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---

**From:** Leing, George (Federal) <GLEing@doc.gov>  
**Sent:** Wednesday, September 23, 2020 8:45 AM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

George

**George Leing** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
Direct: 202-482-5981  
Mobile: (b) (5)

On Sep 22, 2020, at 2:25 PM, Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov> wrote:

(b) (5)

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238

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**From:** Leing, George (Federal) <GLEing@doc.gov>

**Sent:** Tuesday, September 22, 2020 2:11 PM

**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>; Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>

**Subject:** RE: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

Thanks,  
George

**George Leing** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
Direct: 202-482-5981  
Mobile: (b) (6)

---

**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>

**Sent:** Tuesday, September 22, 2020 12:02 PM

**To:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>

**Cc:** Leing, George (Federal) <GLEing@doc.gov>

**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844

Facsimile (301) 763-6238

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**From:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Sent:** Monday, September 21, 2020 8:02 PM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Leing, George (Federal) <GLEing@doc.gov>  
**Subject:** RE: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

**Aristidis (Aris) Kourkouvelis** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
M: (b) (5)

---

**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Sent:** Monday, September 21, 2020 7:24 PM  
**To:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Cc:** Leing, George (Federal) <GLEing@doc.gov>  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

On Sep 21, 2020, at 7:06 PM, Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov> wrote:

Adding George.

**Aristidis (Aris) Kourkouvelis** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
M: (b) (5)

---

**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Sent:** Monday, September 21, 2020 7:05 PM  
**To:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

Here is a link that explains PIAs: <https://www.census.gov/about/policies/privacy/pia.html>.

In the narrative, you will see that Census performs PIAs when it acquires new technologies.

On Sep 21, 2020, at 7:00 PM, Melissa L Creech (CENSUS/PCO FED) <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)> wrote:

Please see attached.

Begin forwarded message:

**From:** "Melissa L Creech (CENSUS/PCO FED)" <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)>

**Date:** September 21, 2020 at 5:37:21 PM EDT

**To:** "Steven K Smith (CENSUS/DEPDIR FED)" <[steven.k.smith@census.gov](mailto:steven.k.smith@census.gov)>

**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)



Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238

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---

**From:** Steven K Smith (CENSUS/DEPDIR FED) <[steven.k.smith@census.gov](mailto:steven.k.smith@census.gov)>

**Sent:** Monday, September 21, 2020 3:56 PM

**To:** Melissa L Creech (CENSUS/PCO FED) <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)>

**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)



Sent from my iPhone

On Sep 21, 2020, at 1:29 PM, Melissa L Creech (CENSUS/PCO FED) <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)> wrote:

All:



(b) (5)

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238

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---

**From:** Steven Dillingham (CENSUS/DEPDIR FED) <[steven.dillingham@census.gov](mailto:steven.dillingham@census.gov)>

**Sent:** Monday, September 21, 2020 1:23 PM

**To:** Kourkouvelis, Aristidis (Federal) <[AKourkouvelis@doc.gov](mailto:AKourkouvelis@doc.gov)>

**Cc:** Risko, Daniel (Federal) <[DRisko@doc.gov](mailto:DRisko@doc.gov)>; Nathaniel Cogley (CENSUS/DEPDIR FED) <[nathaniel.cogley@census.gov](mailto:nathaniel.cogley@census.gov)>; Benjamin A Overholt (CENSUS/DEPDIR FED) <[benjamin.a.overholt@census.gov](mailto:benjamin.a.overholt@census.gov)>; Enrique Lamas (CENSUS/DEPDIR FED) <[Enrique.Lamas@census.gov](mailto:Enrique.Lamas@census.gov)>; Melissa L Creech (CENSUS/PCO FED) <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)>; Steven K Smith (CENSUS/DEPDIR FED) <[steven.k.smith@census.gov](mailto:steven.k.smith@census.gov)>

**Subject:** MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

Ari,

I am informed that the attached draft MOU was developed late last week with your help and the approval of OGC. Can you / your office facilitate and expedite its dispatch to other involved departments and agencies for approval? Michael Berning of the Census Bureau is available to assist as needed. As noted in a previous DHS MOU, this MOU may require an appropriate Statement of Records Notice (SORN) and Privacy Impact Assessment (PIA), which may have prescribed publication timelines.

Many thanks for you assisting us in getting this important MOU approved as soon as possible.

Steve

Steven D. Dillingham, Ph.D., Director  
U.S. Census Bureau  
o: 301-763-2135 | m: (b) (6)  
[census.gov](http://census.gov) | [@uscensusbureau](https://twitter.com/uscensusbureau)

(b) (5)

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**From:** Melissa L Creech (CENSUS/PCO FED) [Melissa.L.Creech@census.gov]  
**Sent:** 9/28/2020 2:40:16 PM  
**To:** Leing, George (Federal) [GLEing@doc.gov]  
**CC:** Kourkouvelis, Aristidis (Federal) [AKourkouvelis@doc.gov]  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

I will forward to Census.

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
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---

**From:** Leing, George (Federal) <GLEing@doc.gov>  
**Sent:** Monday, September 28, 2020 10:36 AM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Subject:** RE: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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---

**From:** Leing, George (Federal) <GLEing@doc.gov>  
**Sent:** Wednesday, September 23, 2020 8:45 AM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

George

**George Leing** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
Direct: 202-482-5981  
Mobile: (b) (6)

On Sep 22, 2020, at 2:25 PM, Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov> wrote:

George:

I will forward your suggestions to Census policy. Census is responsible for the PIAs.

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
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**Sent:** Tuesday, September 22, 2020 2:11 PM

**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>; Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>

**Subject:** RE: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

Thanks,  
George

**George Leing** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
Direct: 202-482-5981  
Mobile: (b) (6)

---

**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>

**Sent:** Tuesday, September 22, 2020 12:02 PM

**To:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>

**Cc:** Leing, George (Federal) <GLEing@doc.gov>

**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b)

(5)

[REDACTED]

[REDACTED]

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844

Facsimile (301) 763-6238

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**Sent:** Monday, September 21, 2020 8:02 PM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Leing, George (Federal) <GLEing@doc.gov>  
**Subject:** RE: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

**Aristidis (Aris) Kourkouvelis** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
M: (b) (6)

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**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Sent:** Monday, September 21, 2020 7:24 PM  
**To:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Cc:** Leing, George (Federal) <GLEing@doc.gov>  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b) (5)

Thanks, Melissa

On Sep 21, 2020, at 7:06 PM, Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov> wrote:

Adding George.

**Aristidis (Aris) Kourkouvelis** | Senior Counsel  
Office of the General Counsel  
U.S. Department of Commerce  
M: (b) (6), (k)(7)

---

**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Sent:** Monday, September 21, 2020 7:05 PM  
**To:** Kourkouvelis, Aristidis (Federal) <AKourkouvelis@doc.gov>  
**Subject:** Re: MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

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(b) (5)

Thanks, Melissa

Melissa L. Creech  
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**From:** Steven Dillingham (CENSUS/DEPDIR FED) <[steven.dillingham@census.gov](mailto:steven.dillingham@census.gov)>

**Sent:** Monday, September 21, 2020 1:23 PM

**To:** Kourkoumelis, Aristidis (Federal) <[AKourkoumelis@doc.gov](mailto:AKourkoumelis@doc.gov)>

**Cc:** Risko, Daniel (Federal) <[DRisko@doc.gov](mailto:DRisko@doc.gov)>; Nathaniel Cogley (CENSUS/DEPDIR FED) <[nathaniel.cogley@census.gov](mailto:nathaniel.cogley@census.gov)>; Benjamin A Overholt (CENSUS/DEPDIR FED) <[benjamin.a.overholt@census.gov](mailto:benjamin.a.overholt@census.gov)>; Enrique Lamas (CENSUS/DEPDIR FED) <[Enrique.Lamas@census.gov](mailto:Enrique.Lamas@census.gov)>; Melissa L Creech (CENSUS/PCO FED) <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)>; Steven K Smith (CENSUS/DEPDIR FED) <[steven.k.smith@census.gov](mailto:steven.k.smith@census.gov)>

**Subject:** MOU Appendix # 1 DRAFT for expedited dispatch and approvals (CUI, Draft, Deliberative)

(b)

(5)

Steve

Steven D. Dillingham, Ph.D., Director  
U.S. Census Bureau  
o: 301-763-2135 | m: (b) (6)  
[census.gov](https://www.census.gov) | [@uscensusbureau](https://twitter.com/uscensusbureau)

(b) (5)

.docx>

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**From:** Melissa L Creech (CENSUS/PCO FED) [Melissa.L.Creech@census.gov]  
**Sent:** 9/28/2020 2:21:00 PM  
**To:** Letitia W McKoy (CENSUS/PCO FED) [Letitia.W.McKoy@census.gov]  
**Subject:** Re: CMS Modification Memos in support of PM - Question

(b) (5)



Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238


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---

**From:** Letitia W McKoy (CENSUS/PCO FED) <Letitia.W.McKoy@census.gov>  
**Sent:** Monday, September 28, 2020 10:12 AM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Subject:** Fw: CMS Modification Memos in support of PM - Question

(b) (5)



  
Fri Sep  
11  
14:36:18  
EDT  
2020  
UPDATE

(b) (5)





(b) (5)

(b) (5)

Letitia

Letitia W. McKoy  
Senior Attorney  
Office of the Chief Counsel for Economic Affairs  
Office of General Counsel  
U.S. Department of Commerce  
Telephone: (301) 763-9844  
Facsimile: (301) 763-6238  
Email: [Letitia.w.mckoy@census.gov](mailto:Letitia.w.mckoy@census.gov)

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---

**From:** Nicole S Adolph (CENSUS/ERD FED) <Nicole.S.Adolph@census.gov>  
**Sent:** Monday, September 28, 2020 9:45 AM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>; Letitia W McKoy (CENSUS/PCO FED) <Letitia.W.McKoy@census.gov>  
**Cc:** Epaphrodite Uwimana (CENSUS/ERD FED) <epaphrodite.uwimana@census.gov>  
**Subject:** CMS Modification Memos in support of PM - Question

Good morning Letitia & Melissa,

(b) (5)

Thank you

---

**Nicole S. Adolph, MA, ACC**

Chief  
Data Acquisitions Branch  
Economic Reimbursable Surveys Division (ERD)  
U.S. Census Bureau

Office 301.763.1577  
Room (b) (6)  
Nicole.s.adolph@census.gov

[census.gov](https://www.census.gov)

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---

**From:** Shatto, Andrew E. (CMS/OEDA)  
**Sent:** Friday, September 25, 2020 11:15 AM  
**To:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Cc:** Nicole S Adolph (CENSUS/ERD FED) <[Nicole.S.Adolph@census.gov](mailto:Nicole.S.Adolph@census.gov)>  
**Subject:** RE: Request for Priority Review/Approval

Hey Mike,

We approved the amendment to your DUA which authorizes the use of the data for the EO and for the Presidential Memorandum dated July 21<sup>st</sup>, 2020 on 9/11 (see attached). Maybe I'm getting confused, but for our side no other agreements are necessary. The IAA, as stated in the purpose section, is for the transfer of funding to cover the data processing fees. The IAA does not cover the use of the data, that is covered under the DUA. The memo just restates what was already approved in the DUA and it thus unnecessary. Is there someone on your side who is saying the memo is necessary?

Andy

---

**From:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Sent:** Wednesday, September 23, 2020 8:40 AM  
**To:** Shatto, Andrew E. (CMS/OEDA) <[Andrew.Shatto@cms.hhs.gov](mailto:Andrew.Shatto@cms.hhs.gov)>  
**Cc:** Nicole S Adolph (CENSUS/ERD FED) <[Nicole.S.Adolph@census.gov](mailto:Nicole.S.Adolph@census.gov)>  
**Subject:** Re: Request for Priority Review/Approval

Hello Andy,

Just checking in on the CMS review/signature of the modification memo.

Thanks!

Mike

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:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Sent:** Wednesday, September 2, 2020 12:56 PM  
**To:** Shatto, Andrew E. (CMS/OEDA) <[Andrew.Shatto@cms.hhs.gov](mailto:Andrew.Shatto@cms.hhs.gov)>  
**Cc:** Nicole S Adolph (CENSUS/ERD FED) <[Nicole.S.Adolph@census.gov](mailto:Nicole.S.Adolph@census.gov)>  
**Subject:** Re: Request for Priority Review/Approval

Hello Andrew,

Now that the DUA request has been submitted, I'm just checking in to see if there's any update on the status of our request.

Thanks again!

Mike

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

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**From:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Sent:** Monday, August 24, 2020 12:47 PM  
**To:** Shatto, Andrew E. (CMS/OEDA) <[Andrew.Shatto@cms.hhs.gov](mailto:Andrew.Shatto@cms.hhs.gov)>  
**Cc:** Nicole S Adolph (CENSUS/ERD FED) <[Nicole.S.Adolph@census.gov](mailto:Nicole.S.Adolph@census.gov)>  
**Subject:** Re: Request for Priority Review/Approval

Hello Andy,

Per my previous email, we have submitted the DUA request to add the additional project work. Also, we've been advised that because the TMSIS and MEDB were covered under two separate agreements, we will need a modification memo for each. As such, I am attaching a copy of the signed TMSIS memo to accompany the EDB memo I sent previously.

Again, thank you for your assistance with this project.

Mike

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)

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**From:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Sent:** Thursday, August 20, 2020 7:49 AM  
**To:** Shatto, Andrew E. (CMS/OEDA) <[Andrew.Shatto@cms.hhs.gov](mailto:Andrew.Shatto@cms.hhs.gov)>  
**Subject:** Re: Request for Priority Review/Approval

Thank you Andy,

We submitted the DUA update yesterday. Also, there is another memo in signature review here for the TMSIS data and authority to use that for this project. As soon as that one is signed here, I will be forwarding that to you.

Thanks again for your help throughout this entire project.

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

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**From:** Shatto, Andrew E. (CMS/OEDA) <[Andrew.Shatto@cms.hhs.gov](mailto:Andrew.Shatto@cms.hhs.gov)>  
**Sent:** Tuesday, August 18, 2020 6:16 PM  
**To:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Subject:** RE: Request for Priority Review/Approval

Mike,

Signing this memo would create a conflict between its language and the language in the DUA covering the release of this data to Census. We don't have a concern with Census also using the data for the new purpose, but the process for approving that use must be through the CMS/Census DUA covering this data. Please contact ResDAC (<https://protect2.fireeye.com/url?k=0daa79c0-51ff70d3-0daa48ff-0cc47adb5650-5278a1701e513922&u=http://www.resdac.org/>) and work with them to request an amendment to your DUA to add the new use of the data. We can then approve this use through the DUA amendment process.

Andy

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**From:** Michael A Berning (CENSUS/ERD FED) <[Michael.A.Berning@census.gov](mailto:Michael.A.Berning@census.gov)>  
**Sent:** Thursday, August 13, 2020 7:48 AM  
**To:** Shatto, Andrew E. (CMS/OEDA) <[Andrew.Shatto@cms.hhs.gov](mailto:Andrew.Shatto@cms.hhs.gov)>  
**Subject:** Request for Priority Review/Approval

Good morning Mr Shatto,

We sincerely appreciate your support in providing data for our efforts under the July 2019, Executive Order 13880 to tabulate the citizenship status of the 2020 Census respondents. Based on a July 2020, Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base following the 2020 Census, we are asking for your priority review and approval to use the CMS data that you have provided for the 2019 EO

project to also be used to support the Census Bureaus response to the 2020 Presidential Memorandum. We ask for your signature on the attached request and the return of the attachment to me as soon as possible but prior to August 20, 2020.

If you have questions or need additional information, please let me know. Again, thank you for your assistance with this project.

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

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

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

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

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

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

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

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

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, STEVEN  
 DILLINGHAM, in his official capacity as Director of  
 the U.S. Census Bureau, and CHERYL L.  
 JOHNSON, in her official capacity as Clerk of the  
 U.S. House of Representatives,

Defendants.

CASE NO.

**COMPLAINT FOR  
 DECLARATORY AND  
 INJUNCTIVE RELIEF**

## 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 no longer count as “persons” under the Constitution. In spite of the Constitution’s words, in spite of statutory command, and in spite of the unbroken practice of every administration since 1790, the President will “exclude from the apportionment base aliens who are not in a lawful immigration status.” 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, which consistently considers a person to be a person. 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. Furthermore, regardless of their immigration status, they have never before been deemed *non*-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. 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.

6. 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.

7. 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**

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

9. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (c)(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.

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

11. 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.

### **PARTIES**

#### **A. Plaintiffs**

12. 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% of its population was born in another country, and nearly one-third of its

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

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

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

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

28

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

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

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

10           **B. Defendants**

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

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

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

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

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

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

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

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

27. The Apportionment Exclusion Order requires Secretary Ross, the Department of Commerce, the Census Bureau, and Director Dillingham 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.

28. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives and 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 in her official capacity.

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

**ALLEGATIONS**

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

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

Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free *Persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

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

31. The Fourteenth Amendment, enacted in the wake of the Civil War, eliminated the Apportionment Clause’s three-fifths component and provided that Representatives must be apportioned based on “the whole number of *persons* in each State, excluding Indians not taxed.” U.S. Const. amend. XIV, § 2 (emphasis added).

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

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

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.

34. The broader text of the Constitution also makes clear that the Framers knew that the word “person” is broad and encompasses all human beings. When the Framers sought to exclude certain *classes* of persons, 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).

35. The all-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).



36. 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.

37. 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. Section 2 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

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

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

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

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

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 Thirtieth 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).

41. 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, 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.”).

42. 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

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

2 *Id.*

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

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

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

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

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

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

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

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

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

28

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

50. 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”).

51. 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)).

52. 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.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72. 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.*

73. 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.*

74. 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/>.

75. 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 unlawfully categorize undocumented immigrants as “non-persons” and thereby exclude them from the apportionment calculation.

76. 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, 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.*

77. 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](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).

78. The Order’s focus on “inhabitants” is misguided. To begin, the Constitution speaks of “persons,” not “inhabitants.” But even if the term used were “inhabitant,” the result would be the same. “Inhabitant” would be co-extensive with the definition of “person” in this context, which means (now, in 1787, and in 1865) 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 equivalent with “citizen,” which connotes a fundamentally different 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”).

**E. Harm to Plaintiffs**

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

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

81. The voting power of Plaintiffs Sam Liccardo, Zerihoun Yilma, and Lovette Kargbo-Thompson will be diluted by the Apportionment Exclusion Order because, by excluding millions of persons from the apportionment count, it will likely cause California to have fewer Representatives spread across their home States of California and Georgia. *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).

82. BAJI is harmed because the Apportionment Exclusion Order causes 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. The Administration's 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 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. As another federal court has already found, and the Supreme Court has upheld on review, undocumented immigrants have a high nonresponse rate to the census and that rate is likely to increase disproportionately if the administration of the census involves questions about citizenship. *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). BAJI has spent and 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.

83. The exclusion of undocumented persons from the Representatives apportionment among the States 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



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

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

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

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**

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

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

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

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

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

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

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

**SECOND CLAIM FOR RELIEF**

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

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

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

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

1           95.     The Equal Protection Clause prohibits malapportioned congressional districts.  
 2     *See Evenwel*, 136 S. Ct. at 1123-24; *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*,  
 3     377 U.S. 533 (1964).

4           96.     The Apportionment Exclusion Order adopts an apportionment scheme that  
 5     excludes undocumented immigrants, and therefore will lead to malapportionment by providing  
 6     fewer Representatives to States with higher populations of such persons.

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

10                               **THIRD CLAIM FOR RELIEF**  
 11                               **Violation of Census Act—Ultra Vires**  
                                   **(2 U.S.C. § 2a; 13 U.S.C. § 141)**

12           98.     Plaintiffs incorporate by reference the above allegations in this Complaint.

13           99.     The Census Act, 13 U.S.C. § 141(b), requires the Secretary to administer the  
 14     decennial census and thereafter report to the President a “tabulation of total population by States  
 15     . . . as required for apportionment of Representatives in Congress.”

16           100.    Title 2 U.S.C. § 2a(a) requires the President to transmit to Congress “a statement  
 17     showing the whole number of persons in each State, excluding Indians not taxed, as ascertained  
 18     under the . . . decennial census of the population, and the number of Representatives to which  
 19     each State would be entitled under an apportionment of the then existing number of  
 20     Representatives by the method known as the method of equal proportions.”

21           101.    The Apportionment Exclusion Order violates these statutory mandates by  
 22     directing the Secretary to report to the President apportionment data that is not based on the  
 23     “total population” or the actual Enumeration of each state.

24           102.    The Apportionment Exclusion Order violates these statutory mandates by  
 25     determining that the President will transmit to Congress apportionment data that is not based on  
 26     “the whole number of persons in each State” and directing the Secretary of Commerce and other  
 27     Defendants to facilitate this unlawful course of action.

28           103.    Defendants’ actions beyond the scope of statutory authority are *ultra vires*

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

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

#### 5 **FOURTH CLAIM FOR RELIEF**

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

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

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

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

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

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

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

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

1 indicating animosity toward communities of color. *See, e.g.,* Josh Dawsey, *Trump derides*  
 2 *protections for immigrants from ‘shithole’ countries [Haiti, El Salvador, African countries]*,  
 3 Washington Post (Jan. 12, 2018, 4:52 AM PST),  
 4 [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html)  
 5 [shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html)  
 6 [31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html); Donald J. Trump Statement on Preventing Muslim Immigration (Dec.  
 7 7, 2015) [https://web.archive.org/web/20160204082711/https://www.donaldjtrump.com/press-](https://web.archive.org/web/20160204082711/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration)  
 8 [releases/donald-j.-trump-statement-on-preventing-muslim-immigration](https://web.archive.org/web/20160204082711/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration); Eugene Scott, *Trump’s*  
 9 *History of Making Offensive Comments about Nonwhite Immigrants*, Washington Post, Jan. 11,  
 10 2018; Julia Hirschfeld Davis et al, *Trump Alarms Lawmakers with Disparaging Words for Haiti*  
 11 *and Africa*, NY Times (Jan. 11, 2018), [https://www.nytimes.com/2018/01/11/us/politics/trump-](https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html)  
 12 [shithole-countries.html](https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html); Matthew Choi, *Trump focuses on white people killed by police, defends*  
 13 *Confederate flag*, Politico (July 14, 2020, 5:45 PM EDT),  
 14 <https://www.politico.com/news/2020/07/14/trump-racism-confederate-flag-police-361205>.

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

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

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

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

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

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

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

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

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

28

119. 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 Latino 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 Latino and Black populations. Those States are most likely to be disadvantaged by Defendants’ action.

120. 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 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).

121. 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 be null and void;
4. Enjoin Defendants Department of Commerce, Census Bureau, Ross, Dillingham, from excluding undocumented persons from the apportionment base following the 2020 Census,



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

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

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

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

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

12 Dated: July 27, 2020

LATHAM & WATKINS LLP

13 By: /s/ Sadik Huseny

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

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

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

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

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

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

*Attorneys for Plaintiff City of San Jose*

STATE OF ALABAMA, *et al.*,  
  
    *Plaintiffs*,  
  
        v.  
  
THE 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.*,  
  
    *Intervenor-Defendants.*

## BC-DOC-CEN-2020-001602-002097

### **OBJECTIONS WHICH APPLY TO ALL INTERROGATORIES**

1. Defendants object to the instructions and definitions articulated in the Interrogatories to the extent those instructions and definitions impose obligations beyond the permissible scope of discovery as outlined in Federal Rule of Civil Procedure 33.

2. Defendants object to the Interrogatories to the extent that the Interrogatories seek information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, or any other recognized privilege.

3. Defendants object to the Interrogatories to the extent that the Interrogatories seek information beyond the possession, custody and control of Defendants. Defendants also object to the Interrogatories to the extent the Interrogatories seek information that cannot be obtained by Defendants after reasonably diligent inquiry, are readily available from public sources, or are available to the propounding party from another source or by other means that are more convenient, more appropriate, less burdensome, or less expensive.

4. Defendants object to any Interrogatory that is vague or calls for speculation.

5. Defendants object to the inclusion of definitions for any term not relied on in these Interrogatories. Any requirement that Defendants respond to such definitions in the abstract is not proportional to the needs of the case and the burden of such a response outweighs its likely benefit, which is none. Defendants do not hereby waive any future objection to the definition of such terms or waive the right to use Defendants' own definition of such terms.

6. Each and every response contained herein is subject to the above objections, which apply to each and every response, regardless of whether a specific objection is interposed in a specific response. The making of a specific objection in response to a particular request is not intended to constitute a waiver of any other objection not specifically referenced in the particular response.

**OBJECTIONS AND RESPONSES TO MARTINEZ DEFENDANT-INTERVENORS’  
INTERROGATORIES**

1. Do you contend that “the President has no authority to base an apportionment on any alternative tally of the population of each state” in comparison to the tally “delivered by the Secretary of Commerce,” as Plaintiffs State of Alabama and Morris J. Brooks (“Plaintiffs”) allege in paragraph 21 of their first amended complaint (Dkt. 112), or do you contend the opposite, and what are all facts and arguments that support your contention one way or the other?.

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants also object because the President does not conduct the apportionment; rather, under 2 U.S.C. § 2a, apportionment is merely based on numbers that the President provides to Congress.

Defendants further object to this Interrogatory on the ground that it seeks to constrain Defendants’ response within only two possibilities. Defendants’ legal position does not lend itself to such a binary choice, and Defendants will articulate that position without artificial constraint.

Defendants further object to the requirement that Defendants articulate “all facts and arguments” that support its answer as having no limiting principle and thereby being unduly burdensome and disproportionate to the needs of the case. Defendants will instead provide the material facts that bear upon its legal position in response to this Interrogatory.

Defendants further object to this Interrogatory on the ground that it contains two separate questions, and therefore counts as two separate interrogatories for purposes of the total interrogatory limit under Rule 33.

**RESPONSE:** In 2 U.S.C. § 2a, Congress provided that apportionment shall be based on a “statement” delivered by the President to Congress “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.” 2 U.S.C. § 2a(a)-(b). This statutory command, on its face,

requires that any apportionment count be derived from the decennial census, which Congress authorized the Secretary of Commerce to conduct pursuant to standards specified in 13 U.S.C. § 141. Defendants contend that, for purposes of apportionment, the President has authority to deliver to Congress any statement of the population that comports with the requirements of these provisions.

2. Do you contend that “[t]o the extent that the President has authority to unilaterally alter the tabulation of the population of each state delivered by the Secretary of Commerce, he will not be able to alter this tabulation to exclude illegal aliens from the apportionment base so long as the Residence Rule remains in effect,” as Plaintiffs allege in paragraph 22 of their first amended complaint, or do you contend the opposite, and what are all facts and arguments that support your contention one way or the other?

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object to this Interrogatory on the ground that it seeks to constrain Defendants’ response within only two possibilities. Defendants’ legal position does not lend itself to such a binary choice, and Defendants will articulate that position without artificial constraint.

Defendants further object to the requirement that Defendants articulate “all facts and arguments” that support its answer as having no limiting principle and thereby being unduly burdensome and disproportionate to the needs of the case. Defendants will instead provide the material facts that bear upon its legal position in response to this Interrogatory.

Defendants further object to this Interrogatory on the ground that it contains two separate questions, and therefore counts as two separate interrogatories for purposes of the total interrogatory limit under Rule 33.

**RESPONSE:** Under the plain terms of 2 U.S.C. § 2(a), the President is required to deliver to 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.”

2 U.S.C. § 2a(a)-(b). Defendants contend that the President has authority to deliver any statement that satisfies this requirement. To the extent such a statement can be produced without reliance on the Residence Rule, 83 Fed. Reg. at 5,526, the President may deliver it to Congress. At this time, Defendants do not know whether such a statement can be produced.

3. Do you contend that “[t]here is no plausible method by which the President could unilaterally alter the report delivered by the Secretary of Commerce to exclude illegal aliens from the tally of the population of each state used for congressional and electoral apportionment,” as Plaintiffs allege in paragraph 23 of their first amended complaint, or do you contend the opposite, and what are all facts and arguments that support your contention one way or the other?

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object to this Interrogatory on the ground that it seeks to constrain Defendants’ response within only two possibilities. Defendants’ legal position does not lend itself to such a binary choice, and Defendants will articulate that position without artificial constraint.

Defendants further object to the requirement that Defendants articulate “all facts and arguments” that support its answer as having no limiting principle and thereby being unduly burdensome and disproportionate to the needs of the case. Defendants will instead provide the material facts that bear upon its legal position in response to this Interrogatory.

Defendants further object to this Interrogatory on the ground that it contains two separate questions, and therefore counts as two separate interrogatories for purposes of the total interrogatory limit under Rule 33.

**RESPONSE:** Under the plain terms of 2 U.S.C. § 2(a), the President is required to deliver to 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.”

2 U.S.C. § 2a(a)-(b). Defendants contend that the President has authority to deliver any statement that satisfies this requirement. At this time, Defendants are evaluating the administrative records collected pursuant to Executive Order 13,880, and working to ascertain those records' coverage and utility. Accordingly, Defendants do not yet know whether it is possible to produce a statement that excludes illegal aliens and satisfies the criteria of 2 U.S.C. § 2(a).

4. Describe in detail all material facts supporting your denial, as set forth in paragraphs 7 and 36 of your answer (Dkt. 126) to Martinez Defendant-Intervenors' cross-claim (Dkt. 119), of Martinez Defendant-Intervenors' allegations that Defendants will not conduct an enumeration of undocumented immigrants in the 2020 Census.

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object because the phrase "conduct an enumeration of undocumented immigrants in the 2020 Census" is vague and ambiguous.

**RESPONSE:** The Census Bureau has planned to conduct a census that enumerates every resident in the United States. *See, e.g.,* (Jan. 16, 2020, Deposition of K. Battle at 46–47, 52). To the extent undocumented immigrants satisfy the criteria of the Residency Rule, the Census Bureau intends to enumerate them.

5. Describe in detail all material facts supporting your denial, as set forth in paragraphs 8 and 42 of your answer to Martinez Defendant-Intervenors' cross-claim, of Martinez Defendant-Intervenors' allegations that any attempt to exclude undocumented immigrants from the total population tabulations reported to the President and Congress would be based on estimations that use probabilistic statistical modeling in order to determine the number of undocumented immigrants in the U.S.



**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object because the terms “estimations” and “probabilistic statistical modeling” are vague and ambiguous.

**RESPONSE:** The Census Bureau will not collect information about immigration status as part of the 2020 decennial census questionnaire. However, it continues to evaluate whether it is possible to use additional data sources, such as administrative records, to determine the number of undocumented immigrants. At the time Defendants answered Martinez-Intervenors’ cross-claim, Defendants lacked knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to Executive Order 13,880 and, on that basis denied the allegation. Defendants are continuing to evaluate the administrative records collected pursuant to Executive Order 13,880, and working to ascertain those records’ coverage and utility. Accordingly, Defendants do not yet know whether it is possible to produce an actual count, rather than an estimate, of undocumented immigrants in the 2020 census.

6. Describe in detail all material facts supporting your denial, as set forth in paragraph 37 of your answer to Martinez Defendant-Intervenors’ cross-claim, of the second and fourth sentences of Martinez Defendant-Intervenors’ allegations that:

- (a) The American Community Survey (“ACS”) data provide estimates of population characteristics, including citizenship, that are based on sample data, and do not provide an enumeration of citizens and non-citizens and that the ACS survey therefore does not provide an estimate or an enumeration of the undocumented population in the U.S; and
- (b) The ACS survey does not provide an estimate or an enumeration of the undocumented population in the U.S.

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object because subpart (a) of this Interrogatory combines two separate allegations in Martinez-Intervenors' complaint, and in so doing mischaracterize the allegation that Defendants denied. Defendants further object because the term "estimate" is vague and ambiguous.

**RESPONSE:** The American Community Survey collects demographic information, including citizenship, from over 3 million U.S. households. For the households that ACS surveys, the ACS provides an actual count of citizens and non-citizens. As a legal matter, this count can be deemed an enumeration of those households. Further, to the extent information collected in the ACS can be matched or combined with other data sources, such as administrative records, it is possible that ACS data could be used to provide an estimate of the undocumented population in the U.S.

7. Describe in detail all material facts supporting your denial, as set forth in 41 of your answer to Martinez Defendant-Intervenors' cross-claim, of Martinez Defendant-Intervenors' allegation that the data collected under EO 13880 is not an enumeration of individuals, and specifically is not an enumeration of undocumented immigrants, in the U.S.

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object because the term "data collected" as used in this context is vague and ambiguous, because it could refer either to specific records or to the analysis of those records.

**RESPONSE:** At the time Defendants answered Martinez-Intervenors' cross-claim, Defendants lacked knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to Executive Order 13,880 and, on that basis denied the allegation. Defendants are continuing to evaluate the administrative records collected pursuant to Executive Order 13,880, and working to ascertain those records' coverage and utility. Accordingly, Defendants

do not yet know whether it is possible to produce an actual count, rather than an estimate, of undocumented immigrants in the 2020 census.

8. Describe in detail all material facts supporting your denial, as set forth in 43 of your answer to Martinez Defendant-Intervenors' cross-claim, of Martinez Defendant-Intervenors' allegation in paragraph 43 of the cross-claim that the President's statement is false and incorrect and that administrative records do not provide a count of the total population, nor do they provide an "accurate count," or an enumeration of citizens, non-citizens, or undocumented immigrations within the total population.

**OBJECTION:** Defendants incorporate by reference the above general objections.

**RESPONSE:** At the time Defendants answered Martinez-Intervenors' cross-claim, Defendants lacked knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to Executive Order 13,880 and, on that basis denied the allegation. Defendants are continuing to evaluate the administrative records collected pursuant to Executive Order 13,880, and working to ascertain those records' coverage and utility. Accordingly, Defendants do not yet know whether it is possible to produce an actual count, rather than an estimate, of undocumented immigrants in the 2020 census.

9. Describe in detail all material facts supporting your denial, as set forth in 48 of your answer to Martinez Defendant-Intervenors' cross-claim, of Martinez Defendant-Intervenors' allegation that without an enumeration of the number of undocumented immigrants within the total population, Defendants would be required to use data from estimations based on probabilistic statistical modeling in order to determine the number of undocumented immigrants in the U.S.

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object because the term “estimations based on probabilistic statistical modeling” is vague and ambiguous.

**RESPONSE:** At the time Defendants answered Martinez-Intervenors’ cross-claim, Defendants lacked knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to Executive Order 13,880 and, on that basis denied the allegation. Defendants are continuing to evaluate the administrative records collected pursuant to Executive Order 13,880, and working to ascertain those records’ coverage and utility. Accordingly, Defendants do not yet know whether it is possible to produce an actual count, rather than an estimate, of undocumented immigrants in the 2020 census.

10. Describe in detail all material facts supporting your denial, as set forth in 50 of your answer to Martinez Defendant-Intervenors’ cross-claim, of Martinez Defendant-Intervenors’ allegation that if Defendants were to decide to exclude undocumented immigrants from the enumeration reported to Congress for the purpose of apportioning Representatives and electors to the Electoral College without a question on the Census form that counted undocumented immigrants living in the U.S., they would be required to adjust the final enumeration based on probabilistic modeling.

**OBJECTION:** Defendants incorporate by reference the above general objections. Defendants further object because the terms “adjust” and “probabilistic modeling” are vague and ambiguous.

**RESPONSE:** At the time Defendants answered Martinez-Intervenors’ cross-claim, Defendants lacked knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to Executive Order 13,880 and, on that basis denied the allegation. Defendants are continuing to evaluate the administrative records collected pursuant to Executive Order 13,880, and working to ascertain those records’ coverage and utility. Accordingly, Defendants

do not yet know whether it is possible to produce an actual count, rather than an estimate, of undocumented immigrants in the 2020 census.

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: July \_\_, 2020

ETHAN P. DAVIS  
Acting Assistant Attorney General

ALEXANDER K. HAAS  
Director, Federal Programs Branch

DIANE KELLEHER  
BRAD P. ROSENBERG  
Assistant Branch Directors

/s/ DRAFT  
ALEXANDER V. SVERDLOV (NY Bar 4918793)  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street, N.W.  
Washington, DC 20005  
Tel: (202) 305-8550  
alexander.v.sverdlov@usdoj.gov

*Attorneys for Defendants*

## CERTIFICATE OF SERVICE

I hereby certify that on July \_\_, 2020, I served the foregoing via email to  
designated counsel of record as agreed to by the parties:

For Plaintiff State of Alabama:

Jim Davis	JimDavis@ago.state.al.us
Brad Chynoweth	bchynoweth@ago.state.al.us
Edmund LaCour	Edmund.LaCour@alabamaag.gov
Win Sinclair	wsinclair@ago.state.al.us
Brenton Smith	bsmith@ago.state.al.us

For Plaintiff Mo Brooks:

Marshall.Yates@mail.house.gov

For Local Government Intervenors:

Anil Mujumdar	anil@zarzaur.com
Ezra Rosenberg	erosenberg@lawyerscommittee.org
Dorian Spence	dspence@lawyerscommittee.org
Robin Thurston	rthurston@democracyforward.org
John Lewis	jlewis@democracyforward.org
Ryan Kusmin	rmkusmin@debevoise.com
Jonathan Weissglass	jonathan@weissglass.com
Marcelo Quinones	marcelo.quinones@cco.sccgov.org
Ravi Rajendra	raphael.rajendra@cco.sccgov.org
Robert Segall	segall@copelandfranco.com

For Martinez Intervenors:

Thomas Saenz	tsaenz@maldef.org
Denise Hulett	dhulett@maldef.org
Andrea Senteno	asenteno@maldef.org
Julia Gomez	jgomez@maldef.org
Edward Still	still@votelaw.com
James Blacksher	jblacksher@ns.sympatico.ca

For State and Other Governmental Entities Intervenors:

Matthew Colangelo	Matthew.Colangelo@ag.ny.gov
Elena Goldstein	Elena.Goldstein@ag.ny.gov
Liz Morgan	Elizabeth.Morgan@ag.ny.gov
Barry Ragsdale	bragsdale@sirote.com
Joyce Vance	joycevance4@gmail.com

/s/ Alexander V. Sverdlov  
Alexander V. Sverdlov

1 I, James T. Christy, make the following Declaration pursuant to 28 U.S.C. § 1746, and state  
2 that under penalty of perjury the following is true and correct to the best of my knowledge and  
3 belief:

- 4 1. This is my fifth declaration in this lawsuit. I am making this declaration in response to  
5 four separate orders. *See* ECF 220, 221, 222, and 229.

6 **ECF 220 Investigation**

- 7 2. In ECF 220, the complaint alleges non-compliance with the Court's order due to certain  
8 identified cases being designated as completed using a "6.040 Max Attempts" code  
9 after only one Non-Response Follow-Up attempt and other cases after a substantial  
10 number of attempts.
- 11 3. I have investigated this issue and confirmed that the identified cases were completed  
12 properly and consistent with the design for the 2020 Census.
- 13 4. These cases were completed consistent with our operational plan because the Census  
14 Bureau has long planned, prior to development of the Replan, to use high-quality  
15 administrative data after one (unsuccessful) visit. This is described in the 2020 Census  
16 Operational Plan – Version 4.0, Section 3.3 "Utilizing Administrative Records and  
17 Third-Party Data" (pages 21 and 22), which states "that high-quality administrative  
18 data could be used for the enumeration. These units will be visited one time in NRFU  
19 and, if not enumerated during that visit, will be mailed a postcard encouraging self-  
20 response and removed from the NRFU workload for all subsequent activity."
- 21 5. I verified that administrative records were used in these specific instances by checking  
22 the data for the listed Area Census Offices, which aligned the administrative record  
23 checks with the number of cases reported as eligible for being resolved with only one  
24 attempt.
- 25 6. For the cases which received numerous attempts – the complaint references one with 12  
26 attempt days and 26 contact attempts – this also is consistent with our longstanding  
27 plan for completing enumeration. During the closeout phase of the operation, cases are  
28 reopened for additional attempts in an effort to garner information for the household in

1 Areas were in the Closeout phase. As of 7:23 am Eastern on September 28, 2020, there  
2 were 959 addresses remaining in the workload assigned to the Pasadena office.

3 10. Completing this remaining work with 93 enumerators is consistent with our closeout  
4 strategy, which was developed prior to the implementation of the Replan. This is  
5 referenced in enumerator training and in the D-1220A, Nonresponse Followup Census  
6 Field Manager Job Aid, pages 100-101 which provides, "As the CFM, you determine  
7 which employees you will keep to finish fieldwork. Since you have worked hand in  
8 hand with your CFSs, you will know who your strongest supervisors are and who you  
9 will want to keep until the end of the operation. When it is time to start terminating  
10 Enumerators, you are encouraged to consult with your CFSs to identify your high  
11 performing Enumerators."

12 11. The second concern that the ECF 221 email references that "there are also 16-30,000  
13 cases that were 'closed' administratively and in error per multiple Census Field  
14 Managers."

15 12. I reviewed the case status information for work resolved by the Pasadena Area Census  
16 Office, and I found no cases that were "closed" inappropriately. It is my belief this  
17 complainant may be referencing the same issue previously addressed in Paragraph 4 of  
18 this Declaration. That is, the cited cases involve addresses for which high-quality  
19 administrative data exists, and one NRFU attempt has already been made.

20 **ECF 222 Investigation**

21 13. The third order, ECF 222, is a 4-page note from a Census Field Supervisor working on  
22 the Group Quarters operation. In this complaint, the employee alleges he was not  
23 notified of the Court's orders related to the 2020 Census. He also notes his release date  
24 of September 28 was in advance of September 30.

25 14. The implementation of the Court's Temporary Restraining Order and the Preliminary  
26 Injunction involved actions by Headquarters and Regional Management staff.

27 15. As referenced in a previous declaration, Headquarters and Regional Management staff  
28 were notified on several occasions of these orders.



1 16. I further confirmed that regional management in the Los Angeles Region, where this  
2 employee works, were properly notified about the issuance of the Court's TRO and PI  
3 Orders. The Regional Director sent emails to the Deputy Regional Directors, the  
4 Assistant Regional Census Managers, the Area Managers, and the Area Census Office  
5 Managers in the region which show the instructions were forwarded.

6 17. As for the employee's release prior to the September 30 date, the Group Quarters  
7 operations were completed on the planned pre-Replan schedule for Group Quarters.  
8 The final operation, the Service-Based Enumeration, finished on September 24, 2020.

9 **ECF 229 Investigation**

10 18. In the fourth order, ECF 229, the complainant alleges "[d]espite your order to continue,  
11 LARCC and local ACOs continue to push toward closure" and forwards a September  
12 28 email from a supervisor which states "LARCC is pushing to get all CFM Zones up  
13 to 99.5% completed by this Wednesday, 9/30."

14 19. The Regional Director informed me that no written or verbal instructions were issued to  
15 Area Census Office staff by her or her managers to complete the work by September  
16 30. She did affirm the direction given to pursue at least 99.5% completion in order to  
17 increase data quality levels.

18 20. The staff on the email distribution list work in the El Cajon Area Census Office in  
19 California. As of September 28, the office was 98.23% complete with the production  
20 NRFU workload, with 39 of the 44 Census Field Supervisor Areas in the Closeout  
21 phase.

22 **Notification to the Office of Inspector General**

23 21. The Census Bureau has notified the Department of Commerce Office of Inspector  
24 General that the Bureau has advised agency personnel that they may direct any  
25 complaints about the 2020 Census, including complaints about compliance with the  
26 Court's Orders, to the OIG. In addition, the Census Bureau intends to forward any  
27 unsolicited communications to the Court alleging non-compliance that are placed on the  
28 Court's docket to the attention of the OIG. I believe that this process may help alleviate

1           some of the concerns the Court has identified regarding unsolicited communications  
2           from non-parties.

3  
4 I have read the foregoing and it is all true and correct.

5 DATED this \_29th\_ day of September, 2020

6       **James Christy** Digitally signed by James Christy  
Date: 2020.09.29 19:13:50 -04'00'

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7  
8 James T. Christy

9 Assistant Director for Field Operations

10 United States Bureau of the Census  
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UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

MEMORANDUM FOR: Andrew E. Shatto  
Deputy Director  
Office of Enterprise Data and Analytics  
Centers for Medicare and Medicaid Services

From: Ron S. Jarmin  
Deputy Director

Subject: Request for Authorized Use as Amendment #2 to December 14, 2019, Agreement No. TMSIS-2064-20-PAY-01.000, "Interagency Agreement Between The Department of Commerce, United States Census Bureau (Census Bureau) and The U.S. Department of Health and Human Services, The Centers for Medicare & Medicaid Services (CMS)"

Thank you for your continuing support to our data acquisition efforts pursuant to the December 14, 2019, Agreement No. TMSIS-2064-20-PAY-01.001, "Interagency Agreement Between The Department of Commerce, United States Census Bureau (Census Bureau) and The U.S. Department of Health and Human Services, The Centers for Medicare & Medicaid Services (CMS)" and subsequent amendment (TMSIS-2064-20-PAY-01.001 signed May 4, 2020) to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Centers for Medicare and Medicaid data acquired under Agreement No. TMSIS-2064-20-PAY-01.000, and TMSIS-2064-20-PAY-01.001 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

CMS's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from CMS component databases. Both deliveries have been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [ [HYPERLINK "mailto:michael.a.berning@census.gov"](mailto:michael.a.berning@census.gov) ].

If CMS is amenable to authorizing the use of CMS data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence. This will constitute Amendment #2 to the Agreement.

## APPROVALS

On behalf of the Census Bureau, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

Ron S. Jarmin  
Deputy Director  
U.S. Census Bureau

(Date)

On behalf of the Centers for Medicare and Medicaid, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

Andrew E. Shatto  
Deputy Director  
Office of Enterprise Data and Analytics  
Centers for Medicare and Medicaid Services

(Date)

Attachment:

## **Attachment – Census Bureau Project Description**

### **Census Bureau Project to Support the July 21, 2020 *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census***

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, “Collecting Information about Citizenship Status in Connection with the Decennial Census”. In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary’s transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of Interior), and Law Enforcement Management Information System (Department of Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal or unknown. The planned output of this project will be state-level tabulations.



UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

MEMORANDUM FOR: Andrew E. Shatto  
Deputy Director  
Office of Enterprise Data and Analytics  
Centers for Medicare and Medicaid Services

From: Ron S. Jarmin  
Deputy Director

Subject: Request for Authorized Use as Amendment #1 to January 30, 2020, Agreement No. 2064-20-PAY-03.000, "Interagency Agreement Between The Department of Commerce, United States Census Bureau and The U.S. Department of Health and Human Services, The Centers for Medicare & Medicaid Services (CMS)"

Thank you for your continuing support to our data acquisition efforts pursuant to the January 30, 2020, Agreement No. 2064-20-PAY-03.000, "Interagency Agreement Between The Department of Commerce, United States Census Bureau and The U.S. Department of Health and Human Services, The Centers for Medicare & Medicaid Services (CMS)" to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Centers for Medicare and Medicaid data acquired under Agreement No. 2064-20-PAY-03.000 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

CMS's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from CMS component databases. Both deliveries have been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [ [HYPERLINK "mailto:michael.a.berning@census.gov"](mailto:michael.a.berning@census.gov) ].

If CMS is amenable to authorizing the use of CMS data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence. This will constitute Amendment #1 to the Agreement.

No. 20-16868

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIONAL URBAN LEAGUE, et al.

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

---

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY  
PENDING APPEAL AND FOR AN IMMEDIATE ADMINISTRATIVE  
STAY PENDING DISPOSITION OF THE STAY MOTION

---

JEFFREY BOSSERT CLARK  
*Acting Assistant Attorney General*

SOPAN JOSHI  
*Senior Counsel to the Assistant Attorney  
General*

MARK B. STERN  
BRAD HINSHELWOOD  
*Attorneys, Appellate Staff  
Civil Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
202-514-7823*

### **CIRCUIT RULE 27-3 CERTIFICATE**

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

**(1) Telephone numbers and addresses of the attorneys for the parties**

*Counsel for Defendants:*

Sopan Joshi (sopan.joshi2@usdoj.gov)  
Mark B. Stern (mark.stern@usdoj.gov)  
Brad Hinshelwood (bradley.a.hinshelwood@usdoj.gov)  
Attorneys, Appellate Staff  
Civil Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
202-514-7823

*Counsel for Plaintiffs National Urban League; League of Women Voters; Black Alliance for Just Immigration; Harris County, Texas; King County, Washington; City of San Jose; Rodney Ellis; Adrian Garcia; and the NAACP:*

Steven M. Bauer (steven.bauer@lw.com)  
Sadik Huseny (sadik.huseny@lw.com)  
Shannon D. Lankenau (shannon.lankenau@lw.com)  
Amit Makker (amit.makker@lw.com)  
Latham & Watkins LLP  
505 Montgomery Street, Suite 2000  
San Francisco, CA 94111  
415-391-0600

Richard P. Bress (rick.bress@lw.com)  
Gemma Donofrio (gemma.donofrio@lw.com)  
Genevieve P. Hoffman (genevieve.hoffman@lw.com)  
Anne W. Robinson (anne.robinson@lw.com)  
Melissa Arbus Sherry (melissa.sherry@law.com)  
Tyce R. Walters (tyce.walters@lw.com)  
Latham & Watkins LLP  
555 Eleventh Street NW, Suite 1000



Washington, D.C. 20004  
202-637-2200

*Counsel for Plaintiffs National Urban League; City of San Jose; Harris County, Texas; League of Women Voters; King County, Washington; Black Alliance for Just Immigration; Rodney Ellis; Adrian Garcia; the NAACP; and Navajo Nation:*

Pooja Chaudhuri (pchaudhuri@lawyerscommittee.org)  
Kristen Clarke (kclarke@lawyerscommittee.org)  
Jon M. Greenbaum (jgreenbaum@lawyerscommittee.org)  
Maryum Jordan (mjordan@lawyerscommittee.org)  
Ezra D. Rosenberg (erosenberg@lawyerscommittee.org)  
Ajay P. Saini (asaini@lawyerscommittee.org)  
Dorian Spence (dspence@lawyerscommittee.org)  
Lawyers' Committee for Civil Rights Under Law  
1500 K St. NW, Suite 900  
Washington, DC 20005  
202-662-8600

Kelly M. Percival (percivalk@brennan.law.nyu.edu)  
Wendy R. Weiser (weiserw@brennan.law.nyu.edu)  
Thomas P. Wolf (wolf@brennan.law.nyu.edu)  
Brennan Center for Justice  
120 Broadway, Suite 1750  
New York, NY 10271  
646-292-8310

*Counsel for Plaintiff City of San Jose:*

Mark Rosenbaum (mrosenbaum@publiccounsel.org)  
Public Counsel  
610 South Ardmere Ave.  
Los Angeles, CA 90005  
213-385-2977

*Counsel for Plaintiff Navajo Nation:*

Doreen McPaul (dmcpaul@nnjo.org)  
Jason Searle (jasearle@nndoj.org)  
Navajo National Department of Justice  
P.O. Box 2010

Window Rock, AZ 86515  
928-871-6345

*Counsel for Plaintiff City of Los Angeles:*

Michael Dundas (mike.dundas@lacity.org)  
Michael N. Feuer (mike.feuer@lacity.org)  
Danielle Goldstein (Danielle.goldstein@lacity.org)  
Kathleen Kenealy (Kathleen.kenealy@lacity.org)  
City Attorney for the City of Los Angeles  
200 N. Main St., 8th Floor  
Los Angeles, CA 90012  
213-473-3231

*Counsel for Plaintiff City of Salinas:*

Christopher A. Callihan (legalwebmail@ci.salinas.ca.us)  
Michael Mutalipassi (michaelmu@ci.salinas.ca.us)  
City of Salinas  
200 Lincoln Ave.  
Salinas, CA 93901  
831-758-7256

*Counsel for Plaintiff City of Chicago:*

Rafey S. Balabanian (rbalabanian@edelson.com)  
Liley E. Hough (lhough@edelson.com)  
Edelson P.C.  
123 Townsend St., Suite 100  
San Francisco, CA 94107  
415-212-9300

Mark A. Flessner  
Rebecca Hirsch (rebecca.hirsch2@cityofchicago.org)  
Stephen J. Kane  
121 N. LaSalle St., Room 600  
Chicago, IL 60602  
312-744-8143

*Counsel for Plaintiff Gila River Indian Community:*

Donald R. Pongrace (dpongrace@akingump.com)  
Akin Gump Strauss Hauer & Feld LLP  
2001 K St. NW  
Washington, DC 20006  
202-887-4000

Dario J. Frommer (dfrommer@akingump.com)  
Akin Gump Strauss Hauer & Feld LLP  
1999 Avenue of the Stars, Suite 600  
Los Angeles, CA 90067  
213-254-1270

*Counsel for Plaintiff County of Los Angeles:*

Jacqueline P. Harvey  
David I. Holtzman (david.holtzman@hklaw.com)  
Daniel P. Nappes  
Holland & Knight LLP  
50 California St., 28th Floor  
San Francisco, CA 94111  
415-743-6970

**(2) Facts showing the existence and nature of the emergency**

Federal law requires that “[t]he tabulation of total population by States ... as required for the apportionment of Representatives in Congress among the several States shall be completed” and “reported by the Secretary to the President of the United States” by December 31, 2020. 13 U.S.C. § 141(b); *see id.* § 141(a). The Census Bureau has established a schedule designed to meet that deadline while achieving maximum accuracy. That schedule sets a target date of September 30 for concluding field operations so that it can begin the final phase of the census at that time. On September 24, 2020, the district court issued a preliminary injunction that “stayed” the “December 31, 2020 [statutory] deadline for reporting the tabulation of the total population to the President” and the Bureau’s “September 30, 2020 deadline for the completion of data collection,” and enjoined the government “from implementing these two deadlines.” Add.78. Immediate relief is therefore necessary.

**(3) When and how counsel notified**

Counsel were notified by email this morning shortly after 10am Pacific. Plaintiffs’ counsel stated that plaintiffs oppose this motion.

**(4) Submissions to the district court**

The government sought a stay of the preliminary injunction both in a filing on that motion before the district court, *see* Doc.196 at 11, and orally during the district court’s hearing on the preliminary injunction on September 22, *see* Add.155-56. After the district court did not rule on a stay pending appeal in its preliminary injunction

order, the government today filed a renewed motion for stay pending appeal out of abundance of caution, Doc.211, which the district court denied shortly thereafter, Doc.212.

*Counsel for Defendants-Appellants*

JEFFREY BOSSERT CLARK  
*Acting Assistant Attorney General*

SOPAN JOSHI  
*Senior Counsel to the  
Assistant Attorney General*

MARK B. STERN  
BRAD HINSHELWOOD  
*Attorneys, Appellate Staff  
Civil Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
202-514-7823*

## INTRODUCTION AND SUMMARY

The Secretary of Commerce, the Department of Commerce, the Bureau of the Census, and its Director respectfully request that this Court stay the district court’s preliminary injunction entered on September 24, 2020 and that it immediately issue an administrative stay to allow the government to complete the decennial census by December 31 as required by the Census Act.

Congress has required that “[t]he tabulation of total population by States ... as required for the apportionment of Representatives in Congress among the several States shall be completed” and “reported by the Secretary to the President of the United States” by December 31, 2020. 13 U.S.C. § 141(b); *see id.* § 141(a). In March 2020, the Census Bureau suspended field operations because of the COVID-19 pandemic, and it initially proposed that Congress adopt an extension of that statutory deadline. But when it became clear that Congress was unlikely to extend the deadline, the Bureau developed and began implementing a schedule, known as the “Replan Schedule,” that could meet the statutory deadline despite the earlier delays. The schedule sets September 30 as the target date on which the Bureau will conclude data-gathering operations in order to begin the final crucial phase of its operations in which it processes the vast array of data it has received—a process that requires analysis, corrections, and integration, culminating in the assignment of the entire population to over 11 million census “blocks” that form the basis for apportionment, redistricting, and the allocation of funds in a variety of programs.

The district court did not question the lawfulness of the deadline imposed by the Census Act, and it “agree[d] that the Census Act’s statutory deadlines bind” the Bureau. Add.68. The court nevertheless enjoined the Department and the Bureau from implementing the Schedule’s “September 30, 2020 deadline for the completion of data collection and the December 31, 2020 [statutory] deadline for reporting the tabulation of the total population to the President.” Add.78.

This unprecedented order rests on fundamental errors of law. Most notably, the court had no authority to compel the Census Bureau to violate a statutory deadline, and it compounded its error by invoking a statutory power “to postpone the effective date of *an agency action*,” 5 U.S.C. § 705 (emphasis added), as the ground for ordering the agency to violate a *congressionally* specified deadline. Add.78. By ordering the agency to violate a key provision of the Census Act, the court turned the Administrative Procedure Act on its head. Moreover, the Replan Schedule was unquestionably designed to achieve an accurate census while meeting the statutory deadline. In preventing the Bureau from following that schedule, the district court identified no standard for judging the adequacy of the Schedule or the resulting census count. Instead, it simply declared that the Bureau could do a better job if it were released from the time constraints in the Census Act, and that it was arbitrary and capricious to develop a schedule that complied with Congress’s express directive.

The injunction precludes the Census Bureau from exercising its expert judgment in determining how best to achieve an accurate census within the statutory

time frame. Most immediately, it requires the Bureau to continue field operations beyond September 30, thus precluding the Bureau from acting on its October 1 target date for the final vital phase of the census, or exercising its judgment as to whether and to what extent field operations might continue without jeopardizing accuracy or the ability to achieve compliance with the Census Act. That an immediate stay is needed from this Court on an emergency basis is in no small part a byproduct of the district court's repeated refusal to issue an appealable order. The court instead enjoined operations for 19 days under temporary restraining orders for the sole purpose of pursuing massive court-initiated discovery under the guise of compiling an administrative record regarding the Bureau's non-final set of scheduling waystations en route to the December 31 statutory deadline.

## **STATEMENT**

### **A. Background**

1. The Constitution requires that an “actual Enumeration shall be made” of the population every ten years “in such Manner as [Congress] shall by Law direct.” U.S. Const. art. I, § 2, cl. 3. In the exercise of that authority, Congress has established the timetable for census operations. The Census Act sets “the first day of April” as “the ‘decennial census date,’” 13 U.S.C. § 141(a), and prescribes that “[t]he tabulation of total population by States ... as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the



census date and reported by the Secretary to the President of the United States,” *id.* § 141(b).

After receiving the Secretary’s report, the President, under a different statutory provision, calculates “the number of Representatives to which each State would be entitled,” and transmits the resulting information to Congress within a week of the new session (here, January 10, 2021). 2 U.S.C. § 2a(a). Congress has also specified that “tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State” by March 31, 2021. 13 U.S.C. § 141(c); *see Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (describing sequence triggered by reporting of the census to the President).

2. The 2020 decennial census is an enormous and enormously complex operation. Particularly relevant here are the two final phases of the Census: the Non-Response Followup (NRFU) operation and the “post processing” operation. In NRFU the Bureau contacts non-responding addresses up to six times to secure a response. Enumerators also gather crucial information that may alter the Master Address File—the Bureau’s account of every household in the country—such as changes resulting from construction, demolition, changing use, and many other factors.

In post processing, the Bureau engages in a sequence of data-processing operations designed to create reliable and usable statistics. The first step is to confirm

or correct information in the Master Address File. The final Master Address File consists of over 11 million census “blocks” that form the backbone of the census, and which are aggregated into larger units for various purposes. Because this address information is central to the census, other data-processing operations cannot take place “until the entire universe” of addresses nationwide is determined, and post-processing operations “must generally be performed consecutively.” Add.97-98, ¶¶67, 68. Concluding field operations is thus an indispensable prerequisite for beginning post-processing operations.

3. The ongoing COVID-19 pandemic forced the Census Bureau to adapt quickly to new challenges, and, in mid-March, the Bureau initiated a four-week suspension of field operations to protect the health and safety of its employees and the public. Add.106, ¶78.

On April 13, the Bureau’s staff finalized a schedule to adjust field operations in light of the pandemic called the “COVID Schedule.” The COVID Schedule “assumed Congressional action” in the form of a 120-day extension of the statutory deadlines for providing appointment and redistricting data. Add.107, ¶80. Thus, in announcing the COVID Schedule, the Secretary of Commerce and the Director of the Census Bureau jointly “stated that they would seek statutory relief from Congress.” *Id.*; see Doc.37-3 at 2. On the assumption that Congress would delay the completion date, the COVID Schedule would have continued the self-response

period and field operations (including the NRFU) until October 31, instead of July 31 as originally planned. Add.106, ¶79.

By late July it became clear that the Department could not rely on an amendment to the governing statute, and on July 29 the Secretary directed the Bureau's professional staff to develop a plan to meet the existing statutory deadlines. Add.107, ¶81. On August 3, Bureau staff presented a revised schedule to the Secretary, known as the "Replan Schedule," which the Secretary approved and announced that day. *Id.* The Bureau explained that it was "announcing updates to our plan ... to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." Doc.37-1 at 1.

The Replan Schedule was designed to compress the remaining field operations and post processing into the five months remaining before the statutory deadline. Add.107-11, ¶¶82-89. The new schedule reduced the time for field operations by one month, concluding on September 30 instead of October 31. In doing so, the Replan Schedule takes advantage of efficiencies in the NRFU process (and the census design itself), such as software that maximizes enumerator effectiveness, as well as financial incentives to increase the number of enumerator hours worked "to get the same work hours as would have been done under the original timeframe." Add.109-10, ¶¶85-88. Thus, under the Replan Schedule, field operations are slated to conclude by

September 30, and data processing is slated to begin on October 1. Add.113, ¶100; Add.149-50, ¶¶22, 24.

## **B. Prior Proceedings**

1. Plaintiffs, a group of local governments, Tribal nations, nonprofit organizations, and individuals, assert that the Bureau's current schedule violates the Enumeration Clause of the Constitution and that it constitutes final agency action that is arbitrary and capricious under the APA.

The district court granted a temporary restraining order on September 5, barring the Bureau from "implementing" the Replan Schedule or "allowing to be implemented any actions as a result of the shortened timelines" in that Schedule, "including but not limited to winding down or altering any Census field operations." Add.121-22.

During the period covered by the TRO, the district court engaged in quasi-adversarial discovery to create what it described as an administrative record for the Replan Schedule. The government repeatedly explained that the Replan Schedule is not "agency action" within the meaning of the APA, and that there is therefore no administrative record associated with the Replan Schedule. *See, e.g.*, Add.15-17, 45. The government urged that if the court nevertheless believed that it was reviewing final agency action and that the action could not be sustained on the basis of the declaration submitted by the government, it should "find against the Defendants on

the likelihood of success on the merits prong” and enter a preliminary injunction to enable sufficient time for orderly appellate review. Doc.88, at 3; Add.45-46.

The district court nevertheless delayed entry of an injunction and directed the expedited production of materials that would, in its view, constitute part of an administrative record. Doc.96, at 21-22. The district court ordered the government to file privilege declarations for all documents (before plaintiffs were required to challenge any specific privilege assertions) and proceeded to conduct *in camera* review through magistrate judges of all documents the government identified as privileged (notwithstanding the near-total absence of specific privilege objections by plaintiffs). Doc.153, at 1; Add.20 & n.5. In conducting this irregular process, the court concluded, among other things, that all documents postdating the Secretary’s July 29 direction to prepare the Replan Schedule were post-decisional and thus not protected by the deliberative process privilege—in other words, that all deliberations regarding the formulation of the schedule at issue were post-decisional. Doc.179, at 6. On September 17, the court extended the TRO to more fully develop its conception of an administrative record, declaring that “Defendants must either produce or add to their privilege log about 1,800 documents.” Add.136. In extending the TRO, the court again rejected the government’s request (Doc.109, at 3) that, given the court’s view of the case, it should instead enter a preliminary injunction to immediately allow for an appeal.

2. On September 24, the district court issued a preliminary injunction that “stayed pursuant to 5 U.S.C. § 705” the “September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President” and enjoined the government “from implementing these two deadlines.” Add.78.

After finding that there was final agency action that was reviewable, the court found that the Bureau had acted arbitrarily and capriciously in failing to consider the possibility of violating the statutory deadline in the Census Act. The court emphasized that Bureau officials had stated (before developing or considering a revised plan, and while seeking an extension from Congress) “that the Bureau could not meet the December 31, 2020 statutory deadline,” Add.59; *see* Add.63, and had more recently expressed doubt about meeting the deadline because of natural disasters and other issues, Add.61. The court declared that the agency had not adequately “explain[ed] why Defendants are ‘required by law’ to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy.” Add.70.

## **ARGUMENT**

This Court should stay the preliminary injunction pending appeal, and enter an immediate administrative stay while it considers this motion. In determining whether to grant a stay, this Court considers “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially

injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The district court has required the Department of Commerce and the Census Bureau to defy the statutory mandate governing the census. The order is premised on grave legal error, and, unless stayed, will result in irreparable injury to the government and the public interest.

#### **A. The District Court’s Order Is Premised On Clear Legal Error**

1. a. The Enumeration Clause of the Constitution provides that the “actual Enumeration” of the population shall be conducted “in such Manner as [Congress] shall by Law direct.” U.S. Const. art. I, § 2, cl. 3. As the Supreme Court has explained, this textual assignment grants Congress “virtually unlimited discretion” to “conduct[] the decennial” census, which Congress in turn largely has delegated to the Executive Branch. *Wisconsin*, 517 U.S. at 19. One aspect that Congress did not delegate, however, is the date for completion of apportionment counts. 13 U.S.C. § 141(b). That deadline is set at December 31, 2020.

The district court did not conclude that application of the statutory deadline is unconstitutional. On the contrary, it specifically declined to reach plaintiffs’ argument on that score. Add.44. Accordingly, the court declared that it “agrees that the Census Act’s statutory deadlines bind Defendants.” Add.68.

That should have been dispositive. Agencies “do not have the authority to ignore unambiguous deadlines set by Congress,” *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992), and the Census Act is no exception: absolutely nothing suggests that the Department or the Bureau have any authority to disregard or unilaterally extend the statutory deadlines. When the Bureau developed the COVID Schedule that prescribed field operations to continue until October 31, 2020, it was proceeding on the assumption that Congress would extend the statutory deadline by 120 days. Congress, however, did not enact an amendment to the statute. As a result, the Bureau had no practical choice but to develop a schedule that would allow it to meet the statutory deadline. That is what it did with the Replan Schedule. The district court’s order “stay[ing]” the statutory deadline under 5 U.S.C. § 705 is not only nonsensical—that provision of the APA allows staying only “agency action,” not a congressionally enacted statute—but is premised on the remarkable belief that a court can, under the aegis of arbitrary-and-capricious review, compel an agency to act “not in accordance with law,” 5 U.S.C. § 706(2)(A).

**b.** The district court did not directly grapple with this fundamental problem. Instead, it purported to identify five failings in the agency’s reasoning that rendered compliance with the statutory deadline arbitrary and capricious. But all of those reasons ultimately rest on the claim that the agency was insufficiently attentive to the possibility of *disregarding* Congress’s plain instructions. *See, e.g.*, Add.47 (in adopting the Replan Schedule to “meet[] the Census Act’s statutory deadline,” the agency



“failed to consider how Defendants would fulfill their statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline”); Add.64 (agency acted arbitrarily and capriciously by “sacrific[ing] adequate accuracy for an uncertain likelihood of meeting one statutory deadline”); Add.70 (concluding that the agency’s announcement of the Replan Schedule “never explains why Defendants are ‘required by law’ to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy”).

The district court sought support for this novel holding in a misreading of disparate cases holding either that an agency does not necessarily lose authority to implement a statute when it exceeds statutory deadlines, or that attempts to compel agency action as unlawfully withheld do not succeed simply because an agency has not acted by the date prescribed by statute. Those cases are quite unlike “staying” a statutory deadline or enjoining an agency from “implementing” such a deadline. And in all events, the court in each of those cases based its holding on its interpretation of the statute at issue.

In *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), for example, the Supreme Court analyzed the governing statute to conclude that it did not deprive the agency of authority to assign coal retirees to coal companies for purposes of funding retiree benefits under that Act. The Court noted, among other things, that “[s]tructural clues support the Commissioner in the Coal Act’s other instances of combining the word ‘shall’ with a specific date that could not possibly be read to prohibit action outside

the statutory period.” *Id.* at 161. Similarly, in *Linemaster Switch Corp. v. U.S. E.P.A.*, 938 F.2d 1299 (D.C. Cir. 1991), the D.C. Circuit concluded that the applicable statute authorized EPA to add hazard waste sites after a statutory deadline, explaining that “[o]ur own review of the legislative history surrounding [the statute] suggests that Congress would not have wanted to revoke EPA’s authority to list sites.” *Id.* at 133. In *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F.3d 110, 112 (8th Cir. 1997), the Eighth Circuit held that the statutory deadline did not by its terms apply to the action, and that the agency “did not violate” the statute. And in *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196, 1198 (D.C. Cir. 1977), the court rejected an attempt to compel agency action as unlawfully withheld, explaining that “[t]he sole issue involved is whether Congress meant for the timetable in [the statute] to be mandatory.” In contrast to the decisions cited by the district court, the deadline here concerns not regulatory programs but the report to the President, who then in turn provides a report to Congress itself. *See* 2 U.S.C. 2a(a). That Congress might choose to retroactively extend census deadlines, as it did in the early 1800s, Add.67, only underscores the absence of the Executive’s authority to disregard those deadlines while they remain in place.

The district court’s reliance on *Regents of the University of California v. Department of Homeland Security*, 140 S. Ct. 1891, 1911 (2020), for the proposition that “Defendants ‘did not appear to appreciate the full scope of [their] discretion,’” Add.68, was misplaced. *Regents* concerned the wind down of an enforcement policy adopted by the

agency *as a matter of discretion*. The Supreme Court did not suggest that agencies have similar discretion to disregard express Congressional commands.

c. The district court committed a related error in repeatedly declaring that the Bureau’s “statutory and constitutional duties to accomplish an accurate count” require the Bureau to proceed as if the statutory deadline is precatory or merely aspirational. Add.47; *see* Add.47-48, 66, 68. The court identified no judicially manageable or enforceable standard of census accuracy. The Supreme Court has repeatedly made clear that no census has been fully accurate. *See Department of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 322 (1999) (“[T]he Bureau has always failed to reach—and has thus failed to count—a portion of the population.”); *accord Wisconsin*, 517 U.S. at 6-8; *Karcher v. Daggett*, 462 U.S. 725, 735-38 (1983). Despite this fact, the Court has never suggested that the Constitution or the Census Act provides a standard for evaluating a particular census plan. Neither source “contain[s] guidelines for an accurate decennial census” that might suffice for a “judicially administrable standard” of accuracy. *Tucker v. U.S. Dep’t of Commerce*, 958 F.2d 1411, 1415, 1417 (7th Cir. 1992); *cf. Wisconsin*, 517 U.S. at 17-18 (rejecting conclusion that past Supreme Court decisions required “a census that was as accurate as possible” and explaining that “[t]he Constitution itself provides no real instruction” on what metrics to use to measure “accuracy” in the census). In contrast, the requirement to present the complete census results to the President by December 31 is explicit and unambiguous.

The court mistakenly suggested that the Census Bureau itself had determined that complying with the statutory deadline would violate a legal standard. The court recounted in detail expressions of doubt by Bureau personnel about whether the Bureau could meet the statutory deadline, as well as internal discussions expressing worries about a reduction in accuracy or data quality as a result of a compressed timeframe. On this basis, the court declared that “the Bureau concluded internally that trying to get the count done by the December 31, 2020 statutory deadline would be unacceptable to the Bureau’s statutory and constitutional interests in accuracy.” Add.57; *see* Add.48-61.

These concerns did not represent a Bureau conclusion that a shortened timeframe would result in a violation of constitutional or statutory standards, and the cited statements relevant to plaintiffs’ claims preceded the formulation and implementation of the Replan Schedule. The Bureau emphasized that it designed the Replan Schedule to “achieve a complete and accurate census and report apportionment counts by the statutory deadline,” Add.111, ¶91, by leveraging the “more efficient and accurate data collection operation” enabled by “the design of the 2020 Census,” and taking advantage of programs to encourage enumerators to work “the same work hours as would have been done under the original time frame,” Add.109, ¶¶86, 88. There is no indication that the Bureau believes that the Replan Schedule will result in unacceptable inaccuracies—provided that the Bureau is, in fact, allowed to operate under that Schedule, and adjust its operations to conditions on the

ground, without court-imposed delays, judicial micromanagement of the Bureau's operations, and the distractions attendant to improperly ordered discovery. *See* Add.147-48, ¶14.

2. Even apart from the fatal legal errors underlying its analysis, the court's order constitutes an extraordinary intrusion into the operation of a complex and technical agency program developed and implemented over years, involving enormous resources and personnel. A court cannot properly entertain the sort of "broad programmatic attack on an agency's operations" that is "preclude[d]" by the APA. *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Plaintiffs must instead identify "circumscribed" and "discrete" agency actions that they challenge, *id.* at 62; requests for improvement or changes to an agency program must be made in "the halls of Congress, where programmatic improvements are normally made," rather than by "court decree," *id.* at 64 (quotation omitted). As the Fourth Circuit observed, challenging "design choices" in the 2020 census "inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations," which "is precisely the result that the 'discreteness' requirement of the APA is designed to avoid." *NAACP v. Bureau of the Census*, 945 F.3d 183, 191 (4th Cir. 2019).

The Replan Schedule, like the COVID Schedule, is a collection of individual judgments by the Census Bureau, all subject to constant revision based on new data, time and resource constraints, and changes in conditions on the ground. New obstacles may pose delays, but in other cases new efficiencies in the design and

execution of the census may advance a timetable. Indeed, as of September 4, before the court's temporary restraining order, the Bureau had already completed operations in approximately 50 area census offices where counting was complete, and those closeouts enabled the Bureau to reallocate "enumerator resources from areas that are complete to areas that require more work." Add.112, ¶¶95, 96. And by the end of the day of September 24, it had enumerated 97% of all households nationwide. *See* <https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-25.pdf>.

The district court's orders in this case track the breadth of plaintiffs' claims and the programmatic nature of the relief. After issuing and extending a TRO that barred the Bureau from implementing various components of the Replan Schedule, the court assumed supervisory authority over the census, ordering the Bureau to respond to employment complaints from individual enumerators, Doc.127 at 1, 2; Doc.127-1, ¶¶12-16, 20, 21; to address complaints submitted by individual non-party enumerators about alleged software glitches that predated the temporary restraining order, Doc.127 at 1, 2; Doc.127-1, ¶¶17, 19, 21; and to provide the court with information about how the Bureau is responding to wildfires in Western states, Doc.127 at 3; Doc.127-1 ¶22. The case now illustrates how "enter[ing] general orders 'compelling compliance with broad statutory mandates' ... result[s] in 'injecting the judge into day-to-day agency management' and raises the 'prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives.'" *Center for*

*Biological Diversity v. Veneman*, 394 F.3d 1108, 1112 (9th Cir. 2005) (quoting *Southern Utah*, 542 U.S. at 66-67).

In insisting that it was not undertaking the management of the census, the court declared that, in contrast to *NAACP*, plaintiffs here claim that the Bureau “fail[ed] to consider important aspects of the problem” or give a “reasoned explanation” for the Replan Schedule. Add.30. But such assertions are common to every APA challenge, and they provide no basis for the court’s injunction here. *See NAACP*, 945 F.3d at 189 (rejecting claims presented “as a request to ‘set aside agency action’ under Section 706(2)’”). And although the district court insisted that plaintiffs’ claims did not require the court “to enforce free-floating standards of ‘sufficiency,’” Add.30, that is precisely what the injunction here does: it forbids the Bureau from following the Replan Schedule on the ground that the census will not be sufficiently accurate, without ever specifying what measure of accuracy is required or what level of accuracy the court believed the Replan Schedule would be able to achieve. An order that purports to direct the timing of agency operations and enjoins the Bureau “from implementing” both the statutory deadline and the predicate internal deadlines, Add.78, cannot be regarded as review of *discrete* agency action or as an order that compels performance with a discrete specific duty. *Southern Utah*, 542 U.S. at 64.

The district court was on no firmer ground in asserting that it was undertaking a review of “circumscribed, discrete agency action” on the basis that the Replan Schedule was “treated” that way by the Bureau internally. Add.31. The district court

apparently derived this conclusion from the fact that the Bureau “named [the Schedule] the ‘Replan,’” presented it to the Secretary “in a single [Powerpoint] slide deck,” announced it in one press release, and that the complex of decisions and deadlines that it reflects were “a codified term for the agency action directed and adopted by the Secretary.” Add.31, 32. Being able to summarize the many changes in the multifarious operations entailed in shifting the course of the census in a set of Powerpoint slides and to group those changes under a general heading cannot elide the fact that they encompass a vast number of interlocking parts formulated to complete the most accurate census possible in the timeframe established by Congress. Nor does it render those myriad changes final or discrete agency action.

**B. A Stay Is Necessary to Halt an Injunction That Requires the Census Bureau to Defy a Congressional Deadline and Precludes a Census That Conforms to the Governing Statute.**

An immediate administrative stay is necessary to prevent irreparable harm to the conduct of the census as mandated by statute, an interest shared by the public as well as by the Executive Branch and Congress. The Bureau cannot commence the final phase of the census until it concludes field operations, and the Replan Schedule establishes October 1 as the target date for beginning those post-processing operations. The period allotted for these crucial operations has already been significantly streamlined; the operations will require the concerted devotion of personnel and resources seven days a week throughout that time. Add.111, ¶89. To achieve an accurate census while meeting the statutory deadline, the Replan Schedule



shortened the schedule for post-processing operations from five to three months. In so doing, the Bureau has already “compressed post enumeration processes to the extent [it] believe[s] feasible,” Add.150, ¶24, and it must remain free to exercise its judgment to determine the point at which field operations must give way to post processing, without facing a Damoclean threat of contempt.

The district court did not question that its order would jeopardize the Bureau’s ability to properly execute the post-processing phase within the statutory time frame, and it did not feel obliged to reckon with the consequences of its order in view of its belief that it could properly enjoin the Bureau from “implementing” the statutory deadline. Add.78. That premise, as discussed, is seriously mistaken, and every day in which the Bureau is precluded from exercising its judgment frustrates its ability to most efficiently allocate its resources to achieve an accurate enumeration while meeting the statutory deadline. Add.143-50, ¶¶5-15, 19-24.

The district court nevertheless dismissed the injury resulting from its injunction as simply causing the defendants to “miss[] a statutory deadline they had expected to miss anyway.” Add.75. That a court would so cavalierly characterize an injunction that would compel an agency to operate in disregard of its statutory mandate exemplifies the extent to which the order departs from all sound principles of administrative law, equitable restraint, and interbranch comity.

That immediate relief is needed from this Court on an emergency basis is likewise an unfortunate result of the district court’s refusal to accept the government’s

express statements that the court should enter a preliminary injunction on the basis of the record before it, rather than needlessly pursuing post-hoc development of the court's view of an "administrative record." Given the delays caused by that detour, swift relief is critical to the Bureau's completion of the census within the framework established by Congress.

### CONCLUSION

The Court should (1) stay the preliminary injunction pending appeal, and (2) enter an immediate administrative stay while it considers this motion.

Respectfully submitted,

JEFFREY BOSSERT CLARK  
*Acting Assistant Attorney General*

SOPAN JOSHI  
*Senior Counsel to the Assistant Attorney General*

MARK B. STERN

/s/ Brad Hinschelwood  
BRAD HINSHELWOOD  
*Attorneys, Appellate Staff*  
*Civil Division*  
*U.S. Department of Justice*  
*950 Pennsylvania Ave., NW*  
*Washington, DC 20530*  
*202-514-7823*

SEPTEMBER 2020

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,071 words according to the count of Microsoft Word.

/s/ Brad Hinschelwood

BRAD HINSHELWOOD

### **CERTIFICATE OF SERVICE**

I hereby certify that, on September 25, 2020, I electronically filed the foregoing docketing statement with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Brad Hinselwood  
BRAD HINSELWOOD

JEFFREY BOSSERT CLARK  
Acting Assistant Attorney General  
ALEXANDER K. HAAS  
Branch Director  
DIANE KELLEHER  
BRAD P. ROSENBERG  
Assistant Branch Directors  
M. ANDREW ZEE  
ALEXANDER V. SVERDLOV  
  
Trial Attorneys  
U.S. Department of Justice  
Civil Division - Federal Programs Branch  
1100 L Street, NW  
Washington, D.C. 20005  
Telephone: (202) 305-0550

*Attorneys for Defendants*

[ SEQ CHAPTER \h \r 1][ADVANCE \y 72]**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

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

Defendants.

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

**DECLARATION OF  
JAMES T. CHRISTY**

1 I, James T. Christy, make the following Declaration pursuant to 28 U.S.C. § 1746, and state  
2 that under penalty of perjury the following is true and correct to the best of my knowledge and  
3 belief:

- 4 1. This is my fifth declaration in this lawsuit. I am making this declaration in response to  
5 four separate orders. *See* ECF 220, 221, 222, and 229.

6 **ECF 220 Investigation**

- 7 2. In ECF 220, the complaint alleges non-compliance with the Court's order due to  
8 certain identified cases being designated as completed using a "6.040 Max Attempts"  
9 code after only one Non-Response Follow-Up attempt and other cases after a  
10 substantial number of attempts.
- 11 3. I have investigated this issue and confirmed that the identified cases were completed  
12 properly and consistent with the design for the 2020 Census.
- 13 4. These cases were completed consistent with our operational plan because the Census  
14 Bureau has long planned, prior to development of the Replan, to use high-quality  
15 administrative data after one (unsuccessful) visit. This is described in the 2020 Census  
16 Operational Plan – Version 4.0, Section 3.3 "Utilizing Administrative Records and  
17 Third-Party Data" (pages 21 and 22), which states "...and that high-quality  
18 administrative data could be used for the enumeration. These units will be visited one  
19 time in NRFU and, if not enumerated during that visit, will be mailed a postcard  
20 encouraging self-response and removed from the NRFU workload for all subsequent  
21 activity."
- 22 5. I verified that administrative records were used in these specific instances by checking  
23 the data for the listed Area Census Offices, which aligned the administrative record  
24 checks with the number of cases reported as eligible for being resolved with only one  
25 attempt.
- 26 6. For the cases which received numerous attempts – the complaint references one with 12  
27 attempt days and 26 contact attempts – this also is consistent with our longstanding  
28 plan for completing enumeration. During the closeout phase of the operation, cases are

1 reopened for additional attempts in an effort to garner information for the household in  
2 the time allotted for the operation. The referenced case was in a CFS Area in the  
3 closeout phase. This methodology is also outlined in the 2020 NRFU Detailed  
4 Operational Plan, Section 2.2.2.3 – NRFU Data Collection, page 7, which states  
5 “Production NRFU cases are subject to reopening for additional attempts during the  
6 Closeout Phase in order to collect sufficient data to support apportionment.”

- 7 7. In the documents attached to the filing submitted to this Court, I recognized enumerator  
8 notes that the Census Bureau does not release or publish and must keep confidential by  
9 law. All information collected by or on behalf of a respondent is confidential under 13  
10 U.S.C. § 9. The Census Bureau may not use any such information for a nonstatistical  
11 purpose or make any publication whereby the collected information could be identified.  
12 Only individuals sworn to uphold these confidentiality provisions may examine the  
13 individual reports or any identifiable data. Enumerator notes are information collected  
14 by or on behalf of a respondent under the provisions of Title 13, United States Code,  
15 and handled by the Census Bureau as individual reports. Therefore, enumerator notes  
16 are made confidential by 13 U.S.C. § 9. Additionally, the enumerator notes also  
17 contain the Census tract and block numbers, as well as descriptive information about  
18 the household, (such as the presence of gates that obscure entrances), and this  
19 information is also protected from release under the provisions of 13 U.S.C. § 9.  
20 These notes are not appropriate for public release, and the Department, through  
21 counsel, intends to take appropriate steps to protect this information in accordance with  
22 these statutory protections.

23 **ECF 221 Investigation**

- 24 8. In the second order, ECF 221, the complainant alleges two things. First, it says that  
25 “[d]espite your order to continue, Pasadena office continues to push towards closure”  
26 and references an email dated September 28 at 11:18am Pacific from an Area Census  
27 Office manager to unknown recipients.  
28

1 9. On September 28, 2020, the Pasadena, California Area Census Office had completed  
2 99.67% of its production work for the Non Response Follow Up (“NRFU”) operation.  
3 All 46 Census Field Supervisor Areas were in the Closeout phase. As of 7:23 am  
4 Eastern on September 28, 2020, there were 959 addresses remaining in the workload  
5 assigned to the Pasadena office.

6 10. Completing this remaining work with 93 enumerators is consistent with our closeout  
7 strategy, which was developed prior to the implementation of the Replan. This is  
8 referenced in enumerator training and in the D-1220A, Nonresponse Followup Census  
9 Field Manager Job Aid, pages 100-101 which provides, “As the CFM, you determine  
10 which employees you will keep to finish fieldwork. Since you have worked hand in  
11 hand with your CFSs, you will know who your strongest supervisors are and who you  
12 will want to keep until the end of the operation. When it is time to start terminating  
13 Enumerators, you are encouraged to consult with your CFSs to identify your high  
14 performing Enumerators.”

15 11. The second concern that the ECF 221 email references that “there are also 16-30,000  
16 cases that were ‘closed’ administratively and in error per multiple Census Field  
17 Managers.”

18 12. I reviewed the case status information for work resolved by the Pasadena Area Census  
19 Office, and I noted no cases were “closed” inappropriately. It is my belief this  
20 complainant may be referencing the same issue previously addressed in Paragraph 4 of  
21 this Declaration. That is, the cited cases involve addresses for which high-quality  
22 administrative data exists, and one attempt has already been made.

### 23 **ECF 222 Investigation**

24 13. The third order, ECF 222, is a 4-page note from a Census Field Supervisor working on  
25 the Group Quarters operation. In this complaint, the employee alleges he was not  
26 notified of the Court’s orders related to the 2020 Census. He also notes his release date  
27 of September 28 was in advance of September 30.  
28



- 1 14. The implementation of the Court's Temporary Restraining Order and the Preliminary  
2 Injunction involved actions by Headquarters and Regional Management staff.
- 3 15. As referenced in a previous declaration, Headquarters and Regional Management staff  
4 were notified on several occasions of these orders.
- 5 16. I further confirmed that regional management in the Los Angeles Region, where this  
6 employee works, were properly notified about the issuance of the Court's TRO and PI  
7 Orders. The Regional Director sent emails to the Deputy Regional Directors, the  
8 Assistant Regional Census Managers, the Area Managers, and the Area Census Office  
9 Managers in the region which show the instructions were forwarded.
- 10 17. As for the employee's release prior to the September 30 date, the Group Quarters  
11 operations were completed on the planned pre-Replan schedule for Group Quarters.  
12 The final operation, the Service-Based Enumeration, finished on September 24, 2020.

13 **ECF 229 Investigation**

- 14 18. In the fourth order, ECF 229, the complainant alleges "[d]espite your order to continue,  
15 LARCC and local ACOs continue to push toward closure" and forwards a September  
16 28 email from a supervisor which states "LARCC is pushing to get all CFM Zones up  
17 to 99.5% completed by this Wednesday, 9/30."
- 18 19. The Regional Director informed me that no written or verbal instructions were issued to  
19 Area Census Office staff by her or her managers to complete the work by September  
20 30. She did affirm the direction given to pursue at least 99.5% completion in order to  
21 increase data quality levels.
- 22 20. The staff on the email distribution list work in the El Cajon Area Census Office in  
23 California. As of September 28, the office was 98.23% complete with the production  
24 NRFU workload, with 39 of the 44 Census Field Supervisor Areas in the Closeout  
25 phase.
- 26

27 The Census Bureau has notified the Department of Commerce Office of Inspector General that  
28 the Bureau has instructed agency personnel to forward any further complaints about compliance

1 with the Court's Order to the OIG. In addition, the Census Bureau intends to forward any  
2 unsolicited communications to the Court alleging non-compliance to the attention of the OIG. I  
3 believe that this process may help alleviate some of the concerns the Court has identified  
4 regarding unsolicited communications from non-parties.

5  
6 I have read the foregoing and it is all true and correct.

7 DATED this \_\_\_\_ day of September, 2020  
8  
9

10 \_\_\_\_\_  
11 James T. Christy

12 Assistant Director for Field Operations

13 United States Bureau of the Census  
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UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

MEMORANDUM FOR: RADM Michael D. Weahkee, MBA, MHSA  
Assistant Surgeon General, U.S. Public Health Service  
Principal Deputy Director  
Indian Health Service

From: Ron S. Jarmin  
Deputy Director

Subject: Request for Authorized Use as Amendment #1 to February 10, 2020, Agreement No. 2064-FY20-NFE-0339.000, "Memorandum of Understanding Through Which the U.S. Census Bureau is Acquiring IHS Patient Registration Data from the Indian Health Service (IHS)"

Thank you for your continuing support to our data acquisition efforts pursuant to the February 10, 2020, Agreement No. 2064-FY20-NFE-0339.000, "Memorandum of Understanding Through Which the U.S. Census Bureau is Acquiring IHS Patient Registration Data from the Indian Health Service (IHS)" to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Indian Health Service data acquired under Agreement No2064-FY20-NFE-0339.000 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

IHS's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from IHS component databases. Both deliveries have been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [[HYPERLINK "mailto:michael.a.berning@census.gov"](mailto:michael.a.berning@census.gov)].

If IHS is amenable to authorizing the use of IHS data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence. This will constitute Amendment #1 to the Agreement.

## APPROVALS

On behalf of the Census Bureau, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

Ron S. Jarmin  
Deputy Director  
U.S. Census Bureau

(Date)

On behalf of the Indian Health Service, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

RADM Michael D. Weahkee, MBA, MHSA  
Assistant Surgeon General, U.S. Public Health Service  
Principal Deputy Director  
Indian Health Service

(Date)

Attachment:

## **Attachment – Census Bureau Project Description**

### **Census Bureau Project to Support the July 21, 2020 *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census***

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, “Collecting Information about Citizenship Status in Connection with the Decennial Census”. In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary’s transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of Interior), and Law Enforcement Management Information System (Department of Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal or unknown. The planned output of this project will be state-level tabulations.

- 1 14. The implementation of the Court's Temporary Restraining Order and the Preliminary  
2 Injunction involved actions by Headquarters and Regional Management staff.
- 3 15. As referenced in a previous declaration, Headquarters and Regional Management staff  
4 were notified on several occasions of these orders.
- 5 16. I further confirmed that regional management in the Los Angeles Region, where this  
6 employee works, were properly notified about the issuance of the Court's TRO and PI  
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16 28 email from a supervisor which states "LARCC is pushing to get all CFM Zones up  
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23 California. As of September 28, the office was 98.23% complete with the production  
24 NRFU workload, with 39 of the 44 Census Field Supervisor Areas in the Closeout  
25 phase.
- 26 20-21. The Census Bureau has notified the Department of Commerce Office of Inspector  
27 General that the Bureau has instructed agency personnel to forward any further  
28 complaints about compliance with the Court's Order to the OIG. In addition, the

1 Census Bureau intends to forward any unsolicited communications to the Court  
2 alleging non-compliance to the attention of the OIG. I believe that this process may  
3 help alleviate some of the concerns the Court has identified regarding unsolicited  
4 communications from non-parties.

5  
6 ~~The Census Bureau has notified the Department of Commerce Office of Inspector General that~~  
7 ~~the Bureau has instructed agency personnel to forward any further complaints about compliance~~  
8 ~~with the Court's Order to the OIG. In addition, the Census Bureau intends to forward any~~  
9 ~~unsolicited communications to the Court alleging non-compliance to the attention of the OIG. I~~  
10 ~~believe that this process may help alleviate some of the concerns the Court has identified~~  
11 ~~regarding unsolicited communications from non-parties.~~

12  
13 I have read the foregoing and it is all true and correct.

14 DATED this \_\_\_\_ day of September, 2020

15  
16 \_\_\_\_\_  
17 James T. Christy  
18 Assistant Director for Field Operations  
19 United States Bureau of the Census  
20  
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28

---

**From:** Melissa L Creech (CENSUS/PCO FED) [Melissa.L.Creech@census.gov]  
**Sent:** 9/1/2020 5:19:28 PM  
**To:** Cannon, Michael (Federal) [MCannon@doc.gov]; Letitia W McKoy (CENSUS/PCO FED) [Letitia.W.McKoy@census.gov]  
**Subject:** Re: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

(b) (5)



Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238

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---

**From:** Cannon, Michael (Federal) <MCannon@doc.gov>  
**Sent:** Tuesday, September 1, 2020 1:18 PM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>; Letitia W McKoy (CENSUS/PCO FED) <Letitia.W.McKoy@census.gov>  
**Subject:** RE: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

(b) (5)


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](mailto:mcannon@doc.gov)



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**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>

**Sent:** Tuesday, September 1, 2020 12:29 PM

**To:** Cannon, Michael (Federal) <MCannon@doc.gov>; McKoy, Letitia W <letitia.w.mckoy@census.gov>

**Subject:** Re: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

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[REDACTED]  
[REDACTED]

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238

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**From:** Cannon, Michael (Federal) <MCannon@doc.gov>

**Sent:** Tuesday, September 1, 2020 11:30 AM

**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>; Letitia W McKoy (CENSUS/PCO FED) <Letitia.W.McKoy@census.gov>

**Cc:** Meredith, Ethan (Federal) <EMeredith@doc.gov>

**Subject:** RE: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

CUI//PRIVILEGE//FED ONLY

(b) (5)

Thanks!

Mike

Michael A. Cannon  
Chief Counsel for Economic Affairs  
Office of the General Counsel  
U.S. Department of Commerce  
Telephone: (202) 482-5395  
Cell: (b) (6)  
Email: [mcannon@doc.gov](mailto:mcannon@doc.gov)

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**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>

**Sent:** Tuesday, September 1, 2020 9:09 AM

**To:** Cannon, Michael (Federal) <MCannon@doc.gov>

**Cc:** McKoy, Letitia W <letitia.w.mckoy@census.gov>; Meredith, Ethan (Federal) <EMeredith@doc.gov>

**Subject:** Re: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

(b)  
(5)

Thanks, Melissa

Melissa L. Creech  
Deputy Chief Counsel  
Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
Telephone (301) 763-9844  
Facsimile (301) 763-6238

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**From:** Cannon, Michael (Federal) <MCannon@doc.gov>  
**Sent:** Tuesday, September 1, 2020 8:53 AM  
**To:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Letitia W McKoy (CENSUS/PCO FED) <Letitia.W.McKoy@census.gov>; Meredith, Ethan (Federal) <EMeredith@doc.gov>  
**Subject:** RE: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

(b) (5)

Thanks.

Mike

Michael A. Cannon  
Chief Counsel for Economic Affairs  
Office of the General Counsel  
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Telephone: (202) 482-5395  
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Email: [mcannon@doc.gov](mailto:mcannon@doc.gov)

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**From:** Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Sent:** Tuesday, September 1, 2020 8:19 AM  
**To:** Cannon, Michael (Federal) <MCannon@doc.gov>  
**Cc:** McKoy, Letitia W <letitia.w.mckoy@census.gov>  
**Subject:** Re: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

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[REDACTED]

(b) (5)



Thanks, Melissa

Melissa L. Creech  
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Office of the Chief Counsel for Economic Affairs  
U.S. Department of Commerce  
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---

**From:** Melissa L Creech (CENSUS/PCO FED) <[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)>  
**Sent:** Tuesday, September 1, 2020 7:13 AM  
**To:** Cannon, Michael (Federal) <[MCannon@doc.gov](mailto:MCannon@doc.gov)>  
**Cc:** Letitia W McKoy (CENSUS/PCO FED) <[Letitia.W.McKoy@census.gov](mailto:Letitia.W.McKoy@census.gov)>  
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(b) (5)



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---

**From:** Meredith, Ethan (Federal) <EMeredith@doc.gov>  
**Sent:** Monday, August 31, 2020 8:17 PM  
**To:** Cannon, Michael (Federal) <MCannon@doc.gov>; Melissa L Creech (CENSUS/PCO FED) <Melissa.L.Creech@census.gov>  
**Cc:** Letitia W McKoy (CENSUS/PCO FED) <Letitia.W.McKoy@census.gov>  
**Subject:** RE: Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Cannon, Michael (Federal) <MCannon@doc.gov>  
**Sent:** Monday, August 31, 2020 8:12 PM  
**To:** Creech, Melissa L <melissa.l.creech@census.gov>  
**Cc:** McKoy, Letitia W <letitia.w.mckoy@census.gov>; Meredith, Ethan (Federal) <EMeredith@doc.gov>  
**Subject:** Review of Census MOUs - DEADLINE 10:45 AM Tuesday Morning!  
**Importance:** High

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(b) (5)



Thanks!

Mike

Michael A. Cannon  
Chief Counsel for Economic Affairs  
Office of the General Counsel  
U.S. Department of Commerce  
Telephone: (202) 482-5395  
Cell: (202) 322-2476  
Email: [mcannon@doc.gov](mailto:mcannon@doc.gov)

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UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

MEMORANDUM FOR: Carol O'Connell  
Acting Assistant Secretary  
Bureau of Population, Refugees, and Migration  
U.S. Department of State

From: Ron S. Jarmin  
Deputy Director and Chief Operating Officer  
Deputy Director

Subject: Request for Authorized Use as Amendment #1 to January 7, 2020, Agreement No. 2064-FY20-NFE-0333.000, "Memorandum of Understanding Through Which the U.S. Census Bureau Acquires Certain Refugee Data from the Department of State Bureau of Population, Refugees, and Migration (PRM)"

Thank you for your continuing support to our data acquisition efforts pursuant to the January 7, 2020, Agreement No. 2064-FY20-NFE-0333.000, "Memorandum of Understanding Through Which the U.S. Census Bureau Acquires Certain Refugee Data from the Department of State Bureau of Population, Refugees, and Migration (PRM)" to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Department of State data acquired under Agreement No. 2064-FY20-NFE-0333.000 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

The Department of State's support to the citizenship project consisted of extracting and transferring to the Census Bureau two deliveries of data drawn from Department of State component databases. Both deliveries have been received, and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [michael.a.berning@census.gov](mailto:michael.a.berning@census.gov).



If Department of State is amenable to authorizing the use of Department of State data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence. This will constitute Amendment #1 to the Agreement.

#### APPROVALS

On behalf of the Census Bureau, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

**RON JARMIN** Digitally signed by RON JARMIN  
Date: 2020.08.20 11:55:16  
-04'00'

---

Ron S. Jarmin  
Deputy Director and Chief Operating Officer  
U.S. Census Bureau

(Date)

On behalf of the Department of State, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

Carol O'Connell  
Acting Assistant Secretary  
Bureau of Population, Refugees, and Migration  
U.S. Department of State

(Date)

Attachment:

## Attachment – Census Bureau Project Description

### **Census Bureau Project to Support the July 21, 2020 *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census***

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, “Collecting Information about Citizenship Status in Connection with the Decennial Census”. In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary’s transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of the Interior), and Law Enforcement Management Information System (Department of the Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal, or unknown. The planned output of this project will be state-level tabulations.



UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

MEMORANDUM FOR: Jeffrey Anderson  
Director  
Department of Justice, Bureau of Justice Statistics

From: Ron S. Jarmin  
Deputy Director

Subject: Request for Authorized Use as Amendment #1 to March 23, 2020 Agreement No. 2064-FY20-NFE-0341.000, "Memorandum of Understanding Between the Bureau of Justice Statistics and the U.S. Bureau of the Census"

Thank you for your continuing support to our data acquisition efforts pursuant to the March 23, 2020, Agreement No. 2064-FY20-NFE-0341.000, "Memorandum of Understanding Between the Bureau of Justice Statistics and the U.S. Bureau of the Census" to support our work under Executive Order 13880 to create estimates of citizenship status. I write to request that all Department of Justice data acquired under Agreement No. 2064-FY20-NFE-0341.000 be added as an approved use for a Census Bureau project responding to the *Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

BJS's support to the citizenship project consisted of extracting and transferring to the Census Bureau data drawn from BJS component databases. The delivery has been received and we have since been analyzing those data. Based on that analysis, and the later introduction of the July 21, 2020 Presidential Memorandum, we recognized the value of these data to the Presidential Memorandum apportionment project.

Thank you in advance for your assistance with this request. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [[HYPERLINK "mailto:michael.a.berning@census.gov"](mailto:michael.a.berning@census.gov)].

If BJS is amenable to authorizing the use of BJS data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence. This will constitute Amendment #1 to the Agreement.

## APPROVALS

On behalf of the Census Bureau, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

Ron S. Jarmin  
Deputy Director  
U.S. Census Bureau

(Date)

On behalf of the Bureau of Justice Statistics the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

---

Jeffrey Anderson  
Director  
Department of Justice, Bureau of Justice Statistics

(Date)

Attachment:

## **Attachment – Census Bureau Project Description**

### ***Census Bureau Project to Support the July 21, 2020 Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census***

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, “Collecting Information about Citizenship Status in Connection with the Decennial Census”. In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

To support the Secretary’s transmittal of the report under the Presidential Memorandum, the Census Bureau is expanding the E.O. work using selected Department of Homeland Security administrative records in combination with selected records from other agencies and data from the 2020 Census. These include Enforcement and Removal Operations (ICE), Deferred Action for Childhood Arrival (CIS), Special Immigrant Juveniles (CIS), Lawful Permanent Resident denials (CIS), Arrival and Departure Information Systems (CBP), Incident Management Analysis Reporting System (Department of Interior), and Law Enforcement Management Information System (Department of Interior).

Using those records in combination with other data already obtained regarding citizenship status, the Census Bureau will further refine the non-citizen category into legal, illegal or unknown. The planned output of this project will be state-level tabulations.



UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

MEMORANDUM FOR: James W. McCament  
Deputy Under Secretary  
Office of Strategy, Policy, and Plans  
Department of Homeland Security

From: Ron S. Jarmin  
Deputy Director

Subject: Request for Additional Data Elements and Authorized Uses as  
Amendment #2 to Dec. 23, 2019, Agreement No. 2064-FY20-NFE-0335,  
"Memorandum of Agreement Between the United States Department of  
Commerce U.S. Census Bureau and United States Department of  
Homeland Security Regarding the Transfer of Immigration and  
Citizenship-Related Data"

Thank you for your continuing support of our data acquisition efforts pursuant to the December 23, 2019, Agreement No. 2064-FY20-NFE-0335, "Memorandum of Agreement Between the United States Department of Commerce U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship-Related Data," (MOA), and support of our work under Executive Order 13880 to create estimates of citizenship status. I write to request that additional data elements maintained by U.S. Citizenship and Immigration Services (USCIS) be provided to help inform this work. The additional data elements will be drawn from USCIS data sources, specifically information pertaining to: Lawful Permanent Resident (LPR) denied applications; Deferred Action for Childhood Arrivals (DACA); ~~and~~ Special Immigrant Juveniles (SIJ) and data from USCIS data source that have characteristics on individuals who at some point have filed an application, petition, or request with USCIS who appear not to be in a lawful immigration status. In addition, I ask that USCIS approve the use of data acquired pursuant to Agreement No. 2064-FY20-NFE-0335, as amended by this memorandum, to assist the Census Bureau, as directed by the Secretary of Commerce, with performing the mandates contained in *Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, dated July 21, 2020. The Census Bureau's project description in response to this Memorandum is attached.

To date, DHS support to the citizenship project consisted of extracting and providing two tranches of data drawn from DHS component databases to the Census Bureau. The first delivery was provided in December of 2019 while the second delivery occurred July of 2020. We have been hard at work analyzing those data provided pursuant to the terms of the MOA. Based on that analysis, and the later issuance of the July 21, 2020 Presidential Memorandum, we recognized data gaps from our initial request for data that will impact the quality of our citizenship project work. The DHS Office of Immigration Statistics (OIS) staff have been very helpful in assisting us to identify data that would help us fill that gap. As a result of those conversations we are requesting additional variables pertaining to Lawful Permanent Resident



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(LPR) denied applications; Deferred Action for Childhood Arrivals (DACA); and, Special Immigrant Juveniles (SIJ) maintained by USCIS. Additionally, we request data from USCIS data source that have characteristics on individuals who at some point have filed an application, petition, or request with USCIS who appear not to be in a lawful immigration status. Specific data elements requested from each of these sources are listed in the attached modification to addendum one of the base agreement.

Thank you in advance for your assistance in providing the additional variables from USCIS systems to the Census Bureau in support of the Executive-Level directed project. If you have questions or need additional information about this project, please contact Mike Berning, Assistant Division Chief for Data Acquisition and Curation, Economic Reimbursable Surveys Division, at 301-763-2028 or [\[ HYPERLINK "mailto:michael.a.berning@census.gov" \]](mailto:michael.a.berning@census.gov).

If DHS is amenable to the provision of the additional USCIS variables to the Census Bureau and in the use of CIS data to support the July 2020 Presidential Memorandum, your signature below will signify concurrence to amend Addendum #1 of Agreement No. 2064-FY20-NFE-0335, by adding the variables to the list of Individual Data Elements shown in item A.5. of the Addendum. This will constitute Amendment #2 to the Agreement.

#### APPROVALS

On behalf of the Census Bureau, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

\_\_\_\_\_  
Ron S. Jarmin  
Deputy Director  
U.S. Census Bureau

\_\_\_\_\_  
(Date)

On behalf of the Department of Homeland Security, the undersigned individual hereby attests that he or she is authorized to enter into this Amendment and agrees to all the terms specified herein.

\_\_\_\_\_  
James W. McCament  
Deputy Under Secretary for the  
Office of Strategy, Policy, and Plans  
U.S. Department of Homeland Security

\_\_\_\_\_  
(Date)

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Attachment:

**Attachment – Census Bureau Project Description**

**Census Bureau Project to Support the July 21, 2020 Presidential Memorandum on  
*Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census***

Under the July 21, 2020 Presidential Memorandum, the Secretary of Commerce will produce a report consistent with the policy stated therein. The Census Bureau will produce a statistical product requested by the Secretary of Commerce, who was the addressee of the Presidential Memorandum, for transmittal of the report to the President. This product will include state-level information about non-citizens who are illegal aliens and enumerated in the 2020 Census.

To complete this task, the Census Bureau will build upon its work supporting Executive Order 13880, “Collecting Information about Citizenship Status in Connection with the Decennial Census”. In support of this Executive Order (E.O.), the Census Bureau is using administrative records from multiple agencies to produce estimates of citizenship.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*,

Plaintiffs,

v.

WILBUR L. ROSS, in his official  
capacity as U.S. Secretary of Commerce,  
*et al.*,

Defendants.

No. 8:19-cv-02710-GJH

MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS

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## **OTHER AUTHORITIES**

Andrew Rafferty, et al., <i>Steve Bannon Out as White House Chief Strategist</i> , NBC News (Aug. 18, 2017), <a href="https://www.nbcnews.com/politics/politics-news/steve-bannon-out-white-house-chief-strategist-n793921">https://www.nbcnews.com/politics/politics-news/steve-bannon-out-white-house-chief-strategist-n793921</a> .....	43
Associated Press, <i>Kobach says he's seriously considering US Senate bid in 2020</i> (Jan. 19, 2019), <a href="https://apnews.com/9de85ad8578243e3aa7fbbcab28e5de0">https://apnews.com/9de85ad8578243e3aa7fbbcab28e5de0</a> .....	43
Devlin Barrett, et al., <i>Jeff Sessions forced out as attorney general</i> , Washington Post (Nov. 7, 2018), <a href="https://www.washingtonpost.com/world/national-security/attorney-general-jeff-">https://www.washingtonpost.com/world/national-security/attorney-general-jeff-</a>	

sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html .....	43
J. David Brown, et al., <i>Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census</i> (June 2019), <a href="https://www2.census.gov/ces/wp/2018/CES-WP-18-38R.pdf">https://www2.census.gov/ces/wp/2018/CES-WP-18-38R.pdf</a> .....	4
Michael Wines, <i>Thomas Hofeller, Republican Master of Political Maps, Dies at 75</i> , <i>New York Times</i> (Aug. 21, 2018), <a href="https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html">https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html</a> .....	44
Sam Levine, <i>DOJ Official Who Played Big Role In Push For Citizenship Question To Leave Trump Admin</i> , <i>Huffington Post</i> (Aug. 9, 2019), <a href="https://www.huffpost.com/entry/john-gore-leaving-doj_n_5d4d8fa0e4b09e7297459561">https://www.huffpost.com/entry/john-gore-leaving-doj_n_5d4d8fa0e4b09e7297459561</a> .....	43
U.S. Census Bureau, <i>Citizen Voting Age Population by Race and Ethnicity (CVAP)</i> , <a href="https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html">https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html</a> .....	5
U.S. Census Bureau, <i>Current Population Reports, Population Estimates</i> (Aug. 13, 1948), <a href="https://www2.census.gov/library/publications/1948/demographics/P25-13.pdf">https://www2.census.gov/library/publications/1948/demographics/P25-13.pdf</a> .....	3
U.S. Census Bureau, <i>History of the 1997 Economic Census</i> (July 2000), <a href="https://www.census.gov/history/pdf/1997econhistory.pdf">https://www.census.gov/history/pdf/1997econhistory.pdf</a> .....	3, 4
U.S. Census Bureau, <i>Update on Disclosure Avoidance and Administrative Data</i> (Sept. 13, 2019), <a href="https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf?">https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf?</a> .....	18

## 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

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

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."<sup>1</sup> 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).<sup>2</sup> 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,<sup>3</sup> and in 1954 the Census

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<sup>1</sup> U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, <https://www.census.gov/history/pdf/1997econhistory.pdf>.

<sup>2</sup> 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).

<sup>3</sup> 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>.

Bureau implemented “large-scale use of administrative records” from the Internal Revenue Service as part of the Economic Census.<sup>4</sup>

The Secretary has collected administrative records containing citizenship data since at least 2002.<sup>5</sup> 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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<sup>4</sup> U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, <https://www.census.gov/history/pdf/1997econhistory.pdf>.

<sup>5</sup> 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).

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.<sup>6</sup> 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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<sup>6</sup> *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>.



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.<sup>7</sup> 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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<sup>7</sup> *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).

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,”

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.

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

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. McMahan*, 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

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