
[42] *Id.* at 00763.
[43] *Id.*
[44] *Id.* at 001141-001142.

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On November 3, 2017, Mr. Gore sent the draft letter to Arthur Gary, an official of the DOJ Justice Management Division, and asked Mr. Gary to send it the Census Bureau under Mr. Gary's signature.[45]

179. On December 12, 2017, Mr. Gary sent a letter to Defendant Jarmin that asked the Census Bureau to add a question on citizenship to the 2020 Census form.[46]

180. In his letter, Mr. Gary stated that, "[t]o fully enforce [the requirements of the Voting Rights Act], the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected" and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data . . . ."[47]

181. The DOJ's request for citizenship data to be collected from the decennial Census does not point to any change in the law or to new facts that affect the DOJ's ability to enforce the Voting Rights Act of 1965, 52 U.S.C. § 10301.

182. On December 29, 2017, Mr. Gary stated in an email that the letter he sent to the Census Bureau was "at the request of leadership, working with John [Gore]."[48]

183. Since 2010, the DOJ has filed a total of four cases to enforce the Section 2 of the Voting Rights Act.

184. In testimony before Congress, John Gore was unable to identify a single case brought under the Voting Rights Act that failed because the court required citizenship data based on a 100% Census survey.

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[45] Email from Michelle M. Allen to Arthur Gary (Nov. 29, 2017, 05:24 EST) at 28, *available at* https://goo.gl/ZdNd8q.
[46] Letter from Arthur Gary, General Counsel, Justice Management Division, Dep't. of Justice, to Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Census Bureau (Dec. 12, 2017), *available at* https://goo.gl/J9aY9p.
[47] *Id.* at 1.
[48] Email from Arthur Gary, General Counsel, Justice Management Division, Dep't. of Justice to Sarah Flores, et al., (Dec. 29, 2017, 1:04 PM EST) at 49, *available at* https://goo.gl/V7VRKK.

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185. On March 19, 2018, President Trump's reelection campaign sent an email that said, "The President wants the 2020 United States Census to ask people whether or not they are citizens," and, "The President wants to know if you're on his side."[49]

186. On March 26, 2018, Defendant Ross directed the Census Bureau to add a citizenship question to the 2020 Census and to use federal and state administrative records to validate Census responses to the citizenship question. As directed, the Census Bureau then submitted its list of questions to Congress for the 2020 Census on March 27, 2018 and included a citizenship question.[50]

187. The new citizenship question for the decennial Census will ask of each household member: "Is this person a citizen of the United States?"[51] Respondents must choose one of the following responses: 1) "Yes, born in the United States[;]" 2) "Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas[;]" 3) "Yes, born abroad of U.S. citizen parent or parents[;]" 4) "Yes, U.S. citizen by naturalization - *Print year of naturalization*[;]" and 5) "No, not a U.S. citizen[.]"[52]

188. In his announcement, Defendant Ross stated that the "Department of Commerce is not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness."[53]

189. After Defendants' added the citizenship question to the 2020 Census, President Trump's campaign sent an email to supporters that stated, "The people spoke. President Trump

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[49] Tara Bahrampour, *Trump's Reelection Campaign Calls For Adding Citizenship Question to 2020 Census Amid Criticism That He is Politicizing the Count*, WASH. POST (Mar. 20, 2018), *available at* https://goo.gl/5KP2bN.
[50] U.S. CENSUS BUREAU, QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY, 7 (2018), *available at* https://goo.gl/pLNGB8.
[51] *Id.*
[52] *Id.*
[53] Memorandum from Secretary Wilbur Ross, Department of Commerce, to Karen Dunn Kelly, Under Secretary for Economic Affairs, on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire 7 (Mar. 26, 2018), *available at* https://goo.gl/5FHVPN [hereinafter *Ross Memorandum*].

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has officially mandated that the 2020 United States Census ask people living in America whether or not they are citizens," and that "the sanctuary state of California is now SUING the Trump Administration to stop this commonsense order."[54]

190. With respect to the addition of the citizenship question, Defendant Ross recently stated:

> "I began considering various fundamental issues regarding the upcoming 2020 Census, including funding and content. Part of these considerations included whether to reinstate a citizenship question, which other Senior Administration officials had previously raised. My staff and I thought reinstating a citizenship question could be warranted, and we had various discussions with other governmental officials about reinstating a citizenship question to the Census. As part of that deliberative process, my staff and I consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act."[55]

191. The Census Bureau did not test the addition of a citizenship question in any of the tests it ran in preparation for the 2020 Census, including: the 2013 Census Test, the 2014 Census Test, the 2015 National Content Test, the 2016 Census Test, the 2017 Census Test, and the 2018 End-to-End Census Test.[56] The Census Bureau does not plan to conduct additional tests on content, design, operations, question placement, or procedures before the 2020 Census.

192. Defendants did not identify any "new circumstances" that would justify the modification of the 2017 report to Congress to add citizenship to the list of subjects included on the 2020 decennial Census.

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[54] Tal Kopan, *Trump Campaign Rallies Supporters on Census Citizenship Question*, CNN, Mar. 28, 2018, available at https://goo.gl/vCwP5m.

[55] Supplemental Memorandum by Secretary of Commerce Wilbur Ross, New York et al v. Dep't of Commerce et al, No. 1:18-cv-0291-JMF (S.D.N.Y. June 6, 2018), ECF No. 189-1.

[56] *See* DECENNIAL CENSUS MANAGEMENT DIVISION, 2020 CENSUS OPERATIONAL PLAN: EXECUTIVE SUMMARY 18-20 (2018), *available at* https://goo.gl/mtHaEJ.

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193. Defendant Ross did not offer any justification or explanation for why the citizenship question does not require testing before it is added to the 2020 decennial Census.

194. Upon information and belief, Defendant Ross did not examine empirical evidence, which indicates that a citizenship question on the 2020 Census will substantially lower response rates.

195. Upon information and belief, Defendant Ross did not investigate the rationale for the DOJ request or the reasoning for the request.

1. Defendants Disregarded the Expertise of Census Bureau Staff and Census Experts and Concerns From the Public

196. In 2017, the Census Bureau's Center for Survey Management released a memorandum stating that its researchers "noticed a recent increase in respondents spontaneously expressing concerns about confidentiality in some of our pretesting studies conducted in 2017."[57] Respondents in these projects were "paid a cash incentive" and "recruited through trusted community organizations."[58] They also had a "researcher sitting next to them during [the] survey" and a researcher "explain confidentiality during informed consent."[59] The Center for Survey Management stated that "respondent concerns might be more pronounced during a production survey than during pretesting."[60]

197. During pretests for an internet self-response platform, "one Spanish-speaking respondent said she was uncomfortable 'registering' other household members . . . because of the

[57] Memorandum from the U.S. Census Bureau, Ctr. For Survey Measurement, to Assoc. Directorate for Research and Methodology, 1, 5-7, 15 (Sept. 20, 2017), *available at* https://goo.gl/bprP6i.
[58] Mikelyn Meyers, Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census, Center for Survey Management, Census Bureau 6 (Nov. 2, 2017), *available at* https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf.
[59] *Id.*
[60] *Id.*

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current political climate and news reports about changing immigration policy."[61] One respondent did not report five unrelated household members (some of whom were immigrants) because she does not report their rental income to the IRS and because of what she referred to as the "Muslim ban."[62] Another "Spanish-speaking respondent filled out information about herself and three family members but intentionally left three or four roomers [*sic*] off the roster because, 'This frightens me, given how the situation is now' and mentioned being worried because of their 'immigration status.'"[63] A Spanish-speaking respondent who was a "legal resident in the country, commented: 'Particularly with our current political climate, the Latino community will not sign up because they think that Census will pass their information on and people can come looking for them.'"[64] Several Chinese-speaking focus group respondents stated that the Chinese community's main fear or concern was immigration status and how the data are used. They also expressed concern about opening the door to a government official and not wanting to be "investigated."[65] The Center for Survey Management stated that "this level of deliberate falsification of the household roster, and spontaneous mention of concerns regarding negative attitudes toward immigrants, is largely unprecedented in the usability interviews that [the Center for Survey Management] has been conducting since 2014 in preparation for the 2020 Census."[66]

198. During the Census Barriers, Attitudes, and Motivators Survey, one Spanish-speaking respondent said, "The possibility that the Census could give my information to internal security and immigration could come and arrest me for not having documents terrifies me," and

[61] Memorandum from the U.S. Census Bureau, Ctr. For Survey Measurement, to Assoc. Directorate for Research and Methodology, 2 (Sept. 20, 2017), *available at* https://goo.gl/bprP6i.
[62] Memorandum from the U.S. Census Bureau, Ctr. For Survey Measurement, to Assoc. Directorate for Research and Methodology, 2 (Sept. 20, 2017), *available at* https://goo.gl/bprP6i. Memorandum from the U.S. Census Bureau, Ctr. For Survey Measurement, to Assoc. Directorate for Research and Methodology, 2 (Sept. 20, 2017), *available at* https://goo.gl/bprP6i.
[63] *Id.* (alteration omitted).
[64] *Id.*
[65] *Id.*
[66] *Id.* at 3.

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that "someone could say, 'If you're not satisfied, why are you here?' and this could be used against her to expel her from the country."[67]

199. The Center for Survey Management conducted focus groups with Spanish-speaking Census Bureau field representatives regarding the Spanish translation of a National Health Interview Survey. A field representative said during the focus group, "This may just be a sign of the times, but in the recent several months before anything begins, I'm being asked times over, does it make a difference if I'm not a citizen?"[68] In addition, a field representative said that in June 2017 "she was doing a Census Bureau survey interview with questions about citizenship status. A Spanish-speaking respondent answered that he was not a citizen, and then appeared to lie about his country of origin. When the [field representative] started asking about his year of entry into the U.S., he 'shut down' and stopped responding to her questions. He then walked out and left her alone in the apartment, which had never happened to her during an interview before."[69] Another Spanish-speaking field representative said, "There was a cluster of mobile homes, all Hispanic. I went to one and I left the information on the door. I could hear them inside. I did two more interviews, and when I came back, they were moving . . . . It's because they were afraid of being deported."[70]

200. During a focus group with field representatives and field supervisors that worked on a recent housing survey operation, "[field supervisors] reiterated that the main issue they saw was privacy concerns of Latino respondents . . . ."[71] Another field representative said that "respondents have been confusing him with someone from Immigration and Customs

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[67] *Id.*
[68] *Id.* at 4.
[69] *Id.* at 5.
[70] *Id.*
[71] *Id.* at 6.

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Enforcement . . . . He reported that respondents that identified him as working for the government were hesitant to answer any questions, and it was difficult to gain their trust."[72]

201. The Center for Survey Management also released findings from a new qualitative study that assessed privacy and confidentiality concerns by respondents based on 2017 and Spring 2018 Census projects. In one example, a Spanish-speaking respondent "redacted detail origin from 'Mexican' to 'Hispanic[,]'" and said, "No, I want to [deselect] that. With the whole [administration] having us classified . . . . We really are fearful . . . . I don't want to write my status."[73] In response to message testing from Privacy Act studies, one Spanish-speaking respondent said, "But for someone who doesn't have papers, sometimes the law doesn't matter. They don't feel protected even by the law . . . . They do not feel that the government will protect them because of what they have seen in their community."[74] Center for Survey Management staff stated that "[r]espondents with confidentiality concerns could potentially: not answer survey questions, provide incomplete or inaccurate data on survey questions, [or] refuse to participate in a survey altogether[,]" and that "[t]his could negatively impact data quality and coverage for the 2020 Census and federal surveys in general."[75]

202. In a January 19, 2018 memorandum to Defendant Ross, the Census Bureau's Chief Scientist and Associate Director for Research and Methodology, John M. Abowd, ("Jan. 19 Memo") considered three alternatives in response to the DOJ's request to add a citizenship question to the 2020 Census, "(A) no change in data collection, (B) adding a citizenship question to the 2020 Census, and (C) obtaining citizenship status from administrative records for the

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[72] *Id.*
[73] Mikelyn Meyers & Patricia Goerman, *Respondent Confidentiality Concerns in Multilingual Pretesting Studies and Possible Effects on Response Rates and data Quality for the 2020 Census*, U.S. CENSUS BUREAU, 23 (Mar. 16-18, 2018), *available at* https://goo.gl/vWsJpL.
[74] *Id.* at 17.
[75] *Id.* at 25.

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whole 2020 Census population."[76] Of the three alternatives the Census Bureau considered in the Jan. 19 Memo, it:

> "recommend[ed] either Alternative A or C. Alternative C best meets DoJ's stated uses, is comparatively far less costly than Alternative B, does not increase response burden, and does not harm the quality of the census count. Alternative A is not very costly and also does not harm the quality of the census count. Alternative B better addresses DoJ's stated uses than Alternative A. However, Alternative B is very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources."[77]

203. The Jan. 19 Memo stated that based on the Census Bureau's estimates, "the addition of a question on citizenship could increase the cost of the 2020 Census by at least $27.5 million. It is worth stressing that this cost estimate is a lower bound. Our estimate of $55 million for each percentage point increase in [nonresponse follow-up] is based on an average of three visits per household. We expect that many more of these noncitizen households would receive six [nonresponse follow-up] visits."[78] The Census Bureau, in response to follow-up questions on the Jan. 19 Memo, reiterated that the additional number of nonresponse follow-ups were a "significant concern."[79] It said that the estimated cost increase was "a lower bound because it assumes the households that do not self-respond because we added a question on citizenship have the same follow-up costs as an average U.S. household. They won't because these households overwhelmingly contain at least one noncitizen, and that is one of our acknowledged hard-to-count subpopulations."[80]

204. The Jan. 19 Memo states that the Census Bureau analyzed ACS citizenship data quality and found that from 2013 to 2016:

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[76] Administrative Record, *supra* note 44, at 001277.
[77] *Id.*
[78] *Id.* at 001282.
[79] *Id.* at 001291.
[80] *Id.* at 001282.

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> "item nonresponse rates for the citizenship question on the mail-in questionnaires for non-Hispanic whites (NHW) ranged from 6.0 [percent] to 6.3 [percent], non-Hispanic Blacks (NHB) ranged from 12.0 [percent] to 12.6 [percent], and Hispanics ranged from 11.6 to 12.3 [percent]. In that same period the [Internet Self Response] item nonresponse rates for citizenship were greater than those for mail-in questionnaires. . . . By 2016 the rates increased for [non-Hispanic Blacks and especially Hispanics. They were [non-Hispanic Whites: 6.2 [percent], [non-Hispanic Blacks]: 13.1 [percent], and Hispanic: 15.5 [percent] (a 2.5 percentage point increase. Whether the response [to the ACS citizenship question] is by mail-in questionnaire or ISR [Internet Self Response] instrument, item nonresponse rates for the citizenship question are much greater than the comparable rates for other demographic variables like sex, birthdate/age, and race/ethnicity (data not shown)."[81]

205. The Jan. 19 Memo stated that the Census Bureau reviewed self-response rates of citizen and non-U.S. citizen households and found that for the 2000 Census, "[b]oth citizen and noncitizen households have lower self-response rates on the long form compared to the short form; however, the decline in self-response for noncitizen households was 3.3 percentage points greater than the decline for citizen households."[82] It similarly found that when it compared responses from the 2010 Census and the 2010 ACS, "the self-response rates were lower in the ACS than in the 2010 Census for both citizen and noncitizen households. In this 2010 comparison, moreover, the decline in self-response was 5.1 percentage points greater for noncitizen households than for citizen households."[83] Mr. Abowd stated that it was a "reasonable inference that a question on citizenship would lead to some decline in overall self-response because it would make the 2020 Census modestly more burdensome in the direct sense,

[81] *Id.* at 001280.
[82] *Id.*
[83] *Id.*

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and potentially much more burdensome in the indirect sense that it would lead to a larger decline in self-response for noncitizen households."[84]

206. The Census Bureau also analyzed the breakoff rates—the point where the respondent chooses to discontinue entering data—that occurred on screens with the citizenship and related questions. The Census Bureau found that "Hispanics and non-Hispanic non-whites (NHNW) have greater breakoff rates than non-Hispanic whites (NHW). . . . Because Hispanics and non-Hispanic non-whites breakoff much more often than non-Hispanic whites, especially on the citizenship-related questions, their survey response quality is differentially affected."[85]

207. On March 1, 2018 Mr. Abowd sent a supplemental memorandum to Defendant Ross on Alternative D. With respect to the methodological challenges of combining administrative records and responses from a citizenship question on the decennial Census, he stated, "Using the 2020 Census data only to fill in gaps for persons without administrative data on citizenship would raise questions about why 100 percent of respondents are being burdened by a citizenship question to obtain information for the two percent of respondents where it is missing." He further stated, "Including a citizenship question in the 2020 Census does not solve the problem of incomplete person linkages when producing citizenship statistics after 2020." Mr. Abowd stated, "In sum, Alternative D would result in poorer quality citizenship data than Alternative C. It would still have all the negative cost and quality implications of Alternative B outlined in the draft January 19, 2018 memo to the Department of Commerce."[86]

208. In his March 26, 2018 Memorandum, Defendant Ross stated, "The Census Bureau and many stakeholders expressed concern that Option B . . . would negatively impact the response rate for non-citizens. A significantly lower response rate by non-citizens could reduce

[84] *Id.* at 001281.
[85] *Id.* at 001281. Non-Hispanic non-whites includes, but is not limited to, Asian Americans.
[86] *Id.* at 001312.

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the accuracy of the decennial census and increase costs for non-response follow-up . . . operations."[87] However, he said, "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially."[88]

209. On April 25, 2018, Attorney General Jefferson B. Sessions stated in response to public concerns about the addition of a citizenship question to the 2020 Census: "I've learned it's the twelfth question on the form, the last question, I believe. It shouldn't scare people, they don't have to answer it, really. So I would think that's a very reasonable thing, and I believe the concerns over it are overblown."[89]

210. Every adult is required by law to answer the questions on the Census form truthfully. Any individual who refuses or willfully neglects to respond is subject to prosecution and financial penalties under 13 U.S.C. § 221.

211. On May 14, 2018, Defendant Ross said of the addition of the citizenship question, "I don't think the sky will fall when we add it to the Census itself in 2020." He further stated, "We are also putting the citizenship question last so that someone who for whatever reason feels uncomfortable with that question, at least they can deal easily with questions with which they are not uncomfortable."[90]

212. A Rhode Island resident—an undocumented immigrant—said during an interview about the 2018 End-to-End test and the addition of the citizenship question to the decennial Census, "After you answer that question saying that you are not a citizen, you're going to be

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[87] *Id.* at 3.
[88] *Id.*
[89] *Attorney General Sessions on Justice Department Budget Request*, C-SPAN (Apr. 25, 2018) *available at* https://goo.gl/oCBty3.
[90] *Commerce Secretary Wilbur Ross at National Press Club*, C-SPAN (May 14, 2018), *available at* https://www.c-span.org/video/?445463-1/commerce-secretary-ross-administration-alternative-remedies-zte-ban.

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looking behind you all the time," and that, "People who live here day by day are thinking, 'Are we going to be here tomorrow?'"[91]

C. Including a Citizenship Question on the 2020 Census Runs Contrary to the Experience and Long-standing Position of Previous Census Bureau Directors

213. According to the Census Bureau, inclusion of a citizenship question in the decennial Census would "inevitably jeopardize the overall accuracy of the population count," and "suspicious and fearful" respondents would refuse to cooperate if they felt that there was any chance the information provided would be used to their detriment.[92] The Census Bureau also stated that a question on citizenship is "particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate."[93]

214. During Congressional testimony in 1988 on legislation that would have required the decennial Census to ask respondents' citizenship status, then-Director of the Census Bureau John Keane stated that any changes to the way the Census is conducted so close in time to the Census date would "impose serious timing problems that could affect the conduct of the census," and cautioned against the inclusion of "untested and unproven procedures."[94] Then-Director Keane predicted that if the decennial Census included a question regarding immigration status "undocumented immigrants may either avoid the census altogether or deliberately misreport themselves as legal residents of [*sic*] the census."[95]

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[91] Hansi Lo Wang and Marisa Peñaloza, *Many Noncitizens Plan to Avoid the 2020 Census, Test Run Indicates*, NPR (May 11, 2018), *available at* https://www.npr.org/2018/05/11/610492880/many-noncitizens-plan-to-avoid-the-2020-census-test-run-indicates.

[92] *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

[93] *Id.*

[94] *Exclude Undocumented Residents from Census Counts for Apportionment: Hearing on H.R. 3639, H.R. 3814, and H.R. 4234 Before the H. Subcomm. on Census & Population of the H.. Comm. on Post Office & Civil Servs.*, 100th Cong. 49-50 (1988) (testimony of John Keane, Director, Census Bureau), *available at* https://goo.gl/DanfPL.

[95] *Id.*

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215. In 2005, former Census Director Kenneth Prewitt testified that a citizenship question on the Census short-form would be "treated with suspicion," and that "accuracy will suffer" if respondents skip questions on the Census form.[96]

216. On October 16, 2009, eight former Census Bureau directors wrote a joint statement opposing a congressional proposal to add a question on citizenship and immigration status to the decennial Census stating, "We can say unequivocally that adding an untested question at this late point in the decennial process would put the accuracy of the enumeration in all communities at risk . . . ."[97] The former directors explained that enumerators might have difficulties with non-response follow-up if "legalized 'head of household[s]' [] avoid enumerators because one or more other household members are present unlawfully."[98]

217. In 2016, four former Census Bureau directors, Dr. Kenneth Prewitt, Dr. Robert Groves, Dr. Martha Farnsworth Riche, and Vincent P. Barabba said that a citizenship question posed to every household would "invariably lead to a lower response rate to the Census in general . . . ."[99] The directors noted that a citizenship question would "seriously frustrate the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states."[100]

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[96] *Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Rep., Hr'g Before the Subcomm. on Federalism and the Census of the Cmte on gov't Reform*, 109th Cong. 72 (Dec. 6, 2005) (Statement of Kenneth Prewitt), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26074/html/CHRG-109hhrg26074.htm (last visited May 28, 2018).

[97] Statement of Vincent P. Barabba et al., Former Census Directors to U.S. Congress on Adding A New Question to the 2010 Census (Oct. 16, 2009), *available at* https://goo.gl/PPMce5.

[98] *Id.*

[99] Brief of Former Directors of the U.S. Census Bureau as Amici Curiae Supporting Appellees at 25, *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016).

[100] *Id.*

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218. On January 26, 2018, six former Census Bureau directors wrote a letter to Defendant Ross that opposed the addition of a citizenship question for the 2020 Census. The former directors stated,

> "Adding a citizenship question without a testing opportunity in a contemporary, [C]ensus-like environment will invalidate the results and lessons learned from the End-to-End test. Key assumptions underlying estimates of self-response, staffing needs, local office sites, and communication strategies will no longer be sound, calling into question cost projections that we know [the Bureau has] worked hard to validate and update."[101]

The former directors further stated,

> "It is highly risky to ask untested questions in the context of the complete 2020 Census design. There is a great deal of evidence that even small changes in survey question order, wording, and instructions can have significant, and often unexpected, consequences for the rate, quality, and truthfulness of response. The effect of adding a citizenship question to the 2020 Census on data quality and census accuracy, therefore, is completely unknown."[102]

D. Defendants' Decision to Add a Citizenship Question to the Decennial Census Was Motivated By Racially Discriminatory Intent

1. President Trump and Administration Officials Have Expressed an Intent to Target Latinos, African Americans, Asian Americans, Native Americans, and Non-U.S. Citizens.

219. On June 16, 2015, President Donald J. Trump announced his candidacy for President of the United States and stated, "When Mexico sends its people, they're not sending their best . . . . They're sending people that have lots of problems, and they're bringing those

[101] Letter from Vincent P. Barabba et al., Former Directors of the U.S. Census Bureau to Wilbur Ross Secretary of the Dep't of Commerce (Jan. 26, 2018), *available at* https://goo.gl/L3694b.
[102] *Id.*

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problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[103]

220. On July 5, 2015, in an interview on Fox News' "Media Buzz," President Trump stated: "What can be simpler or more accurately stated? The Mexican Government is forcing their most unwanted people into the United States. They are, in many cases, criminals, drug dealers, rapists, etc."[104]

221. In August 2015, at a Republican presidential debate, President Trump said, "[T]he Mexican government is much smarter, much sharper, much more cunning, and they send the bad ones over because they don't want to pay for them, they don't want to take care of them."[105]

222. During an October 2015 radio interview with Breitbart News, Attorney General Sessions stated:

> "In seven years, we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think we've always had these numbers, and it's not so. It's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through the 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America."[106]

223. In Fall 2015, during his presidential campaign, President Trump issued a press release that called "for a total and complete shutdown of Muslims entering the United States

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[103] Newsday.com Staff, *Donald Trump Speech, Debates and Campaign Quotes*, NEWSDAY (Nov. 9, 2016, 2:48 AM), *available at* https://goo.gl/v8AwJa.
[104] Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (Jul. 8, 2015), *available at* https://goo.gl/CRdok3.
[105] Louis Jacobson, *Donald Trump: 'The Mexican Government . . . They Send the Bad Ones Over'*, POLITIFACT (Aug. 6, 2015, 10:12 PM), *available at* https://goo.gl/GKJpX1.
[106] Jessica Prois, *Jeff Sessions, Who Has An Asian Granddaughter, Praised Era When Asians Were Banned From U.S.*, HUFF. POST (Jan. 11, 2017), *available at* https://www.huffingtonpost.com/entry/jeff-sessions-asian-granddaughter_us_5876a1cee4b092a6cae514d5.

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until our country's representatives can figure out what is going on."[107] President Trump also asserted that he was following in Roosevelt's footsteps when he said "what I am doing is no different than what FDR — FDR's solution for German, Italian, Japanese, you know, many years ago," adding, "Take a look at what FDR did many years ago, and he's one of the most highly respected presidents . . . . They named highways after him.'"[108]

224. On February 27, 2016, President Trump said of Gonzalo P. Curiel, a U.S. District Judge for the Southern District of California who was presiding over two civil lawsuits related to Trump University, "I think it has to do with, perhaps, with the fact that I'm very, very strong on the border - very, very strong on the border. He has been extremely hostile to me. Now, he is Hispanic, I believe."[109]

225. In March 2016, Trump Administration advisor Steve Bannon said, "Engineering schools . . . are all full of people from South Asia, and East Asia. . . . They've come in here to take these jobs."[110] Mr. Bannon further added that American students "can't get engineering degrees; they can't get into these graduate schools because they are all foreign students. When they come out, they can't get a job."[111] According to Mr. Bannon, "Twenty percent of this country is immigrants. Is that not the beating heart of this problem?"[112]

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[107] Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.*, CNN (Dec. 8, 2015), *available at* https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html.
[108] Duncan Williams and Gideon Yaffe, *Trump's Administration Says the Travel Ban Isn't Like Japanese Internment. It Is.*, WASH. POST (May 16, 2017), *available at* https://www.washingtonpost.com/posteverything/wp/2017/05/16/trumps-administration-says-the-travel-ban-isnt-like-japanese-internment-it-is/?utm_term=.d5c23f572d02.
[109] Geneva Sands, *Judge, Once Berated by Trump, Rules in Favor of Border Wall Waivers*, ABC News, (Feb. 28, 2018, 9:54 PM), *available at* https://goo.gl/Gk6HAx.
[110] Phillip Bump, *Steven Bannon Once Complained That 20 Percent of the Country is Made up of Immigrants. It Isn't*, WASH. POST (Feb. 1, 2017), *available at* https://www.washingtonpost.com/news/politics/wp/2017/02/01/steve-bannon-once-complained-that-20-percent-of-the-country-is-made-up-of-immigrants-it-isnt/?noredirect=on&utm_term=.700948ce4c7b.
[111] *Id.*
[112] *Id.*

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226. On March 9, 2016, President Trump told CNN that he wanted to ban Muslims from entering the United States of America because "we can't allow people coming into this country who have this hatred of the United States" and "of people that are not Muslim."[113]

227. On May 25, 2016, President Trump tweeted, "The protesters in New Mexico were thugs who were flying the Mexican flag. The rally inside was big and beautiful, but outside, criminals!"[114]

228. On May 27, 2016, at a campaign rally in San Diego, President Trump said Judge Curiel was a "hater of Donald Trump" because he "happens to be, we believe, Mexican[.]"[115]

229. On June 2, 2016, President Trump said Judge Curiel had an "absolute conflict" presiding over the Trump University case.[116] President Trump referred to Judge Curiel as "a Mexican," and stated, "I'm building a wall. It's an inherent conflict of interest."[117]

230. On June 10, 2016, President Trump tweeted in reference to United States Senator Elizabeth Warren, "Pocahontas is at it again! Goofy Elizabeth Warren, one of the least productive U.S. Senators, has a nasty mouth. Hope she is V.P. choice."[118]

231. On June 24, 2016, President Trump tweeted, "Many of the thugs that attacked the peaceful Trump supporters in San Jose were illegals. They burned the American flag and laughed at police."[119]

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[113] Anderson Cooper 360 Degrees, *Exclusive Interview with Donald Trump*, CNN (Mar. 9, 2016), *available at* http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html.
[114] Donald Trump, The protesters in New Mexico were thugs who were flying the Mexican flag. The rally inside was big and beautiful, but outside, criminals!, Twitter, May 25, 2016, *available at* https://goo.gl/GLFeTg.
[115] Kristen East, *Trump Attacks 'Mexican' Judge in Trump U Lawsuit*, POLITICO, May 28, 2016, available at https://goo.gl/SfNYEX.
[116] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,' WALL STREET JOURNAL, June 3, 2016, available at https://goo.gl/LCMcBX.
[117] Elliot Hannon, Trump Says Judge's Mexican Ancestry Is "Inherent Conflict of Interest" Because "the Wall," Slate (June 2, 2016), available at https://goo.gl/ChspcJ.
[118] Donald Trump, Pocahontas is at it again! Goofy Elizabeth Warren, one of the least productive U.S. Senators, has a nasty mouth. Hope she is V.P. choice, Twitter, June 10, 2016, available at https://goo.gl/tiGukS.

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232. On October 19, 2016, during a presidential debate, President Trump said in response to a question about immigration that, "[w]e have some bad hombres here, and we're going to get them out."[120]

233. In November 2016, Attorney General Sessions stated that "almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."[121]

234. In November 2016, Carl Higbie, a former member of the Trump Administration who was appointed to, but resigned from the Corporation for National and Community Service, said a Muslim registry would "hold constitutional muster" and that "[w]e've done it with Iran back a while ago. We did it during World War II with the Japanese.[]" Mr. Higbie further stated, "I'm just saying there is precedent for it."[122]

235. In 2016, when the previous administration planned to house unaccompanied, undocumented children in Alabama, then-Senator Sessions stated that the decision was "idiotic policy" that is "encouraging more people to come illegally." He further stated that, "then we treat them, we house them, we feed them for months, and we release them basically on bail and then they just go where they wanted to go to begin with."[123]

236. In response to lower Latino enrollment in Alabama public schools following the enactment of Alabama HB 56, then-Senator Sessions stated, "All I would just say to you is that

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[119] Donald Trump, Many of the thugs that attacked peaceful Trump supporters in San Jose were illegals, Twitter, June 4, 2016, available at https://goo.gl/ZcKCiU.
[120] Matt Pearce, Trump on immigration: 'We have some bad hombres here, and we're going to get them out,' L.A. Times (Oct. 19, 2016), available at https://goo.gl/61878B.
[121] Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From An Entire Country*, HUFFINGTON POST (updated Nov. 20, 2016), *available at* https://goo.gl/xQ6NrY.
[122] Derek Hawkins, *Japanese American Internment is 'Precedent' For National Muslim Registry, Prominent Trump Backer Says*, WASH. POST (Nov.. 17, 2016), *available at* https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/japanese-internment-is-precedent-for-national-muslim-registry-prominent-trump-backer-says/?utm_term=.ee84e6e5a7e9.
[123] Remezcla Estaff, *A Look At Attorney General Appointee Jeff Sessions' Long History of Hostility Toward Latinos*, REMEZCLA (Jan. 12, 2017, 12:55 PM), *available at* https://goo.gl/mwNuih.

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it's a sad thing that we've allowed a situation to occur for decades that large numbers of people are in the country illegal [*sic*] and it's going to have unpleasant, unfortunate consequences."[124]

237. On November 27, 2016, President Trump tweeted, "[i]n addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally."[125]

238. On January 23, 2017, news outlets reported on a leaked draft Executive Order entitled, "Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs" ("Jan. 23 Draft Executive Order").[126]

239. The Jan. 23 Draft Executive Order stated that its purpose was to "help fulfill several campaign promises" and to address the "flow of illegal entries and visa overstays."[127] To that end, it instructed the Director of the U.S. Census Bureau to "include questions to determine U.S. citizenship and immigration status on the long-form questionnaire in the decennial [C]ensus."[128]

240. The Jan. 23 Draft Executive Order made no mention of voting rights enforcement or the need for citizenship data in order to enforce Section 2 of the federal Voting Rights Act. The Jan. 23 Draft Executive Order also made no mention of placing a question about citizenship on the decennial Census questionnaire that is sent to all households.

241. In January 2017, Kansas Secretary of State Kris Kobach stated to the media that he spoke with President Trump about adding a citizenship question to the U.S. Census and that the President "absolutely was interested in this." Kobach explained that the Census should

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[124] *Id.*
[125] Donald Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 3:30 PM), *available at* https://goo.gl/Lhj4hu.
[126] Memorandum from Andrew Bremberg to Donald Trump, President on Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs 1 (Jan. 23, 2017), *available at* https://goo.gl/qWHL5T.
[127] *Id.*
[128] *Id.*

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inquire into citizenship because California in particular, has had its "congressional seats inflated by counting illegal aliens."[129]

242. On June 13, 2017, the Acting Director of U.S. Immigrations and Customs Enforcement ("ICE"), Thomas Homan, testified before Congress that "every immigrant in the country without papers . . . should be uncomfortable. You should look over your shoulder. And you need to be worried."[130]

243. On August 25, 2017, President Trump pardoned former Maricopa County, Arizona Sheriff Joe Arpaio, who had been held in criminal contempt by a federal district court for failure to comply with another federal court's order that enjoined his practice of racially profiling Latinos.

244. On September 5, 2017, Attorney General Sessions said that Deferred Action for Childhood Arrivals "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens."[131]

245. In Fall 2017, President Trump asked a career intelligence officer "Where are you from?" When the Asian American woman answered that she was from New York, President Trump asked her where "your people" are from.[132]

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[129] Bryan Lowry, *That citizenship question on the 2020 Census? Kobach says he pitched it to Trump*, THE KANSAS CITY STAR (Mar. 27, 2018, 2:01 PM), *available at* https://goo.gl/iZFVjP.

[130] *Immigration and Customs Enforcement and Border Patrol Fiscal Year 2018 Budget Request: Hearing Before the Subcomm. on Homeland Sec. of H. Comm. on Appropriations*, 115th Cong. (2017) (statement of Thomas D. Homan, Acting Director, Immigration and Customs Enforcement), *available at* https://goo.gl/cRcX6i; *see also* Elise Foley, *ICE Director To All Undocumented Immigrants: 'You Need To Be Worried,'* HUFFINGTON POST (Jun. 13, 2017, 6:51 PM) *available at* https://goo.gl/dMvXrx.

[131] Jefferson B. Sessions, U.S. Attorney General, Remarks on DACA (Sep. 5, 2017), *available at* https://goo.gl/sT7EGQ.

[132] Christopher Woody, *Trump Reportedly Asked Why a 'Pretty Korean Lady' Intelligence Officer Wasn't Negotiating with North Korea for the US*, Buss. Ins. (Jan. 12, 2018), *available at* http://www.businessinsider.com/trump-pretty-korean-lady-negotiating-north-korea-2018-1.

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246. On November 3, 2017, President Trump tweeted about United States Senator Elizabeth Warren, "Pocahontas just stated that the Democrats, lead [sic] by the legendary Crooked Hillary Clinton, rigged the Primaries! Lets [sic] go FBI and Justice Dept."[133]

247. In November 2017, at an event at the White House honoring Navajo code talkers, President Trump again referenced his nickname for Senator Warren and stated, "[W]e have a representative in Congress who has been here a long time … longer than you – they call her Pocahontas!"[134]

248. On January 11, 2018, President Trump discussed an immigration proposal with advisors and party leaders and asked why he would want "all these people from shithole countries," referring to Haiti and various nations in Africa.[135] President Trump added that the United States should accept more immigrants from countries like Norway.[136]

249. On May 10, 2018, during an interview with National Public Radio, White House Chief of Staff John Kelly said undocumented immigrants were "not people that would easily assimilate into the United States, into our modern society. They're overwhelmingly rural people. In the countries they come from, fourth-, fifth-, sixth-grade educations are kind of the norm. They don't speak English; obviously that's a big thing. . . . They don't integrate well; they don't have skills."[137]

250. On May 16, 2018, during a California Sanctuary State Roundtable and in response to a comment by Fresno County Sheriff, Margaret Mim, about the criminal gang MS-13,

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[133] Donald Trump, Pocahontas just stated that the Democrats, lead by the legendary Crooked Hillary Clinton, rigged the Primaries! Lets go FBI and DOJ.", Twitter, Nov. 3, 2017, *available at* https://goo.gl/74r8yw.
[134] Dan Merica, *At Navajo Veterans' Event, Trump Makes 'Pocahontas' Crack*, CNN Politics (Nov. 28, 2017), *available at* https://goo.gl/Zr1isQ.
[135] Julie H. Davis, et al., *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, NYT, Jan. 11, 2018, *available at* https://goo.gl/xCTsNN (last visited May 16, 2018).
[136] *Id.*
[137] John Burnett and Richard Gonzales, *John Kelly on Trump, The Russia Investigation and Separating Immigrant Families*, NPR (May 10, 2018), *available at* https://goo.gl/7RDpmH.

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President Trump said, "We have people coming into the country, or trying to come in—and we're stopping a lot of them—but we're taking people out of the country. You wouldn't believe how bad these people are. These aren't people. These are animals. And we're taking them out of the country at a level and at a rate that's never happened before."[138]

251. On May 21, 2018, the White House published an article on its website regarding MS-13 that used the term "animals" to describe individuals ten times. The article states, "President Trump's entire Administration is working tirelessly to bring these violent animals to justice."[139]

252. On May 23, 2018, during a roundtable on immigration, President Trump said, "We have the worst immigration laws of any country, anywhere in the world," and that unaccompanied, undocumented children have "exploited the loopholes in our laws to enter the country as unaccompanied alien minors…. They look so innocent. They're not innocent."[140]

253. On June 19, 2018 President Trump tweeted, "Democrats are the problem. They don't care and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13. They can't win on their terrible policies, so they view them as potential voters!"[141]

254. At a rally on July 5, 2018, President Trump referred to Senator Warren as "Pocahontas," and said, "She of the great tribal heritage, what tribe is it? Uh, let me think about that one. Meantime, she's based her life on being a minority. Pocahontas. They always want

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[138] *President Trump Hosts California Sanctuary State Roundtable*, C-SPAN (May 16, 2018), *available at* cs.pn/2INPSJ4.

[139] White House, *What You Need to Know About the Violent Animals of MS-13*, May 21, 2018, *available at* https://www.whitehouse.gov/articles/need-know-violent-animals-ms-13/.

[140] Seung Min Kim, T*rump Warns Against Admitting Unaccompanied Migrant Children: 'They're Not Innocent'*, Wash. Post (May 23, 2018), *available at* https://goo.gl/QknT7u.

[141] Donald Trump, Democrats are the problem. They don't care and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13. They can't win on their terrible policies, so they view them as potential voters!, Twitter, June 19, 2018, *available at* https://goo.gl/6QsBbY.

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me to apologize for saying it, and I hereby, oh no, I want to apologize, I'll use tonight. Pocahontas, I apologize to you. I apologize. To you, I apologize. To the fake Pocahontas I won't apologize. . . ." He later stated, "When she proclaims that she is of Indian heritage, because her mother said she has high cheekbones . . . we will say, I will give you a million dollars to your favorite charity, paid for by Trump, if you take the test and it shows you're an Indian."[142]

2. President Trump Demands Exacting Loyalty From Cabinet Heads and Department Secretaries

255. Since taking office in January 2017, President Trump has fired or forced several members of his Administration to resign. As of April 12, 2018, there have been at least 23 high-profile firings or forced resignations from the Trump Administration.[143] The rate of turnover for high-level positions is double that of President Ronald Reagan's Administration and three times higher than the Administration of President Barack Obama.[144]

256. Upon information and belief, President Trump caused the departure of several Administration members for failing to follow strictly President Trump's agenda and for engaging in specific actions that President Trump disagreed with politically.

257. For example, in November 2017, Acting Secretary of Homeland Security Elaine Duke extended temporary protected status for immigrants from Honduras for six months. In response to Acting Secretary Duke's decision, White House Chief of Staff, John Kelly, told her

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[142] Jonathan Allen, Trump Challenges 'Pocahontas' Warren to DNA Test to Prove She's Native American, NBC News (July 5, 2018), available at https://goo.gl/sx9YmT.

[143] Denize Lu & Karen Yourish, *Hired and Fired: The Unprecedented Turnover of the Trump Administration*, N.Y. TIMES (updated Apr. 26, 2018), *available at* https://goo.gl/T6y5Dx; *see also* Jeremy Berke, *Tom Bossert is Out — Here Are All The Casualties of the Trump Administration so Far*, BUS. INSIDER (Apr. 10, 2018, 12:20 PM), *available at* https://goo.gl/mB952x.

[144] Kathryn Dunn Tenpas, *Why is Trump's Staff Turnover Higher than the 5 Most Recent Presidents?*, BROOKINGS INST. (Jan. 19, 2018), *available at* https://goo.gl/2Qhba7.

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that her decision "'prevents our wider strategic goal' on immigration."[145] Former Secretary of State Rex Tillerson also told Acting Secretary Duke that ending temporary protected status for immigrants from Honduras "was just something she had to do."[146] In April 2018, Acting Secretary Duke and Department of Homeland Security international adviser James Nealon, reportedly resigned because of pressure from the Trump Administration to end temporary protected status for immigrants from Honduras and Haiti.[147]

258. In May 2018, during a meeting on immigration, President Trump criticized Homeland Security Secretary Kirstjen Nielsen because the number of people arrested for illegally crossing the Mexico border topped 50,000 for the second consecutive month.[148] President Trump said to Nielson, "Why don't you have solutions? How is this still happening?" and that "We need to shut [the border] down. We're closed."[149] President Trump also stated that Nielson is "not tough enough."[150]

259. In March 2018, James Schwab, an U.S. Immigrations Custom Enforcement spokesperson resigned over what he described as "false" and "misleading" statements about "criminal aliens" escaping capture in Northern California because Oakland's mayor tipped them off, made by Attorney General Sessions and Thomas Homan, ICE acting director.[151] Mr. Schwab explained, "I quit because I didn't want to perpetuate misleading facts . . . . I asked

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[145] Jonathan Blitzer, *The Battle Inside the Trump Administration Over T.P.S.*, THE NEW YORKER (May 11, 2018), *available at* https://goo.gl/UapFdC (last visited May 19, 2018).
[146] Lorelei Laird, *Officials Resigned Reportedly After Pressure to Cancel Temporary Protected Status for Immigrants*, ABA Journal (May 14, 2018), available at https://goo.gl/8PSjv5 (last visited May 19, 2018).
[147] *Id.*
[148] Josh Dawsey and Nick Miroff, Trump Unloads on Homeland Security Secretary in Lengthy Immigration Tirade, Wash. Post (May 10, 2018), *available at* https://goo.gl/UuyJFs (last visited May 19, 2018).
[149] *Id.*
[150] *Id.*
[151] Meagen Flynn and Avi Selk, ICE Spokesman Resigns, Citing Fabrications by Agency Chief, Sessions About Arrests, Chicago Tribune (March 13, 2018), *available at* https://goo.gl/ncZEuc (last visited May 19, 2018).

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them to change the information. I told them that the information was wrong, they asked me to deflect, and I didn't agree with that. Then I took some time and I quit."[152]

E. The Inclusion of a Citizenship Question Harms Latinos, African Americans, Asian Americans, Native Americans, and Non-U.S. Citizens and Increases the Chances of a Large and Differential Undercount

260. Latinos, African Americans, Asian Americans, Native Americans, and non-U.S. citizens, including individual Plaintiffs, clients and members of Plaintiff organizations and member constituents of Plaintiff legislative caucuses, will be injured by the addition of a citizenship question to the 2020 Census.

261. The Census Bureau recognizes racial and ethnic minorities, linguistic minorities, lower income persons, homeless persons, undocumented immigrants, young mobile persons, and children as hard-to-count populations.[153]

262. A University of New Hampshire study found that "about a quarter of all [hard-to-count] counties in the nation are rural majority-minority counties," based on Census data.[154] "Of the thirty-seven Hispanic [hard-to-count] counties, twenty-nine were located in rural areas, mostly in the Southwest . . . ."[155] The Census Bureau also identified certain barriers to census enumeration in the *colonias* or hard-to-count areas studied: "irregular housing, little or no knowledge of English and limited formal education, concerns regarding confidentiality, and complex and fluid households."[156]

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[152] *Id.*
[153] Julie A. Dowling, *Hard to Count Population Working Group Presentation*, Census Bureau, 2 (Mar. 27, 2015), *available at* https://www2.census.gov/cac/nac/meetings/2015-03/2015-03-26_dowling.pdf.
[154] William P. O'Hare, *2020 Census Faces Challenges in Rural America*, University of New Hampshire, 3 (2017), *available at* https://scholars.unh.edu/cgi/viewcontent.cgi?article=1329&context=carsey.
[155] *Id.*
[156] Manuel de la Puente, *Census 2000 Testing, Experimentation, and Evaluations Program Topic Report No. 15, TR-15: Census 2000 Ethnographic Studies*, U.S. Census Bureau, 21 (Mar. 2014), *available at* https://www.census.gov/pred/www/rpts/TR15.pdf.

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263. The 1990 Census undercounted Hispanics by approximately 5 percent.[157] The 2010 Census undercounted Hispanics by 1.5 percent.[158] The 2000 Census undercounted Hispanics by 0.7 percent.[159]

264. The 1990 Census undercounted African Americans by 4.6 percent.[160] The 2000 Census undercounted African Americans by 1.8 percent.[161] The 2010 Census undercounted African Americans by 2.1 percent.[162]

265. The undercount of the Asian American and Pacific Islander ("AAPI") community in the 1990 Census was 2.36 percent.[163] The 2010 Census had a relatively "accurate" count for AAPIs, with a net undercount rate of 0.08 percent for Asian Americans, and 1.34 percent for Non-Hispanic Pacific Islanders.[164] Although statistically insignificant, the 2010 Census missed hundreds of thousands of Asian Americans – a problem that was offset, at the national level, by double counting or other mistaken enumerations.[165] The proportion of Asian Americans who should have been counted but were not during the 2010 census was higher than that of non-Hispanic Whites, with 5.3 percent of Asian Americans not counted as compared to 3.8 percent for non-Hispanic Whites.[166]

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[157] Edward W. Fernandez, *Using Analytic Techniques to Evaluate the 1990 Census Coverage of Young Hispanics* (U.S. Census Bureau, Working Paper No. 11, 1995), *available at* https://goo.gl/zZfxtM.
[158] Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census (May 22, 2012), *available at* https://goo.gl/rbdUFP.
[159] *Id.*
[160] U.S. Census Bureau, *2010 Census Coverage Measurement Estimation Report: Summary of Estimates of Coverage for Persons in the United States* 4 (2012), *available at* https://www.census.gov/coverage_measurement/pdfs/g01.pdf [hereinafter "2010 CCM Report"].
[161] *Id.* at 4.
[162] *Id.*
[163] 2010 CCM Report at 15.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 17.

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266. The 1990 Census undercounted Native Americans and Alaska Natives living on reservations by 12.22 percent.[167] The 2000 Census undercounted Native Americans by 0.9 percent.[168] The 2010 Census undercounted Native Americans by 4.9 percent.[169]

267. Latino children are particularly vulnerable to an undercount. The 2010 Census undercounted Latino children by 7.5 percent.[170]

268. The Census Bureau recognizes that questions about citizenship or immigration status are considered sensitive.[171] Given that these hard-to-count populations already experience undercounts relative to the general population and that these populations represent a significant percentage of the overall population in Arizona, California, Georgia, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, South Dakota, Texas, Washington and Wyoming, any reluctance by Latinos, African Americans, Asian Americans, and Native Americans to participate in the Census will result in a more severe undercount of Hispanic/Latino, African Americans, Asian American, and Native American populations.

269. Latinos, African Americans, Asian Americans, Native Americans, and non-U.S. citizens are less likely to respond to a Census questionnaire that includes a citizenship question. Defendant Ross noted in his March 26, 2018 Memorandum that when the citizenship question was included in the decennial Census long form, the decline in self-response rates for non-U.S.

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[167] 2010 CCM Report at 5.
[168] Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census (May 22, 2012), *available at* https://goo.gl/rbdUFP.
[169] 2010 CCM Report at 5.
[170] Scott Konicki, *The Undercount of Young Children in the Decennial Census*, Census Bureau, 5 (Apr. 12, 2016), *available at* https://goo.gl/BZ8shj.
[171] DATA STEWARDSHIP EXECUTIVE POLICY COMMITTEE, DS-16: POLICY ON RESPONDENT IDENTIFICATION AND SENSITIVE TOPICS IN DEPENDENT INTERVIEWING, U.S. CENSUS BUREAU, (Dec. 9, 2014), *available at* https://www2.census.gov/foia/ds_policies/ds016.pdf.

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citizen households was 3.3 percent greater than for citizen households.[172] Defendant Ross also noted that for the 2013-2016 ACS survey, 11.6 to 12.3 percent of Hispanics did not respond to the citizenship question, compared to 6.0 to 6.3 percent of non-Hispanic whites.[173]

F. Defendants' Actions Harm Organizational Plaintiffs, as Well as Their Members, Clients and Constituents

270. Organizational Plaintiffs, as well as their members, clients and constituents, will be injured by the addition of a citizenship question to the 2020 Census.[174]

271. Organizational Plaintiffs' members, clients and constituents live in communities that will suffer from a disproportionate undercount of Latinos, African Americans, Asian Americans, Native Americans and non-U.S. citizens. Organizational Plaintiffs' members, clients, and constituents live in communities whose residents are less likely to respond to the citizenship question on the Census out of fear that Census responses will not be kept confidential and that there may be adverse immigration enforcement against non-U.S. citizen household members.

272. Organizational Plaintiffs will be injured as organizations by the addition of a citizenship question to the decennial Census. A citizenship question on the decennial Census will discourage Plaintiffs' members, clients, and constituents from completing the Census form.

273. Adding a citizenship question to the Census will harm Organizational Plaintiffs, including, but not limited to draining their limited resources and frustrating their organizational missions. Organizational Plaintiffs expended or will be required imminently to expend additional resources to educate their members, constituents and the clients they serve about how

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[172] Memorandum from Secretary Wilbur Ross, Department of Commerce, to Karen Dunn Kelly, Under Secretary for Economic Affairs, on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), *available at* https://goo.gl/5FHVPN.

[173] *Id.* at 3.

[174] The term "Organizational Plaintiffs" refers to all Plaintiffs except for Plaintiffs Juanita Valdez-Cox and Gene Wu.

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to respond to a citizenship question on the 2020 Census questionnaire. Organizational Plaintiffs have also expended and will be required imminently to expend additional resources to address community fears and to persuade their members, constituents, and clients to participate in the Census despite the addition of a citizenship question on the questionnaire, including expending resources on additional staff, hotlines, public service announcements, written educational materials and other outreach methods that these organizations would not otherwise conduct.

Arizona Organizational Plaintiffs

274. Many of the communities that AZLLC, CPLC, Friendly House, and PAZ serve have relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States.

275. The addition of the citizenship question will harm individuals that AZLLC, CPLC, Friendly House, and PAZ serve and/or represent because they will all receive a 2020 decennial Census questionnaire. AZLLC and PAZ will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because AZLLC has constituents and PAZ has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question.

276. The inclusion of a citizenship question will result in a disproportionate undercount of residents in Arizona and the majority of counties AZLLC, CPLC, Friendly House, and PAZ serve and/or represent. Individuals in these counties will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. These individuals will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

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277. An undercount will result in a loss of federal funds for services and programs on which AZLLC constituents, PAZ members, and the individuals that CPLC, Friendly House, and PAZ serve rely.

278. The addition of a citizenship question to the 2020 decennial Census frustrates AZLLC's mission to integrate immigrant communities into society and improve the quality of life of working-class Latino residents in Arizona. Plaintiff AZLLC will devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of the Latino and non-U.S. citizen population. As a result of the citizenship question, AZLLC will have to divert resources away from civic engagement efforts, such get-out-the-vote and voter registration efforts, to address concerns over the citizenship question. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent on AZLLC's core activities.

279. The addition of a citizenship question to the 2020 decennial Census has made it difficult for CPLC to encourage other nonprofits to join coalitions around the Census because they have reservations about the question. The addition of a citizenship question further frustrates CPLC's mission to drive economic and political empowerment in Arizona. As a result of the addition of the citizenship question, CPLC has already diverted employee time from its other programs and coalition work, including its education, healthcare, civic engagement, and voter registration work, to educate other nonprofits as well as community members about the citizenship question. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward CPLC's core activities.

280. The addition of a citizenship question to the 2020 decennial Census frustrates Friendly House's mission to empower and address the pressing needs of diverse communities in

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Arizona. As a result of the addition of the citizenship question, Friendly House will have to divert employee time from its other programs, including its education, workforce development, and family services, to educate community members about the citizenship question with additional workshops and other programmatic efforts. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward Friendly House's core activities.

281. As a result of the addition of a citizenship question to the 2020 Census, PAZ has already diverted resources by receiving and responding to inquiries from community members concerned about the addition of a citizenship question to the 2020 Census. PAZ will imminently have to divert its limited resources—including time and money—from its other efforts to educate the communities it serves about what the addition of this question means, and to encourage these communities to complete the Census questionnaire.

California Organizational Plaintiffs

282. Many of the communities that CHIRLA serves have relatively larger Latino and non-U.S. citizen populations when compared to California and the United States.

283. The addition of the citizenship question will harm all CHIRLA members because they will all receive a 2020 decennial Census questionnaire. CHIRLA will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because CHIRLA has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question.

284. The addition of the citizenship question will frustrate CHIRLA's primary mission to advance the human and civil rights of immigrants and refugees through civic engagement, outreach, and education. CHIRLA has diverted resources—including time and money—from its

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get-out-the-vote efforts to its Census outreach program in order to respond to the addition of the citizenship question and inevitable undercount of the Latino and non-U.S. citizen population. In order to test the impact of the citizenship question, and to assess the additional resources that will be needed to counteract the addition of the citizenship question, CHIRLA plans to use its members to conduct focus groups that test response rates and participant willingness to respond to a citizenship question on the 2020 decennial Census. CHIRLA will imminently divert resources away from other advocacy activity to secure more funding and resources for increased outreach to ensure an accurate count of hard-to-count populations in California. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward CHIRLA's core activities.

285. Many of the communities in which API Legislative Caucus, CLBC, and CLLC members reside have relatively larger African American, Asian American, Asian Pacific Islander, Latino, and non-U.S. citizen populations when compared to California and/or the United States.

286. Plaintiff API Legislative Caucus will devote significant resources to counteract the negative effect of the addition of the citizenship question and undercount of the Asian American and Asian Pacific Islander communities such as diverting resources from authoring legislation to protect immigrant communities in California, and educating immigrant communities about the availability of state resources for non-U.S. citizens. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward API Legislative Caucus's core activities.

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287. The addition of a citizenship question to the 2020 decennial Census frustrates CLLC's mission to integrate immigrant communities into society and improve the quality of life for working-class Latino residents in California.

288. The addition of a citizenship question to the 2020 decennial Census frustrates CLBC's mission to improve the quality of life for African-American families, eliminating the disparities between racial groups, and increasing African American participation and representation in all levels of government.

289. Plaintiffs CLBC and CLLC will devote significant resources to counteract the negative effect of the addition of the citizenship question and undercount of racial and ethnic minorities and non-U.S. citizen population, such as diverting resources from their immigration advocacy and educational efforts, including, but not limited to, the defense of California's Senate Bill 54, and educating immigrant communities about the availability of California resources for non-U.S. citizens. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward CLBC's and CLLC's core activities.

290. API Legislative Caucus, CLBC, and CLLC will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because API Legislative Caucus, CLBC, and CLLC members have African American, Asian American, and Latino and/or non-U.S. citizen constituents that will receive the 2020 Census questionnaire and many of those constituents will be deterred from responding to the 2020 Census because of the citizenship question.

291. Many of the communities that DHF serves have relatively larger Latino and non-U.S. citizen populations when compared to California and the United States.

292. DHF will be harmed by the inclusion of the citizenship question because DHF relies on Census data to determine which communities in the Central Valley are in most need of

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DHF's assistance. Inaccurate Census data would frustrate DHF's mission because DHF may not target those communities that it otherwise would want to target for its services.

293. In response to concerns raised after the addition of the citizenship question to the 2020 decennial Census by Latino and immigrant communities that DHF serves, DHF will shift to a more intensive direct neighbor-to-neighbor education model instead of using volunteers that may not be local residents. The addition of the citizenship question will frustrate DHF's primary mission to organize and empower communities to pursue social justice through systemic and structural transformation. DHF will devote significant resources to counteract the negative effects of the citizenship question and undercount of the Latino and non-U.S. citizen population. DHF will divert its limited resources—including time and money—from other important matters, such as promoting civic engagement through voter registration, voter education, and get-out-the-vote campaigns, in order to educate community members and mitigate any negative effects that the addition of the citizenship question to the Census may have on the completeness or accuracy of the count. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward DHF's core activities.

294. The inclusion of a citizenship question will result in a disproportionate undercount of residents in California and the majority of counties API Legislative Caucus, CHIRLA, CLBC, CLLC, and DHF serve. API Legislative Caucus, CHIRLA, CLBC, CLLC, and DHF members, clients, and constituents will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. API Legislative Caucus, CHIRLA, CLBC, CLLC, and DHF members, clients, and constituents will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

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295. An undercount in California will result in the loss of federal funds for services and programs on which API Legislative Caucus, CHIRLA, CLBC, CLLC, and DHF members, and individuals within the communities they serve rely.

Georgia Organizational Plaintiff

296. The addition of the citizenship question will harm GALEO members because they will all receive a 2020 decennial Census questionnaire. GALEO will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because GALEO has members who are Latinos who will be deterred from responding to the 2020 Census because of the citizenship question.

297. The inclusion of a citizenship question will result in a disproportionate undercount of residents in the majority of counties GALEO serves. GALEO members will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. GALEO members will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

298. An undercount in Georgia will result in a loss of federal funding in counties where GALEO members reside, including funding for public roads and highways.

299. The addition of the citizenship question will frustrate the primary mission of GALEO to achieve political social change through civic engagement. In service of its mission, GALEO uses Census data to identify where to target its programs and advocacy efforts, and inaccurate Census data will harm GALEO's ability to effectively target its resources. Plaintiff GALEO will be required to devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of the Latino and non-U.S. citizen population. GALEO will start its Census outreach efforts much earlier than it planned and will

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expend resources to recruit volunteers in order to conduct its Census related work. GALEO also will divert organizational resources to expanding its role as the leader of the GLCCC, given that the addition of the citizenship question will make it more difficult to ensure Latinos fill out and return the Census form. GALEO also plans to begin training staff and volunteers to respond to specific community concerns and to provide assistance with filling out the form. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward GALEO's core activities.

Illinois Organizational Plaintiff

300. Many of the communities that Advancing Justice-Chicago serves have relatively larger Asian American and non-U.S. citizen populations when compared to Illinois and the United States. According to ACS data, the total population of Cook County, Illinois is 6.8 percent Asian American. Non-U.S. citizens comprise 10.9 percent of the population in Cook County, and 18.8 percent are Asian American.

301. The inclusion of a citizenship question in the Census will result in a disproportionate undercount of residents in many of the communities that Advancing Justice-Chicago serves. The communities that Advancing Justice-Chicago serves will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. The communities that Advancing Justice-Chicago serves will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

302. The addition of the citizenship question will frustrate the primary mission of Advancing Justice-Chicago to build power through collective advocacy and organizing to achieve racial equity. To counteract the negative effects of the addition of the citizenship question to the 2020 decennial Census, Advancing Justice-Chicago will have to spend additional

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resources, financially as well as with volunteer and staff time to: (1) educate and inform community partners, media, business affinity groups, and the Asian American community in the Chicago area about the presence of the citizenship question; (2) encourage community members to answer the citizenship question; and (3) alleviate fears about immigration repercussions.

Maryland Organizational Plaintiff

303. MLLC's members serve constituents who reside in state legislative districts with higher-than-average Latino population when compared to Maryland and the United States. As a result, the inclusion of a citizenship question will result in a disproportionate undercount of residents in many of the districts MLLC's members represent and in which they reside.

304. The inclusion of a citizenship question in the Census will result in a disproportionate undercount of residents in many of the geographic areas that MLLC members represent. The local communities that MLLC serves will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. The geographic areas that MLLC serves will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

305. MLLC will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because MLLC members have Latino and/or non-U.S. citizen constituents who will receive the 2020 Census questionnaire and many of those constituents will be deterred from responding to the 2020 Census because of the citizenship question.

306. An undercount in Maryland will result in loss of federal funds for programs on which MLLC constituents rely.

307. In response to the addition of the citizenship question on the 2020 decennial Census, MLLC will be required to divert resources to further publicize the Census, respond to

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community concerns about answering the citizenship question, and increase public education to ensure constituents understand the importance of a complete count of the Latino community. The addition of a citizenship question frustrates MLLC's mission to advocate on specific issues that impact Latinos and to promote civic engagement of the Latino community in Maryland. In service of its mission, MLLC uses Census data to identify where to target its programs and advocacy efforts and to advocate for increased funding for resources to the Latino community, and inaccurate Census data will harm MLLC's ability to effectively fight for resource allocation to the communities local areas they serve and efficiently target their programs and advocacy. MLLC will devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of the Latino and non-U.S. citizen population, and will divert resources from its legislative agenda to activities to address the distrust and concerns caused by the addition of the citizenship question. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward MLLC's core activities.

Massachusetts Organizational Plaintiff

308. According to ACS data, the total population of Chelsea, Massachusetts is 65.6 percent Latino. Non-U.S. citizens comprise 47.1 percent of the population in Chelsea, and 87.7 percent of non-U.S. citizens are Latino.

309. The inclusion of a citizenship question will result in a disproportionate undercount of residents in the geographic area served by the Chelsea Collaborative.

310. The addition of the citizenship question will harm Chelsea Collaborative members because they will all receive a 2020 decennial Census questionnaire. The Chelsea Collaborative will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because

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the Chelsea Collaborative has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question.

311. An undercount in Chelsea will result in loss of federal funds for programs on which Chelsea Collaborative members rely.

312. Chelsea Collaborative members will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. Chelsea Collaborative members will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

313. The addition of the citizenship question will frustrate the primary mission of the Chelsea Collaborative to achieve political and social change through civic engagement. In service of its mission, the Chelsea Collaborative uses Census data to identify where to target its programs and to support its advocacy efforts for greater resources into the area based on population trends. The Chelsea Collaborative will be required to devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of the Latino and non-U.S. citizen population. The Chelsea Collaborative plans to imminently divert some of its staff and volunteer time from its core activities, such as monitoring wage theft cases, holding ESL classes, or providing other immigration services, to train staff and volunteers to respond to specific community concerns about the Census and to provide assistance with filling out the form. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward the Chelsea Collaborative's core activities.

New Mexico Organizational Plaintiff

314. Many of the communities that Somos serves have relatively larger Latino and non-U.S. citizen populations when compared to New Mexico and the United States. As a result,

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the inclusion of a citizenship question will result in a disproportionate undercount of residents in many of the counties Somos serves. Somos members will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. Somos members will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

315. The addition of the citizenship question will harm all Somos members because they will all receive a 2020 decennial Census questionnaire. Somos will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because Somos has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question.

316. An undercount in New Mexico will result in loss of federal funds for programs on which Somos members rely.

317. Following the addition of the citizenship question to the 2020 Census, Somos members have expressed concerns over that question. The addition of the citizenship question will frustrate the primary mission of Somos to promote civic engagement and worker justice. In service of its mission, Plaintiff Somos uses Census data to identify where to target its programmatic activities and advocacy efforts, and inaccurate Census data will harm its ability to effectively target its resources. Somos imminently plans to widen the scope of its year-round organizing campaigns—which currently focus on issues such as wage theft, racial profiling, and immigrant access to drivers' licenses—to include outreach efforts to mitigate the undercount that will result from the addition of the citizenship question. Somos imminently plans to divert resources to create public service announcements and educational materials on the inclusion of that question and use its weekly radio show, social media platforms, earned media, e-mail alert system, and text alert system to distribute that information. Somos also implements

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naturalization, voter registration, and get-out-the-vote programming through its "Viva el Voto" initiative, which is designed to build the political power of the Latino, rural and immigrant communities in New Mexico. Because the addition of the citizenship question frustrates the goals of the "Viva el Voto" initiative, Somos imminently plans to divert resources—including time and money—from its citizenship and naturalization outreach to educate its members and the community it serves on the importance of mitigating the historic undercount of Latino, rural, and immigrant communities. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent on Somos's core activities.

New York Organizational Plaintiff

318. Many of the communities that MinKwon serves have relatively larger Asian American, and non-U.S. citizen populations when compared to New York State and the United States. As a result, the inclusion of a citizenship question will result in a disproportionate undercount of residents in New York City and the communities MinKwon serves. The communities MinKwon serves will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. The communities MinKwon serves will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

319. An undercount in New York will result in loss of federal funds for programs on which the individuals MinKwon serves rely.

320. The addition of the citizenship question will frustrate the primary mission of MinKwon to empower the Korean American, wider Asian American, and immigrant communities to achieve economic and social justice. MinKwon will devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of

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the Asian American population, such as diverting resources from its civic engagement work, including hosting candidate forums, mailing voter guides, and canvassing potential voters to remind them of the upcoming election. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent on MinKwon's core activities.

North Carolina Organizational Plaintiff

321. The inclusion of a citizenship question will result in a disproportionate undercount of residents in the counties El Pueblo serves.

322. An undercount in North Carolina will result in loss of federal funds for programs on which the individuals served by El Pueblo rely.

323. The individuals El Pueblo serves will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. The individuals El Pueblo serves will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

324. The addition of the citizenship question will frustrate the primary mission of El Pueblo to achieve political and social change through civic engagement. In service of its mission, El Pueblo uses Census data to identify where to target its programs such as voter registration get-out-the-vote efforts, community advocacy, and know-your-rights efforts, and inaccurate Census data will harm El Pueblo's ability to effectively target its resources. El Pueblo will be required to devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of the Latino and non-U.S. citizen population. El Pueblo will need to start its outreach efforts much earlier than it planned and will expend resources to recruit volunteers in order to conduct its Census related work. El Pueblo will imminently divert some of its canvassing capacity from previously planned civic engagement

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programs to provide information about the 2020 Census and mitigate the damage of the addition of the citizenship question by training volunteers and staff to respond to specific community concerns and to provide assistance with filling out the form. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward El Pueblo's core activities.

Ohio Organizational Plaintiff

325. Several of the communities that ASIA serves have relatively larger Asian American and non-U.S. citizen populations when compared to Ohio. As a result, the inclusion of a citizenship question will result in a disproportionate undercount of residents in Ohio and the counties ASIA serves. The communities ASIA serves will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. The communities ASIA serves will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

326. An undercount in Ohio will result in loss of federal funds for programs on which the individuals ASIA serves rely.

327. The addition of the citizenship question will frustrate the primary mission of ASIA to empower and advocate for Asian Americans and to promote civic engagement and equal access to civic and social opportunities. To counteract the negative effects of the addition of the citizenship question to the 2020 Census decennial form, ASIA will have to spend additional resources, financially as well as with volunteer and staff time to: (1) explain the addition of the citizenship question, (2) explain how to answer the citizenship question, and (3) alleviate fears about immigration repercussions.

Texas Organizational Plaintiffs

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328. Many of the communities that LUPE, MALC, OCA-GH, and SHC serve have relatively larger Asian American, Latino and non-U.S. citizen populations when compared to Texas and the United States.

329. The inclusion of a citizenship question will result in a disproportionate undercount of residents in many of the Texas counties where LUPE, MALC, OCA-GH, and SHC members, constituents, and clients reside, when compared to Texas and the United States.

330. In response to the addition of a citizenship question to the 2020 decennial Census, LUPE has experienced a significant increase in phone calls and questions from its members and other Rio Grande Valley residents who seek information about the implications of the citizenship question. The addition of a citizenship question frustrates LUPE's mission to build strong, healthy communities in the Texas Rio Grande Valley through community organizing and civic engagement. As a result of the addition of the citizenship question, LUPE imminently plans to divert employee time from its English as a Second Language classes toward activities designed to mitigate a Census undercount exacerbated by the addition of a citizenship question, such as the expansion of its know-your-rights campaigns to address community concerns over the citizenship question. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward LUPE's core activities.

331. The addition of the citizenship question will harm LUPE members because they will all receive a 2020 decennial Census questionnaire. LUPE will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because LUPE has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question.

332. The addition of the citizenship question will frustrate the primary mission of OCA-GH to increase the long-term leadership, civic participation, education and engagement of Asian Americans in the Greater Houston metropolitan area. OCA-GH will devote significant resources to counteract the negative effects of the addition of the citizenship question and undercount of the Asian American population, such as diverting resources from its civic engagement work including phone banking, voter education, candidate forums, voter registration, and voting assistance. OCA-GH will be forced to expand its 2020 Census activities to explain the presence of the citizenship question, counsel how to answer the citizenship question, alleviate immigration fears, as well as underscore the importance of Census participation. In addition to creating outreach materials such as reference guides, tip sheets, op-eds, and advertisements addressing these additional concerns, OCA-GH will also spend additional resources translating these materials into Asian languages incurring added cost. OCA-GH will need to expend additional resources to conduct additional community events and briefings. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent on OCA-GH's core activities.

333. In response to the addition of the citizenship question on the 2020 Census, MALC will be required to convene briefings to educate members and their staff on the effect of and strategies to address the undercount exacerbated by the addition of the citizenship question. MALC members will also be required to respond to constituent phone calls and concerns over the citizenship question. The addition of a citizenship question frustrates MALC's mission to promote the civic engagement of the Latino community in Texas. In service of its mission, MALC uses Census data to identify where to target its programmatic and legislative efforts, and inaccurate Census data will harm MALC's ability to effectively target its resources. As a result

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of the addition of the citizenship question, MALC plans imminently to redirect time and expenditures away from its programming and legislative advocacy in its traditional policy focus areas—immigration, business, energy, health, higher education, and public education—toward activities designed to mitigate a Census undercount exacerbated by the addition of a citizenship question, such as hiring a new staff member whose time will partially focus on addressing the addition of the citizenship question. MALC has already cancelled its plans to sponsor "citizenship workshops" in San Antonio, El Paso, Corpus Christi, and the Rio Grande Valley that would have helped Latino legal permanent residents become U.S. citizens so they could more effectively engage in the political process. MALC will spend an unprecedented amount of its limited resources, when compared to previous Census cycles, to implement a coordinated Census outreach plan and complete count effort that includes strategies designed to counteract the negative effects of the citizenship question on its constituent communities. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward MALC's core activities.

334. In response to the addition of the citizenship question on the 2020 Census, SHC will be required to convene briefings to educate members and their staff on the effect of and strategies to address the undercount exacerbated by the addition of the citizenship question. SHC members will also be required to respond to constituent phone calls and concerns over the citizenship question. The addition of a citizenship question frustrates SHC's mission to promote the civic engagement of the Latino community in Texas. In service of its mission, SHC uses Census data to identify where to target its programmatic and legislative efforts and inaccurate Census data will harm SHC's ability to effectively target its resources. Plaintiff SHC will devote significant resources to counteract the negative effects of the addition of the citizenship question

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and undercount of the Latino and non-U.S. citizen population, such as diverting resources away from its voter participation and civic engagement efforts, such as its annual presentation on voting rights and civic engagement at the Texas Democratic Party Convention and its outreach to Latino communities in Texas to educate them about their rights as voters. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward SHC's core activities.

335. MALC and SHC will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because MALC and SHC members have Latino and/or non-U.S. citizen constituents that will receive the 2020 Census questionnaire and many of those constituents will be deterred from responding to the 2020 Census because of the citizenship question.

336. The inclusion of a citizenship question will result in a disproportionate undercount of residents in Texas and the majority of counties that LUPE, MALC, OCA-GH, and SHC serve. LUPE's, MALC's, OCA-GH's and SHC's members, clients, and constituents will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. LUPE, MALC, OCA-GH, and SHC members, clients, and constituents will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

337. An undercount in Texas will result in loss of federal funds for programs on which LUPE, MALC, OCA-GH, SHC members, clients, constituents, and individuals within the communities they serve rely.

Washington Organizational Plaintiff

338. According to ACS data, Latinos comprise 47.7 percent of the total population in Yakima County, Washington. Non-U.S. citizens comprise 13.6 percent percent of the total population in Yakima County, and 96.1 percent of non-U.S. citizens are Latino.

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339. Individuals that LCF serves will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because Latino and/or non-U.S. citizens will be deterred from responding to the 2020 Census because of the citizenship question.

340. The inclusion of a citizenship question will result in a disproportionate undercount of residents in many of the Washington counties where LCF constituents reside when compared to Washington and the United States.

341. An undercount will result in loss of federal funds for programs that the individuals that LCF serves rely on.

342. In response to the addition of a citizenship question to the 2020 decennial Census, LCF has had to organize and participate in coalition work to address the question. Prior to the announcement that the Census would include a citizenship question, LCF had started preparing and planning for its 2020 Census outreach efforts to educate the communities it serves about the importance of being counted. As a result of the addition of the citizenship question, LCF has had to divert employee time away from its efforts to educate the community about the importance of completing the Census questionnaire to work on addressing community concerns about the citizenship question. But for the addition of the citizenship question, these financial and organizational resources would otherwise be spent toward LCF's core activities.

National Organizational Plaintiffs

343. The total non-U.S. citizen population in just six of states in which SVREP, MFV, and LCLAA conduct activity—California, Texas, Florida, Arizona, Nevada and Washington—comprises over half of the non-U.S. citizen population in the United States. As a result, the inclusion of a citizenship question will result in a disproportionate undercount of members and residents that SVREP, MFV, and LCLAA serve.

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344. An undercount will result in loss of federal funds for programs on which the members and individuals served by LCLAA, SVREP, and MFV rely.

345. In response to the addition of the citizenship question on the 2020 Census, LCLAA, SVREP, and MFV will expand their historic Census outreach efforts to address their clients' concerns over the addition of the citizenship question to the 2020 decennial Census questionnaire. The addition of a citizenship question frustrates LCLAA, SVREP, and MFV's missions to promote the civic engagement of Latinos in the communities they serve. In service of their mission, LCLAA, SVREP, and MFV use Census data to identify where to target their programmatic activities and advocacy efforts, and inaccurate Census data will harm their ability to effectively target their resources.

346. SVREP and MFV use Census data to assess where Latino populations are moving in order to help them get the resources they need and as a part of the organizations' work to ensure Latinos are properly accounted for during state and federal redistricting. LCLAA uses Census data in its research and advocacy, particularly to identify population trends in the Latino population and workforce, and to identify how to best target its limited resources.

347. LCLAA will divert significant organizational resources to counteract the negative effects of the addition of the citizenship question and undercount of the Latino and non-U.S. citizens populations. LCLAA plans to divert staff and volunteer time to provide trainings and resources to its chapters on the effect of the citizenship question and how to respond to community concerns with filling out the Census form instead of conducting chapter development and recruitment. SVREP will divert resources to address the addition of the citizenship question, such as revising the curriculum for its Latino Academy, a training "boot camp" of community organizers and potential Latino candidates, to include information on the impact of an

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undercount of Latinos and how to respond to community concerns over the citizenship question. MFV plans to divert some of its canvassing capacity from previously-planned civic engagement programs to provide information about the 2020 Census and mitigate the damage of the addition of the citizenship question by training volunteers and staff to respond to specific community concerns and to provide assistance with filling out the form. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward LCLAA, SVREP, and MFV's core activities.

348. The addition of the citizenship question will harm LCLAA members because they will all receive a 2020 decennial Census questionnaire. LCLAA will be harmed by the inclusion of a citizenship question in the 2020 decennial Census because LCLAA has members who are Latinos and/or non-U.S. citizens who will be deterred from responding to the 2020 Census because of the citizenship question.

349. The inclusion of a citizenship question will result in a disproportionate undercount of residents in communities LCLAA, SVREP, and MFV serve. LCLAA, SVREP, and MFV members and the individuals they serve and will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. LCLAA, SVREP, and MFV members and the individuals they serve will also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

Native American Organizational Plaintiff

350. Four Directions works on reservations and in areas with large concentrated American Indian populations.

351. Four Directions will be harmed by the inclusion of the citizenship question because Four Directions relies on Census data to determine where to target its resources. The

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addition of the citizenship question will frustrate Four Directions' primary mission to empower tribal nations and tribal members to pursue social and economic justice through increased U.S. political involvement. The inclusion of a citizenship question on the Census will exacerbate distrust by tribal members in the federal government and make it more difficult for Four Directions to encourage tribal members to participate in the political process. As a result of the addition of a citizenship question, some American Indians will not accurately answer the citizenship question because of the confusion it creates when Tribal members identify their citizenship with their Tribal Nations, and other American Indians will be dissuaded from completing the census form entirely. Native Americans will be harmed by an inaccurate count of Tribal members. Native Americans will be harmed to the extent that the government uses citizenship data to decide who should counts for purposes of distribution of resources and services to Tribal nations or the programs and services that Tribal members rely on, as a result of the inclusion of the citizenship question.

352. In response, Four Directions will be required to divert its limited resources from its core activities, such as promoting civic engagement through voter registration, voter education, and get-out-the-vote efforts, to educate tribes and Tribal members and mitigate any negative effects that the addition of the citizenship question to the Census may have on the completeness or accuracy of the count of the Native population. Four Directions plans to create new educational materials about the Census to raise awareness about the citizenship question. But for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward Four Directions' primary activities.

G. Defendants' Actions Harm Plaintiffs Juanita Valdez-Cox, Gene Wu, Mia Su-Ling Gregerson, Cindy Ryu, Sharon Tomiko Santos, Raj Mukherji and Oliver Semans.

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353. According to ACS data, the total population of Donna, Texas, where Plaintiff Juanita Valdez-Cox resides, is 16,349 and Latinos constitute 91.74 percent of the total population.

354. An undercount will additionally harm Plaintiff Valdez-Cox because she and her family regularly drive on highways and roads in Hidalgo County, Texas.

355. According to ACS data, the total population of Houston, Texas, where Plaintiff Wu resides, is 2,240,580 and Asian Americans constitute 6.7 percent of the total population. Nearly 180,000 residents in his home district are foreign born. In the Greater Houston area, approximately 35 percent of Asian Americans are limited English proficient, nearly 41,000 live below the poverty line, and nearly 110,000 are low-income.

356. An undercount will additionally harm Plaintiff Wu because he and his family regularly drive on highways and roads in Harris County.

357. According to ACS data, the total population of Seatac, Washington, where Plaintiff Mai Su-Ling Gregerson resides is 28,298 and Asian Americans constitute 15.9 percent of the total population. An undercount will additionally harm Plaintiff Gregerson because she and her family regularly drive on highways and road in Washington.

358. According to ACS data, the total population of Shoreline, Washington, where Plaintiff Cindy Ryu resides is 55,021 and Asian Americans constitute 13.3 percent of the total population. An undercount will additionally harm Plaintiff Ryu because she and her family regularly drive on highways and roads in Washington.

359. According to ACS data, the total population of Seattle Washington, where Plaintiff Sharon Tomiko Santos resides is 668,849 and Asian Americans constitute 14.1 percent

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of the total population. An undercount will additionally harm Plaintiff Santos because she and her family regularly drive on highways and roads in Washington.

360. According to ACS data, Plaintiff Mukherji is one of an estimated 67,688 Asian Americans living in his hometown of Jersey City, where 25 percent of the population is Asian American. Plaintiff Mukherji's legislative district includes municipalities that, in total, are comprised of 37.4 percent minorities and over 42 percent are foreign-born. Asian Americans make up 15.45 percent of the population of Plaintiff Mukherji's home district, with over 35,839 persons. Additionally, 44.5 percent of Plaintiff Mukherji's home district is Hispanic or Latino. Both the Asian American and Latino populations are relatively larger when compared to New Jersey and the United States.

361. According to ACS data, the total population of the Rosebud Sioux Reservation, where Plaintiff OJ Semans resides, is 1,670 and American Indians constitute 84 percent of the total population.

362. An undercount will harm Plaintiff Semans because he and his family live on the Rosebud Sioux Reservation, where all aspects of daily life, such as housing, healthcare, roads, transportation, and education are funded based on Census data. Plaintiff Semans will be injured by an inaccurate count of Tribal members and where the government plans to use citizenship data to determine funding for the distribution of resources, services, and Tribal benefits. Plaintiff Semans also regularly drives on highways and roads on the Rosebud Sioux Reservation and in Todd County, South Dakota.

363. As a result of an undercount, Plaintiffs Valdez-Cox,Wu, Gregerson, Ryu, Santos, and Mukherji will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies. Plaintiffs Valdez-Cox,Wu, Gregerson, Ryu, Santos, and Mukherji will

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also suffer a dilution of their voting strength and diminished ability to elect candidates of their choice.

CAUSES OF ACTION

COUNT I

(Violation of the Enumerations Clause of the United States Constitution)

364. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

365. Article I, Section 2, Clause 3 of the U.S. Constitution requires an "actual enumeration" of people in the United States. The Constitution mandates that the apportionment of congressional seats be conducted on the basis of total population. U.S. CONST., Amdt. XIV, § 2 ("Representatives shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State").

366. Defendants' inclusion of a citizenship question in the 2020 Census questionnaire violates the "actual enumeration" clause of the Constitution because the question will cause a disproportionate undercount of non-U.S. citizens, the U.S. citizen family members of non-U.S. citizens, Asian Americans, and Latinos.

367. The inclusion of the citizenship question is inconsistent with the constitutional purposes of the Census and it does not bear a reasonable relationship to the accomplishment of an actual enumeration of the population.

368. The disproportionate undercount will injure Plaintiffs and organizational Plaintiffs' members by depriving them of access to social services whose funding is based on the Census, and will also injure Plaintiffs and organizational Plaintiffs' members by depriving them of representation in the U.S. House of Representatives as well as in state and local redistricting.

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COUNT II

(Violation of the Equal Protection Clause of the Fifth Amendment to the United States Constitution)

369. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

370. The Due Process Clause of the Fifth Amendment incorporates the equal protection guarantee of the Fourteenth Amendment.

371. The inclusion of a citizenship question in the decennial Census violates the equal protection guarantee of the Fifth Amendment because it is motivated by racial animus towards Latinos, Asian Americans, and animus towards non-U.S. citizens and foreign-born persons.

372. Defendants' violation caused and will cause harm to Plaintiffs.

COUNT III
(Conspiracy to Violate Civil Rights Under 42 U.S.C. § 1985(3))

373. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

374. The Due Process Clause of the Fifth Amendment incorporates the equal protection guarantee of the Fourteenth Amendment.

375. Motivated by their racial and class-based animus toward Latinos, African Americans, Asian Americans, Native Americans, non-U.S. citizens and foreign-born persons, Defendant Ross, Defendant Jarmin, President Donald Trump, John Gore, Arthur Gary, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to include a citizenship question in the 2020 decennial Census.

376. By taking the actions described herein, Defendant Ross, Defendant Jarmin, President Donald Trump, John Gore, Arthur Gary, Attorney General Sessions, Kris Kobach and Stephen Bannon conspired to deprive Latinos, African Americans, Asian Americans, Native

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Americans and non-U.S. citizens of their Fifth Amendment right to equal protection of the laws under the Fifth Amendment of the U.S. Constitution in violation of 42 U.S.C. § 1985(3).

377. Defendants' unlawful conduct to conspire to violate the constitutional rights of Latinos, African Americans, Asian Americans, Native Americans, and non-U.S. citizen persons caused and will cause harm to Plaintiffs.

COUNT IV

(Violation of the Apportionment Clause of the U.S. Constitution)

378. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

379. U.S. congressional seats are apportioned based on a count of the "whole number of persons." U.S. CONST., amend. XIV, § 2.

380. Defendants' addition of a citizenship question to the decennial Census will result in an undercount of the whole number of persons and inaccurate Census data for the purposes of congressional district apportionment.

381. Defendants' violation caused and will cause harm to Plaintiffs.

COUNT V

(Administrative Procedure Act; 5 U.S.C. § 706 (2))

382. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

383. The APA prohibits final agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," "contrary to constitutional right, power, privilege or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

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384. Defendants' represent or are agencies subject to requirements of the APA. 5 U.S.C. § 706 (b)(1).

385. Defendants failed to provide any independent analysis or support to justify the DOJ's position that citizenship data is required from the decennial Census in order to enforce the Voting Rights Act.

386. Defendants failed to complete any studies or tests to research the impact a citizenship question on the decennial Census might have on response rates and accuracy among hard-to-count populations.

387. Defendants departed from statutory and regulatory requirements under the Paperwork Reduction Act and Information Quality Act, as well as OMB and Census Bureau standards and practices, in order to add a highly sensitive and untested citizenship question to the 2020 decennial Census.

388. Defendants added the citizenship question to discriminate against Plaintiffs and Plaintiffs' members because of their race, national origin, or alienage.

389. Defendants' actions are in violation of their Constitutional obligation to carry out an actual enumeration of the population.

390. Defendants failed to provide Congress with any report of new circumstances that require a modification to the Census subjects submitted in 2017, as required by statute.

391. For the foregoing reasons, Defendants' inclusion of a citizenship question in the 2020 decennial Census is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction and authority; and without observance of procedure required by law. Defendants' actions are therefore in violation of the APA and must be set aside.

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392. Plaintiffs suffered and will suffer permanent and irreparable injury unless the addition of a citizenship question is enjoined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

(a) Declare that addition of a citizenship question to the 2020 Census questionnaire is unauthorized by, and contrary to, Article I, Section 2, Clause 3 of the U.S. Constitution;

(b) Declare that addition of a citizenship question to the 2020 Census questionnaire is unauthorized by, and contrary to, amend. XIV, § 2 of the U.S. Constitution;

(c) Declare that addition of a citizenship question to the 2020 Census questionnaire violates the Equal Protection guarantee of the Fifth Amendment;

(d) Declare that addition of a citizenship question to the 2020 Census questionnaire violates § 706(2)(A)-(D) of the APA because it is arbitrary and capricious, an abuse of discretion, and not in accordance with law; contrary to constitutional power, right, privilege or immunity; and/or in excess of statutory jurisdiction and authority, and without observance of procedure required by law;

(e) Enjoin Defendants and their agents from including a citizenship question on the 2020 Census questionnaire and from taking any irreversible steps to include a citizenship question on the 2020 Census questionnaire;

(f) Award Plaintiffs reasonable costs, expenses, and attorneys' fees pursuant to 28 U.S.C. § 2412; and

(g) Award such additional relief as the interests of justice may require.

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Dated: June 9, 2018

Respectfully submitted,

By */s/ Burth G. Lopez*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, JUANITA VALDEZ-COX, ROGENE GEE CALVERT, ZEENAT NISHA HASAN, and CANDY L. GUTIERREZ,

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce,

STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau,

U.S. DEPARTMENT OF COMMERCE, and

U.S. CENSUS BUREAU,

Defendants.

Civil Action No. 8:19-cv-02710-GJH

Hon. George J. Hazel

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO UN-RELATE AND REASSIGN THIS CASE

INTRODUCTION

Since taking office in 2017, the Trump Administration has sought to diminish the political representation of Latinos, non-U.S. citizens, immigrants, and communities of color by manipulating the Census Bureau's information collection and reporting processes. First, Defendants sought to accomplish their discriminatory goal by adding a question to the 2020 decennial census questionnaire that would have collected citizenship information from every individual in this country. That was Plan A. After Plan A was enjoined by various courts, including the Supreme Court and this Court, Defendants proceeded to Plan B. Plan B seeks to collect the same information, citizenship data, but instead of collecting it through a question on the 2020 census questionnaire, Defendants seek to collect citizenship data using administrative records. Although the means have changed, the goal is the same: collect citizenship data so that states can use the data for redistricting in 2021 to benefit non-Hispanic Whites and Republicans.

Several of the same plaintiffs who challenged the Trump Administration's decision to add a citizenship question to the 2020 census again petition this Court to prevent Defendants from accomplishing their discriminatory objective. Accordingly, Plaintiffs properly designated this case as related to the earlier case challenging Defendants' decision to add a citizenship question to the 2020 census because it involves overlapping questions of fact and law, involves several identical parties, and would entail substantial duplication of labor if heard by a different judge.

BACKGROUND

The Citizenship-Question Lawsuit

On May 31, 2018, plaintiffs in *La Unión Del Pueblo Entero (LUPE) v. Ross*, No. 18-cv-01570-GJH (D. Md.) (hereinafter, the "citizenship-question case") filed a lawsuit challenging the

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addition of a citizenship question to the 2020 decennial census.[1] The case was later consolidated for trial with another case before this Court also involving a challenge to the citizenship question, *Kravitz v. Department of Commerce*, No. 18-cv-1041 (D. Md.) (hereinafter we refer to the consolidated cases as "*Kravitz*"). In *Kravitz*, plaintiffs sought declaratory and injunctive relief to preserve the integrity of the decennial census and prevent Defendants from violating the Fifth Amendment's equal protection guarantee, the Apportionment and Enumeration Clauses, the Administrative Procedure Act ("APA"), and 42 U.S.C. § 1985, conspiracy to violate civil rights (citizenship-question case only). *Id.*, ECF 42 ¶ 2.

On April 5, 2019, after a six-day bench trial, this Court granted plaintiffs' requested relief and found, among other things, that:

> [T]he decision to add a citizenship question to the 2020 Census was arbitrary and capricious in violation of the APA; Defendants' actions violate the Constitution by unreasonably compromising the distributive accuracy of the Census contrary to the Enumeration Clause's mandate; and Plaintiffs did not meet their burden to prove Defendants' actions violate the Due Process Clause or amount to a conspiracy to violate civil rights because Plaintiffs failed to show that the addition of the citizenship question was motivated by invidious racial discrimination.

Kravitz v. Dep't of Commerce, 366 F. Supp. 3d 681, 691 (D. Md. 2019).

This Court permanently enjoined Defendants from:

> [I]including a citizenship question on the 2020 decennial Census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purposes of including a citizenship question; and from asking persons about citizenship status on the 2020 Census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial Census.

Kravitz v. Dep't of Commerce, No. 18-cv-1041 (D. Md. July 16, 2019), ECF 203.

[1] The plaintiffs in the prior *LUPE* lawsuit consisted of seven individual plaintiffs and twenty-five organizational plaintiffs. *LUPE v. Ross*, No. 18-cv-01570-GJH (D. Md.), ECF 42 ¶¶ 1-130.

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The parties appealed the Court's April 5 ruling, and while the decision was pending on appeal, the Supreme Court heard arguments in *Department of Commerce v. New York*, No. 18-966, a parallel consolidated case involving challenges to the citizenship question.

On June 3, 2019, the *Kravitz* plaintiffs moved for relief from judgment and sought an indicative ruling from this Court based on "newly discovered evidence" from the late map drawer and Republican strategist, Dr. Thomas Hofeller, that "provide[d] the link between the explicitly discriminatory purpose behind the citizenship question and the Commerce Department's actions." *Kravitz*, No. 18-cv-1041 (D. Md. June 3, 2019), ECF 162-1 at 1. This Court concluded that the "newly discovered evidence" raised a "substantial issue" because it "suggests that Dr. Hofeller was motivated to recommend the addition of a citizenship question to the 2020 Census to advantage Republicans by diminishing Hispanics' political power." *Kravitz*, No. 18-cv-1041 (D. Md. June 24, 2019), ECF 175 at 8, 13. Consequently, on June 25, 2019, the Fourth Circuit granted *Kravitz* plaintiffs' motion to remand for further proceedings on the Fifth Amendment and conspiracy claims. *Kravitz*, No 19-1382 (4th Cir. June 25, 2019), ECF 45.

On June 27, 2019, the Supreme Court vacated and remanded Secretary Ross's decision to add a citizenship question to the 2020 decennial census, holding that the Secretary's decision violates the APA because his rationale for adding a citizenship question "seems to have been contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

On August 19, 2019, the Fourth Circuit remanded *Kravitz* to this Court with instructions to vacate paragraph six of the Court's April 5 order. *LUPE v. Ross*, No 19-1425 (4th Cir. Aug. 19, 2019), ECF 52.[2]

[2] Paragraph six states: "Final judgment is entered for Defendants and against Plaintiffs on Plaintiffs' claims arising under the Due Process Clause of the Fifth Amendment of the Constitution (Count II of the *Kravitz* Plaintiffs' Third Amended Complaint, ECF No. 86 (18-

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The Current Lawsuit

On July 11, 2019, President Trump issued Executive Order 13880, Collecting Information about Citizenship Status in Connection with the Decennial Census ("EO 13880"). Among other things, EO 13880 directs Secretary Ross to instruct the Census Bureau to create an inter-agency working group to collect citizenship data in connection with the 2020 decennial census for states to use in redistricting. On July 12, 2019, the Census Bureau published a notice dated July 3, 2019, stating that Secretary Ross had directed the Census Bureau to collect and produce Citizenship Voting Age Population ("CVAP") information prior to April 1, 2021 that states may use in redistricting.

On September 13, 2019,[3] Plaintiffs filed this lawsuit, alleging that the President's order and Secretary Ross's directive that the Department of Commerce provide states with CVAP information for redistricting is motivated by a racially discriminatory scheme to reduce Latino political representation and increase the over-representation of non-Latino Whites, unlawfully advantaging White voters at Latino voters' expense.

Plaintiffs allege that EO 13880 and Secretary Ross's directive should be set aside because they violate the APA, and that Defendants' actions should be enjoined because they are motivated by racial animus, are discriminatory toward Latinos and non-citizens, and are the result of a partisan conspiracy intended to dilute the representation of non-citizens and Latinos, in violation of the equal protection guarantee of the Fifth Amendment of the U.S. Constitution, and 42 U.S.C. § 1985(3).

1041) and Count II of the LUPE Plaintiffs' Amended Complaint, ECF No. 42 (18-1570))." *LUPE v. Ross, 18-cv-01570-GJH* (D. Md.), ECF 126 at 2.

[3] On October 9, 2019, Plaintiffs amended their complaint to add three individuals from Texas, Arizona, and Washington.

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When Plaintiffs filed their complaint, they indicated on the civil cover sheet that this case is related to *LUPE v. Ross*, No. 18-cv-1570, which was later consolidated with the *Kravitz* case. ECF 1-1.

LEGAL STANDARD

Generally cases are randomly assigned to judges in this district. However, in the interest of judicial economy, Local Rule 103.1(b)(i) creates an exception to the random assignment rule.[4] The District of Maryland Local Rules state:

> If counsel for a plaintiff in a civil action believes that the action being filed and one (1) or more other civil actions or proceedings previously decided or pending in this Court (1) arise from the same or identical transactions, happenings, or events; (2) involve the identical parties or property; (3) involve the same patent or trademark; *or* (4) for any other reason would entail substantial duplication of labor if heard by different judges, counsel shall indicate that fact by designating the case as a "related case" on the civil cover sheet.

Local Civ. R. 103.1(b)(i) (emphasis added).

"In determining whether cases are related, the paramount consideration is whether assigning them to the same district judge will further the efficient administration of justice." *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 396 (E.D. Wis. 2008) (finding four cases to be related because, although they did not arise from the exact same transaction or event, they

[4] Defendants' description of the legal standard for determining whether cases are properly related rests on inapposite cases where plaintiffs manipulated the judicial process by engaging in improper "judge-shopping." *See, e.g., In re BellSouth Corp.*, 334 F. 3d 941, 958 (11th Cir. 2003) (examining the proper course of action where a party is accused of contriving to engineer the recusal of a judge by hiring a close relative of the judge as counsel); *Vaqueria Tres Monjutas, Inc. v. Rivera Cubano*, 341 F. Supp. 2d 69 (D.P.R. 2004) (finding that plaintiffs were "judge-shopping" where they voluntarily dismissed their case after losing a preliminary injunction motion only to refile the same case to try again with a different judge); *United States v. Kelly*, 519 F. Supp. 1029 (D. Mass. 1981) (denying objection to case related designation where the U.S. Attorney moved to disqualify federal judge from a criminal case on alleged prior relationship between the judge and defendant where the motion was based on mere innuendo and rumor that was ultimately refuted). Here, there are no allegations or evidence that Plaintiffs contrived to manipulate the judicial process or engaged in any wrongdoing.

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involved similar factual circumstances and the "administrative records of the projects substantially overlap") (citing Fed. R. Civ. P. 1).

District courts have discretion to determine whether a case is properly designated as related to a prior filed case. *Access Now, Inc. on behalf of New v. Allen Edmonds Corp.*, No. 17CV0959, 2017 WL 4023258, at *1 (W.D. Pa. Sept. 13, 2017) ("this Court has discretion to reject an assignment if the Court determines that a case was not related to a prior filed case, or if the assignment would not promote the convenience of the parties or witnesses or the just and efficient conduct of the action.") (internal citations omitted); *see also United States v. Stone,* 411 F.2d 597, 599 (5th Cir. 1969) ("District Judges have the inherent power to transfer cases from one to another for the expeditious administration of justice.").

ARGUMENT

Plaintiffs properly designated this case as related to the citizenship-question case, and assignment to this Court is proper. The two cases involve similar factual questions and legal issues, similar parties, and the same counsel, "such that judicial economy would be served by having these matters resolved by the same judge." *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010).

I. This Case And The Citizenship-Question Case Arise From The Same Transactions, Happenings, Or Events.

Defendants argue that this case is not related to the citizenship-question case because "the prior case 'ar[o]se from' the Secretary's decision to include a citizenship question on the 2020 Census" while "this case 'arise[s] from' the President's decision to gather citizenship information from administrative records." ECF 44-1, Defendants' Corrected Memorandum of Law in Support of Defendants' Motion to Un-Relate and Reassign This Case ("Defs.' Opp. Mem."), at 10.

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Defendants' argument fails for several reasons. First, Defendants ignore the fact that Plaintiffs are in fact challenging action by the Secretary and not just action by the President.[5] Plaintiffs are challenging Secretary Ross's July 2019 directive to the Census Bureau "to collect and produce [CVAP] information prior to April 1, 2021 that states may use in redistricting." ECF 41, Plaintiffs' First Amended Complaint ("FAC"), ¶ 1.

Second, and more importantly, despite Defendants strained efforts to find a few examples of differing factual questions in a case with a myriad of complicated factual issues, the two cases arise from the same "transactions, happenings, or events." Defs.' Opp. Mem. at 11-12. "By concentrating on how the cases diverge, defendant[s'] arguments miss the mark: related cases need not be identical." *Moore v. Rite Aid Hdqtrs Corp.*, No. CIV.A. 13-1515, 2013 WL 4833854, at *2 (E.D. Pa. Sept. 11, 2013). The proper focus is on whether "the two cases contain central events with a core of similarity, such that assigning the cases to one judge would increase judicial efficiency." *Id.*

Here, the factual questions at the heart of both cases is that Defendants and others outside the government conspired with the Trump Administration, in some form or another (either through a question on the census questionnaire or through administrative records), to collect citizenship information to dilute the political strength and representation of Latinos (and other communities of color) and non-U.S. citizens. Although the intricate details and mechanics of the actions taken to effectuate the conspiracy may differ somewhat, there is substantial factual overlap between the two cases "such that assigning the cases to one judge would increase judicial efficiency." *Id.*

[5] The discriminatory motive of both the President and the Secretary were also at issue in the previous litigation. *See, e.g., LUPE v. Ross*, No. 18-cv-1570 (D. Md.), ECF 137-1 at 6-8, 11-13; *see also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977).

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For example, Plaintiffs in both cases allege that Defendants and the Trump Administration took part in a conspiracy to intentionally discriminate against and dilute the political power of Latinos, non-U.S. citizens, and communities of color to benefit non-Latino White, Republicans. The conspiracy began in at least 2017 when President Trump took office, and has continued to the present day. The factual issues raised in the citizenship-question case related to this conspiracy did not end when Defendants were enjoined from adding a citizenship question to the 2020 census, rather, that was only the first part of the story. Indeed, in the Department of Commerce's July 2019 OMB submission, Information Collection Request 2020 Census – Enumeration Operations OMB Control Number 0607-1006 ("July 2019 OMB submission"), the Department noted that because the Supreme Court ruled that the Secretary's decision to add a citizenship question did not meet APA standards, that the Census Bureau would essentially move on to Plan B:

> The Department, having carefully considered the matter, has determined that there is not sufficient time to develop an alternative record to support inclusion of the citizenship question. Accordingly, the Secretary has directed the Census Bureau to proceed with the 2020 Census without a citizenship question on the questionnaire, and rather to produce Citizenship Voting Age Population (CVAP) information prior to April 1, 2021 that states may use in redistricting.

FAC ¶ 65 (quoting the July 2019 OMB submission at 18).[6] In determining Plaintiffs' conspiracy claim, the Court will be called upon to examine the factual predicate that includes many of the same facts from the citizenship-question case. *See*, *e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252. 266-68 (1977) (identifying a non-exhaustive list of factors that may constitute part of the mosaic of evidence that can give rise to an inference of discrimination).

[6] *Paperwork Reduction Act Program, Information Collection Request 2020 Census - Enumeration Operations OMB Control Number 0607-1006*, Department of Commerce and U.S. Census Bureau at 18 (July 3, 2019), *available at* https://www.documentcloud.org/documents/6192581-2020-Census-Supporting-Statement-A- Revised-July.html#document/p18/a512146.

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Moreover, courts have found that where a discriminatory purpose infected a prior policy, that discriminatory purpose can also provide evidence that a new policy is similarly motivated by discriminatory intent. *See*, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985) (looking at the original enactment of a state constitutional provision to support finding that, even 80 years later and after several changes, the provision was still discriminatory); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) ("That 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.").

In addition to common questions of fact related to Plaintiffs' conspiracy claim, there are common questions of fact as to Plaintiffs' APA claims. Many of the policies and procedures that govern the Census Bureau's collection of information from direct inquiries on the 2020 census questionnaire apply to the Census Bureau's collection of information from administrative records. *See*, *e.g.*, FAC ¶¶ 21-35, 46-47, 49-50; Defendants' Exh. A in support of Defendants' motion to unrelated and reassign the case ("Defs.' Exh. A"), ECF 44-2 ¶¶ 137-172. Furthermore, several Census Bureau studies and analyses regarding the effectiveness and appropriateness for collecting citizenship data through either a survey or administrative records are relevant in both cases. *See*, *e.g.*, FAC ¶¶ 66-72; Defs.' Exh. A ¶¶ 168, 202, 207. Relatedly, in assisting the Court in its findings of fact, there will likely be overlap in the experts and expert topics between the two cases.

Moreover, when determining whether cases are properly related, courts do not require complete factual overlap or that that there be no factual difference, *see*, *e.g.*, *Assiniboine & Sioux Tribe of Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 160 (D.D.C. 2002) (finding that "although differences may exist between the [two cases], there are clearly issues of

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fact that are common to both cases that are sufficient to" relate the two cases), rather, relation is appropriate where there are "many" overlapping "factual issues that [the] Court must resolve" in both cases, *id.* at 159. Here, there are many overlapping factual issues. Both cases involve factual questions related to Census Bureau internal policies and practices regarding information collection and reporting.

Third, Defendants argue that "Plaintiffs now take issue with the exact decision some of them previously desired—the use of administrative records to gather citizenship data." Defs.' Opp. Mem. at 7. Assuming, *arguendo*, that Defendants' point had merit, it suggests that relation of these cases is appropriate given that this Court is in the best position to determine what arguments Plaintiffs previously made and whether or not they are consistent with the arguments Plaintiffs now make.

Fourth, Defendants claim that "there is no overlap in legal issues" between the two cases because Plaintiffs do not "advance [] Enumeration or Apportionment Clause claims." Defs.' Opp. Mem. at 12. However, there is substantial overlap of legal claims and all of the claims in the current case are identical to claims that were raised in the citizenship-question case. Both cases assert claims for violation of the APA (FAC ¶¶ 88-109; *Kravitz*, 366 F. Supp. 3d at 691, 742-51), the Fifth Amendment's equal protection guarantee (FAC ¶¶ 110-113; *Kravitz*, 366 F. Supp. 3d at 691, 752-55), and conspiracy to violate civil rights under 42 U.S.C. § 1985(3) (FAC ¶¶ 114-117; *Kravitz*, 366 F. Supp. 3d at 691, 752-55). The only different legal theory is that in the citizenship-question case, plaintiffs raised a claim under the Enumeration Clause of the Constitution. The fact that one of the claims is not identical is not sufficient to un-relate these cases. *See* Local Civ. R. 103.1(b)(i) (relation of cases is proper when "for any other reason would entail substantial duplication of labor if heard by different judges").

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Additionally, the cases share many similar factual questions related to the type of harm alleged by the plaintiffs and they share the same ultimate goal. In the citizenship-question case, plaintiffs alleged, *inter alia*, that they would be harmed by the addition of the citizenship question because an undercount in their communities would result in inaccurate redistricting data that would disproportionately exclude non-citizens and would cause intrastate vote dilution. *Kravitz*, 366 F. Supp. 3d at 723-25. Here, Plaintiffs similarly allege that administratively collecting and disseminating citizenship data for use by the states as a redistricting population base that excludes non-citizens will result in intrastate vote dilution. FAC ¶¶ 85-87. In both cases, plaintiffs express the same goal: to prevent Defendants from carrying out their conspiracy to use the Census Bureau to collect and report citizenship data that will either disproportionately or purposefully exclude non-U.S. citizens from apportionment to the advantage of non-Latino White Republican voters and at the expense of the Latino community. *See Assiniboine & Sioux Tribe*, 211 F. Supp. 2d at 158-59 (finding that cases were properly related where the individual Indian plaintiffs and Indian tribe plaintiff sought the same "ultimate goal").

II. This Case And The Citizenship-Question Case Involve Identical Defendants And Several Of The Same Plaintiffs.

Defendants admit that there is overlap in the parties but argue that the case should not be related because this case "adds four plaintiffs" and "subtracts 24 organizations and six individuals." Defs.' Opp. Mem. at 15-16. However, courts do not require that every party be identical to relate cases. *See, e.g., Singh v. McConville*, 187 F. Supp. 3d 152, 157 (D.D.C. 2016) (finding that even though "the Court will conduct an individual analysis with respect to each plaintiff to determine whether each plaintiff is entitled to the relief he seeks does not obviate the need for factual determinations related to the defendants' regulations and policies, and their administrations of those policies, which are common to both cases.").

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For example, in *Assiniboine & Sioux Tribe*, 211 F. Supp. 2d 157, the court found that a case brought by an Indian tribe against the Secretary of the Interior to compel performance of trust obligations was properly "related" to a suit filed by individual Indian plaintiffs against the trustee-delegates of the United States and other federal officials alleging that the federal government's trustee-delegates had breached their fiduciary duties.

Likewise, in *Autumn Journey Hospice*, the court found that a case brought by a hospice care provider to whom Health and Human Services ("HHS") issued a Medicare cap repayment demand was related to a case brought by a different hospice care provider that also challenged the hospice cap regulation even though they were not "identical parties." *Autumn Journey Hospice*, 753 F. Supp. 2d at 138-41.

Here, there is significant overlap between the parties in this case and the citizenship-question case including identical Defendants and several identical plaintiffs that is sufficient to "relate" the two cases. Plaintiffs La Unión Del Pueblo Entero, Promise Arizona, and Juanita Valdez-Cox are identical in both cases, and Plaintiff Lydia Camarillo, although not named in the citizenship-question case, was involved as the Executive Director of Plaintiff Southwest Voter Registration Education Project.

The Defendants in both cases are also virtually identical. The technical difference is that at the time of filing the citizenship question case, the Acting Director of the Census Bureau was Ron Jarmin and now the Director of the Census Bureau is Steven Dillingham. However, this is a distinction without a difference because plaintiffs sued both Mr. Jarmin and Mr. Dillingham in their official capacity as Director of the Census Bureau and did not sue them personally. *See* Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official

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capacity . . . ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.").

III. There Will Be "Substantial Duplication Of Labor" If This Case Is Heard By A Different Judge.

Contrary to Defendants' assertion otherwise, there is substantial overlap in factual questions and legal issues, such that there would be "substantial duplication of labor" if a different judge heard this case. Local Civ. R. 103.1(b)(i). As discussed above, there is significant overlap between the factual questions and legal issues.

Defendants are wrong about the facts and the law, and none of the cases cited by Defendants support un-relating these cases and reassigning the present case. For example, in *Molinari v. Bloomberg*, No. CV08-4539 (ERK)(JO), 2008 WL 4876847, at *2 (E.D.N.Y. Nov. 12, 2008), the district court found that aside from having one plaintiff in common between the two cases, there were no other commonalities of fact or legal issues between the two cases, and therefore relation was not proper. Here, the citizenship-question case and the present case have much more than just one party in common.

Similar to the other cases cited by Defendants, *Singh*, *Autumn Journey Hospice*, and *Assiniboine & Sioux Tribe*, this case should be related to the citizenship-question case because there is substantial overlap in factual questions and legal issues, and there would be "substantial duplication of labor" if a different judge heard this case. *Singh*, 187 F. Supp. 3d at 156 (holding that relation was proper because the court would "be required to make similar factual determinations in both cases related to . . . defendants' justifications for their regulations and policies, and the defendants' discriminatory conduct and/or intent, if any"); *Autumn Journey Hospice*, 753 F. Supp. 2d at 138-41 (finding that a case brought by a hospice care provider to whom HHS issued a Medicare cap repayment demand was related to a case brought by a different

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hospice care provider that also challenged the hospice cap regulation because the cases "share[d] common factual issues and arise out of a common event or transaction . . . such that judicial economy would be served by having [the] matters resolved by the same judge."); *Assiniboine & Sioux Tribe*, 211 F. Supp. 2d at 159 (holding that two cases brought by individual Indian plaintiffs and an Indian tribe plaintiff were related where they shared several significant common issues of fact and "[i]t would waste judicial resources and be nonsensical to have another court address these same factual issues, particularly in light of the fact that this Court has already heard weeks of testimony" concerning the Department of the Interiors' operations and computer systems).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to un-relate and reassign this case.

Dated: October 25, 2019

Respectfully submitted,

By /s/ Terry Ao Minnis

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* Pro hac vice *applications forthcoming*
** *Application for admission forthcoming*
° *Not admitted in DC.*

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CERTIFICATE OF SERVICE

I certify that on this 25th day of October, 2019, I caused a copy of Plaintiffs' Opposition to Defendants Motion to Un-Relate and Reassign to be sent to all parties receiving CM/ECF notices in this case.

/s/ Terry Ao Minnis
Terry Ao Minnis

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, and JUANITA VALDEZ-COX,

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce,

STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau,

U.S. DEPARTMENT OF COMMERCE, and

U.S. CENSUS BUREAU,

Defendants.

Civil Action No. 8:19-cv-02710-GJH

ORDER GRANTING PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

This Court having read and considered Plaintiffs' *Ex Parte* Motion for Leave to Conduct Expedited Discovery:

IT IS HEREBY ORDERED that the Motion is GRANTED; and

IT IS FURTHER ORDERED THAT Plaintiffs have leave to conduct limited discovery in the form of a Federal Rule of Civil Procedure 45 subpoena(s) to non-party records custodian Common Cause and/or Stephanie Hofeller for documents subpoenaed in *Common Cause v. Lewis*, No. 19 CVS 014001 (N.C. Super.) that relate to redistricting work done by Dr. Thomas Hofeller.

SO ORDERED this 14th day of November, 2019.

By /S/_____

Paula Xinis
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

LA UNIÓN PUEBLO ENTERO, *et al.*, *

Plaintiffs, *

v. **Case No.: GJH-19-2710**

*

WILBUR L. ROSS, *et al.*,

*

Defendants.

*

* * * * * * * * * * * * *

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is ordered by the United States District Court for the District of Maryland that:

1. Defendants' Motion to Un-Relate and Reassign this Case, ECF No. 44, is **GRANTED**; and
2. The Clerk **SHALL** randomly assign this case.

Dated: November 13, 2019

/s/
GEORGE J. HAZEL
United States District Judge

BC-DOC-0000030596

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO UN-RELATE AND REASSIGN THIS CASE

INTRODUCTION

The issue in this motion is simple: whether a new case challenging Defendants' collection of citizenship information through administrative records is "related" to an old case challenging Defendants' decision to include a citizenship question on the 2020 Census with different legal theories, different requested relief, and an inconsequential overlap in parties. The answer is also simple: no. The applicable Local Rule says as much. In order to be considered "related," two cases must "arise from *the same or identical* transactions, happenings, or events"; involve "*identical* parties or property"; or entail a "*substantial* duplication of labor if heard by different judges." Local Civ. R. 103.1(b)(i) (emphasis added). There are no factual or legal similarities between these two cases, so there would be no duplication of labor if they were heard by different judges. Here, as in most cases, the default rule of random assignment should govern "in order to ensure greater public confidence in the integrity of the judicial process, guarantee fair and equal distribution of cases to all judges, avoid public perception or appearance of favoritism in assignments, and reduce opportunities for judge-shopping." *Comm. on Judiciary v. McGahn*, 391 F. Supp. 3d 116, 118–19 (D.D.C. 2019) (citations omitted).

Plaintiffs attempt to obfuscate this straightforward analysis by framing their claims as broadly as possible, arguing that both cases derive from a plot that "began in at least 2017 when President Trump took office" to "intentionally discriminate against and dilute the political power of Latinos, non-U.S. citizens, and communities of color to

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benefit non-Latino White, Republicans." Pls.' Opp'n at 8. Notably absent from Plaintiffs' argument, however, is any specific discussion of their own allegations or the facts needed to support them. Nowhere do Plaintiffs explain how the only two factual issues in the citizenship-question case—the reasons for the Secretary's 2018 decision to *include a citizenship question* on the 2020 Census, and whether a citizenship question would cause an inaccurate census count—have anything to do with the factual issues concerning the 2019 decision to collect citizenship information through administrative records. And nowhere do Plaintiffs explain how the legal analyses in the prior litigation—whether reinstating a citizenship question violated the Constitution, the APA, and 42 U.S.C. § 1985—have anything to do with the legality of one federal agency, the Census Bureau, collecting citizenship information from other federal agencies.

They do not because they cannot. The Court would not examine "the same or identical transactions, happenings, or events" to assess the lawfulness of *both* a citizenship question on the 2020 Census *and* the use of the administrative records to gather citizenship data. Nor could the Court award Plaintiffs' requested relief in *this* case—an injunction barring Defendants "from collecting data as dictated by EO 13380 and from producing tabulations of citizenship population"—by scrutinizing the "transactions, happenings, or events" in the citizenship-question case. So it is logically impossible for the "transactions, happenings, [and] events" to be "the same or identical."

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Plaintiffs' remaining arguments are easily rejected: they readily admit that this case and the citizenship-question case do not involve "identical parties," and they make little effort to identify a "substantial duplication of labor" beyond parroting their illogically broad arguments and citing cases that support *Defendants'* position. "The burden on the party claiming relation is heavy as random assignment of cases is essential to the public's confidence in an impartial judiciary." *McGahn*, 391 F. Supp. 3d at 119. Plaintiffs cannot meet their heavy burden.

ARGUMENT

I. The citizenship-question case and this case do not "arise from the same or identical transactions, happenings, or events."

As Defendants previously explained, the prior case "ar[o]se from" the Secretary's 2018 decision to include a citizenship question on the 2020 Census; this case "arise[s] from" the President's 2019 decision to gather citizenship information from administrative records. Defs.' Mem. at 10. The Court would not be examining "the same or identical transactions, happenings, or events" to assess the lawfulness of those incongruent decisions. *Id.* Plaintiffs do not dispute this legally dispositive point or, really, any of Defendants' specific arguments. Instead, they try a different tactic: framing their claims as broadly as possible, regardless of the facts needed to prove the relevant claims or any applicable legal analysis.

To begin, all factual development that occurred in the prior year-long litigation concerned two issues: (1) the process preceding, and the reasons for, the Secretary's

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decision to include a citizenship question; and (2) whether a citizenship question would cause an inaccurate census count after the Census Bureau's extensive Non-response Follow-up operations and imputation. *See* Defs.' Mem. at 11–12. Neither of those inquiries are relevant here. The Secretary's reasons for including a citizenship question on the census have nothing to do with the compilation of administrative records under a presidential directive concerning a different decision, and there is no allegation that simply gathering citizenship information from other agencies would affect the census count. *Id.*

How do Plaintiffs' address this critical discrepancy? They don't. Instead, Plaintiffs hypothesize a presidential conspiracy dating back to 2017, Pls.' Opp'n at 7–9, and contend that there is a discriminatory motive behind collecting citizenship data from agencies and producing it "for use along with the P.L. 94-171 Redistricting Data File." FAC ¶¶ 96, 112, 115–16. But these (meritless) claims about the collection of administrative records are entirely distinct from the prior litigation in which the citizenship-question plaintiffs argued that "the Secretary's decision [to include a citizenship question] was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 754 (D. Md. 2019). Neither

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"depressing immigrant response" nor including a citizenship question are at issue here. *See* Defs.' Mem. at 14.[1]

Plaintiffs also claim that "there are common questions of fact as to Plaintiffs' APA claims" due to "policies and procedures that govern the Census Bureau's collection of information." Pls.' Opp'n at 9. They are mistaken. Even assuming Plaintiffs' APA claims are cognizable (they are not), "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal" and "[t]he entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (alterations omitted); *Owusu-Boakye v. Barr*, 376 F. Supp. 3d 663, 667 (E.D. Va. 2019). So there cannot be "common questions of fact" on Plaintiffs' APA claims. In any event, the

[1] Plaintiffs are incorrect that "where a discriminatory purpose infected a prior policy, that discriminatory purpose can also provide evidence that a new policy is similarly motivated by discriminatory intent," Pls.' Opp'n at 9. *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, 1199 (9th Cir. 2019) (analyzing anew a policy barring transgender persons from military service—after a previous version of the policy was enjoined—because "the 2018 Policy is significantly different from the 2017 Memorandum in both its creation and its specific provisions"). But even if Plaintiffs were correct, it would make little difference to the relevant inquiry: whether both cases "arise from *the same or identical* transactions, happenings, or events." Local Civ. R. 103.1(b)(i) (emphasis added). For one, no court ever found that the Secretary was motivated by discriminatory animus in deciding to reinstate a citizenship question on the 2020 Census. *See Kravitz*, 366 F. Supp. 3d at 754; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019), *aff'd in part, rev'd in part and remanded* 139 S. Ct. 2551 (2019); *see also Kravitz v. U.S. Dep't of Commerce*, No. 18-cv-1041 (D. Md. June 24, 2019), ECF No. 175 at 8, 13 (finding a "substantial issue" in the citizenship-question context). For another, the citizenship-question plaintiffs were, unsurprisingly, focused on whether the Secretary's decision to include a citizenship question on the 2020 Census "was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *See Kravitz*, 366 F. Supp. 3d at 754. Even if Plaintiffs' current claims are cognizable, they would need to prove a discriminatory motive to collect citizenship data *from other administrative agencies* (and prove a discriminatory effect from such collection). In short, if this case progressed to the merits, the Court's inquiry would not examine "the same or identical transactions, happenings, or events" or perform the same legal analysis.

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Court's APA inquiry on this procedural claim would look nothing like the analysis in the citizenship-question litigation. There, the Court examined Census Bureau procedures and found that the citizenship question was not "well tested" because "the Administrative Record show[ed] that . . . the citizenship question [did] not perform adequately on the [American Community Survey (ACS)]." *Kravitz*, 366 F. Supp. 3d at 748 (deemphasized). Here, again, there is no census question at issue nor any dispute about pretesting census questions. And perhaps unsurprisingly, Plaintiffs make no effort to defend the relatedness of their other APA claims. *See* FAC ¶¶ 88–92 (APA claim for purportedly failing to provide "any independent analysis or support to justify collecting citizenship data to produce this data for use with the population tabulations provided to states in the 2020 Census P.L. 94-171 Redistricting Data File"); *id.* ¶¶ 99–104 (APA claim for supposedly exceeding statutory authority).

It is true that "courts do not require complete factual overlap or that that there be no factual difference" between related cases. Pls.' Opp'n at 9. But this Court's Local Rules require that both cases "arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). Plaintiffs' cited cases, and many others, simply support the unremarkable proposition codified by the Local Rules: when two cases "arise from the same or identical transactions, happenings, or events," *id.*, "the strong presumption of random case assignment" may be "outweighed by the interests of judicial

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efficiency" because there will be "virtually identical and highly overlapping issues of fact" that must be resolved, *McGahn*, 391 F. Supp. 3d at 121.

Yet, again, Plaintiffs nowhere explain how the only two factual issues in the citizenship-question case (the reasons for the Secretary's decision to *include a citizenship question*, and whether a citizenship question would cause an inaccurate census count) relate in any way to the collection of citizenship information through administrative records.[2] So Plaintiffs' cited authorities—finding cases related due to virtually identical alleged harms and virtually identical factual issues—are unlike this situation. *See, e.g.*, *Moore v. Rite Aid Corp.*, 2013 WL 4833854, at *3 (E.D. Pa. Sept. 11, 2013) (finding cases related because "the harm alleged to have been sustained by both putative classes stems from the same facts—the use of LexisNexis's employment adjudication services and whether such conduct violates the FCRA"); *Sellers v. Phila. Police Com'r*, 2002 WL 32348499, at *3 (E.D. Pa. Feb. 7, 2002) (noting that cases were "hardly identical" but nonetheless related because "the central events underlying the claims" all concerned "the alleged consequences of police surveillance and infiltration . . . at 4100 Haverford Avenue"); *Assiniboine & Sioux Tribe of Fort Peck Indian Reservation v. Norton*, 211 F. Supp.

[2] Plaintiffs also advance the non sequitur that they are "challenging action by the Secretary and not just action by the President." Pls.' Opp'n at 7. But they do not explain how this is relevant to whether the two cases "arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). If anything, Plaintiffs' statement goes to whether the cases involve "identical parties or property," *id.*, but as explained below, Plaintiffs fail that test too.

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2d 157, 158–59 (D.D.C. 2002) (finding cases related because they both sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act, and it "would be a needless exercise in pedantry to discuss all of the common issues of fact between the" cases).[3]

Nor do Plaintiffs explain how the legal analyses in the citizenship-question litigation would remotely resemble the legal analyses in this case. Instead, they argue that "all of the claims in the current case are identical to claims that were raised in the citizenship-question case" because "[b]oth cases assert claims for violation[s] of the APA, the Fifth Amendment's equal protection guarantee, and conspiracy to violate civil rights under 42 U.S.C. § 1985(3)." Pls.' Opp'n at 10 (citations omitted).

This contention is nonsensical. For starters, alleging claims that arise under the same statutory or constitutional provisions has nothing to do with whether the two cases

[3] Plaintiffs also advance other premature arguments. For example, they allude to an "overlap in the experts and expert topics between the two cases." Pls.' Opp'n at 9. This argument is misplaced for two reasons. First, this case should be resolved on Defendants' forthcoming motion to dismiss; there is no need for discovery, let alone expert discovery. Second, Plaintiffs give no reason why similar "experts and expert topics" would be used in both cases when nearly all expert testimony in the citizenship-question litigation related to the procedures for including a citizenship question on the census and its impact on the census count, neither of which are at issue here. *See, e.g.*, *Kravitz*, 366 F. Supp. 3d at 710–11(findings of fact related to procedures for adding a question to the census); *id.* at 712–33 (findings of fact related to citizenship-question plaintiffs' standing, including whether the census count would capture individuals deterred from responding to the census because of a citizenship question); *see United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007) (explaining that Federal Rule of Evidence 702 "requires that the expert testimony must be the product of reliable principles and methods that are reliably applied *to the facts of the case*" (emphasis added)). Plaintiffs similarly claim that "several Census Bureau studies and analyses regarding the effectiveness and appropriateness for collecting citizenship data through either a survey or administrative records are relevant in both cases." Pls.' Opp'n at 9. But this is Plaintiffs' conjecture; they cannot know which "Census Bureau studies and analyses" are relevant to the compilation of citizenship records until their case survives Defendants' motion to dismiss and relevant information is produced by the agency.

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"arise from the same or identical transactions, happenings, or events." Local Civ. R. 103.1(b)(i). For example, the Court routinely decides equal protection claims in numerous contexts, none of which "arise from the same or identical transactions, happenings, or events." *See, e.g.*, *Moore v. Bishop*, 2019 WL 1331352, at *1 (D. Md. Mar. 25, 2019) (Hazel, J.) (rejecting an equal protection claim by a prisoner suing under 42 U.S.C. § 1983); *CASA de Maryland* v. *Trump*, 355 F. Supp. 3d 307 (D. Md. 2018) (Hazel, J.) (addressing an equal protection challenge to the Secretary of Homeland Security's termination of El Salvador's Temporary Protected Status). That is why the applicable Local Rule makes no mention of common legal *claims* giving rise to "related" cases. *See* Local Civ. R. 103.1(b)(i).

Worse yet, if common statutory or constitutional claims were enough to relate cases, then this Court could be tasked with deciding every APA challenge to administrative action, every alleged violation of equal protection, and every alleged claim of a civil-rights conspiracy filed in this District. *See, e.g.*, *Casa De Maryland, Inc. v. Trump*, 2019 WL 5190689, at *1 (D. Md. Oct. 14, 2019) (alleging that the Department of Homeland Security's immigration rule regarding "public charge" determinations violates the APA and equal protection); *Stone v. Trump*, 2019 WL 3935363, at *1 (D. Md. Aug. 20, 2019) (alleging equal protection and due process "challenges to President Trump's policy regarding transgender persons' enlistment and service in the military"); *Edokobi v. Mondo Int'l, LLC*, 2019 WL 3432431, at *13 (D. Md. July 29, 2019) (alleging a civil conspiracy under 42 U.S.C. § 1985(3)); *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349 (D. Md. 2019)

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(alleging violations of the APA and the Enumeration Clause based on purported deficiencies in the Census Bureau's 2020 Census procedures that would result in an inaccurate census count). Plaintiffs' theory would eviscerate Local Rule 103.1(b) and make a mockery of the related-case inquiry. There could be no inferior way to "guarantee fair and equal distribution of cases to all judges" and "avoid public perception or appearance of favoritism in assignments." *McGahn*, 391 F. Supp. 3d at 118.

The "transactions, happenings, or events" in this case and the citizenship-question case (as well as attendant legal questions) are not similar, much less "the same or identical." Defendants previously explained, and Plaintiffs do not dispute, that the Court would not examine "the same or identical transactions, happenings, or events" to assess the lawfulness of *both* a citizenship question on the 2020 Census *and* the sole use of administrative records to gather citizenship data. *See* Defs.' Mem. at 15. Put differently, Plaintiffs do not (and cannot) elucidate any way for the Court to scrutinize the "transactions, happenings, or events" in the citizenship-question case and award the relief requested in *this* lawsuit—an injunction barring Defendants "from collecting data as dictated by EO 13380 and from producing tabulations of citizenship population." FAC at 31–32. So the "transactions, happenings, [and] events" in this case cannot possibly be "the same or identical" to the citizenship-question case. *See Singh v. McConville*, 187 F. Supp. 3d 152, 157 (D.D.C. 2016) (finding related cases where "plaintiffs in both cases . . . challenge the same Department of Defense and Army regulations governing requests for

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religious accommodations on the same grounds"); *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010) (finding multiple related cases where "[e]ach case [ ] presents identical issues for resolution: whether the regulation impermissibly conflicts with the underlying statute"); *Assiniboine*, 211 F. Supp. 2d at 159 (finding related cases where both cases sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act). Plaintiffs have therefore failed to carry their heavy burden of demonstrating that the cases are related. *McGahn*, 391 F. Supp. 3d at 119.

II. The citizenship-question case and this case do not "involve the identical parties or property."

Plaintiffs' concede that this case and the citizenship-question case do not "involve the *identical* parties or property" as required by Local Rule 103.1(b). *See* Pls.' Opp'n at 11 (noting "overlap in the parties" and admitting that there are only [s]everal [o]f [t]he [s]ame Plaintiffs); *id.* at 12 (observing a "significant overlap between the parties"). Notwithstanding this concession, Plaintiffs attempt to rewrite the Local Rule, wishing it required only an "overlap" in parties rather than "identical parties." *Compare id.* at 11–13 *with* Local Civ. R. 103.1(b). But they cite no cases applying this atextual interpretation of the District of Maryland Local Rules, nor any court interpreting an analogous local rule in the manner they desire.

Instead, they rely on cases from the U.S. District Court for the District of Columbia, which does not relate cases based on "identical" parties. *See* D.D.C. Local Civ. R.

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40.5(a)(3) ("[C]ases are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent."); *see* Pls.' Opp'n at 11–12. It is no surprise, then, that Plaintiffs' cited cases never confronted the issue of "identical parties" and instead related cases on other grounds. *See Singh*, 187 F. Supp. 3d at 156 (finding related cases where "plaintiffs in both cases at issue [ ] challenge the same Department of Defense and Army regulations governing requests for religious accommodations on the same grounds"); *Autumn Journey*, 753 F. Supp. 2d at 140 (finding multiple related cases where they all "concern[ed] a hospice care provider subject to recently issued cap repayment demands calculated pursuant to the same regulation"); *Assiniboine*, 211 F. Supp. 2d at 159 (finding related cases where they both sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act, and it "would be a needless exercise in pedantry to discuss all of the common issues of fact between the" cases).

The Court should follow the Local Rules' unambiguous text and reject Plaintiffs' claim of "identical parties" when Plaintiffs themselves admit that the parties are not "identical." *See* Local Civ. R. 103.1(b).

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III. There would be no "duplication of labor," let alone a "substantial duplication of labor," if a different judge heard this case.

Defendants previously explained that this case concerns factual allegations and legal claims entirely distinct from the citizenship-question litigation, so this case would be no easier for this Court to handle based on its familiarity with the prior litigation. *See* Defs.' Mem. at 16–18; *see also* Section I., *supra*. Even the legal arguments in Defendants' forthcoming motion to dismiss will be dissimilar because they will be tailored to the unique claims in *this* litigation, which concerns the compilation of administrate records, not a census question. *Compare LUPE v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018) (finding standing at the motion-to-dismiss stage because, among other reasons, the plaintiffs plausibly plead that "the citizenship question would have a coercive effect on individuals' decisions not to respond to the Census") *with* Defs.' Mem. at 10–15 (explaining that neither a census question nor census response rates are at issue in this case).

Once again, Plaintiffs advance nothing but broad generalities in response. *See* Pls.' Opp'n at 13–14. And their cited cases actually prove *Defendants'* point: judicial economy is served by relating cases only "when virtually identical and highly overlapping issues of fact are likely to be resolved in two cases." *McGahn*, 391 F. Supp. 3d at 121; *see Singh*, 187 F. Supp. 3d at 156 (finding related cases where "plaintiffs in both cases at issue [ ] challenge the same Department of Defense and Army regulations governing requests for religious accommodations on the same grounds"); *Moore*, 2013 WL 4833854, at *3 (finding

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cases related because "the harm alleged to have been sustained by both putative classes stems from the same facts—the use of LexisNexis's employment adjudication services and whether such conduct violates the FCRA"); *Autumn Journey*, 753 F. Supp. 2d at 140 (finding multiple related cases where they all "concern[ed] a hospice care provider subject to recently issued cap repayment demands calculated pursuant to the same regulation" and "[e]ach case [ ] presents identical issues for resolution: whether the regulation impermissibly conflicts with the underlying statute"); *Sellers*, 2002 WL 32348499, at *3 (E.D. Pa. Feb. 7, 2002) (noting related cases where "the central events underlying the claims" all concerned "the alleged consequences of police surveillance and infiltration . . . at 4100 Haverford Avenue"); *Assiniboine*, 211 F. Supp. 2d at 159 (finding related cases where they both sought "accounting of their funds held in trust by the United States" under the 1994 Indian Trust Fund Management Reform Act, and it "would be a needless exercise in pedantry to discuss all of the common issues of fact between the" cases).

As discussed above, this case and the citizenship-question case do not present the same legal issues, much less "virtually identical and highly overlapping issues of fact." *McGahn*, 391 F. Supp. 3d at 121. So there would be no "duplication of labor" if this case were heard by a different judge. *See* Local Civ. R. 103.1(b). A contrary ruling would "contravene the very purpose of random assignment, which is to 'prevent judge-shopping by any party, thereby enhancing public confidence in the assignment process.'"

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Vaqueria Tres Monjitas, Inc. v. Rivera Cubano, 341 F. Supp. 2d 69, 72–73 (D.P.R. 2004) (quoting *United States v. Mavroules*, 798 F. Supp. 61 (D. Mass. 1992)). The Court should therefore reject Plaintiffs' designation of "related" cases and allow random assignment, which "is essential to the public's confidence in an impartial judiciary." *McGahn*, 391 F. Supp. 3d at 119.

CONCLUSION

For the reasons set forth above and in Defendants' prior memorandum, the Court should un-relate this case from *LUPE v. Ross*, No. 18-cv-1570 (D. Md.), so that it may be randomly assigned.

DATED: November 8, 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

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, and JUANITA VALDEZ-COX,

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce,

STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau,

U.S. DEPARTMENT OF COMMERCE, and

U.S. CENSUS BUREAU,

Defendants.

Civil Action No. 8:19-cv-02710-GJH

REQUEST FOR JUDICIAL NOTICE

Plaintiffs La Unión Del Pueblo Entero ("LUPE"), Promise Arizona ("PAZ"), Lydia Camarillo, and Juanita Valdez-Cox (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby request that the Court take judicial notice pursuant to Federal Rule of Evidence 201 of portions of the docket in *Common Cause v. Lewis*, No. 19 CVS 014001 (N.C. Super.). The Court may take judicial notice of court dockets in other proceedings, including state court proceedings. *See*, *e.g.*, *Bey v. Shapiro Brown & Alt, LLP*, 997 F.Supp.2d 310, 312 n. 1 (D. Md. 2014), aff'd, 584 F. Appx. 135 (4th Cir. 2014); *see also Strickland–Lucas v. Citibank, N.A.*, 256 F.Supp.3d 616, 620 n. 3 (D. Md. 2017) (explaining judicial notice generally, including judicial

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notice of docket entries).

Plaintiffs respectfully request that the court take judicial notice of the following documents filed in *Common Cause v. Lewis*, No. 19 CVS 014001 (N.C. Super.):

1. Consent Protective Order, filed on April 5, 2019, attached hereto as Exhibit 1.

2. Plaintiffs' Motion for the Court to Issue Direction to Legislative Defendants, filed June 6, 2019, attached hereto as Exhibit 2.

3. Geographic Strategies LLC's Motion For Leave to Request An Order of Protection, And in The Alternative, To Intervene Under Rules 45 and/or 24, filed on June 15, 2019, attached hereto as Exhibit 3.

4. Order on Geographic Strategies LLC's Motion to Designate Hofeller Files as Highly Confidential and to Compel Production, filed on July 12, 2019, attached hereto as Exhibit 4.

5. Memorandum In Support of Geographic Strategies' Response to Court Order of 7/12/19, filed on August 30, 2019, attached hereto as Exhibit 5.

6. Dalton L. Oldham's Affidavit In Support of Geographic Strategies LLC's Motion to Designate Documents Confidential or Highly Confidential and for Additional Requests for Relief, dated August 23, 2019, attached hereto as Exhibit 6.

7. Motion for the Court to Issue Direction to Plaintiffs Regarding Privileged Documents Within Their Possession and Control, filed on August 30, 2019, attached hereto as Exhibit 7.

8. Order on Unopposed Motion For One-Week Extension of Time For Plaintiffs' Response to Geographic Strategies' August 30 Submissions, filed on September 5, 2019, attached hereto as Exhibit 8.

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9. Motion for Leave to File Amicus Curiae Brief Mexican American Legal Defense and Educational Fund and Asian Americans Advancing Justice | AAJC, filed on September 13, 2019, attached hereto as Exhibit 9.

10. Order extending "CONFIDENTIAL" designation on all Hofeller files until October 27, 2019, filed on September 24, 2019, attached hereto as Exhibit 10.

Dated: October 1, 2019

Respectfully submitted,

By /s/ Terry Ao Minnis

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° *Not admitted in DC.*

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CERTIFICATE OF SERVICE

I certify that on this 1st day of October 2019, I caused a copy of the Motion for Leave to Conduct Early Discovery to be sent to all parties receiving CM/ECF 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-GJH

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY

Defendants take no position on Plaintiffs' request to serve a single subpoena "on a third-party records custodian to prevent destruction of evidence." Pls.' Mot. at 1, ECF No. 40. Defendants do not concede, however, that the documents sought by Plaintiffs are relevant to this action, or that any discovery would be appropriate if this case survives Defendants' forthcoming motion to dismiss.

DATED: October 15, 2019

Respectfully submitted,

JOSEPH H. HUNT
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Counsel for Defendants

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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Assistant Attorney General

DIANE KELLEHER
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/s/ Stephen Ehrlich
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Counsel for Defendants

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.

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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

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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,

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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.	**CIVIL ACTION** **No. 8:19-cv-02710-PX**

BRIEF OF TOM WOLF, GOVERNOR OF PENNSYLVANIA, AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

The Pennsylvania Office of the Governor ("Governor") submits this *amicus* brief out of its interest in an accurate census and a fair and orderly election process, and respectfully asks this Court to deny the Motion to Dismiss and to consider the important issues raised by this suit. Precedent favors resolving such disputes before the census, and delaying litigation until states draw new district maps would provide a narrow—and perhaps impossible—window of time for resolution of the disputes, potentially depriving voters of any remedy prior to the 2022 election.

The Governor is also concerned by Defendants' attempt to raise the bar for standing at this stage of the litigation, and to distort the actual governmental actions which provide the backdrop for this suit. Executive Order 13380 seeks to provide states with a redistricting citizenship dataset so those officials can engage in citizen voting age population (CVAP) redistricting, and it explicitly says that the Department of Commerce intends to provide that information. Defendants implausibly claim that Plaintiffs lack standing because states' use of CVAP redistricting is so hypothetical and speculative that it is impossible to plead a plausible injury resulting from the federal government's collection and sharing of citizenship data.

Finally, Defendants' discussion of the factors relevant to discriminatory animus presents a deceptively selective slice of the relevant facts, and the Governor provides some further context for the Court's consideration.

II. STATEMENT OF INTEREST

Plaintiffs in this case are citizens of Arizona, Texas, and Washington, and the Governor believes that this is a case of nationwide importance, and that its holding may avert—or spawn—litigation in the Commonwealth of Pennsylvania ("Commonwealth") and across the Nation. The Governor has a distinct interest in resolving these issues now, instead of waiting to begin litigation until just before the 2022 election cycle. This interest is particularly acute because

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contentious, last-minute litigation has characterized Pennsylvania's recent elections. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 108 (Pa. 2018); *Agre v. Wolf*, No. 17-4392, 2017 U.S. Dist. LEXIS 190136 (E.D. Pa. Nov. 16, 2017). In the wake of this intense redistricting litigation, Governor Tom Wolf signed Executive Order 2018-07, which establishes a Redistricting Reform Commission because, *inter alia*, "Pennsylvania's past processes may have led to underrepresentation of minority groups…." Governor Tom Wolf, Exec. Order 2018-7: Pennsylvania Redistricting Reform Commission (Nov. 29, 2018), https://www.governor.pa.gov/newsroom/executive-order-2018-07-pennsylvania-redistricting-reform-commission/. Indeed, the report of that Commission expressly recognizes that the Commonwealth's citizens desire a redistricting process that is "straightforward, open, and transparent." Pennsylvania Redistricting Reform Commission Report at 5, (Aug. 29, 2019), https://www.dos.pa.gov/VotingElections/Pages/Redistricting-Report-2019.aspx.

III. LEGAL STANDARD

At the pleading stage, the question for the Court is whether the Complaint pushes the claim "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A "plaintiff need not 'forecast' evidence sufficient to prove the elements of the claim." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012). This is because "*Iqbal* and *Twombly* do not require a plaintiff to prove his case in the complaint. The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 291 (4th Cir. 2012).

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IV. ARGUMENT

A. Plaintiffs Have Adequately Pleaded Standing

Defendants' core argument is that Plaintiffs lack standing because any injury would result from a "highly attenuated chain of possibilities, including the independent decisions of states and localities to use (or not use) citizenship data." Memorandum of Law In Support of Defendants' Motion to Dismiss 2 ("Br."). Specifically, Defendants contend that "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[.]'" Br. 13. But Defendants ignore the phased inquiry at the heart of standing, the legal standard, and the existence of factual and state law limits on redistricting procedures.

1. Plaintiffs Have Met Their Burden at This Stage

Article III 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). An "injury in fact" occurs "where a harm is concrete, though widely shared," and "[t]he deprivation of the right to vote is just such a concrete harm." *Bishop v. Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," because courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 424 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)). A plaintiff "need only plausibly allege" injury at this stage. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89–90 (4th Cir. 2013). The causation prong of the standing test sets a lower bar than "a requirement of tort causation." *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002) (citing *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974,

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980 n. 7 (4th Cir. 1992)). And "the redressibility requirement is satisfied where there is 'a non-speculative likelihood that the injury would be redressed by a favorable judicial decision.'" *Cooksey v. Futrell*, 721 F.3d 226, 238 (4th Cir. 2013) (quoting *Frank Krasner Enters. v. Montgomery Cty., Md.*, 401 F.3d 230, 234 (4th Cir. 2005)). Standing is not a static inquiry: "the proof required to establish standing increases as the suit proceeds." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). And discovery is proper where the claim to standing is plausible. *See, e.g.*, *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 211 (4th Cir. 2017).

Plaintiffs have met their burden to show standing at the pleading stage. They have alleged that the Census Bureau is motivated by racial animus in collecting citizenship data as part of a "conspiracy intended to dilute the representation of non-citizens and Latinos," Compl. ¶ 4. They have also explained the precise mechanism through which use of that citizenship data would dilute their votes. Compl. ¶¶ 86-87. In fact, the Executive Order cited in the Complaint claims that states are already asking for citizenship data for CVAP redistricting, and the Department of Commerce must provide that data:

> 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***.

Executive Order 13380, 84 Fed. Reg. 33821 (July 11, 2019) ("Executive Order 13380") (emphasis added). These facts establish "a substantial risk" that vote dilution will occur as a result of the collection of citizenship data in the decennial census. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). This is particularly true where the Supreme Court has explicitly recognized that "the threat of vote dilution" arising from improper census procedures

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"is concrete and actual or imminent, not conjectural or hypothetical." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) (internal quotations omitted).

Defendants argue that "[m]erely 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." Br. 14 (emphasis in original). This is thoroughly flawed: it (1) ignores the Executive Order, which suggests that Defendants are creating a redistricting dataset because they know states will use CVAP to draw districts, (2) flips the motion to dismiss standard on its head by asking the Court to draw inferences in favor of Defendants, (3) asks the Court to resolve the factual question of whether CVAP will be used without considering any evidence, and (4) simply contradicts the Complaint, which alleges that states ***will*** use CVAP. *See* Compl. ¶¶ 15, 87.

Moreover, Defendants' suggestion that states might not implement CVAP redistricting once they receive the redistricting citizenship dataset departs from reality. Defendants themselves acknowledge that multiple states, including Texas, have a longstanding "desire for CVAP redistricting." Br. 12, n. 8. Just last summer, multiple members of Congress from Texas and Arizona wrote to Attorney General Barr that "citizenship is unquestionably germane to carrying out our duty to apportion representatives." Letter from Members of Congress to Attorney General William P. Barr at 1 (July 10, 2019), *available at* https://tinyurl.com/tuh5drl.[1] But this Court need not resolve the question of whether states will use that citizenship data in a way that dilutes Plaintiffs' votes. Plaintiffs have plausibly alleged that they will, which is what matters at this stage.

[1] This Court may take judicial notice of "information contained on state and federal government websites." *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017).

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2. Defendants Set The Standing Bar Too High

Defendants' interpretation of the proper legal standard is wrong in two ways. First, Defendants suggest that "allegations of *possible* future injury are not sufficient" for Constitutional standing. Br. 15 (quoting *Wikimedia Found.*, 857 F.3d at 207-08 (alterations omitted)). This relies on a selective quotation of the *Clapper* decision, and ignores the Supreme Court's clarification the next year that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158; *see also Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018) (citing *Susan B. Anthony List*). Thus, a plaintiff need not show it is "literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). In a census case, a plaintiff may establish standing based on "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

Second, Defendants suggest that any injury to Plaintiffs would result from states' "own independent decisions," Br. 12, and that to establish standing, Plaintiffs would have to show that "Defendant's mere collection of citizenship data somehow coerces States into using that data for CVAP redistricting," *id.* n. 8. This, too, is wrong. In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010), the Supreme Court held that alfalfa farmers had standing to challenge deregulation of genetically engineered crops by a federal agency when there was a "significant risk" that engineered crops from neighboring farms would contaminate plaintiffs' alfalfa, and that risk was "readily attributable" to the deregulation decision. Defendants' insistence that Plaintiffs lack standing to challenge the Census Bureau's actions until states apportion using CVAP would be akin to the Supreme Court deciding that the alfalfa farmers in *Monsanto* lacked

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standing until after their neighbors decided to plant harmful crops. That is simply not the standard. Plaintiffs are entitled to the opportunity to proceed to the next stage of the case.

3. Defendants Ignore Important Limits on Redistricting

Defendants suggest that Plaintiffs' states may, under federal law, draw districts based on datasets other than the decennial census, including "either voter-registration data or the Census Bureau's ACS-based citizenship data." Br. 13-14. But regardless of federal law, most states use the decennial census for drawing districts, by command of their state constitutions, state statutes, or long-standing practices. *See* Redistricting and Use of Census Data, National Conference of State Legislatures (July 8, 2019), *available at* https://tinyurl.com/y4hrcwp4. In Pennsylvania, for example, the state constitution establishes that state legislative districts must be drawn upon receipt of "population data for the Commonwealth as determined by the Federal decennial census." Pa Const. Art. II, § 17. In Washington, district populations must be "based on the population reported in the federal decennial census." Wash. Rev. Code Ann. § 44.05.090. Arizona law similarly ties redistricting data to the decennial census. Ariz. Rev. Stat. Ann. § 16-1103. Thus, in many states, any CVAP redistricting must be done using the decennial census dataset—which perhaps explains Defendants' rush to compile citizenship data "in connection with the census[.]" Executive Order 13380, 84 Fed. Reg. 33825.

Discovery is essential to resolve this case fairly. Fact-bound legal, practical, and historical frameworks governing redistricting—and questions of data sufficiency and practicality—will almost surely be the subject of expert testimony. *Cf. Kravitz v. United States Dep't of Commerce*, 366 F. Supp. 3d 681, 740 (D. Md. 2019) ("Plaintiffs' experts consistently opined that it was highly unlikely that Plaintiffs' injuries would be remedied by third-party conduct, even if that conduct was in the realm of lawful possibilities."). Defendants recognize this, as they quote "experienced demographers" to claim that states can use ACS data (rather

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than decennial census data) for redistricting purposes. Br. 14 n. 10. This dive into disputed facts in the Motion to Dismiss highlights why factual development is necessary, and why the Court would err by disposing of this case on the pleadings, without the benefit of any evidence.

B. The Case Is Ripe For A Decision Now

Defendants argue that this case is unripe because (1) "it is far from certain that Plaintiffs would suffer any redistricting harm whatsoever," and (2) collection of citizenship data "neither obligates Plaintiffs to, nor prohibits Plaintiffs from, any action." Br. 23. The first point essentially restates Defendants' standing arguments, and fails for the same reasons. The second point ignores Plaintiffs' claim of vote dilution, census jurisprudence from all relevant courts, the extreme timing and practical challenges that would result from evading this issue, and the critical importance of eliminating racial animus from government action.

1. Courts Do Not Wait To Decide Census-Related Cases

Last summer, the Supreme Court emphasized that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion. We and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking." *New York*, 139 S. Ct. at 2568. And in census-related vote dilution cases, "it is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme—possibly irremediable—hardship." *U.S. House of Representatives*, 525 U.S. at 332. The Fourth Circuit has recognized that "the hardship that the plaintiffs would experience from the delay" in a census challenge "is well established." *NAACP v. Bureau of the Census*, 945 F.3d 183, 193 (4th Cir. 2019). The proper time to resolve census-related issues is before the census.

Defendants nonetheless claim that Plaintiffs' sole remedy is a suit against their "respective States," Br. 14-15, and then "only when Plaintiffs' state and local officials choose to

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use CVAP *with discriminatory intent*," Br. 20 (emphasis original). Under this view, there would be no recourse when the Census Bureau itself creates a citizenship dataset for use in redistricting, or modifies the data it provides to the states, with discriminatory animus. This is, in essence, an argument for discrimination laundering: federal officials may conduct the census with discriminatory intent, but the poison of discrimination is beyond the reach of the courts once the data is provided to the states.

2. Failure to Decide These Issues Will Result in Avoidable Chaos

The reality of the redistricting process following the decennial census means that residents of the Commonwealth would have a dangerously small window of opportunity to litigate complex factual and legal issues. The Governor is concerned that delay in addressing the important matters raised here would result in unnecessary chaos, and could prevent judges from fashioning workable remedies prior to the 2022 election cycle. This would effectively leave Plaintiffs defenseless against the known danger of vote dilution.

Pennsylvania provides a good example of why it is important to resolve census-related disputes early. In Pennsylvania, the legislative process necessary to effect Congressional redistricting historically begins only after publication of the Federal Decennial Census. *See, e.g.*, Pa. S.B. 1249, 2011 Gen. Assemb., Reg. Sess (introduced Sept. 14, 2011) (enacted as 2011 Act 131 Dec. 22, 2011). In contrast, state legislative redistricting must begin by "no later than ninety days after the [state redistricting] commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later …" Pa. Const. Art. II, § 17. Delays are common in these processes: following the last census, no legislation authorizing a Congressional map was available until December 22, 2011. This leaves little time to prepare for the petition circulation and filing period for congressional and legislative seats, which begins on February 15, 2022, in the upcoming cycle.

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Implementing new maps, keeping voters informed, and conducting elections in compliance with state and federal law can be a daunting task following the decennial census. The Pennsylvania Department of State ("Department") must convert map data files into lists of precincts and update the elections system database with the new precinct lists; post nomination petitions on its website; and update the voter registration files in the Statewide Uniform Registry of Electors system, a process which allows candidates to obtain updated lists of voters from the Department or from the county boards of elections. The Department must also ensure accurate information about the new maps is widely available, including through its website and social media. For state legislative districts, the Department is required to publish textual descriptions and maps in at least one newspaper of general circulation in each county in which such newspapers are published. The congressional enactment likewise usually contains a similar publication requirement. Delays in implementing the maps can cascade, as candidates rely on them to circulate and file nomination petitions; the Department must send lists of candidates' names to the county boards of elections; and the county boards of elections must prepare balloting materials and send them to military and overseas voters.

This is all to say that waiting to litigate known issues regarding the census data file until states draw their maps will predictably throw the carefully-choreographed election process into chaos, confusing voters and disrupting essential preparations. Even worse, it is possible (and perhaps likely) that by the time a future court has considered and decided a challenge related to the redistricting citizenship dataset at issue in this suit, it will be too late to implement any

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changes or re-draw electoral districts. Indeed, courts frequently find that by the time they rule on election-related matters, there is insufficient time to fashion a remedy before the next election.[2]

These realities affect the states in which Plaintiffs reside. In Arizona, primary elections occur "on the first Tuesday in August," and candidates' nomination papers must be submitted 120 to 150 days before the primary election. Ariz. Rev. Stat. Ann. § 16-201. This places the window for submissions between March and April. Following the last decennial census, Arizona finalized its maps on February 9, 2012. Congressional Maps Get DOJ Approval, Ariz. Indep. Redistricting Comm'n (Apr. 9, 2012), *available at* https://tinyurl.com/r82vn8b. If past is prologue, a court would have somewhere around 60 to 90 days in 2022 to rule on a challenge to Arizona's districts. In Washington, where legislative districts would likely be finalized between January and March of 2022, candidates' filings would be due by late May—likely between 90 and 150 days after the maps were finalized. *See* Wash. Const. art. II, § 43(6); Rev. Code Wash. §§ 44.05.100; 29A.24.050. It seems likely that Texas, too, will have a tight turnaround for any challenge to its districts, since candidates must file for primary elections even earlier than in the other states (by mid-December, 2021). Tex. Elec. Code § 172.023(a).

The Governor urges the Court to resolve these issues now. At best, declining to hear this case will result in widespread uncertainty, followed by a rush to adjudicate last-minute legal challenges regarding use of citizenship data for apportionment. At worst, delay could produce

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[2] *See, e.g.*, *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018), *vacated on other grounds*, 139 S.Ct. 2484 (2019) (holding "there is insufficient time for this Court to approve a new districting plan and for the State to conduct an election using that plan.... [I]mposing a new schedule for North Carolina's congressional elections would, at this late juncture, unduly interfere with the State's electoral machinery and likely confuse voters and depress turnout.").

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chaos, subject Plaintiffs to the exact vote dilution they warn of, and deprive voters of meaningful recourse to the courts.

3. When Racial Animus Motivates Government Action, Courts May Step In

Defendants have set out an extreme position: even if racial animus motivated creation of a redistricting citizenship database in connection with this census, Plaintiffs have no recourse against the federal government. Rather, "Plaintiffs' quarrel lies with their respective States, not the President, the Secretary of Commerce, or the Census Bureau." Br. 14. To the extent Plaintiffs challenge action by the federal government, Defendants maintain that Plaintiffs "may seek relief through the political process—not the courts." Br. 15. This is wrong. A constitutional claim regarding the census is "not a political one" because:

> If this constitutional question were beyond the reach of judicial review, the People would have no ordered redress of Legislative and Executive Branch actions or inactions that thwart their essential constitutional right. If Congress is in violation of the Enumeration Clause's mandate, it cannot take refuge behind the fig leaf of deference to administrative procedure. Nothing is more existential to the preservation of the "Republic" than requiring an "actual Enumeration" without "partiality or oppression."

NAACP, 945 F.3d at 194 (Gregory, J. concurring). Chief Judge Gregory's beliefs regarding the Enumeration Clause apply with equal force to Plaintiffs' claim that the Census Bureau has violated the Fifth Amendment's Equal Protection Clause through racial animus. The Governor entirely agrees: judicial review is necessary to safeguard Constitutional and statutory rights.

C. The Court Should Consider The Context For This Motion

Defendants cite a four-part test for discriminatory intent, which focuses on a decisionmaker's past actions, "historical background," the "specific sequence of events" leading

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up to a decision, and "contemporaneous statements" by the decisionmaker.[3] Br. 33 (quoting *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 635 (4th Cir. 2016)). Because context is so important to this inquiry, and because Defendants fault the Complaint for failing to identify a history of discrimination, the Governor will provide some background.

1. The Presidential Advisory Committee on Election Integrity

The President's Executive Order is the latest move in a long-running and tactical pattern of discrimination and interference with the fundamental right to vote. In 2016, President-Elect Trump tweeted: "In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally[.]" President Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), *available at* https://tinyurl.com/hlodj9x (last visited January 16, 2020). In May 2017, he established the Presidential Advisory Commission on Election Integrity ("Commission") by executive order. Executive Order 13799, 82 Fed. Reg. 22389 (May 11, 2017). Kansas Secretary of State Kris Kobach was appointed Vice Chair of the Commission. Statement from Kris Kobach, Secretary of State and Vice Chair of the Presidential Advisory Commission on Election Integrity (July 5, 2017), *available at* https://tinyurl.com/qn3m4wx.[4] Kobach and the Commission requested voter information from the Commonwealth, among other states. Governor Wolf responded:

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[3] Defendants contend that the President's statements are irrelevant because the Secretary of Commerce is the decisionmaker. Br. 34. But the Third Count alleges that the Secretary of Commerce "improperly allow[ed] President Trump to usurp the discretion delegated to the Secretary by Congress." Compl. ¶ 102.

[4] As Kansas Secretary of State, Kobach was then a defendant and attorney in federal litigation regarding whether requiring voters to present proof of citizenship violated the Equal Protection Clause of the Fourteenth Amendment. See Amended Complaint, *Fish v. Kobach*, 2:16-cv-02105-JAR (D. Kan. March 17, 2016), Dkt. 39. In June of 2017, Kobach was sanctioned and fined $1,000 in that suit for failure to produce discoverable materials after he was photographed carrying relevant documents to a meeting with President Trump. Order at 4, *Fish v. Kobach*, 2:16-cv-02105-JAR, (D. Kan. June 23, 2017), Dkt. 355. In 2018, Kobach's lawsuit went to trial. Kobach had argued that indicia of voter fraud were just the

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> I have serious reservations about the true intentions of this effort in light of the false statements this administration has made regarding voting integrity, the historical suppression of voting rights, and the way that such data has been used in the past. . . . I have grave concerns your request is a mere pretense for pursuing restrictions on the fundamental right of citizens to vote. . . . Voter suppression is undemocratic and I will not allow Pennsylvania to participate in this process to further the trend of suppression seen across the country.

Letter to Kris W. Kobach from Governor Tom Wolf (June 30, 2017), https://www.governor.pa.gov/wp-content/uploads/2017/06/Kobach.pdf. Kobach denied knowledge of these requests, and the Commission was disbanded in early 2018. Statement by the Press Secretary on the Presidential Advisory Commission on Election Integrity, (Jan. 3, 2018), *available at* https://tinyurl.com/qsu37e2.

2. The Census Question

During his time on the Commission, Kobach was also working to include a citizenship question in the decennial census. *Kravitz v. United States Dep't of Commerce*, 382 F. Supp. 3d 393, 397 (D. Md. 2019). In litigation connected with the citizenship question, Judge Hazel found that "Plaintiffs had presented evidence that individuals in Secretary Ross's orbit, including the President and Mr. Kobach, did harbor discriminatory animus towards non-citizens." *Id.* at 398. Judge Hazel also summarized a memorandum written by Dr. Thomas Hofeller, a key player in the citizenship question saga, which even Defendants refer to as the "proverbial smoking gun":

> Dr. Hofeller acknowledged that a change from redistricting based on total population to CVAP would be a "radical departure" that might alienate Hispanic voters. He noted that further research should address whether "the gain of GOP voting strength" from the use of CVAP data would be "worth the alienation of Latino voters

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"tip of the iceberg," but the Court drew "the more obvious conclusion that there is no iceberg; only an icicle, largely created by confusion and administrative error." Findings of Fact and Conclusions of Law at 88-89, *Fish v. Kobach*, 2:16-cv-02105-JAR (D. Kan. June 18, 2018) Dkt. 542. The Judge again sanctioned Kobach for presenting undisclosed expert witness testimony at trial, and ordered him to complete Continuing Legal Education courses.

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> who will perceive the switch" as an "attempt to diminish their voting strength."

Id. Dr. Hofeller's documents, which are now available online, reveal that his Texas calculations did not just focus on CVAP, but on dividing voters between "Percent CVAP Anglo" and "Percent Hispanic CVAP."[5]

Defendants claim that "Plaintiffs fail to plausibly allege any departures from normal procedures such that discriminatory intent could be inferred." Br. 35. But this ignores Count III of the Complaint. *See* n. 4, *supra*. It also ignores the extraordinary fact that the Chief Justice of the Supreme Court found that Defendants' stated reason for including the census question "seems to have been contrived." *New York*, 139 S. Ct. 2551, 2575 (2019).

The redistricting citizenship dataset at issue is not an isolated action, as Defendants suggest. It is the latest battle in a purposeful, years-long, wide-reaching campaign by Defendants and the individuals named in the Complaint to game the voting and redistricting process. But it is also part of a larger struggle, as old as our country: "[f]rom the very beginning, the Enumeration Clause was born in the tainted cauldron of racism, sexism, and classism." *NAACP*, 945 F.3d at 194 (Gregory, J. concurring). The Governor urges the Court to zealously protect the census and redistricting processes from gamesmanship, and to allow these claims to move forward.

V. CONCLUSION

For the foregoing reasons, the Pennsylvania Office of the Governor respectfully asks that this Court deny Defendants' Motion to Dismiss.

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[5] Dr. Hofeller's documents are available at https://www.thehofellerfiles.com/.

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Dated: January 16, 2020

Respectfully submitted,

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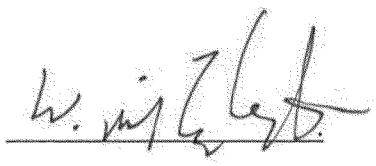
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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,

By /s/ Terry Ao Minnis

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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

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.

[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

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, PROMISE ARIZONA, LYDIA CAMARILLO, JUANITA VALDEZ-COX, ROGENE GEE CALVERT; ZEENAT NISHA HASAN; and CANDY L. GUTIERREZ, *Plaintiffs*, v. WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce, STEVEN DILLINGHAM, sued in his official capacity as Director of the U.S. Census Bureau, U.S. DEPARTMENT OF COMMERCE, and U.S. CENSUS BUREAU, *Defendants*.	Civil Action No. 8:19-CV-02710-GJH AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

AMENDED COMPLAINT

INTRODUCTION

1. On July 11, 2019, President Trump issued Executive Order 13880, Collecting Information about Citizenship Status in Connection with the Decennial Census ("EO 13880"), that directs: (1) Secretary Ross to instruct the Census Bureau to create an inter-agency working group to collect citizenship data in connection with the 2020 decennial census for redistricting; (2) the Department of Commerce to "strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship"; and (3) all federal agencies to provide citizenship

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data via administrative records to the Census Bureau. On July 12, 2019, the Census Bureau published a notice dated July 3, 2019, stating that Secretary Ross had directed the Census Bureau to collect and produce Citizenship Voting Age Population ("CVAP") information prior to April 1, 2021 that states may use in redistricting.

2. The President's order and Secretary Ross's directive that the Department of Commerce provide states with CVAP information for redistricting is motivated by a racially discriminatory scheme to reduce Latino political representation and increase the over-representation of non-Latino Whites, thereby advantaging White voters at Latino voters' expense. As the Department of Commerce and the Census Bureau comply with Secretary Ross's directive and EO 13880 to collect citizenship data and when they produce population tabulations that purport to exclude non-citizens for purposes of drawing state and local districting plans, voters will be denied their constitutionally guaranteed rights to equitable political representation based on actual population.

3. The Court should enjoin Defendants' actions as violative of the Administrative Procedure Act ("APA") for a number of reasons. First, Defendants failed to articulate an adequate rationale for making the decision to collect and produce citizenship data from administrative records. Second, for discriminatory reasons, EO 13880 and Secretary Ross's directive instructs the Census Bureau to perform an impossible task contrary to law: to determine the total number of non-U.S. citizens without an actual enumeration of the non-U.S. citizen population. Administrative records cannot provide citizenship data to the states without the use of statistical sampling and estimation, and therefore cannot provide a total enumeration of the citizen and non-citizen population. Third, Secretary Ross's compliance with EO 13880 is in excess of the statutory authority that the Secretary has to conduct the decennial census. By

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deciding to collect citizenship data in response to EO 13880, Secretary Ross is improperly allowing the President's judgment to displace his own discretion over the census. The Constitution vests Congress, not the President, with discretion over the conduct of the census. Congress delegated this responsibility to the Secretary, not the President. Fourth, Defendants failed to comply with the mandated procedures and requirements for making a substantive change to the data collected and reported by the Census Bureau in connection with the 2020 decennial census, in violation of the requirements of federal laws and regulations.

4. Defendants' actions should also be enjoined because they are motivated by racial animus, are discriminatory toward Latinos and non-citizens, and are the result of a partisan conspiracy intended to dilute the representation of non-citizens and Latinos, in violation of the equal protection guarantee of the Fifth Amendment of the U.S. Constitution, and 42 U.S.C. § 1985(3).

5. Plaintiffs seek declaratory and injunctive relief to prevent Defendants from violating the APA, the equal protection guarantee of the Fifth Amendment of the U.S. Constitution, and 42 U.S.C. § 1985(3).

PARTIES

Plaintiffs

6. Plaintiff La Unión del Pueblo Entero ("LUPE") is a nonprofit membership organization founded by labor rights activists César Chávez and Dolores Huerta. LUPE's mission is to build strong, healthy communities in the Texas Rio Grande Valley through community organizing and civic engagement. To promote civic engagement in the communities it serves, LUPE conducts know-your-rights discussions and membership meetings, participates

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in issue-focused advocacy, connects its members to social services, conducts census outreach, and conducts voter registration, education, and non-partisan get-out-the-vote campaigns.

7. LUPE is headquartered in San Juan, Texas, and its members primarily reside in Hidalgo, Cameron, Willacy, and Starr Counties, Texas. LUPE has over 8,000 members, including Latinos, U.S. citizens, and non-U.S. citizens. Some LUPE members are immigrants not authorized to be present in the United States. LUPE has members that live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Texas and the United States.

8. Plaintiff Promise Arizona ("PAZ") is a nonprofit, faith-based membership organization founded in 2010 in response to the passage of Arizona Senate Bill 1070. It is headquartered in Phoenix, Arizona. PAZ's mission is to build Latino and immigrant political power to ensure family unity, a path to citizenship, worker protections, and a path to equitable educational opportunities for all immigrants. To achieve its mission, PAZ promotes civic engagement, provides scholarships to members and other individuals for immigration-related expenses, partners with community colleges to conduct educational and job training programs, conducts youth leadership programs, and provides assistance with applications for immigration relief. To promote civic engagement, PAZ registers members and individuals to vote, educates members about important voting issues, conducts get-out-the-vote campaigns, and participates in various issue-focused advocacy.

9. PAZ has members and serves individuals who primarily reside in Maricopa, Yuma, and Pinal Counties, Arizona. PAZ has hundreds of members, including Latinos, U.S. citizens, non-U.S. citizens, and members of mixed-status families (in which some members are citizens or non-U.S. citizens with legal status and others are not). Some PAZ members and some

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of the individuals PAZ serves are immigrants not authorized to be present in the United States. PAZ has members and serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States.

10. Plaintiff Juanita Valdez-Cox is a member and the Executive Director of LUPE, and has held that position since approximately 2007. She identifies as Latina, is a registered voter, and lives in Donna, Texas. According to American Community Survey ("ACS") data, the total population of Donna, Texas, is 16,507 and Latinos constitute approximately 92.3 percent of the total population.

11. Plaintiff Lydia Camarillo is the President of Southwest Voter Registration Education Project ("SVREP") and has worked with SVREP for approximately twenty years. Ms. Camarillo identifies as a Latina, is a registered voter, and lives in San Antonio, Texas. According to ACS data, the total population of San Antonio, where Plaintiff Lydia Camarillo resides, is 1,461,623, and Latinos constitute approximately 64 percent of the total population.

12. Plaintiff Rogene Gee Calvert identifies as Asian American, is a registered voter, and lives in Houston, Texas. According to ACS data, the total population of Houston, Texas is 2,267,336 and Asian Americans constitute approximately 6.7 percent of the total population.

13. Plaintiff Zeenat Nisha Hasan identifies as Asian American, is a registered voter, and lives in Phoenix, Arizona. According to ACS data, the total population of Phoenix, Arizona is 1,574,421 and Asian Americans constitute approximately 3.6 percent of the total population.

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14. Plaintiff Candy L. Gutierrez identifies as Latina, is a registered voter, and lives in Yakima, Washington. According to ACS data, the total population of Yakima, Washington is 91,067 and Latinos constitute approximately 46.2 percent of the total population.

Defendants

15. Defendant Wilbur L. Ross is Secretary of the U.S. Department of Commerce. The Secretary of Commerce carries out the functions and duties imposed on him by the Census Act, issues rules and regulations to carry out his responsibilities, and delegates functions and duties as necessary. 13 U.S.C. § 4. The Secretary of Commerce prepares questionnaires, determines inquiries, and determines the number and form of statistics, surveys, and censuses. 13 U.S.C. § 5. Congress delegated the duty to conduct the census to the Secretary of Commerce, who must take a census on April 1 every 10 years "in such form and content as he may determine [.]" 13 U.S.C. § 141 (a); *see also* 13 U.S.C. § 5. In that capacity, Defendant Ross directed the Census Bureau to produce CVAP information as part of the redistricting dataset provided to States prior to April 1, 2021, for the purpose of affording states the option of using a voter-eligible population base for redistricting. Defendant Ross is sued in his official capacity.

16. Defendant Steven Dillingham is the Director of the U.S. Census Bureau. The Director of the U.S. Census Bureau oversees the 2020 decennial census operations and is responsible for ensuring the accuracy of the 2020 decennial census count. Defendant Dillingham directs the Census Bureau and performs census-related duties assigned by law, regulation, or the Secretary of Commerce. 13 U.S.C. § 21. He is sued in his official capacity.

17. Defendant U.S. Department of Commerce is an agency of the U.S. government which oversees the U.S. Census Bureau and its conduct of the decennial census and other census programs.

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18. Defendant U.S. Census Bureau is an agency within the U.S. Department of Commerce. 13 U.S.C. § 2. The Census Bureau is responsible for conducting all census programs, including the development and implementation of the 2020 decennial census and the collection of information for and formulation of the P.L. 94-171 population tabulations used by states for redistricting.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Plaintiffs' causes of action under the United States Constitution and federal statutes. This Court has jurisdiction under 5 U.S.C. §§ 702 and 704 over Plaintiffs' claims under the APA. This Court may grant Plaintiffs' request for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

20. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1), because: (1) Defendants Dillingham (in his official capacity) and United States Census Bureau reside in Prince George's County within this District, and (2) a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

FACTUAL ALLEGATIONS

A. Background on the U.S. Census and P.L. 94-171 Redistricting Data File

1. The Census Act and the Census Bureau

21. The U.S. Constitution requires an "actual Enumeration" of every person living in the United States to take place every ten years. U.S. Const. art. I, § 2, cl. 3.

22. The Constitution gives Congress authority to conduct the census "in such a Manner as [Congress] shall by Law direct," U.S. Const. art. I, § 2, and "vests Congress with wide discretion over . . . the conduct of the census," *Wisconsin v. City of N.Y.*, 517 U.S. 1, 15

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(1996). Pursuant to this authority, Congress delegated the duty of conducting the census to the Secretary of Commerce, subject to the provisions of the Census Act of 1976, 13 U.S.C. § 141, *et seq*. (the "Census Act"), and other applicable federal statutes and regulations promulgated thereunder.

23. Section 141(f) of Tile 13, requires that the Secretary report his "determination[s]" as to the content of the next census within certain deadlines in advance of the Census Date. 13 U.S.C. § 141(f); 90 Stat. 2462.

24. The Census Act authorizes the Secretary to collect information "other" than total population only "as necessary." 13 U.S.C. § 141(a). The Secretary may not modify the "subjects" for the decennial census report to Congress under § 141(f)(1), without finding that "new circumstances exist under which necessitate" such a modification and reporting that finding to Congress. *Id.* § 141(f)(3).

25. Section 6 of Title 13 addresses the methods that the Secretary is authorized to use in collecting data other than the enumeration of total population for apportionment purposes. In particular, Section 6 provides:

> (a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.
>
> (b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.
>
> (c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries.

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13 U.S.C. § 6.

26. The Census Bureau is a statistical agency subject to the standards and directives of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-21, and the federal Information Quality Act ("IQA"), *see* consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (amending PRA).

27. The PRA sets forth standards that federal agencies must meet before the OMB can approve a proposed data collection, and requires the OMB to "coordinate the activities of Federal statistical system to ensure the efficiency and effectiveness of the system[] and the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes." 44 U.S.C. § 3504(e)(1).

28. Under the OMB's Policy Directive No. 1, federal statistical agencies must: (1) provide objective, accurate, and timely information; (2) have credibility with data users; (3) have the trust of the individuals whose information is collected; and (4) be independent from political and other undue external influence in the development, production, and dissemination of statistics.[1]

29. Policy Directive No. 1 states that the Census Bureau is a federal statistical agency. The Directive also states that federal statistical agencies must "seek input regularly from the broadest range of private-and public-sector data users" in any plans for information

[1] Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units ("Policy Directive No.1"), 79 Fed. Reg. 71611-12 (Dec. 2, 2014), *available at* https://www.govinfo.gov/content/pkg/FR-2014-12-02/pdf/2014-28326.pdf.

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collection or dissemination and must "apply sound statistical methods to ensure statistical products are accurate."[2]

30. The Census Bureau must also "conduct objective statistical activities," which means that they must "produce data that are impartial, clear, and complete" and make information available on an "equitable, policy-neutral, transparent, timely, and punctual basis."[3] The agency "must seek to avoid even the appearance that agency design, collection, processing, editing, compilation, storage, analysis, release, and dissemination processes may be manipulated."[4] To guarantee such impartiality, statistical agencies including the Census Bureau "must function in an environment that is clearly separate and autonomous from the other administrative, regulatory, law enforcement, or policy-making activities within their respective Departments" and "must be able to conduct statistical activities autonomously when determining information to collect and process."[5]

31. Pursuant to the IQA, the Census Bureau's Information and Quality Guidelines state that the Census Bureau must "provide information that is accurate, reliable, and unbiased."[6]

2. Apportionment, the Bureau's Apportionment Tabulation, State Redistricting, and the P.L. 94-171 Redistricting Data File

32. The decennial count of the national population is used to allocate seats in the U.S. House of Representatives to states based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2.

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[2] *Id.* at 71615.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 71615.
[6] Information Quality Guidelines Objectivity, U.S. Census Bureau, https://www.census.gov/about/policies/quality/guidelines/objectivity.html (last visited Aug. 28, 2019).

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33. Federal law requires the Secretary of Commerce to deliver the "tabulation of total population of states . . . for the apportionment of Representatives in Congress among the several States" to the President by the end of the census year, who must report them to Congress within a week after the start of Congress's new session. 13 U.S.C. § 141(a)-(b); 2 U.S.C. § 2a.

34. After the Secretary of Commerce takes the census in a form and content determined by the Secretary of Commerce, he reports the population tabulations to the President. 13 U.S.C. § 141(b). "After receiving the Secretary's report, the President 'shall transmit to the 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 under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions[.]'" *Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (quoting 2 U.S.C. § 2a(a)).

35. Decennial census data are also used for state legislative redistricting. *See*, *e.g.*, 13 U.S.C. § 141(c) ("tabulations of population of each State . . . shall . . . be completed, reported, and transmitted to each respective State within one year after the decennial census date" by the Secretary of Commerce).

36. Public Law (P.L.) 94-171, enacted in 1975, "directs the Census Bureau to make special preparations to provide redistricting data needed by the fifty states. Within a year following Census Day, the Census Bureau must send the data agreed upon to redraw districts for the state legislature to each state's governor and majority and minority legislative leaders."[7]

[7] *Public Law 94-171 (P.L. 94-171)*, U.S. Census Bureau, Fact Finder, https://factfinder.census.gov/help/en/public_law_94_171_p_l_94_171.htm (last visited Aug. 15, 2019).

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37. To fulfill this obligation, the Census Bureau is also required to conduct the program in a non-partisan manner. 13 U.S.C. § 141(c).

38. To comply with the requirements of P.L. 94-171, "the Census Bureau set up a voluntary program that enables participating states to receive data for voting districts (e.g., election precincts, wards, state house and senate districts) in addition to standard census geographic areas such as counties, cities, census tracts, and blocks."[8]

39. While P.L. 94-171 only requires the Census Bureau to furnish counts of the total population, additional data items are also included. For example, since 1990 the Census Bureau has included summaries for the major race groups specified by the Statistical Programs and Standards Office of the OMB in Directive 15 (as issued in 1977 and revised in 1997).[9]

40. The 2020 Census Redistricting Data Program ("2020 CRDP") provides states the opportunity to delineate voting districts and to suggest census block boundaries for use in the 2020 census redistricting data tabulations ("P.L. 94-171 Redistricting Data File"). The CRDP is also "responsible for the effective delivery of the 2020 Census P.L. 94-171 Redistricting Data prior to April 1st, 2021, one year from census day."[10]

41. On July 15, 2014, the Census Bureau announced and sought public comments on the establishment of the 2020 CDRP.[11]

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[8] *Id.*

[9] *Decennial Census P.L. 94-171 Redistricting Data*, U.S. Census Bureau (Mar. 8, 2017), *available at* https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html.

[10] Redistricting & Voting Rights Data Office, *Redistricting Data Program Management*, U.S. Census Bureau (last revised Dec. 27, 2018), https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html?.

[11] Establishment of the 2020 Census Redistricting Data Program, 79 Fed. Reg. 41258 (Jul. 15, 2015), *available at* https://www.govinfo.gov/content/pkg/FR-2014-07-15/pdf/2014-16532.pdf.

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42. As part of its process, the Census Bureau issued a "prototype product to illustrate what the states can expect from the decennial census."[12] The "prototype data product [is used] to illustrate and solicit feedback on what the 2020 Census P.L. 94-171 Redistricting Data File will look like and how it addresses the needs of the states for their legislative redistricting requirements. This prototype is used to build and test systems in advance of the official data release so that states can begin work immediately, as many have short statutory deadlines that begin with the receipt of their data."[13]

43. The Census Bureau's standard procedure is "[i]f substantive changes are needed to the 2020 Census P.L. 94-171 Redistricting Data File design based on comments received regarding this prototype, then an additional Federal Register Notice explaining those differences will be issued."[14]

44. On November 8, 2017, the Census Bureau published a notice in the Federal Register asking for public comment on the "Proposed Content for the Prototype 2020 Census Redistricting Data File."[15] The prototype did not include citizenship population tabulation data as substantive content to be included in the P.L. 94-171 file. The Census Bureau received three public comments. None of the public comments requested that the Census Bureau include citizenship data in the 2020 Census Redistricting File.[16]

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[12] Redistricting & Voting Rights Data Office, *Redistricting Data Program Management*, U.S. Census Bureau (last revised Dec. 27, 2018), https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html?.
[13] *Id.*
[14] *Id.*
[15] Ron Jarmin, *Final Content Design for the Prototype 2020 Census Redistricting Data File* (Apr. 24, 2018), *available at* https://www.federalregister.gov/documents/2018/05/01/2018-09189/final-content-design-for-the-prototype-2020-census-redistricting-data-file.
[16] *Id.*

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45. The final Prototype 2020 Census Redistricting Data File published in the Federal Register on May 1, 2018, did not include citizenship population tabulation data as substantive content to be included in the P.L. 94-171 file.[17]

46. On December 28, 2018, in connection with the Census Bureau's submission to OMB for clearance, the Census Bureau submitted a proposal for collection of information under the provisions of the PRA.[18] The proposal posted to the Federal Register, included the following notice:

> The purpose of the 2020 Census Redistricting Data Program (RDP) is to provide to each state the legally required redistricting data tabulations by the mandated deadline of one year from Census Day: April 1, 2021. In compliance with Public Law (Pub. L.) 94-171, the Census Bureau will tabulate for each state the total population counts by race and Hispanic origin. The Census Bureau will tabulate these counts for the total population and for the population age 18 and over in a prototype redistricting data file released as part of the 2018 End-to-End Census Test. The Census Bureau intends to work with stakeholders, specifically "the officers or public bodies having initial responsibility for the legislative apportionment of each state," to solicit feedback on the content of the prototype redistricting data file. If those stakeholders indicate a need for tabulations of citizenship data on the 2020 Census Public Law 94-171 Redistricting Data File, the Census Bureau will make a design change to include citizenship as part of that data.[19]

47. The December 28, 2018 notice was issued in connection with a prior proposal that included a citizenship question on the 2020 decennial census for the pretextual reason of using the data for VRA enforcement.

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[17] *2020 Census Prototype Redistricting Data (Public Law 94-171) Summary File from the End-to-End Census Test*, U.S. Census Bureau, https://www2.census.gov/programs-surveys/decennial/rdo/about/2020-census-program/Phase3/Phase3_prototype_schematic_final.pdf?# (last visited Aug. 27, 2019).

[18] *OMB Information Collection Request, 2020 Census, OMB Control Number 0607-1006*, Department of Commerce and U.S. Census Bureau, *available* at https://www.reginfo.gov/public/do/DownloadDocument?objectID=88197702 (last visited Sep. 13, 2019).

[19] *Id.* at 38-39.

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48. Since its creation, citizenship population data has not been included in any of the tabulations contained within the P.L. 94-171 Redistricting Data File.

49. In February 2019, the Department of Commerce released the final version of the OMB request.[20] The request noted that the issue of whether a citizenship question would be included in the 2020 census was still being litigated.[21] The document also provides that if "stakeholders indicate a need for tabulations of citizenship data on the 2020 Census P.L. 94-171 Redistricting Data File, the Census Bureau will make a design change to include citizenship as part of that data, *if collected*. That new design would then be published in the Federal Register after it is completed in the summer of 2019."[22]

50. On March 29, 2019, the Census Bureau published the prototype redistricting data file to states based on the test enumeration of Providence County, Rhode Island, that took place in 2018.[23] The Providence County, Rhode Island test did not collect citizenship data, and the prototype redistricting data file did not contain citizenship data.

3. Citizenship Data From the Census Bureau's American Community Survey

51. There will not be a question on the 2020 decennial census regarding the citizenship of respondents and their households. Therefore, the decennial census hard count will not include a count of the total population divided into citizen and non-citizen categories.

52. The ACS is an ongoing, yearly survey by the Census Bureau that collects demographic information including ancestry, citizenship, educational attainment, income,

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[20] *Information Collection Request 2020 Census – Enumeration Operations OMB Control Number 0607-1006,* U.S. Census Bureau, *available at* https://t.co/j0FuZmgUKf?amp=1
[21] *Id.* at 38-42.
[22] *Id.* at 30-31 (emphasis added).
[23] *See* U.S. Census Bureau Press Release, *2018 Census Test Complete, Prototype Redistricting File Sent to States* (Mar. 29, 2019), *available at* https://www.census.gov/newsroom/press-releases/2019/prototype-redistricting-file.html.

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language proficiency, migration, disability, employment, and housing characteristics from approximately 2.5 percent of U.S. households.

53. ACS data are an estimate of population characteristics, including citizenship, are based on sample data, and are not a count of citizens and non-citizens. ACS data are not used to determine whether voting districts are equipopulous and comply with the "one person, one vote" constitutional requirement. Rather, "in the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census" total population enumeration. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

B. Defendants' Collection of Citizenship Data For Apportionment and Redistricting Purposes

54. On March 26, 2018, Defendant Ross directed the Census Bureau to add a citizenship question to the 2020 census and to use federal and state administrative records to validate census responses to the citizenship question. Defendant Ross falsely claimed that the reason for adding the citizenship question was to collect citizenship data to assist the Department of Justice ("DOJ") in its enforcement of the VRA.

55. Several lawsuits successfully challenged the addition of the citizenship question as unlawful and three federal courts permanently enjoined Defendants from adding a citizenship question to the 2020 census.[24]

56. On June 27, 2019, the United States Supreme Court determined that the "VRA enforcement rationale—the sole stated reason [for adding a citizenship question]—seems to have been contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

[24] *See Kravitz v. Dep't of Commerce*, 366 F. Supp. 3d 681, 755 (D. Md. 2019); *California v. Ross*, 358 F. Supp. 3d 965, 1050 (N.D. Cal. 2019); *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 679 (S.D.N.Y.), aff'd in part, revd in part and remanded sub nom. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

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57. Defendants were also permanently enjoined from "delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purposes of including a citizenship question; and from asking persons about citizenship status on the 2020 Census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial Census." *Kravitz v. Dep't of Comm.*, No. 18-cv-1041, ECF No. 203; *see also California*, 358 F. Supp. 3d at 1050 (permanently enjoining defendants from including citizenship question on 2020 census); *New York*, 351 F. Supp. 3d 502 at 679 (same).

58. On July 11, 2019, President Trump issued EO 13880 requiring that, among other things, all executive departments and agencies provide the Department of Commerce "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" the objective of collecting citizenship data.[25] EO 13880 also directs Secretary Ross to instruct the Census Bureau to create an inter-agency working group to collect citizenship data in connection with the 2020 decennial census for redistricting, directs the Department of Commerce to "strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship," and later directs that the Department "shall strengthen its efforts, consistent with law, to gain access to relevant State administrative records."[26]

59. EO 13880 states several pretextual reasons for collecting robust citizenship data from all federal agencies and states, including: (1) "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

[25] *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/.
[26] *Id.* at §§ 1, 3(b), and 3(d).

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inform policymakers considering basic decisions about immigration policy"; (2) "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"; and (3) "data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country," which is necessary "evaluat[e] many policy proposals."[27]

60. The executive order also lists, at least in part, the true reason for the order and for Secretary Ross's prior decision to add a citizenship question to the 2020 census: so that "State and local legislative districts [can redistrict] based on the population of voter-eligible citizens."[28] EO 13880 further states that "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."[29]

61. To that end, EO 13880 instructs the Census Bureau to continue its efforts to "make a design change to make [tabulations of citizenship data] available" for interested states to use for state and local redistricting purposes.[30]

62. That same day during a press conference, President Trump stated that his intention in issuing EO 13880 is so that "[t]he Census Bureau can use [citizenship] information, along with information collected through the questionnaire, to create the official census. In other words, as a result of today's executive order, we will be able to ensure the 2020 Census

[27] *Id.* at § 1.
[28] *Id.*
[29] *Id.*
[30] *Id.*

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generates an accurate count of how many citizens, non-citizens, and illegal aliens are in the United States of America."[31]

63. The President further stated that, "[t]his information is also relevant to administering our elections" because "[s]ome states may want to draw state and local legislative districts based upon the voter-eligible population," and that the Supreme Court "would not review certain types of districting decisions, which could encourage states to make such decisions based on voter eligibility."[32]

64. Attorney General William Barr added that "there is a current dispute over whether illegal aliens can be included for apportionment purposes. Depending on the resolution of that dispute, this data may be relevant to those considerations," and that the DOJ "will be studying this issue."[33]

65. On July 12, 2019, the Census Bureau published a revision of the February 2019 OMB request, reportedly backdated to July 3, 2019, that stated that 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 (CVAP) information prior to April 1, 2021 that states may use in redistricting."[34]

C. Shortcomings of Citizenship Data Derived From Administrative Records

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[31] *Remarks by President Trump on Citizenship and the Census*, The White House (July 11, 2019, 5:37 p.m.), *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[32] *Id.*

[33] *Id.*

[34] *Paperwork Reduction Act Program, Information Collection Request 2020 Census - Enumeration Operations OMB Control Number 0607-1006*, Department of Commerce and U.S. Census Bureau at 18 (July 3, 2019), *available at* https://www.documentcloud.org/documents/6192581-2020-Census-Supporting-Statement-A-Revised-July.html#document/p18/a512146.

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66. "[T]he Census Numident is the most complete and reliable administrative record source of citizenship data currently available to the Census Bureau. The Numident file is a record of individual applications for Social Security cards and certain subsequent transactions for those individuals."[35]

67. On March 1, 2018, Chief Scientist and Associate Director for Research and Methodology, John M. Abowd, prepared a memorandum for Defendant Ross that set forth the various reasons why collecting citizenship data from administrative records does not produce 100 percent accurate data on citizenship.[36]

68. For example, "[i]n the 2017 Numident . . ., 6.6 million persons born outside the U.S. have blank citizenship among those born in 1920 or later with no year of death. The evidence suggests that citizenship is not missing at random. Of those missing citizenship in the Numident, a much higher share appears to be U.S. citizens than compared to those for whom citizenship data are not missing . . . some of the blanks may be noncitizens."[37]

69. Dr. Abowd further stated that another weakness in administrative records is that there are questions about how complete the Numident citizenship data are and how timely it updates naturalization. Although naturalized citizens are instructed to apply for a social security number, "we do not know what fraction of naturalized citizens actually notify the [Social Security Administration], and how soon after being naturalized they do so."[38]

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[35] J. David Brown, *et al.*, *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census*, U.S. Census Bureau, Center for Economic Studies (August, 2018), *available at* https://www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf.

[36] 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) (hereinafter "Abowd Memo.").

[37] *Id.*

[38] *Id.*

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70. Additionally, "[a] third potential weakness of Numident citizenship is that some people are not required to have a Social Security Number (SSN), whether they are a U.S. citizen or not." According to Dr. Abowd, although U.S. Citizenship and Immigration Services ("USCIS") and State Department memoranda of understanding could provide some context for gaps in citizenship data, USCIS data on naturalizations, lawful permanent residents, and I-539 non-immigrant visa extensions can only partially address the weakness of the Numident. "The data do not cover naturalizations occurring before 1988, as well as not covering and some between 1988-2000. USCIS data do not always cover children under 18 at the time a parent became a naturalized U.S. citizen" and some of the data for children may not be in electronic form.[39]

71. Other data gaps in administrative records includes the following categories: (1) U.S. citizens from birth with no SSN 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 an SSN prior to 1974 and were 18 years or older, or applied before the age of 18 prior to 1978; (3) U.S. citizens who were naturalized prior to 2001 and did not inform SSA of their naturalization because they originally applied for an SSN after they were naturalized, and it was prior to when citizenship verification was required for those born outside the U.S. (1974); (4) 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 did not inform USCIS or receive a U.S. passport; (5) Lawful permanent residents ("LPR") who received that status prior to 2001 and either do not have an SSN or applied for an SSN prior to when citizenship verification was required for those born outside the U.S. (1974); (6) noncitizen, non-LPR residents who do not have SSN or ITIN and who did not apply for a

[39] *Id.*

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visa extension; and (7) persons with citizenship information in administrative data, but the administrative and decennial census data cannot be linked due to missing or discrepant Protected Identification Key.[40]

72. Because of the gaps in administrative data, the Census Bureau "will most likely never possess a fully adequate truth deck to benchmark [citizenship] to."[41]

D. Defendants' Decision to Produce Citizenship Data For Use With the P.L. 94-171 File is Motivated By Racially Discriminatory Intent

73. Throughout the litigation challenging the addition of a citizenship question to the decennial census, including before the U.S. Supreme Court, Defendant Ross maintained that he decided to add the citizenship question to the 2020 decennial census so that the DOJ could better enforce the VRA. The documents produced during that litigation revealed instead that Defendant Ross, members of the Trump Administration, A. Mark Neuman, then-Kansas Secretary of State Kris Kobach, members of the DOJ, including then-Attorney General Jefferson Sessions ("AG Sessions") and head of the DOJ's Civil Rights Division John Gore, and Republican strategist Dr. Thomas Hofeller conspired to add a citizenship question to the 2020 census to reduce the response rates of people of color and immigrants, and exclude them from congressional apportionment and redistricting to achieve the objective of reducing their political power.

74. After consulting with the White House and Mr. Kobach, Defendant Ross used the Department of Commerce to facilitate the conspiracy by directing staff to research the exclusion of immigrants from apportionment and to create an alternative justification for the addition of the citizenship question to the census. Defendant Ross and the Department of Commerce then

[40] *Id.*
[41] *Id.*

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solicited the assistance first of the DOJ and then of the Department of Homeland Security ("DHS"), before finally securing the participation of the DOJ, including AG Sessions.

75. Defendant Ross, through the Department of Commerce, coordinated with AG Sessions, other members of the DOJ, and the White House to fabricate a "need" for the citizenship question that resulted in a letter from the DOJ requesting the addition of the question to the 2020 census (the "DOJ Letter").

76. Without their knowledge, Defendant Ross used the Census Bureau to continue to facilitate the conspiracy and directed the Census Bureau to look into the DOJ request. In a March 28, 2018 memorandum, Defendant Ross ignored the findings and recommendation of the Census Bureau and reached the conspiracy's predetermined conclusion to add a citizenship question on the 2020 census questionnaire.

77. After Defendant Ross issued the March 28 memorandum, the Trump Administration publicly admitted its role in the conspiracy in campaign emails to supporters. Defendant Ross has continued to facilitate the conspiracy to exclude non-citizens from congressional apportionment and redistricting to achieve the objective of reducing the political power of non-citizens and Latinos.

78. Following the Supreme Court's rejection of the contrived rationale in *Department of Commerce v. New York*, Defendants continued to pursue the collection of data that would allow non-citizens to be excluded from apportionment and redistricting, as evidenced by EO 13880 and Defendant Ross's July 2019 directive.

79. On June 3, 2019, plaintiffs in *LUPE v. Ross*, filed a motion for relief from final judgment and request for indicative ruling that included documents belonging to the late Dr. Hofeller, a leading Republican redistricting strategist and map-drawing expert for the Republican

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National Committee. *La Unión Del Pueblo Entero, et al. v. Secretary Ross, et al.*, No. 18-CV-1570 (D. MD.) (hereinafter, "*LUPE v. Ross*"), ECF No. 136.

80. The Hofeller documents demonstrate that the addition of the citizenship question, and now the directives that the Census Bureau to collect citizenship data to be produced for use with the P.L. 94-171 Redistricting Data File, was motivated by a racially discriminatory scheme to reduce Latino representation and increase over-representation of non-Latino Whites, thereby serving Republican political ends at Latinos' expense.

81. Dr. Hofeller acknowledged that the shift from redistricting based on total population to CVAP was a "radical departure"—one that would alienate Latino voters. But, he concluded, "[a] switch to the use of citizen voting age population as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites." 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.

82. The Hofeller documents show that Dr. Hofeller drafted and gave to Commerce and DOJ officials, including Mr. Neuman, part of President Trump's transition team, and Mr. Gore, the substantive content of the December 2017 DOJ letter requesting the addition of the citizenship question.

83. The Hofeller documents demonstrate a partisan and discriminatory purpose behind the addition of the citizenship question.

84. The same discriminatory motivation behind adding the citizenship question motivated Defendants to continue their unlawful course of action to collect citizenship data and produce citizenship population tabulation data for use with the P.L. 94-171 Redistricting Data

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File so that states can exclude non-U.S. citizens from apportionment to the advantage of non-Latino White Republican voters and at the expense of the Latino community.

E. The Production of Citizenship Data For Use With The P.L. 94-171 Redistricting Data File Population Tabulations Harms Latinos and Non-U.S. Citizens and Increases the Chances of Malapportioned State Legislative and Local Districts

85. Plaintiffs and members of organizational plaintiffs live in states where there is a higher population of non-citizens.

86. Under Article I, Section 2, Clause 3 of the U.S. Constitution, as amended by the Fourteenth Amendment, the decennial population counts are used to determine the number of congressional representatives apportioned to each state. Exclusion of non-citizens from the population count used for 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.

87. Plaintiffs and members of organizational plaintiffs also live in states where lawmakers have expressed an interest and desire to use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021.[42] Plaintiffs and members of organizational plaintiffs reside in areas in which, according to recent ACS data, the population has a higher percentage of non-citizens than the population of their states as a whole. Latinos and non-U.S. citizens, including individual Plaintiffs and members of Plaintiff organizations will be injured when the Census Bureau provides those states with citizenship data to be used along with the total population tabulations in the P.L. 94-171 Redistricting Data File, resulting in the

[42] *See, e.g.*, Nick Brown, *Republicans want census data on citizenship for redistricting*, Reuters (Apr. 8, 2019), *available at* https://www.reuters.com/article/us-usa-census-redistricting-insight/republicans-want-census-data-on-citizenship-for-redistricting-idUSKCN1RK18D; *see also* Brief of the City of Yakima, Washington as Amicus Curiae Supporting Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

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exclusion of non-citizens from the population base used for redistricting congressional, state legislative and local districts. As a result, Plaintiffs will suffer vote dilution and loss of representation in unconstitutionally overpopulated districts.

CAUSES OF ACTION

COUNT I

(Administrative Procedure Act, 5 U.S.C. § 706 (2)(A))

(Inadequate Rationale)

88. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

89. The APA prohibits final agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law[.] " 5 U.S.C. § 706(2)(A).

90. Defendants represent or are agencies subject to the requirements of the APA. 5 U.S.C. § 701 (b)(1).

91. Defendants failed to provide any independent analysis or support to justify collecting citizenship data to produce this data for use with the population tabulations provided to states in the 2020 Census P.L. 94-171 Redistricting Data File. Defendants' decision to collect citizenship data and produce citizenship population tabulations for use alongside the 2020 Census P.L. 94-171 Redistricting Data File is thus arbitrary and capricious, discriminatory, an abuse of discretion, and otherwise not in accordance with law, and therefore violates the APA and must be set aside.

92. Plaintiffs suffered and will suffer permanent and irreparable injury unless Defendants are enjoined from collecting citizenship data and producing tabulations of citizenship population for use along with the 2020 Census P.L. 94-171 Redistricting Data File.

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COUNT II

(Administrative Procedure Act, 5 U.S.C. § 706 (2)(B))

(Contrary to Law)

93. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

94. The APA prohibits final agency action that is "contrary to constitutional right, power, privilege or immunity[.]" 5 U.S.C. § 706(2)(B).

95. Defendants represent or are agencies subject to the requirements of the APA. 5 U.S.C. § 701 (b)(1).

96. Defendants seek to collect and produce tabulations of citizenship population for use along with the 2020 Census P.L. 94-171 Redistricting Data File to discriminate against Plaintiffs and organizational Plaintiffs' members because of their race, national origin, or alienage. Exclusion of non-citizens from the population base used for redistricting without a hard count of citizens and non-citizens will result in unconstitutionally malapportioned congressional and state legislative districts. Defendants' decision to collect citizenship data and produce citizenship population tabulations for use along with the 2020 Census P.L. 94-171 Redistricting Data File is contrary to constitutional right, power, privilege or immunity, and therefore violates the APA and must be set aside.

97. Plaintiffs suffered and will suffer permanent and irreparable injury unless Defendants are enjoined from collecting citizenship data and producing tabulations of citizenship population for use along with the 2020 Census P.L. 94-171 Redistricting Data File.

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COUNT III

(Administrative Procedure Act, 5 U.S.C. § 706 (2)(C))

(Excess of Lawful Authority)

98. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

99. The APA prohibits final agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(C).

100. Defendants represent or are agencies subject to the requirements of the APA. 5 U.S.C. § 701 (b)(1).

101. Presidential power is limited to the authority conferred on the President by acts of Congress or by the Constitution itself. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The Constitution gives Congress authority to conduct the census "in such a Manner as [Congress] shall by Law direct," U.S. Const. art. I, § 2, and "vests Congress with wide discretion over . . . the conduct of the census," *Wisconsin*, 517 U.S. at 15. Under to this authority, Congress delegated the duty of conducting the census to the Secretary of Commerce, subject to the provisions of the Census Act. Neither the Census Act nor the Constitution vests the President with authority over the *conduct* of the census.

102. Defendant Ross has exceeded his statutory authority over the conduct of the decennial census by following EO 13880, thus improperly allowing President Trump to usurp the discretion delegated to the Secretary by Congress. Secretary Ross has directed the Census Bureau to collect citizenship data not because he finds that it is necessary to collect this data, but because President Trump, as a co-conspirator in the continuing scheme to deprive Plaintiffs of political representation, finds that it is necessary for the Census Bureau to collect this data.

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103. For the foregoing reasons, Defendant Ross's decision to follow EO 13380 and direct the Census Bureau to, among other things, collect citizenship data and produce citizenship population tabulations for use along with the 2020 Census P.L. 94-171 Redistricting Data File is in excess of the Secretary's statutory jurisdiction, authority, or limitations, or short of statutory right, and therefore violates the APA and must be set aside.

104. Plaintiffs suffered and will suffer permanent and irreparable injury unless the Secretary is enjoined from following EO 13380.

COUNT IV

(Administrative Procedure Act, 5 U.S.C. § 706 (2)(D))

(Improper Procedure)

105. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

106. The APA prohibits final agency action that is "without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(D).

107. Defendants represent or are agencies subject to the requirements of the APA. 5 U.S.C. § 701 (b)(1).

108. Defendants departed from statutory and regulatory requirements under 13 U.S.C. § 141(c) and Public Law 94-171, as well as OMB and Census Bureau standards and practices, to collect and produce specific tabulations of population other than total population, race, and Hispanic/non-Hispanic origin for use along with the 2020 Census P.L. 94-171 Redistricting Data File. Defendants' decision to collect citizenship data and produce citizenship population tabulations for use along with the 2020 Census P.L. 94-171 Redistricting Data File is thus without observance of procedure required by law, and therefore violates the APA and must be set aside.

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109. Plaintiffs suffered and will suffer permanent and irreparable injury unless Defendants are enjoined from collecting citizenship data and producing tabulations of citizenship population for use along with the 2020 Census P.L. 94-171 Redistricting Data File.

COUNT V

(Equal Protection Clause of the Fifth Amendment

to the United States Constitution)

110. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

111. The Due Process Clause of the Fifth Amendment incorporates the equal protection guarantee of the Fourteenth Amendment.

112. The 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 Amendment because it is motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons.

113. Defendants' violation caused and will cause harm to Plaintiffs.

COUNT VI

(Conspiracy to Violate Civil Rights Under 42 U.S.C. § 1985(3))

114. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

115. Motivated by their racial and class-based animus toward Latinos, 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.

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116. By taking the actions described herein, President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Barr, Kris Kobach and Stephen Bannon conspired to deprive Latinos and non-U.S. citizens of their Fifth Amendment right to equal protection of the laws under the Fifth Amendment of the U.S. Constitution in violation of 42 U.S.C. § 1985(3).

117. Defendants' unlawful conduct to conspire to violate the constitutional rights of Latinos and non-U.S. citizen persons caused and will cause harm to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

(a) Declare 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;

(b) Declare that Secretary Ross's decision to follow EO 13380 and order the Census Bureau to produce tabulations of citizenship population data for use along with the P.L. 94-171 Redistricting Data File, or to include citizenship data in the File, violates §§ 706(2)(A)-(D) of the APA because it is arbitrary and capricious, an abuse of discretion, and not in accordance with law; contrary to constitutional power, right, privilege or immunity; and/or in excess of statutory jurisdiction and authority, and without observance of procedure required by law;

(c) Enjoin Defendants and their agents from collecting data as dictated by EO 13380 and from producing tabulations of citizenship population for use alongside the P.L. 94-171 Redistricting Data File and population tabulations or including citizenship data in the File and from taking any irreversible steps to produce tabulations of citizenship population for

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use alongside with the File or including tabulations of citizenship population in the File;

(d) Award Plaintiffs reasonable costs, expenses, and attorneys' fees pursuant to 28 U.S.C. § 2412; and

(e) Award such additional relief as the interests of justice may require.

Dated: October 9, 2019

Respectfully submitted,

By /s/ Terry Ao Minnis

ASIAN AMERICANS ADVANCING JUSTICE | AAJC
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* Pro hac vice *applications forthcoming*
** *Application for admission forthcoming*
° *Not admitted in DC.*

BC-DOC-0000030819

To: Olson, Stephanie (Federal)[SOlson@doc.gov]
From: Enrique Lamas (CENSUS/DEPDIR FED)[Enrique.Lamas@census.gov]
Sent: Mon 8/10/2020 2:17:18 PM (UTC-04:00)
Subject: Fw: One -pager
2020810 Data Acquistion Status.docx

Enrique Lamas
Senior Advisor
Director's Office
U.S. Census Bureau
Office: 301-763-3811

From: Michael A Berning (CENSUS/ERD FED) <Michael.A.Berning@census.gov>
Sent: Monday, August 10, 2020 12:41 PM
To: Enrique Lamas (CENSUS/DEPDIR FED) <Enrique.Lamas@census.gov>
Subject: One -pager

Per your request. Please let me know if you have questions.

Mike

Mike Berning, Assistant Division Chief for Data Acquisition and Curation
Economic Reimbursable Surveys Division
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To: Hull, Cordell (Federal)[CHull@doc.gov]
Cc: Brebbia, Sean (Federal)[SBrebbia@doc.gov]
From: Olson, Stephanie (Federal) b(6)
b(6)
Sent: Mon 9/30/2019 5:45:12 PM (UTC-04:00)
Subject: [CONFIDENTIAL – DELIBERATIVE – PRE-DECISIONAL] Letter
2019-07-23 Schatz to Ross and Barr re Data Sharing (1).pdf

[CONFIDENTIAL – DELIBERATIVE – PRE-DECISIONAL]

Good evening,

We had discussed b(5) - DP
b(5) - DP

Thank you,

Stephanie Olson
Senior Counsel, Office of Special Projects
D: 202.482.5981
M: b(6)

United States Senate

WASHINGTON, DC 20510

July 23, 2019

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Secretary Ross and Attorney General Barr:

The executive order directing federal agencies to compile citizenship data through administrative records and merge it with decennial census data is a blatant effort to collect this information for political and discriminatory purposes.[1] We write in strong opposition to this attempt to inappropriately mix this administration's harmful immigration policies with the ordinarily nonpartisan decennial census and nonpartisan work of federal statistical agencies generally. Furthermore, we will work to prohibit the Department of Commerce, or any other agency, from using federal funds to carry out this action.

Litigation surrounding the administration's efforts to add a citizenship question to the 2020 Census form, as well as documents from a partisan operative recently disclosed as part of that litigation, revealed that the proposal to collect citizenship information was designed both to depress the 2020 Census count and to be "advantageous to Republicans and Non-Hispanic Whites" and "clearly be a disadvantage to the Democrats" in gerrymandering efforts.[2] Furthermore, in his remarks on the proposed citizenship question, Attorney General Barr raised the possibility that these data could be used to change the population base used for congressional apportionment—a purpose, we should note, that would blatantly violate the U.S. Constitution's apportionment clause.[3]

In addition, the president justified his executive order by citing the use of citizenship data for immigration and other public policy purposes, stating, for example, that "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," and that "[t]he 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."

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[1] "Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census," 11 July 2019, https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/.

[2] Michael Wines, "Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question," The New York Times, 30 May 2019, https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html.

[3] "Remarks by Attorney General William P. Barr on Census Citizenship Question," 11 July 2019, https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-census-citizenship-question. Specifically, Attorney General Barr stated: "For example, there is a current dispute over whether illegal aliens can be included for apportionment purposes. Depending on the resolution of that dispute, this data may possibly prove relevant."

The president's executive order bypasses the successful legal challenges to the citizenship question and forces this information into 2020 Census data using methods that have not been reviewed for accuracy, legality, and feasibility. This is an unlawful overreach of executive authority. The failed attempt to add a citizenship question clearly illustrated the true intent of this administration to assist discriminatory redistricting, apportionment, and public policy decisions that harm communities of color, and particularly immigrant populations.

The president's attempt to sustain the controversy over citizenship data in the decennial census—which is the basis for allocating federal funding and congressional and legislative districts—makes clear that his purpose is not a robust 2020 Census, but rather a partisan and discriminatory attack on people living in our country. Our government must never use decennial census data to otherize, separate, or disenfranchise people living in our country.

Sincerely,

BRIAN SCHATZ
United States Senator

RICHARD J. DURBIN
United States Senator

PATTY MURRAY
United States Senator

DIANNE FEINSTEIN
United States Senator

JACK REED
United States Senator

SHERROD BROWN
United States Senator

KIRSTEN GILLIBRAND
United States Senator

SHELDON WHITEHOUSE
United States Senator

ELIZABETH WARREN
United States Senator

TIM KAINE
United States Senator

ROBERT P. CASEY, JR.
United States Senator

CORY A. BOOKER
United States Senator

TAMMY DUCKWORTH
United States Senator

AMY KLOBUCHAR
United States Senator

MAZIE K. HIRONO
United States Senator

MICHAEL F. BENNET
United States Senator

CHARLES E. SCHUMER
United States Senator

From: Sharma, Sapna (Federal) [SSharma@doc.gov]
Sent: 3/16/2020 11:25:58 AM
To: DiGiacomo, Brian (Federal) [bDiGiaco@doc.gov]; Cannon, Michael (Federal) [MCannon@doc.gov]; Craig, Russell (Federal) [rCraig2@doc.gov]; Bogomolny, Michael (Federal) [MBogomolny@doc.gov]; Olson, Stephanie (Federal) [SOlson@doc.gov]; Brebbia, Sean (Federal) [SBrebbia@doc.gov]; Ryan, Miles F III [miles.f.ryan.iii@census.gov]
CC: Heller, Megan (Federal) [MHeller@doc.gov]
Subject: Fwd: 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

All:

Please attached for defendant-intervenors' expert reports.

Sapna

Sapna Sharma
Attorney
General Litigation Division
Office of the Assistant General Counsel for Employment, Litigation, and Information
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From: Rosenberg, Brad (CIV) b(6)
Sent: Monday, March 16, 2020 11:20:06 AM
To: Sharma, Sapna (Federal) <SSharma@doc.gov>; Sverdlov, Alexander V. b(6)
Cc: Echols, Alexis (CIV) b(6) Heller, Megan (Federal) <MHeller@doc.gov>
Subject: RE: Def-Int Expert Report

Hi Sapna:

Please see the attached. b(6) please direct any inquiries directly to Alexis and me.

Thanks,
-Brad

From: Sharma, Sapna (Federal) <SSharma@doc.gov>
Sent: Monday, March 16, 2020 11:13 AM
To: Sverdlov, Alexander V. b(6)

Cc: Echols, Alexis (CIV) <b(6)> Rosenberg, Brad (CIV) <b(6)> Heller, Megan (Federal) <MHeller@doc.gov>
Subject: Def-Int Expert Report

Aleks,

b(5) - AC/WP

Sapna

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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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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.

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Hillygus, D.S. 2005. "The Missing Link: Exploring the Relationship between Higher Education and Political Behavior," *Political Behavior*, 27(1): 25-47.

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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*

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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.

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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-0000030900

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

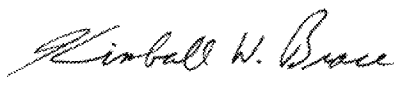
Dr. Poston compares his apportionment results in his first report to the 2019 EDS, Inc. Report results, presumably in support of his conclusions. But this comparison is not appropriate because the calculations are based on different inputs. Thus, any consistency between the two reports is as much the 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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BC-DOC-0000030918

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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

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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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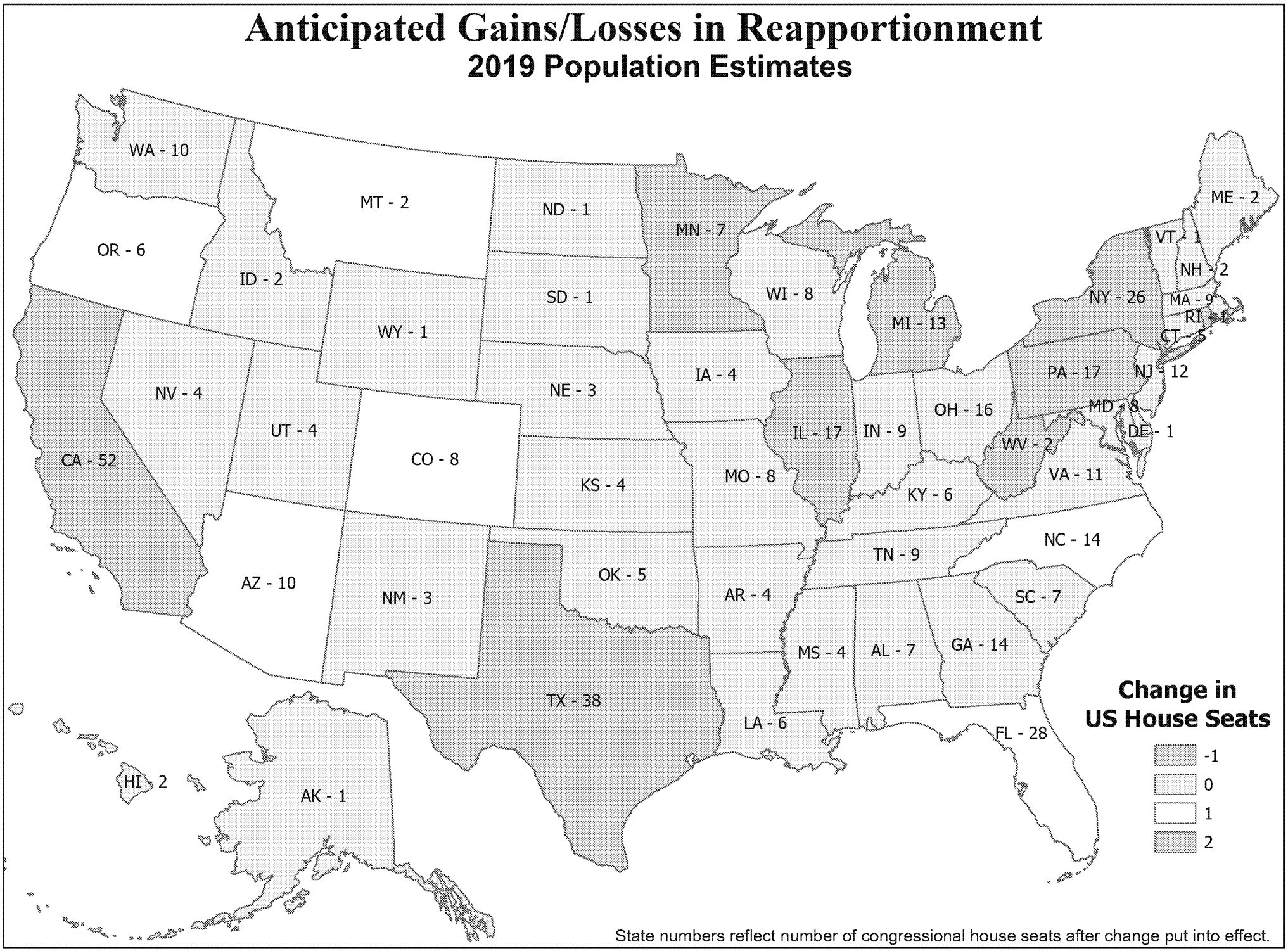
[i] National Conference of State Legislatures reports 26 states have appropriated funds for Census counting. http://www.ncsl.org/research/redistricting/2020-census-resources-and-legislation.aspx

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										

BC-DOC-0000030936

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

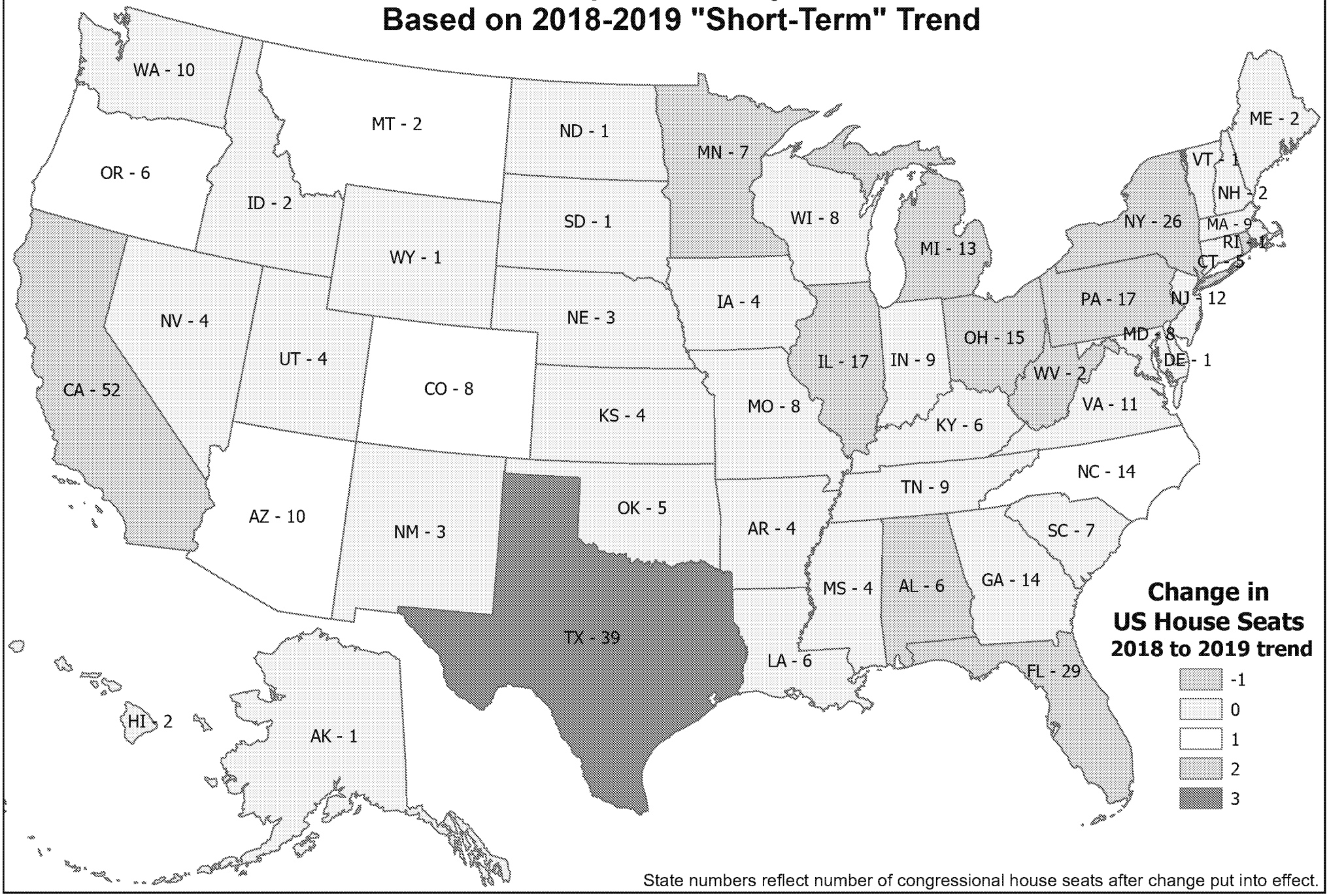
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2020 Projections (short term 2018-2019 change) based on 2019 Population Estimates, Generated by Census Bureau 12/30/2019										
State	Population	Compare To	Seats	Change	Gain a Seat	Lose a Seat	Last Seat Given	Next Seat At	Average Size	Size Rank
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-0000030939

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										

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

BC-DOC-0000030943

					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				

BC-DOC-0000030944

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										

BC-DOC-0000030948

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%

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%

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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
Attorneys for Defendants

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-

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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.

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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-0000030968

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

BC-DOC-0000030969

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

BC-DOC-0000030970

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

BC-DOC-0000030971

(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.

BC-DOC-0000030972

(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

BC-DOC-0000030973

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-

BC-DOC-0000030974

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

BC-DOC-0000030975

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-0000030976

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-0000030977

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-0000030978

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-0000030979

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)

2019* "Humans Adapt to Social Diversity Over Time." Proceedings of the National Academy of Sciences 116 (25) 12244-12249. (with Miguel R. Ramos, Matthew R. Bennett, and Miles Hewstone)

BC-DOC-0000030980

2018* "Undocumented and Unwell: Legal Status and Health among Mexican Migrants." International Migration Review 53(2):571–601. (with Amanda Cheong)

2018* "The Perils of Seeing 21st Century Migration through a 20th Century Lens." International Social Science Journal 68(227-228):101-104.

2018* "Scientific Communication in a Post-Truth Society." Proceedings of the National Academy of Sciences 116 (16) 7656-7661. (with Shanto Iyengar)

2018 "The Great Recession and the Destruction of Minority Wealth." Current History 117(802):298-304. (with Jacob S. Rugh)

2018 "Segregation in 21st Century America." Journal of Catholic Social Thought 15(2):2325-260.

2018* The Social Structure of Mortgage Discrimination: A Qualitative Analysis. Housing Studies 33:(5):759-776. (with Justin P. Steil, Len Albright, Jacob S. Rugh).

2018 "Finding the Lost Generation: Identifying Second Generation Immigrants in Federal Statistics." Annals of the American Academy of Political and Social Science 677:96-104.

2018 "The Intersection of Race and Class: Zoning, Affordable Housing, and Segregation in U.S. Metropolitan Areas." Pp. 245-265 in Gregory Squires, ed., The Fight for Fair Housing: Causes, Consequences and Future Implications of the 1968 Federal Fair Housing Act. New York: Taylor and Francis. (with Jacob Rugh)

2018* "Neighborhood Disadvantage and Telomere Length: Results from the Fragile Families Study." RSF: Russell Sage Foundation Journal of the Social Sciences 4(4):38-42. (with Brandon Wagner et al.)

2017* "Suburbanization and Segregation in the United States." Ethnic and Racial Studies 41(9):1594-1611. (with Jonathan Tannen). http://dx.doi.org/10.1080/01419870.2017.1312010

2017 "Migration and Categorical Inequality." Pp. 26-43 in Ernesto Castaneda, ed., Immigration and Categorical Inequality: Migration to Cities and the Birth of Race and Ethnicity. New York: Routledge.

2017 "Segregation, Stigma, and Stratification: A Biosocial Model." Pp. 147-162 in Brenda Major, John Dovidio, and Bruce Link, eds., The Oxford Handbook of Stigma, Discrimination, and Health.York: Oxford University Press. (with BrandonWagner).

2017 "The Origins and Future of Global Latinos." Pp. 1-16 in Mark Overmyer-Velázquez and Enrique Sepúlveda, eds., Global Latin(o) Americanos: Transoceanic Diasporas and Regional Migrations. New York: Oxford University Press.

BC-DOC-0000030981

2017* "Why Death Haunts Black Lives." Proceedings of the National Academy of Sciences 114(5): 800-802. www.pnas.org/cgi/doi/10.1073/pnas.1620083114

2016 "La Migración Mexicana en la era de los Indocumentados" Pp. 261-276 in Alanís Enciso, Fernando Saúl and Rafael Alarcón Acosta, (Eds.). El Ir y Venir de los Norteños. La Historia de la Migración Mexicana a Estados Unidos (S. XIX-S. XXI). Mexico: El Colegio de la Frontera Norte, El Colegio de San Luis A.C. y El Colegio de Michoacán..

2016 "Incidencia de la Violencia y las Redes Sociales en la Migración de Colombianos." Pp.89-114 in María Gertrudis Roa Martínex, ed., Migración Internacionales: Patrones y Determinantes. Bogotá: Universidad del Valle.

2016 "The Mexico-U.S. Border in the American Imagination." Proceedings of the American Philosophical Society 160(2):160-177.

Winner of the 2017 Henry Allen Moe Prize of the American Philosophical Society. For the best paper in humanities or jurisprudence read at a meeting of the Society.

2016* "Segregation by race and income in the United States 1970-2010." Social Science Research 60:445-60. (with Jake Intrator and Jonathan Tannen)

2016* "El Proyecto de Migración Mexicana (Mexican Migration Project, MMP), Monitoreo y análisis del proceso migratorio entre México y Estados Unidos." Coyuntura Demográfica 10:105-113. (with Jorge Durand, Karen Pren, Silvia Giorguli and David Lindstrom)

2016* "'Riding the Stagecoach to Hell:' A Qualitative Analysis of Racial Discrimination in Mortgage Lending." City and Community 15(2):118-136. (with Len Albright, Justin Steil, and Jacob S. Rugh)

2016 "Twenty-First Century Globalization and Illegal Migration." Annals of the American Academy of Political and Social Science 666:7-26. (with Katharine M. Donato)

2016 "Double Disadvantage: Unauthorized Mexicans in the U.S. Labor Market." Annals of the American Academy of Political and Social Science 666:78-90. (with Jorge Durand and Karen A. Pren)

2016 "The Precarious Position of Latino Immigrants in the United States: A Comparative Analysis of Ethnosurvey Data."Annals of the American Academy of Political and Social Science 666:91-109. (with Jorge Durand and Karen A. Pren)

2016* "Residential Segregation is the Linchpin of Racial Stratification." City and Community 15(1):4-7.

2016* "International Migration Under the Microscope." Science 352(6288) 897-899. (with Frans Willekens, James Raymer, and Cris Beauchemin)

2016* "Why Border Enforcement Backfired." American Journal of Sociology 121 (5): 1557–1600. (with Jorge Durand and Karen A. Pren)

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1987 "Los Angeles as an Immigrant City." Pp. 192-99 in M. Mark Stolarik, ed., The Other Ports of Entry. Philadelphia: Balch Institute of Ethnic Studies Press.

1984 "Comments on Statistical Data and Public Policy." Pp. 133-38 in V.M. Briggs and M. Tienda, eds., Immigration: Issues and Policies. Washington, D.C.: National Council on Employment Policy.

1983 "A Summary and Evaluation of Local Area Statistics on Hispanics." Report of the Ford Foundation Task Force on Statistical Policy and Data Needs for Hispanics. New York: Ford Foundation.

1979 "Migration from a Rural Mexican Town to the United States: Research Report." Intercom 7:6-7. (with Joshua S. Reichert)

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To: Sverdlov, Alexander V b(6) b(6) - Brad Rosenberg
Cc: Cannon, Michael (Federal)[MCannon@doc.gov]
From: Olson, Stephanie (Federal b(6)
b(6)
Sent: Tue 2/25/2020 2:04:58 PM (UTC-05:00)
Subject: CUI//PRIV FW: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf

Aleks and Brad,

b(5) - AC/WP Thanks.

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

From: Christopher J Stanley (CENSUS/OCIA FED) <christopher.j.stanley@census.gov>
Sent: Friday, February 21, 2020 7:13 PM
To: Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>; Ahmad, Ali M <ali.m.ahmad@census.gov>
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880

FYI.

Begin forwarded message:

> **From:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
> **Date:** February 21, 2020 at 7:08:55 PM EST
> **To:** "Christopher J Stanley (CENSUS/OCIA FED)" <christopher.j.stanley@census.gov>, "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "jmason1@doc.gov" <jmason1@doc.gov>
> **Cc:** "BOC Correspondence Quality Assurance (CENSUS)" b(6) @census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> **Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
>
> Attached is a new congressional letter from the Tri-Caucus regarding EO-13880.
>
> Alan
>
> **Alan Lang**, Deputy Chief
> Office of Congressional and Intergovernmental Affairs
> U.S. Census Bureau
> O: 301-763-1950 direct | M: b(6)
> census.gov | @uscensusbureau
> **Shape your future. START HERE >** 2020census.gov
>
> Sent from my iPhone
> Begin forwarded message:
>
> > **From:** "Palencia, Stephanie" <Stephanie.Palencia@mail.house.gov>
> > **Date:** February 21, 2020 at 6:37:38 PM EST
> > **To:** "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>, "Eduardo I Guity (CENSUS/PH FED)" <eduardo.i.guity@census.gov>
> > **Cc:** "Acosta, Alma" <Alma.Acosta@mail.house.gov>, "Street, Caren" <Caren.Street@mail.house.gov>, "Ka'ai, Krystal (CAPAC)" <Krystal.Ka'ai@mail.house.gov>
> > **Subject: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880**
> >
> > Hello,

Please find the attached letter from the Chairs of the Congressional Tri-Caucus, Rep. Joaquin Castro, Rep. Karen Bass, and Rep. Judy Chu, regarding the Department of Commerce and President Trump's EO 13880, dated July 11, 2019.

Please confirm receipt and we look forward to your response by Wednesday March 4, 2020.

Sincerely,
Stephanie Palencia

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

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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?

---

[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-0000031047

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-0000031048

To: Foti, Anthony (Federal)[AFoti@doc.gov]; Brebbia, Sean (Federal)[SBrebbia@doc.gov]; Olson, Stephanie (Federal)[SOlson@doc.gov]; Ahmad, Ali M[ali.m.ahmad@census.gov]
From: Christopher J Stanley (CENSUS/OCIA FED)[christopher.j.stanley@census.gov]
Sent: Fri 2/21/2020 7:12:37 PM (UTC-05:00)
Subject: Fwd: Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director on EO-13880
Tri-Caucus Letter to Commerce Secretary Ross and Census Bureau Director Dillingham on EO 13880_February.21.2020.pdf
ATT00001.htm

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Washington, DC 20233

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[3] https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf

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Sincerely,

Joaquin Castro
Member of Congress
CHC Chair

Karen Bass
Member of Congress
CBC Chair

Judy Chu
Member of Congress
CAPAC Chair

BC-DOC-0000031053

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

BC-DOC-0000031056

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

LETITIA JAMES
Attorney General of the State of New York

By: */s/ Matthew Colangelo*
Matthew Colangelo
Chief Counsel for Federal Initiatives
Elena Goldstein
Deputy Bureau Chief, Civil Rights Bureau
Amanda Meyer, *Assistant Attorney General*
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6057
Matthew.Colangelo@ag.ny.gov

Attorneys for the State and Other Intervenors

/s/ Anil A. Mujumdar
ZARZAUR
Anil A. Mujumdar (ASB-2004-L65M)
2332 Second Avenue North
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OF COUNSEL:
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Ezra D. Rosenberg
Dorian L. Spence
1401 New York Avenue NW, Suite 400
Washington, DC 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-9857
Email: erosenburg@lawyerscommittee.org
dspence@lawyerscommittee.org

BC-DOC-0000031057

DEMOCRACY FORWARD
Javier M. Guzman
Robin F. Thurston
John T. Lewis
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
Telephone: (202) 448-9090
Email: jguzman@democracyforward.org
rthurston@democracyforward.org
jlewis@democracyforward.org

Attorneys for Defendant-Intervenors KING COUNTY, ARLINGTON COUNTY, CITY OF SAN JOSÉ, and CITY OF ATLANTA

DEBEVOISE & PLIMPTON LLP
Jyotin Hamid
Lauren M. Dolecki
Ming Ming Yang
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000
Facsimile: (212) 909-6836
Email: jhamid@debevoise.com
lmdolecki@debevoise.com
mmyang@debevoise.com

Ryan M. Kusmin
801 Pennsylvania Avenue NW, Suite 500
Washington, DC 20004
Telephone: (202) 383-8000
Facsimile: (202) 383-8118
Email: rmkusmin@debevoise.com

CITY OF SAN JOSÉ
Richard Doyle, City Attorney
Nora Frimann, Assistant City Attorney
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, CA 95113-1905
Telephone: (408) 535-1900
Facsimile: (408) 998-3131
Email: cao.main@sanjoseca.gov
Attorneys for Defendant-Intervenor CITY OF SAN

BC-DOC-0000031058

JOSÉ

COPELAND FRANCO SCREWS & GILL, P.A.
Robert D. Segall (SEG003)
Post Office Box 347
Montgomery, AL 36101-0347
Phone: (334) 834-1180
Facsimile: (334) 834-3172
Email: segall@copelandfranco.com

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
James R. Williams, County Counsel
Greta S. Hansen
Raphael N. Rajendra
Marcelo Quiñones
Laura S. Trice
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San José, CA 95110
Email: raphael.rajendra@cco.sccgov.org
marcelo.quinones@cco.sccgov.org

LAW OFFICE OF JONATHAN WEISSGLASS
Jonathan Weissglass
1939 Harrison Street, Suite 150-B
Oakland, CA 94612
Telephone: (510) 836-4200
Email: jonathan@weissglass.com
Attorneys for Defendant-Intervenor COUNTY OF SANTA CLARA, CALIFORNIA

BC-DOC-0000031059

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

BC-DOC-0000031060

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.

BC-DOC-0000031065

To: Nowell, Laura (Federal)[LNowell@doc.gov]
Cc: Olson, Stephanie (Federal)[SOlson@doc.gov]; Cannon, Michael (Federal)[MCannon@doc.gov]
From: Sharma, Sapna (Federal) b(6)
b(6)
Sent: Tue 1/14/2020 2:04:00 PM (UTC-05:00)
Subject: b(5) - AC/WP/DP
b(5) - AC/WP/DP

Attached.

CUI//PRIV//FED ONLY

Sapna Sharma
Attorney
General Litigation Division
Office of the Assistant General Counsel for Employment, Litigation, and Information
Office of the General Counsel
U.S. Department of Commerce
Room 5889

O: (202) 482-5550 | M: b(6) | F: (202) 482-5858
ssharma@doc.gov

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From: Nowell, Laura (Federal) <LNowell@doc.gov>
Sent: Tuesday, January 14, 2020 1:15 PM
To: Sharma, Sapna (Federal) <SSharma@doc.gov>
Cc: Olson, Stephanie (Federal) <SOlson@doc.gov>
Subject: RE: b(5) - AC/WP/DP

Sapna,
b(5) - AC/WP/DP
Thanks,
Laura

From: Sharma, Sapna (Federal) <SSharma@doc.gov>
Sent: Tuesday, January 14, 2020 1:11 PM
To: Nowell, Laura (Federal) <LNowell@doc.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>; Brad.Rosenberg@usdoj.gov; Sverdlov, Alexander V. <Alexander.V.Sverdlov@usdoj.gov>; Cannon, Michael (Federal) <MCannon@doc.gov>
Subject: b(5) - AC/WP/DP

b(5) - AC/WP/DP

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From: Michael A Berning (CENSUS/ERD FED) <Michael.A.Berning@census.gov>
Sent: Tuesday, January 14, 2020 12:48 PM
To: Sharma, Sapna (Federal) <SSharma@doc.gov>
Subject: Fwd: Questions re: DHS privacy impact

Sent from my iPhone
Begin forwarded message:

> **From:** "Michael A Berning (CENSUS/ERD FED)" <Michael.A.Berning@census.gov>
> **To:** "Ali Mohammad Ahmad (CENSUS/ADCOM FED)" <ali.m.ahmad@census.gov>, "Cannon, Michael (Federal)" <MCannon@doc.gov>
> **Cc:** "Ron S Jarmin (CENSUS/DEPDIR FED)" <Ron.S.Jarmin@census.gov>, "Steven Dillingham (CENSUS/DEPDIR FED)" <steven.dillingham@census.gov>, "Enrique Lamas (CENSUS/DEPDIR FED)" <Enrique.Lamas@census.gov>, "Christa D Jones (CENSUS/DEPDIR FED)" <Christa.D.Jones@census.gov>, "John Maron Abowd (CENSUS/ADRM FED)" <john.maron.abowd@census.gov>, "Michael C Cook (CENSUS/PIO FED)" <Michael.C.Cook@census.gov>, "Olson, Stephanie (Federal)" <SOlson@doc.gov>, "DiGiacomo, Brian (Federal)" <bDiGiaco@doc.gov>, "Melissa L Creech (CENSUS/PCO FED)" <Melissa.L.Creech@census.gov>, "Miles F Ryan III (CENSUS/PCO FED)" <Miles.F.Ryan.III@census.gov>, "Brebbia, Sean (Federal)" <SBrebbia@doc.gov>
> **Subject: Re: Questions re: DHS privacy impact**
>
> Ali,

b(5) - DP/AC

Mike Berning, Assistant Division Chief for Data Acquisition and Curation
Economic Reimbursable Surveys Division
U.S. Census Bureau
O: 301-763-2028 | M: b(6)
census.gov | @uscensusbureau

From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Friday, January 3, 2020 1:58 PM
To: Cannon, Michael (Federal) <MCannon@doc.gov>
Cc: Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>; Steven Dillingham (CENSUS/DEPDIR FED) <steven.dillingham@census.gov>; Enrique Lamas (CENSUS/DEPDIR FED) <Enrique.Lamas@census.gov>; Christa D Jones (CENSUS/DEPDIR FED) <Christa.D.Jones@census.gov>; John Maron Abowd (CENSUS/ADRM FED) <john.maron.abowd@census.gov>; Michael A Berning (CENSUS/ERD FED) <Michael.A.Berning@census.gov>; Michael C Cook (CENSUS/PIO FED) <Michael.C.Cook@census.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>; DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>; Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>; Miles F Ryan III (CENSUS/PCO FED) <Miles.F.Ryan.III@census.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>
Subject: Re: Questions re: DHS privacy impact

I am going to call Mike Berning to get him to weigh in on those questions.

On Jan 3, 2020, at 1:51 PM, Cannon, Michael (Federal) <MCannon@doc.gov> wrote:

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b(5) - DP/AC

Thanks.

Mike

Michael A. Cannon
Chief, General Litigation Division
Office of the Assistant General Counsel for Employment, Litigation, and Information
Office of the General Counsel
U.S. Department of Commerce
Telephone: (202) 482-5395
Cell: b(6)
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From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Friday, January 3, 2020 1:37 PM
To: Jarmin, Ron S <ron.s.jarmin@census.gov>; Dillingham, Steven <steven.dillingham@census.gov>; Lamas, Enrique <enrique.lamas@census.gov>; Jones, Christa D <christa.d.jones@census.gov>; Abowd, John M <john.maron.abowd@census.gov>; Berning, Michael A <michael.a.berning@census.gov>; Cannon, Michael (Federal) <MCannon@doc.gov>
Cc: Cook, Michael C <michael.c.cook@census.gov>
Subject: Re: Questions re: DHS privacy impact

Adding Cannon.

> On Jan 3, 2020, at 1:14 PM, Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov> wrote:
>
> NPR asking about these sections.
>
> (https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf)
>
> Page 1: "Pursuant to Executive Order (E.O.) 13880*Collecting Information About Citizenship Status*
> *in Connection with the Decennial Census*, issued July 11, 2019, the Department of Homeland
> Security (DHS) is providing the Department of Commerce (DOC), U.S. Census Bureau (Census
> or Census Bureau) with administrative records to assist in determining the number of citizens,
> lawfully present non-citizens, and **unauthorized immigrants** in the United States during the

decennial census (2020 Census)."

Page 9: "The Census Bureau plans to use several administrative data sources of citizenship and
immigration status in a statistical model that will produce a probability of being a U.S. citizen, a
lawfully present non-citizen, or**an unauthorized immigrant** on April 1, 2020, for each person in
the 2020 Census."