Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE,
805 15th Street NW, 8th Floor, Washington, DC 20005,

CITY OF ATLANTA,
55 Trinity Avenue, Atlanta, GA 30303,

CITY OF CLARKSTON,
1055 Rowland Street, Clarkston, GA 30021,

CITY OF DAYTON,
101 W 3rd Street, Dayton, OH 45402,

CITY OF EL PASO,
300 N. Campbell Street, El Paso, TX 79901,

CITY OF PATERSON,
155 Market Street, Paterson, NJ 07505,

CITY OF PORTLAND,
1221 SW 4th Avenue, Portland, OR 97204,

CITY OF SANTA MONICA,
1685 Main Street, Santa Monica, CA 90401,

CITY OF SOUTH PASADENA,
1414 Mission Street, South Pasadena, CA 91030,

EL MONTE UNION HIGH SCHOOL DISTRICT,
3537 Johnson Avenue, El Monte, CA 91731,

CENTER FOR CIVIC POLICY,
P.O. Box 27616, Albuquerque, NM 87125,

MASA,
2770 Third Avenue, 1st Floor, Bronx, NY 10455,

NEW JERSEY CITIZEN ACTION,
625 Broad Street, Suite 270, Newark, NJ 07102,

NEW MEXICO ASIAN FAMILY CENTER,
115 Montclaire Drive SE, Albuquerque, NM 87108,

NM COMUNIDADES EN ACCIÓN Y DE FÉ ,

Case No. 1:20-cv-02023-CRC

SECOND AMENDED COMPLAINT

THREE-JUDGE COURT REQUESTED

420 W Griggs Avenue, Las Cruces, NM 88005,

PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS,
4089 Fairmount Avenue, San Diego, CA, 92105,

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DENNIS VROEGINDEWEY,
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SUSAN N. WILSON,
c/o Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas, New York, NY 10036,

and

MYRNA YOUNG,
c/o Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas, New York, NY 10036,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States,
1600 Pennsylvania Avenue NW, Washington, DC 20500,

UNITED STATES DEPARTMENT OF COMMERCE,
1401 Constitution Avenue NW, Washington, DC 20230,

WILBUR L. ROSS, JR., in his official capacity as
Secretary of Commerce,
U.S. Department of Commerce
1401 Constitution Avenue NW, Washington, DC 20230,

BUREAU OF THE CENSUS, an agency within the
United States Department of Commerce,
4600 Silver Hill Road, Washington, DC 20233

and

STEVEN DILLINGHAM, in his official capacity as
Director of the Bureau of the Census,
4600 Silver Hill Road, Washington, DC 20233,

Defendants.

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive and mandamus relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"). Plaintiffs seek relief on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; 2 U.S.C. § 2a; 13 U.S.C. § 141; and 13 U.S.C. § 195.

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

3. Since the founding, all three branches of government have agreed that "the whole number of persons in each state" includes any non-citizens, documented or undocumented, who reside in each state. That consensus includes a three-judge panel of this very Court. *See Fed'n. for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (stating that "the population base for purposes of apportionment" must "***includ[e] aliens both lawfully and unlawfully within our borders***" (emphasis added)), *appeal dismissed*, 447 U.S. 916 (1980).

4. Now, for the first time in our nation's history, the President has purported to declare the opposite, without any statutory or constitutional basis for his unilateral action. As the Department of Justice observed in 1980, such a change would be "a radical revision of the constitutionally mandated system for allocation of Representatives to the States of the Union and an equally radical revision of the historic mission of the decennial census."

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

6. Equally problematic, because the government has never conducted—and cannot now conduct—a direct headcount of undocumented immigrants in each state, implementing the Memorandum would necessarily violate the Constitution's requirement of "actual Enumeration." On information and belief, implementing the Memorandum would also require Defendants to violate Congress's express prohibition on "statistical sampling and adjustment" in connection with apportionment. As Congress has found, the use of such techniques "to carry out the census with respect to any segment of the population poses the risk of ***an inaccurate, invalid, and unconstitutional census***." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209(a)(7), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note) (emphasis added).

7. Plaintiffs bring this action for declaratory, injunctive, and mandamus relief under 42 U.S.C. § 1983, 28 U.S.C. § 2201(a), and 28 U.S.C. § 1361 to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States; under 28 U.S.C. § 1346(a)(2), because this is a qualifying civil action against the United States; and under 28 U.S.C. § 1361, because this is an action in the nature of mandamus to compel an officer of the United States to perform a duty owed to Plaintiffs.

9. Relief is authorized under 42 U.S.C. § 1983, 28 U.S.C. § 2201(a), and 28 U.S.C. § 2202.

10. Plaintiffs request the convening of a three-judge court pursuant to 28 U.S.C. § 2284; 13 U.S.C. § 195; and Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note (e)(1)).

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

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

PARTIES

13. Plaintiff Common Cause is a nonprofit organization based in and organized under the laws of the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein both on its own behalf and on behalf of its members.

14. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean. The Mayor's Office for Immigrant Affairs works to create a connected, inclusive community, where Atlantans are afforded equal opportunities and can meaningfully engage in civic life, regardless of language or country of origin.

15. Plaintiff City of Clarkston is a vibrant community of 13,500 people located in DeKalb County, Georgia. Clarkston is proud of its ethnic diversity with half the population born outside the United States, hailing from over fifty countries across six continents. Fifty-eight percent of Clarkston's residents speak a language other than English at home. The city proudly boasts being the most diverse square mile in America.

16. Plaintiff City of Dayton is the county seat of Montgomery County, Ohio, with a population of approximately 140,000. Since the mid-2000s, Dayton's immigrant population has more than doubled. In 2011, Dayton launched Welcome Dayton, a community initiative that

promotes immigrant integration into the region. In 2017, Dayton was the first city in the United States to earn the status of Certified Welcoming in recognition of inclusiveness and integration of immigrants from Welcoming America, a non-partisan national nonprofit.

17. Plaintiff City of El Paso is the county seat of El Paso, Texas, with a population of more than 681,000 people. People of color constitute the majority of its population, which is eighty percent Latino. Approximately twenty-four percent of El Paso residents were born outside of the United States.

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

19. Plaintiff City of Portland is the county seat of Multnomah County and the most populous city in Oregon, with a population of approximately 650,000. Portland has approximately 85,000 immigrant residents, including approximately 18,000 undocumented immigrants and approximately 14,000 refugees. In 2016, Portland established the New Portlanders Policy Commission to advise the City on policies and practices to integrate immigrant and refugee communities into the City's decision-making process.

20. Plaintiff City of Santa Monica is a small coastal city in California with a population of approximately 90,000. Approximately twenty-three percent of its residents were not born in the United States and approximately ten percent are non-citizens, including Latino and Asian immigrants. The City has implemented a number of programs to preserve and help residents keep affordable housing despite economic pressures that disproportionately affect portions of its immigrant community.

21. Plaintiff city South Pasadena is located in Los Angeles County, California, with a population of over 25,000. More than one quarter of the city's population was born outside of the United States and approximately ten percent of residents are non-citizens. South Pasadena, a majority-minority city and one of the most ethnically diverse cities in California, has declared it the public policy of the City to be inclusive and to respect the inherent worth of every person, without regard to a person's race, color, religion, national origin, sex, gender identity, or immigration status.

22. Plaintiff El Monte Union High School District is a large school district in Los Angeles County, California with a population of approximately 200,000 people. Its high schools include Arroyo, El Monte, Mountain View, Rosemead, South El Monte and Fernando R. Ledesma High School. El Monte Union High School District also features the El Monte-Rosemead Adult School, one of California's largest and most respected adult programs, serving 11,000 adults. Approximately 10.5% of its students were not born in the United States and many are undocumented Latino and Asian immigrants. The majority of the people work in industrial and factory work and retail sales. The families who live in this area include many in the middle to lower income economic groups.

23. Plaintiff Center for Civic Policy (CCP) is a 501(c)(3) nonprofit based in Albuquerque, New Mexico. CCP works to empower and amplify the voices of everyday New Mexicans, especially those who experience oppression, to shape a more inclusive, responsive, and accountable democracy—using a racial, gender, class, and equity lens to build transformative power through collective responsibility and build thriving communities in New Mexico. In collaboration with local and national partners, CCP works to increase voter participation and turnout, identifying and training new leaders for civic life.

24. Plaintiff Masa is a community organization based in the Bronx, New York that partners with Mexican and Latino children, youth, and families to develop strong learners and leaders who fully participate in and contribute to the larger community. Masa was founded by a group of undocumented students and over the years has built deep ties with the South Bronx Mexican, Central American and indigenous speaking community—often being the first place they turn to for help. Masa's programs encompass early childhood and K-12 education, family engagement, leadership development, and community empowerment. Since 2019, Masa has been actively engaged in outreach related to the 2020 Census. As part of that effort, Masa has reached over 10,500 community members and has been able to get 1,250 households counted. These efforts are already being adversely affected by the Memorandum.

25. Plaintiff New Jersey Citizen Action (NJCA) is a non-partisan 501(c)(3) statewide grassroots organization based in Newark, New Jersey that fights for social, racial and economic justice. NJCA combines on-the-ground organizing, legislative advocacy, and electoral campaigns to win progressive policy and political victories that make a difference in people's lives. NJCA has over 125 organizational affiliates and over 60,000 members. In addition to issue-advocacy campaigns, NJCA provides free direct services to low- and moderate-income individuals across New Jersey to empower people to take control of their economic futures. NJCA has engaged in significant "Get Out the Count" work, including community outreach and education and advocacy with elected officials, to ensure that New Jersey has a full, fair, and accurate census count. It sues herein on its own behalf and on behalf of its members and organizational affiliates.

26. Plaintiff New Mexico Asian Family Center (NMAFC) is a 501(c)(3) nonprofit based in Albuquerque, New Mexico. NMAFC's primary goal is to help Asians and their

families become more self-sufficient, empowered, and aware of their rights by utilizing multilingual and multicultural staff members, licensed counselors, and interpreters. NMAFC is a clearing house of information and referrals. It collaborates with government, private and other non-profit agencies in the areas of program development, public policy, education, and training. NMAFC serves immigrants and refugees, including those who are survivors of domestic violence, sexual assault, or other crimes. As part of the abuses they experienced, some survivors have been left in the loopholes of the immigration process and become undocumented. In addition to the direct services it provides, NMAFC advocates for public policy that benefits its clients and educates its clients about public policy, including the importance of completing the census. NMAFC leads the "Get Out the Count" outreach work to the New Mexico Asian/Pacific Islander community.

27. Plaintiff New Mexico Comunidades en Acción y de Fé (CAFé) is a 501(c)(3) nonprofit with 140 members based in Dona Ana County, New Mexico, and serving Luna, Hidalgo, and Grant counties. CAFé works to create a culture of support that empowers New Mexicans to act on their own behalf towards a better quality of life. Since its inception CAFé has been a crucial actor in the political landscape in southern New Mexico, creating a "land of opportunity" by challenging our elected leaders to put the needs of families and the common good of New Mexico first. At the helm of CAFé's efforts are strong spiritual leaders who have played a pivotal role in healing the state and restoring people's confidence in a responsive government that promotes opportunity for all.

28. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public

policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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

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

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

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

33. Plaintiff Angelo Ancheta is a natural-born U.S. citizen and a resident of San Francisco, California. His racial identity is Asian and he is of Filipino heritage. He is a registered voter and regularly exercises his right to vote.

34. Plaintiff Cynthia Ming-hui Dai is a natural-born U.S. citizen and a resident of San Francisco, California. Her racial identity is Asian and she is of Chinese heritage. She is a registered voter and regularly exercises her right to vote.

35. Plaintiff Simon Fischer-Baum is a natural-born U.S. citizen and a resident of Houston, Texas. His racial identity is Caucasian. He is a registered voter and regularly exercises his right to vote.

36. Plaintiff Stan Forbes is a natural-born U.S. citizen and a resident of Sacramento, California. His racial identity is Caucasian. He is a registered voter and regularly exercises his right to vote.

37. Plaintiff Connie Galambos Malloy is a natural-born U.S. citizen and a resident of Pasadena, California. Her racial identity is Black and she is of Latina ethnicity and of Colombian heritage. She is a registered voter and regularly exercises her right to vote.

38. Plaintiff Raquel Morsy is a U.S. citizen and a resident of Hillside, New Jersey. She is of Latina ethnicity. She is a registered voter and regularly exercises her right to vote.

39. Plaintiff Norma (Robin) Mote is a natural-born U.S. citizen and a resident of Dallas, Texas. Her racial identity is Caucasian. She is a registered voter and regularly exercises her right to vote.

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

41. Plaintiff Lilbert (Gil) Roy Ontai is a natural-born U.S. citizen and a resident of San Diego, California. He is of Native Hawaiian heritage. He is a registered voter and regularly exercises his right to vote.

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

43. Plaintiff Coleen P. Stevens Porcher is a naturalized U.S. citizen and a resident of Montclair, New Jersey. She is of African/Caribbean ancestry and Jamaican national origin. She is a registered voter and regularly exercises her right to vote.

44. Plaintiff Jeanne Ellen Raya is a natural-born U.S. citizen and a resident of San Gabriel, California. She is of Latina ethnicity and Mexican heritage. She is a registered voter and regularly exercises her right to vote.

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

46. Plaintiff Josanna Smith is a natural-born U.S. citizen and a resident of Missouri City, Texas. Her racial identity is Caucasian. She is a registered voter and regularly exercises her right to vote.

47. Plaintiff Thad (Bo) Smith is a natural-born U.S. citizen and a resident of Missouri City, Texas. His racial identity is Caucasian. He is a registered voter and regularly exercises his right to vote.

48. Plaintiff Inge Spungen is a naturalized U.S. citizen and a resident of Paterson, New Jersey. She is of Caucasian ethnicity and Danish national origin. She is a registered voter and regularly exercises her right to vote.

49. Plaintiff Irene Sterling is a U.S. citizen and a resident of Belleville, New Jersey. She is a registered voter and regularly exercises her right to vote.

50. Plaintiff Dennis Vroegindewey is a U.S. citizen and a resident of Whippany, New Jersey. He is of Caucasian ethnicity. He is a registered voter and regularly exercises his right to vote.

51. Plaintiff Susan N. Wilson is a natural-born U.S. citizen and a resident of Princeton, New Jersey. Her racial identity is Caucasian. She is a registered voter and regularly exercises her right to vote.

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

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

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

55. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Bureau of the Census. Pursuant to statute, he is responsible for reporting to the President by January 1, 2021, a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). He is sued herein in his official capacity.

56. Defendant Bureau of the Census ("Census Bureau") is an agency within the United States Department of Commerce. 13 U.S.C. § 2. The Census Bureau is the agency directly responsible for planning and administering the decennial census under the direction and control of the Secretary of Commerce.

57. Defendant Steven Dillingham is the Director of the Census Bureau. In that capacity, he is responsible for administering a complete enumeration of all persons residing in the United States and providing that figure to the Secretary of Commerce for transmission to the President. He is sued herein in his official capacity.

FACTUAL ALLEGATIONS

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

58. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of Representatives among the States. Although apportionment is the only purpose given for the census in the Constitution itself, census data is also used for a number of other purposes, such as redistricting of state legislative districts; determining the distribution of hundreds of millions of dollars of federal funding; and informing the decisions of federal, state, and local policymakers.

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

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

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

62. As part of its preparation for the current census, the Census Bureau formally adopted a rule—pursuant to a notice-and-comment rulemaking process—regarding, among other things, how noncitizens would be counted. *See Final 2020 Census Residence Criteria and Residence Situations* ("Residence Rule"), 83 Fed. Reg. 5525 (Feb. 8, 2018). The Residence Rule provided that the criteria set forth in the rule must be used "to apportion the seats in the U.S. House of Representatives among the states." *Id.* at 5526 n.1.

63. Specifically, the Residence Rule provided that "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. As part of the notice-and-comment process, the Census Bureau considered and rejected a comment that "expressed concern about the impact of including

undocumented people in the population counts for redistricting," opting to count ***all*** foreign citizens who "live and sleep most of the time" in the United States.[1]

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

65. Thereafter, the President is required by statute to transmit to Congress two sets of numbers. First, the President must provide "a statement showing the ***whole number of persons*** in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

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

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

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[1] *Final 2020 Census Residence Criteria and Residence Situations*, Federal Register, Vol. 83, No. 27, Thursday, February 8, 2018, https://www.govinfo.gov/content/pkg/FR-2018-02-08/pdf/2018-02370.pdf (last visited August 10, 2020).

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

69. Nor can such authorization be read into the statute. If Congress had intended to delegate to the President the substantive discretion to make wholesale changes in the apportionment base according to his own policy views, it would have said so expressly. "Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion.").

70. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "to report 'upon a problem in mathematics . . . for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer.'" *Franklin*, 505 U.S. at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess. at 4-5 (1929)); *see also* S. Rep. No. 2, 71st Cong., 1st Sess. at 4 (1929) (stating that the President shall report "apportionment tables" to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President is as purely and completely a ministerial function as any function on earth could be").

71. The Supreme Court, too, has recognized that "the President ***exercises no discretion***" under 2 U.S.C. § 2a(a) "in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

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

73. "In sum, as befits a subject over which the Constitution assigns ***Congress*** 'virtually unlimited discretion,' Congress has been judicious in its delegation of that authority to the Executive Branch, . . . tak[ing] care to limit that [delegated] authority and . . . enact[ing] clear instructions to the Secretary to follow in carrying out his statutory duties." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 523-24 (S.D.N.Y.) (citation omitted) (emphasis in original), *aff'd in relevant part*, 139 S. Ct. 2551 (2019).

74. The President has no inherent power or discretion to modify how congressional seats are apportioned, beyond the purely ministerial powers which Congress has expressly granted to him by statute. The Constitution places the task of apportionment within Article I,

which deals with Congress's powers, since that task determines the composition of the legislative branch. By contrast, Article II, which deals with the President's powers, says nothing at all about legislative apportionment.

75. This is no accident. The Framers were deeply concerned about the "concentration of the several powers [of government] in the same department [*i.e.*, branch]," and they drafted the Constitution to resist such encroachments—not to authorize them. James Madison, Federalist No. 51 (1788). As Madison emphasized, "each department should have a will of its own," and thus, "the members of each [department] should have as little agency as possible in the appointment of the members of the others." *Id.* Giving the President inherent authority to change the composition of the House of Representatives at his whim would have been anathema to the Framers. The Constitution contains no such implicit grant of power.

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

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

77. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to ***the whole number of free persons***, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons [*i.e.*, slaves]" (emphasis added).

78. Thus, the Framers expressly chose to omit "Indians not taxed" from the apportionment base, and infamously, to count slaves as less than full people. But they pointedly did not exclude any other "free persons" from the apportionment base, demonstrating that no further exceptions were intended. *See FAIR*, 486 F. Supp. at 576-77. That includes free non-citizens, who as a matter of plain meaning are "persons." *See 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. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' [within the meaning of] the Fifth and Fourteenth Amendments.").

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

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

81. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result would require a constitutional amendment." *FAIR*, 486 F. Supp. at 576-77.

82. For example, in advance of the 1930 census, Congress considered removing "aliens" from the congressional apportionment base.[2] This proposal "was known as the Evans plan after the head of the Ku Klux Klan, Hiram Wesley Evans."[3] Its chief supporter in Congress, Representative Homer Hoch of Kansas, argued that he "knew no reason why his 'state should lose one member and New York gain one member through inclusions of thousands of unnaturalized aliens in the country[.].'"[4] But the Senate Legislative Counsel concluded that "statutory exclusion of aliens from the apportionment base would be unconstitutional." *FAIR*, 486 F. Supp. at 576-77 (citing 71 Cong. Rec. 1821 (1929)). The proposal failed, and the enacted census bill continued to "base[] apportionment upon the total number of 'persons' residing in each State, with the exceptions of 'Indians not taxed.'"[5]

83. Again in 1940, Congress considered whether "aliens who are in this country in violation of law have the right to be counted and represented." *FAIR*, 486 F. Supp. at 576-77 (quoting 86 Cong. Rec. 4372 (1940)). Representative Emanuel 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

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[2] *Census Bill Passed; Amendments Killed*, New York Times, June 7, 1929, https://timesmachine.nytimes.com/timesmachine/1929/06/07/95965674.html?pageNumber=1 (last accessed August 10, 2020).

[3] Charles W. Eagles, Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s 70 (paperback ed. 2010).

[4] *Id.*

[5] *Census Bill Passed*, *supra*, New York Times, June 7, 1929.

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

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

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

85. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *FAIR*, 486 F. Supp. at 565. Opposing the suit, the U.S. Department of Justice ("DOJ") told this Court that the plaintiffs "s[ought] a radical revision of the constitutionally mandated system for allocation of Representatives to the States of the Union and an equally radical revision of the historic mission of the decennial census." Federal Defendants' Post-Argument Mem. at 1, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

86. "[F]or 200 years," the DOJ told this Court, "the decennial census has counted all residents of the states irrespective of their citizenship or immigration status," and those counts had been employed in apportionment. *Id.* Given "the clear and unequivocal language of Section 2 of the Fourteenth Amendment," the DOJ urged, the "radical revision" that the plaintiffs sought could come only from "a constitutional amendment." *Id.* What is more, the DOJ explained, such a revision would be "patently unfair" to residents of communities in which undocumented

immigrants live, as undocumented immigrants "demand[] precisely the same level of the services from the municipalities and states in which [they] reside as do all other citizens." *Id.* at 12.

87. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[6] In the DOJ's view, it was "clear" that, under the Fourteenth Amendment, "all persons, ***including aliens residing in this country***, [must] be included" in the congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, the Reconstruction Congress "rejected arguments that representation should be based on people with permanent ties to the country" and "consciously chose to include aliens." *Id.* at 2-3.

88. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler*, 457 U.S. at 210).

89. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the [DOJ] concerning the constitutionality of proposed legislation excluding illegal or deportable aliens from the decennial census count." Letter from Carol T. Crawford, Assistant Attorney General, dated Sept. 22, 1989, at 1, 135 Cong.

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

Rec. S12235 (1989). The DOJ responded that "section two of the Fourteenth Amendment which provides for 'counting the whole number of persons in each state' and the original Apportionment and Census Clauses of Article I section two of the Constitution ***require that inhabitants of States who are illegal aliens be included*** in the census count." *Id.* (emphasis added). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

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

91. Multiple Secretaries of Commerce and Directors of the Census Bureau have expressed the same position. For example, in a 1989 letter to Senator Jeff Bingaman, then-Secretary of Commerce Robert Mosbacher—a Republican serving under President George H. W. Bush—reiterated the Department of Commerce's "long-held position" that, "based on

constitutional considerations," "illegal aliens must be included within the census counts for purposes of apportioning congressional representation."[7]

92. Much more recently, in a hearing before the House Committee on Oversight and Reform, four former Directors of the Census Bureau, who served under Presidents of both parties, testified that exclusion of undocumented immigrants from the apportionment base, as commanded by the Memorandum, would be unconstitutional.[8] Those who so testified were:

- Vincent Barabba, Director of the Census Bureau from 1973–76 and 1979–81, under Presidents Nixon, Ford, and Carter, who oversaw the 1980 census;
- Kenneth Prewitt, Director of the Census Bureau from 1998–2001, under President Clinton, who oversaw the 2000 census;
- Robert M. Groves, Director of the Census Bureau from 2009–12, under President Obama, who oversaw the 2010 census; and
- John H. Thompson, Director of the Census Bureau from 2013–17, under Presidents Obama and Trump, who prepared for the 2020 census.

93. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. Supreme Court has found it "abundantly clear . . . that in allocating Congressmen the number assigned to each state should be determined solely by the number of the State's inhabitants"—*i.e.*, not by the number of citizens or voters. *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

94. Just four years ago, the Supreme Court unanimously reaffirmed that the Constitution "select[s] . . . total population as the basis for allocating congressional seats, . . . ***whether or not [individuals] qualify as voters***." *Evenwel*, 136 S. Ct. at 1129. Because

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[7] Letter from Secretary of Commerce Robert A. Mosbacher to Honorable Jeff Bingaman (Sept. 25, 1989), *in* 135 Cong. Rec. S22522 (daily ed. Sept. 29, 1989).

[8] Counting Every Person: Hearing on Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks Before the House Comm. on Oversight & Reform, 116th Cong. (2020), https://www.youtube.com/watch?v=SKXS8e1Ew7c (last accessed August 10, 2020).

immigration was at the center of the controversy in *Evenwel*,[9] it is beyond question that the Supreme Court had non-citizen immigrants in mind as part of the "total population" when it made this declaration.

95. Lower courts, including this Court, have also determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *FAIR*, 486 F. Supp. at 576 (emphasis added); *see also New York*, 351 F. Supp. 3d at 514 (observing that "the Constitution mandates that [the Census must] count every single person residing in the United States . . . ***whether living here with legal status or without***," and that "[t]he population count derived from that effort is used . . . to apportion Representatives" (emphasis added)).

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

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

97. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[10] Breaking with almost 250 years of precedent, the Memorandum unilaterally declares that it is now "the policy of the United States to exclude from the [congressional] apportionment base aliens who are not in a lawful

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

[10] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed August 10, 2020).

immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

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

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

100. In an accompanying statement, President Trump stated: "Today, I am . . . directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." He then expressly linked the Memorandum to his own partisan and nativist views, stating: "There used to be a time when you could proudly declare, 'I am a citizen of the United States.' But now, the radical left is trying to erase the existence of this concept and

conceal the number of illegal aliens in our country. This is all part of a broader left-wing effort to erode the rights of American citizens, and I will not stand for it."[11]

101. Two days after President Trump issued the Memorandum, his reelection campaign sent a mass email to supporters characterizing the Memorandum as an "EXECUTIVE ORDER BLOCKING ILLEGAL ALIENS FROM BEING COUNTED IN [THE] U.S. CENSUS." The email went on to state that "President Trump just signed an Executive Order that will block illegal aliens from receiving congressional representation, and ultimately, being counted in the U.S. Census." The email once again linked the Memorandum to the President's own partisan, nativist, and bigoted views, asserting that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens."[12]

102. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. *Cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) ("[In the census context], as in other areas, our interpretation of the Constitution is guided" by "early understanding of and long practice"); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of the severe constitutional problem with [the challenged action] is the lack of historical precedent for [it].").

103. Instead, the Memorandum purports to justify the President's new "policy" based on his own personal view that "[e]xcluding . . . illegal aliens from the apportionment base is

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[11] Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/ (last accessed August 10, 2020).

[12] Hansi Lo Wang (@hansilowang), Twitter (July 23, 2020, 3:34 PM), https://twitter.com/hansilowang/status/1286384297314844672 (last accessed August 10, 2020).

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

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

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

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

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

Redistricting" (the "Hofeller Study").[13] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[14] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

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

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

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[13] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed August 10, 2020).

[14] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed August 10, 2020).

109. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[15]

110. The rest is already well-known. *See generally New York*, 139 S. Ct. 2551. In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

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

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

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

affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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

114. On July 5, 2019, just days after the Supreme Court rendered its decision, President Trump admitted what the true reason for the citizenship question had always been. At a press conference, he was asked: "What's the reason . . . for trying to get a citizenship question on the census?" Contrary to what the Administration had maintained in the census litigation, the President answered: "Congress. You need it for Congress, for districting. You need it for appropriations. Where are the funds going?"[16]

115. Six days later, at another press conference, President Trump similarly stated that the citizenship information his Administration had sought was "relevant to administering our elections," because "[s]ome states may want to draw state and local legislative districts based upon the voter-eligible population." He went on to explicitly tie that project of transforming the apportionment base to his own partisan and nativist views: "As shocking as it may be, far-left

[16] Remarks by President Trump Before Marine One Departure, July 5, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed August 10, 2020).

Democrats in our country are determined to conceal the number of illegal aliens in our midst. They probably know the number is far greater, much higher than anyone would have believed before. Maybe that's why they fight so hard. This is part of a broader left-wing effort to erode the rights of the American citizen."[17]

116. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—the day of his remarks about purportedly "erod[ing] the rights of the American citizen"—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

117. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

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[17] Remarks by President Trump on Citizenship and the Census, White House (July 11, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/ (last accessed August 10, 2020).

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

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

E. To Implement the Memorandum, Defendants Must Violate the Constitution's Requirement of "Actual Enumeration" and/or The Statutory Bar on Sampling

120. From the beginning, Article I, Section 2, Clause 3 of the U.S. Constitution has provided that the numbers used in congressional apportionment "shall be determined" via an "***actual Enumeration***" (emphasis added).

121. Ratification-era dictionaries "demonstrate that an 'enumeration' requires an actual counting, and not just an estimation of number." *Dep't of Commerce v. U.S. House of*

Representatives, 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring). Thus, as the Supreme Court has observed, "the Framers expected census enumerators to seek to reach each individual household" when making determinations that bear on apportionment. *Utah v. Evans*, 536 U.S. 452, 477 (2002). To the extent other "methods substitute for any such effort, it may be argued that the Framers did not believe that the Constitution authorized their use." *Id.*

122. Defendants have recently conceded this point. When the State of New York and others challenged the addition of a citizenship question to the 2020 census as a violation of (*inter alia*) the Enumeration Clause, the DOJ—appearing on behalf of Defendants—recognized that "the Constitution's reference to 'actual Enumeration' is simple: population [for purposes of apportionment] is to be determined ***through a person-by-person headcount, rather than through estimates or conjecture***." Br. in Support of Defendants' Mot. to Dismiss (ECF 155) at 30, *New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. filed May 25, 2018) (emphasis added); *see also id.* at 25 (stating that the Enumeration Clause "provides a simple judicial standard for determining the constitutionality" of a practice used in creating data used for apportionment: "the Secretary ***must perform a person-by-person headcount***, rather than an estimate of population" (emphasis added)).

123. Consistent with the Constitution's demand for an "actual Enumeration," starting "[f]rom the very first census" in 1790, "Congress has prohibited the use of statistical sampling in calculating the population for purposes of apportionment." *House of Representatives*, 525 U.S. at 335. Instead, it has required that "enumeration . . . be made by ***an actual inquiry at every dwelling-house . . . and not otherwise***." *Id.* (emphasis added) (quoting Act of Mar. 26, 1810, § 1, 2 Stat. 565-566); *see also New York*, 351 F. Supp. 3d at 520 ("Since 1790, the government has conducted the required 'actual enumeration' through questions—initially asked in person by U.S.

Marshals and 'specially appointed agents' and later by means of written questionnaire—. . . of those living in each American household.").

124. Both the Supreme Court and Defendants themselves have recognized "the importance of [this] historical practice when examining Enumeration Clause issues." Br. in Support of Defendants' Mot. to Dismiss (ECF 155) at 32, *New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. filed May 25, 2018) (citing *Wisconsin v. City of New York*, 517 U.S. 1, 51 (1996); *Franklin*, 505 U.S. at 803-06); *see also New York*, 139 S. Ct. at 2567.

125. In 1957, in response to a request by the Secretary of Commerce, Congress authorized the Census Bureau to use statistical sampling for the first time. However, that grant of permission was limited to "gathering supplemental, ***nonapportionment*** census information regarding population, unemployment, housing, and other matters collected in conjunction with the decennial census." *Id.* at 336-37 (emphasis added).

126. Indeed, Congress expressly excluded "the determination of population for apportionment purposes" from the list of permitted uses of statistical sampling. *Id.* (quoting 13 U.S.C. § 195 (1970 ed.)); *see also id.* at 338 (holding that "[13 U.S.C.] § 195 ***directly prohibits the use of sampling*** in the determination of population for purposes of apportionment." (ermphasis added)); *New York*, 139 S. Ct. at 2600-01 (Alito, J., concurring in part and dissenting in part) ("Section 195 . . . prohibits the use of sampling 'for the determination of population for purposes of apportionment of Representatives in Congress.'"). Therefore, all information used for apportionment purposes must still be gathered through actual inquiry and counting via the census outreach process. *House of Representatives*, 525 U.S. at 337.

127. In 1997, Congress reiterated that the Constitution and 13 U.S.C. § 195 both prohibit the use of "statistical sampling or adjustment in conjunction with an actual

enumeration," and found that the use of such techniques "to carry out the census with respect to any segment of the population poses the risk of ***an inaccurate, invalid, and unconstitutional census***." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209(a)(7), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note) (emphasis added).

128. As an independent matter, to be lawful, methods used as part of the census and apportionment process must be accurate. *See Evans*, 536 U.S. at 478 (noting that the Enumeration Clause embodies a "strong constitutional interest in accuracy"); *Franklin*, 505 U.S. at 819-20 (Stevens, J., concurring) (noting that the "statutory command" to count the "whole number of persons in each State . . . also embodies a duty to conduct a census that is accurate"); *New York*, 351 F. Supp. 3d at 614 ("[I]t is, of course, the federal government's job to collect and distribute accurate federal decennial census data."); *City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 555 (S.D. Ga. 1983) ("Necessarily implicit in the Census Act is the command that the census be accurate."); *see also* Pub. L. No. 105-119, § 209(a)(6), 111 Stat. at 2481 ("Congress finds that . . . [i]t is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States.").

129. Again, the Memorandum orders the Secretary of Commerce "to provide information permitting the President" to determine the number of undocumented immigrants in each state so that they may be removed from the congressional apportionment base. *Id.* § 3. Assuming *arguendo* that it is permissible to exclude undocumented immigrants from the apportionment base at all, the only lawful way to implement the Memorandum consistent with the Enumeration Clause and the Census Act would be to actually "enumerate"—that is, to attempt to personally reach and identify—each undocumented immigrant. Defendants could not

lawfully employ methods of quantifying undocumented immigrants for removal from the apportionment base ***other than*** "actual enumeration," including but not limited to statistical sampling, modeling, inference, estimation, or resort to other administrative records or data.

130. Conducting an "actual Enumeration" of undocumented immigrants as part of the 2020 census is not possible. As part of the 2020 census, Defendants have never proposed to inquire about whether noncitizen respondents are "in a lawful immigration status under the Immigration and Nationality Act." Memorandum § 2. There is no such question on the census survey to which well over half of all Americans have already responded. It is too late for such a question to be added. *See La Unión del Pueblo Entero v. Ross*, 771 F. App'x 323, 325 (4th Cir. 2019) ("[T]he Government's briefing has repeatedly represented to this Court and the Supreme Court that the 2020 Census questionnaire must be finalized by this Sunday, June 30, 2019."). Nor could such a question lawfully be added in light of the Supreme Court's decision prohibiting Defendants from inquiring about citizenship.

131. On information and belief, Defendants do not possess any other data, gathered outside the 2020 census process, which constitutes an "actual enumeration" of the immigration status of every person living in the United States. Indeed, in separate litigation, a Census Bureau Senior Advisor represented that the Census Bureau presently "lack[s]" even "accurate ***estimates*** of the resident undocumented population" on a state-by-state basis.[18] Similarly, at a recent congressional hearing, when asked how the Census Bureau intends to calculate the number of undocumented immigrants in each State, the Bureau's current Director, Defendant Dillingham, responded that its "experts" would "look at our administrative data and any [other] data that we

[18] Defendants' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep't of Commerce*, Case No. 2:18-cv-00772-RDP (N.D. Ala. March 13, 2020) (emphasis added).

have," including data obtained from outside sources, then "determine . . . the [President's desired] statistic" by "appl[ying]" unspecified "methodologies" to that data.[19]

132. Because actual enumeration of undocumented immigrants is not possible, any quantification of undocumented immigrants that the Secretary would provide to the President pursuant to the Memorandum, or that the President would thereafter rely upon in preparing apportionment tables for transmission to Congress, would violate the Enumeration Clause.

133. In addition, on information and belief, any quantification method that Defendants might employ in determining the number of undocumented immigrants to subtract from the apportionment base would be based on unlawful statistical sampling. Indeed, in separate litigation concerning the Memorandum in the District of Maryland, DOJ Attorney Stephen Ehrlich recently told the court that carrying out the orders in President Trump's Memorandum may require "some statistical modeling," although the government had not yet "formulated" a specific "methodology."[20]

134. Furthermore, on information and belief, any quantification method that Defendants might employ in determining the number of undocumented immigrants to subtract from the apportionment base, other than actual enumeration (which is impossible) and statistical sampling (which is unlawful), would itself be unconstitutionally and unlawfully inaccurate.

135. The Constitution and 13 U.S.C. § 195 permit one narrow exception to the requirement that all data used in apportionment be generated through direct inquiry as part of the

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[19] Counting Every Person: Hearing on Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks Before the House Comm. on Oversight & Reform, 116th Cong. (2020), https://www.youtube.com/watch?v=SKXS8e1Ew7c (last accessed August 10, 2020).

[20] Hansi Lo Wang, *Trump Sued Over Attempt To Omit Unauthorized Immigrants From A Key Census Count*, NPR (July 24, 2020), https://www.npr.org/2020/07/24/894322040/trump-sued-for-attempt-to-omitunauthorized-immigrants-from-a-key-census-count (last accessed August 10, 2020).

census outreach process. Namely, the Census Bureau may use a technique called "imputation" to infer certain data about a particular address (*e.g.*, "whether [it] represents a housing unit," or "the number of persons an occupied unit contains"). *See Evans*, 536 U.S. at 457-58. For several reasons, however, what Defendants propose to do here is not lawful "imputation."

136. For starters, the Bureau may "turn[] to imputation only after ordinary questionnaires and interviews have failed." *Id.* at 470; *see also id.* at 477 (imputation permissible "only after [the Bureau] has exhausted its efforts to reach each individual"). Here, however, the Census Bureau has never even attempted to ask about immigration status (as opposed to citizenship *per se*) through "ordinary questionnaires and interviews."

137. Second, as a "quantitative" matter, the Bureau may use imputation only "sparingly"—*i.e.*, to fill in gaps involving "a tiny percent of the population," such as the 0.4% at issue in *Evans*. *Id.* at 471, 477, 479 (suggesting that if the number of missing responses had been as high as 10%, the result would have been different). Here, however, Defendants do not lack directly enumerated data about the immigration status of just 0.4% —or even 10%—of the U.S. population. To the contrary, Defendants lack such directly enumerated data about the vast majority of the population.

138. Third, the Supreme Court stressed in *Evans* that permissible "imputation" must be conducted in a politically neutral manner, and cannot be used "to manipulate [apportionment] results" toward a desired outcome. *Id.* at 471-72; *see also id.* at 479 (noting that, in *Evans*, "manipulation of the [imputation] method [was] highly unlikely"). Here, by contrast, the Memorandum's express intent is to strip certain disfavored states of representation in Congress. Thus, "manipulation" is the very reason why the methods at issue are being adopted. *See also Dep't of Commerce v. Montana*, 503 U.S. 442, 464 & n.42 (1992) (rejecting Enumeration Clause

claim; noting that challenged technique was adopted in "good faith," rather than as an attempt to "favor[] a particular party" or "maintain partisan political advantage").

139. Finally, the *Evans* Court's holding depended on the fact that the particular use of imputation in that case—using data about neighboring addresses to infer whether an address was residential and how many people lived there—resembled the long-accepted practice of "ask[ing] … neighbors, landlords, postal workers, or other proxies about the number of inhabitants in a particular place" after direct inquiry had failed. *Id.* at 477. "Such reliance on hearsay," the Court concluded, had a long historical pedigree, and "need be no more accurate" than "the Bureau's method of imputation." *Id.*

140. Here, however, the data that Defendants seek to estimate—how many people in each State are "in a lawful immigration status under the Immigration and Nationality Act," Memorandum § 2—is far different from whether a particular address is residential or how many people live there. Neighbors, landlords, postal workers, and other third-party "proxies" generally ***do not*** have accurate first-hand knowledge of whether a given individual in their community is in compliance with immigration laws. The use of inferential techniques to divine ***that*** data, therefore, would not resemble anything ever done the history of the decennial census.

141. Congress has expressly provided a private right of action for declaratory, injunctive, and other appropriate relief to "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law . . . in connection with the . . . decennial census." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209(b), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note). An "aggrieved person" is defined to include "any resident of a State whose congressional representation or district ***could*** be changed as a result of

the use of a statistical method." *Id.* § 209(d)(1) (emphasis added). As detailed below, Plaintiffs are aggrieved persons under this definition.

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

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

1. *Injury Based On Vote Dilution and Diminished Representation*

143. The stated purpose of the Memorandum is to reduce the number of congressional representatives of certain states with higher-than-average populations of undocumented immigrants. The shrinking of the congressional delegations in the states where Plaintiffs (or their members or residents) live and vote, without more, is "undoubtedly" a cognizable injury-in-fact. *House of Representatives*, 525 U.S. at 331-32 (holding that "Appellee Hofmeister's [*i.e.*, an Indiana resident's] expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing" because "[w]ith one fewer Representative, Indiana residents' votes will be diluted"); *see also New York*, 351 F. Supp. 3d at 607 ("The Supreme Court has squarely held that the loss of a seat or seats in the House of Representatives 'undoubtedly satisfies the injury-in-fact requirement of Article III standing' because of the dilution of political power that results from such an apportionment loss.").

144. For example, the size of a state's congressional delegation is directly linked to the number of electors that state receives in the Electoral College. *See* U.S. Const., Art. II, § 1, cl. 2 ("Each State shall appoint . . . a Number of Electors, equal to the whole number of Senators ***and Representatives*** to which the State may be entitled in the Congress" (emphasis added)). The reduction in size of a state's congressional delegation therefore reduces the number of electors to

which that state is entitled, and diminishes the weight of that state's plebiscite—and the weight of each of its voters' individual votes—in the selection of the President and Vice President.

145. The Memorandum expressly notes that one unnamed state has "more than 2.2 million illegal aliens" and that their exclusion from the apportionment base could cost that state as many as "two or three . . . congressional seats." Memorandum § 2. Upon information and belief, that state is California.

146. Analyses by multiple independent research organizations and academics have confirmed that California would lose at least one seat if undocumented immigrants are excluded from the apportionment base. These include analyses by the Pew Research Center,[21] the Center for Immigration Studies,[22] the Center for Politics at the University of Virginia,[23] and a peer-reviewed academic study (Baumle and Poston 2019).[24]

147. These same analyses agree that Texas would also lose a congressional seat if undocumented immigrants are excluded from the apportionment base. Additionally, at least one of these analyses found that Florida, New York, and/or New Jersey would lose a seat.

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[21] *See* Jeffrey S. Passel & D'Vera Cohn, How removing unauthorized immigrants from census statistics could affect House reapportionment, Pew Research Center (July 24, 2020), https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment/ (last accessed August 10, 2020).

[22] Steven A. Camarota and Karen Zeigler, The Impact of Legal and Illegal Immigration on the Apportionment of Seats in the U.S. House of Representatives in 2020, Center for Immigration Studies (Dec. 19, 2019), https://cis.org/Report/Impact-Legal-and-Illegal-Immigration-Apportionment-Seats-US-House-Representatives-2020 (last accessed August 10, 2020).

[23] Dudley L. Poston Jr. and Teresa A. Sullivan, Excluding Undocumented Immigrants from the 2020 U.S. House Apportionment, UVA Center for Politics (July 30, 2020, http://centerforpolitics.org/crystalball/articles/excluding-undocumented-immigrants-from-the-2020-u-s-house-apportionment/ (last accessed August 10, 2020).

[24] Amanda K. Baumle and Dudley L. Poston Jr., Apportionment of the US House of Representatives in 2020 under Alternative Immigration-Based Scenarios, Population and Development Review (Feb. 2019), https://onlinelibrary.wiley.com/doi/abs/10.1111/padr.12230 (last accessed August 10, 2020).

148. As alleged above, a number of the individual Plaintiffs live and vote in California, Texas, Florida, New York, and New Jersey. Plaintiff Common Cause has members residing in all of these states. Plaintiff PANA also has members residing in California, and Plaintiff NJCA has members residing in New Jersey.

149. The diminution in size of these states' congressional delegations, without more, directly results in the dilution of the vote of every resident of these states in the selection of the President and Vice President. *See House of Representatives*, 525 U.S. at 331-32; *New York*, 351 F. Supp. 3d at 607.

150. That is not the only way in which the Memorandum causes vote-dilution injury. The shrinking of a state's congressional delegation also means that the affected state's total population must be divided up into a smaller number of congressional districts. Because the Constitution commands "that congressional districts be drawn with equal populations," *Evenwel*, 136 S. Ct. at 1123, the Memorandum will artificially increase the number of residents in every congressional district in each affected state. As a result, all citizens of each affected state will suffer diminished weight of their own personal vote within their own congressional district, and all citizens of each affected state will have to compete with a larger number of fellow-constituents for his or her representative's limited attention and resources.

151. Finally, even in states that do not lose a seat in Congress because of the Memorandum, citizens may suffer vote dilution as a result of the Memorandum. In particular, urban areas having an above-average number of undocumented immigrants compared to the state as a whole may be placed in overpopulated districts, while rural areas having a below-average number of undocumented immigrants may be placed in underpopulated districts. If so, citizens who live in the overpopulated urban districts would suffer vote dilution as compared to citizens

in the underpopulated rural districts. They would also have to compete with a larger number of fellow-constituents for their representative's limited attention and resources than citizens of the underpopulated rural districts.

152. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in urban areas with an above-average number of undocumented immigrants. For this reason alone, these persons may suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

153. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" the citizen-voters of California, Texas, New York, and Florida, and/or the citizen-voters of urban areas, "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

2. *Injury Based On Racial Discrimination*

154. As alleged above, the Memorandum is part of a concerted, intentional effort to diminish the political power of voters of color—chiefly, but not exclusively, Latinos—and to transfer their political power to "non-Hispanic Whites."

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

156. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters of color have suffered cognizable dignitary harm as a result of Defendants' intentional race discrimination. They, and the racial and ethnic communities to which they belong, are also certain to suffer diminished voting strength and political power if Defendants' actions are not enjoined.

3. *Injury Due to Census Undercount*

157. Whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is already inflicting irreparable injury on Plaintiffs by suppressing the census response rate among immigrant communities—both documented and undocumented.

158. At this time, the census count is still ongoing. As of this writing, however, fully four in ten Americans have yet to be counted.[25] Those who have not responded "are disproportionately likely to be from groups the census has struggled to count accurately in previous decennial census collections, including the Black and Hispanic populations," as well as "immigrant communities." It is well known that these populations are harder for census workers to reach than white and non-immigrant populations.[26]

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[25] *See* D'vera Cohn, *Four-in-ten who haven't yet filled out U.S. census say they wouldn't answer the door for a census worker*, Pew Research Center, July 28, 2020, https://www.pewresearch.org/fact-tank/2020/07/28/four-in-ten-who-havent-yet-filled-out-u-s-census-say-they-wouldnt-answer-the-door-for-a-census-worker/ (last accessed August 10, 2020).

[26] *Id.*; *see also* Jose A. Del Real & Fredrick Kunkle, *Abrupt change to census deadline could result in an undercount of Latino and Black communities*, Washington Post, August 9, 2020, https://www.washingtonpost.com/politics/abrupt-change-to-census-deadline-could-result-in-an-undercount-of-latino-and-black-communities/2020/08/09/1d074eb6-d8b7-11ea-930e-d88518c57dcc_story.html (last accessed August 10, 2020).

159. At this moment, the Memorandum is already causing fear, confusion, and distrust among the immigrant population and even further reducing the likelihood that immigrants (both documented and undocumented) will respond to the census.[27] On information and belief, many undocumented immigrants who have learned of the Memorandum believe that, as a result of its issuance, the census will not enumerate them at all, or that their responses will not count. Others believe that, as a result of the Memorandum, data provided in response to the census may lead to the deportation of respondents, their family, or their friends. *Cf. New York*, 139 S. Ct. at 2566 (holding that presence of citizenship question on census would "predictabl[y]" lead noncitizen households to avoid responding).

160. The people most likely to be undercounted as a result of the Memorandum—immigrants and people of color—live disproportionately in cities and urban areas. As a result,

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[27] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed August 10, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed August 10, 2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed August 10, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); Kevin Freking and Mike Schneider, *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed August 10, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed August 10, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

whether or not President Trump ultimately excludes undocumented immigrants from the congressional apportionment base, cities and urban areas will have their populations disproportionately undercounted. This will lead, in turn, to a number of secondary injuries, such as the loss of federal and state financial grants (as discussed below) and additional vote dilution due to malapportioned congressional and state legislative districts. *Cf. House of Representatives*, 525 U.S. at 334 ("Thus, the appellees who live in the aforementioned counties have a strong claim that they will be injured by the Bureau's plan because their votes will be diluted vis-à-vis residents of counties with larger 'undercount' rates.").

161. The Department of Commerce and Census Bureau have recognized that attempting to exclude undocumented immigrants from the apportionment base would deter census participation and cause undercounting. For example, in a 1989 letter to Congress, then-Secretary of Commerce Robert Mosbacher stated that "excluding undocumented aliens would be entirely infeasible and would considerably undermine critical efforts being undertaken by the [Census] Bureau to assure an effective and complete count." Secretary Mosbacher further warned that attempts to exclude undocumented immigrants "could seriously jeopardize the accuracy of the census."[28]

162. Much more recently, in a hearing before the House Committee on Oversight and Reform, John Thompson, the former Director of the Census Bureau, testified that he was "extremely concerned" that the Memorandum "will adversely affect the quality and accuracy of the 2020 census." In particular, Thompson explained that "the directive to exclude undocumented persons from the Apportionment base" is likely to further reduce the response

[28] Letter from Secretary of Commerce Robert A. Mosbacher to Honorable Jeff Bingaman (Sept. 25, 1989), *in* 135 Cong. Rec. S22522 (daily ed. Sept. 29, 1989).

rate among "hard-to-count populations including non-citizens and immigrants" by strengthening the "serious belief[] that their information will be given to immigration enforcement."[29]

163. At the same hearing, Vincent Barabba, another former Director of the Census Bureau, testified that, as a result of the Memorandum, documented and undocumented immigrants "perceive that by filling out the Census form they will be placing themselves in danger—the consequence of which will be that they will be less likely to fill out the Census form and therefore not be counted."[30]

164. Unless Defendants' actions are declared unlawful and void now, before the conclusion of the count, this disproportionate undercount will be "baked in" to the census results. It will be too late to remedy these undercount-related harms in January 2021, when President is scheduled to transmit the results of the count to Congress, or thereafter.

4. *Injury Based On Loss of Government Funds*

165. "A large number of federal domestic financial assistance programs rely on census data to allocate money. In fiscal year 2016, for example, at least 320 such programs allocated about $900 billion using census-derived data." *New York*, 351 F. Supp. 3d at 596.[31]

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[29] Counting Every Person: Hearing on Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks Before the House Comm. on Oversight & Reform, 116th Cong. 1–3 (2020) (statement of John H. Thompson, Former Director of Census Bureau).

[30] *Id.* (statement of Vincent P. Barabba, Former Director of Census Bureau).

[31] For example, these include: Federal Transit Formula Grants, Community Development Block Grants/Entitlement Grants, Crime Victim Assistance, Title I Grants to Local Educational Authorities, Special Education Grants, State Children's Health Insurance Program ("CHIP"), Head Start, Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), Child Care and Development Block Grant, Supporting Effective Instruction State Grants, Workforce Innovation and Opportunity Act ("WIOA") Youth Activities, Rehabilitation Services: Vocational Rehabilitation Grants to the States, Unemployment Insurance administrative costs, Block Grants for Prevention and Treatment of Substance Abuse, Social Services Block Grants, Career and Technical Education—Basic Grants to States, WIOA Disclosed Worker Formula Grants, Special Programs for the Aging, Title III, Part C,

166. Any reduction in a state's population as calculated by the census consequently results in fewer financial resources being directed to that state—and, by extension, to cities and residents within that state. This is so ***whether or not*** the state in question actually loses a representative in Congress as a result of the undercount.[32] *See New York*, 351 F. Supp. 3d at 596-98 (listing ways in which "[a] net undercount of people who live in noncitizen households" would "cause states (and their residents) to lose access to federal funding"); *New York*, 139 S. Ct. at 2565 ("Several state respondents here have shown that if noncitizen households are undercounted by as little as 2% . . . they will lose out on federal funds that are distributed on the basis of state population.").

167. Moreover, "many federal finding programs provide direct funding to localities based on census-derived information, including the Community Development Block Grant ('CDBG'), Emergency Solutions Grant ('ESG') program, and the HOME Investment Partnerships Program." *Id.* at 598. "These programs provide funding to cities and counties based at least in part on such jurisdictions' share of the overall population count relative to other metropolitan areas. . . ." *Id.* Thus, any differential undercount in a particular locality would result in less direct federal funding to that locality (and to its residents).

Nutrition Services, Medical Assistance Program (traditional Medicaid), Foster Care, Child Care, Adoption Assistance, and Medicare Part D Clawback. *New York*, 351 F. Supp. 3d at 596 nn. 44-45.

[32] That said, if a state does lose representation in Congress, it would likely suffer a further loss of financial resources. A number of economics and political science studies have found that distributive spending is allocated in part based on the number of seats that a geographic area has in Congress (*e.g.*, Ansolabehere, Gerber and Snyder 2002; Cascio and Washington 2014; Elis, Malhotra, and Meredith 2009). For instance, Elis, Malhotra, and Meredith (2009) find that a 10% increase in a state's share of the U.S. House of Representatives equates to a 0.7 increase in a state's share of the federal budget. This implies that an extra congressional seat can gain a state as much as $100 per capita in additional federal funding.

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

169. The Supreme Court and lower courts have squarely held that such a loss of government funds due to census undercount satisfies Article III standing. *See New York*, 139 S. Ct. at 2565; *see also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) ("[C]itizens who challenge a census undercount on the basis . . . that improper enumeration will result in loss of funds to their city have established [standing]."); *New York*, 351 F. Supp. 3d at 608-09.

170. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in states or intrastate regions with an above-average number of undocumented immigrants. Because these states and regions are currently suffering and will continue to suffer from differential undercount as a result of the Memorandum, these persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

171. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services"

whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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

5. *Injury Based on Harm to Organizational Mission*

173. The organizational Plaintiffs are presently suffering harm to their organizational missions as a result of the Memorandum. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *New York*, 351 F. Supp. 3d at 615-16.

174. For example, as alleged above, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. As part of that mission, PANA has organized, is facilitating, and provides ongoing support to a Refugee Census & Immigrant Hub (RICH) of 15 grassroots organizations, to conduct census outreach, education, and questionnaire assistance to refugee communities living in hard-to-count census tracts across San Diego County. The refugees whom PANA assists are at a heightened risk of not being counted by the census because of fear and distrust of government, stemming in part from significant trauma in their countries of origin.

175. To help "get out the count" in the San Diego refugee community, among other things, PANA and its cooperating organizations have hired and trained phone-banking staff, translated census materials, and integrated census materials into existing programs and services.

Collectively, PANA and its partners have educated 30,000 refugees and immigrants across San Diego about census participation through workshops or over the phone.

176. As alleged above, the Memorandum makes it more difficult for PANA to complete its organizational mission to "get out the count" by, among other things, worsening refugees' preexisting fear and distrust of government. Thus, the Memorandum directly impairs and undermines PANA's organizational mission. It also requires PANA to divert its limited resources from projects and priorities that it would otherwise pursue to counter the adverse effect of the Memorandum on its mission to "get out the count."

177. In addition, because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

178. Similarly, Common Cause's organizational mission as a nonpartisan pro-democracy organization includes removing barriers to full participation in our democracy and ensuring that each American has an equal voice and vote. As the census is a cornerstone of our democratic system, ensuring a fair and accurate census that counts all Americans is pivotal to Common Cause's mission. To that end, Common Cause has conducted public education about the importance of responding to the census and encouraged its members to lobby their representatives for a fair, accurate, and fully funded count.

179. By discouraging immigrants (both documented and undocumented) from responding to the census, the Memorandum directly impairs and undermines Common Cause's organizational mission. It also requires Common Cause to divert its limited resources from

projects and priorities that it would otherwise pursue to counter the adverse effect of the Memorandum on its mission to ensure a fair and accurate census.

180. As alleged above, the missions of the remaining organizational plaintiffs also involve census outreach and advocacy in immigrant and minority communities. For similar reasons, therefore, the remaining organizational Plaintiffs are also suffering, and will continue to suffer, harms to their organizational missions because of the Memorandum.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 &
U.S. Const., amend. XIV, § 2 ("Whole Number of Persons")

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

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

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

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

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

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

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

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

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

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

190. Similarly, by purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their Representative's limited attention and resources with an artificially high number of fellow-constituents.

191. In addition, by purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants will reduce the size of the congressional

delegations in the states where Plaintiffs (or their members and/or residents) live and vote, thereby directly reducing the number of electors to which each such state is entitled in the Electoral College, and accordingly, reducing the weight of Plaintiffs' votes (or the votes of their members and/or residents) in the election of the President of the United States.

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

COUNT III
Violation of Equal Protection Clause
(Invidious Discrimination)

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

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

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

196. Like the rest of the Fifth Amendment's Due Process Clause, its Equal Protection component "applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Garza v. Hargan*, 874 F.3d 735, 737–38 (D.C. Cir. 2017) (Millett, J.,

concurring) (observing that the "bedrock protections of the Fifth Amendment's Due Process Clause" are not eliminated by the "mere act of entry into the United States without documentation").

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

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

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

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

200. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress." This statute does not authorize the Secretary of Commerce to calculate or transmit to the President for purposes of apportionment any number ***other*** than the "total population by States," such as the number of undocumented immigrants in each State.

201. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled"

applying the so-called "method of equal proportions" to ***that*** "whole number of persons." This statute does not authorize the President to calculate apportionment based on any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

202. As alleged above, the President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation. Moreover, the President has no "inherent authority" under the Constitution to exercise discretion or make policy determinations in this process, or any other authority beyond that which Congress has expressly delegated to him, since the Constitution expressly assigns all power over apportionment to Congress, not the President.

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

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

205. Because President Trump and Secretary Ross have acted or will act beyond the scope of their statutory authority, they are acting *ultra vires*, and their actions are null and void. See, e.g., *Mountain States Legal Found. v. Bush*, 306 F. 3d. 1132, 1136 (D.C. Cir. 2002) ("[T]he

Supreme Court has indicated generally that review is available to ensure that Proclamations are consistent with constitutional principles and the President has not exceeded his statutory authority."); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority. . . . That the executive's action here is essentially that of the President does not insulate the entire executive branch from judicial review.").

206. The Memorandum also will result in the President and Secretary Ross failing to perform their clear legal duties to, among other things: tabulate the total populations of the States based on data from the decennial census that includes all persons who live in the United States as their usual residence; calculate the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence; and transmit to Congress the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence.

207. These violations have caused, are causing, and unless Defendants are enjoined or compelled via mandamus to comply with their duties, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT V
Violation of U.S. Const., Art. I, § 2, cl. 3 and 13 U.S.C. § 195
(Lack of "Actual Enumeration" / Unlawful Statistical Sampling)

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

209. Article I, Section 2, Clause 3 of the U.S. Constitution provides that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined" via an "***actual Enumeration***" (emphasis added).

210. The Census Act, moreover, "directly prohibits the use of sampling in the determination of population for purposes of apportionment." *House of Representatives*, 525 U.S. at 338 (opinion of the court) (discussing 13 U.S.C. § 195).

211. Further, the Constitution and the Census Act both require that any method of counting the population for apportionment purposes be accurate. *See Evans*, 536 U.S. at 478; *Franklin*, 505 U.S. at 819-20 (Stevens, J., concurring); *New York*, 351 F. Supp. 3d at 614; *City of Willacoochee*, 556 F. Supp. at 555; Pub. L. No. 105-119, § 209(a)(6), 111 Stat. at 2481.

212. As set forth above, it is impossible for Defendants to conduct an "actual Enumeration" of the number of undocumented immigrants in each state in connection with the 2020 census. Therefore, any implementation of the Memorandum would necessarily violate the Enumeration Clause.

213. Moreover, as set forth above, any manner of implementing the Memorandum that might be available to Defendants would require unlawful statistical sampling, would be unlawfully inaccurate, or both.

214. Congress has expressly provided a private right of action for declaratory, injunctive, and other appropriate relief to "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law . . . in connection with the . . . decennial census." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209(b), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82

(1997) (codified at 13 U.S.C. § 141 note). An "aggrieved person" is defined to include "any resident of a State whose congressional representation or district ***could*** be changed as a result of the use of a statistical method." *Id.* § 209(d)(1) (emphasis added). As alleged above, Plaintiffs are aggrieved persons under this definition.

215. Plaintiffs are therefore entitled to a declaration, injunction, and writ of mandamus against Defendants' violations of the Enumeration Clause and 13 U.S.C. § 195 in connection with their implementation of the Memorandum.

PRAYER FOR RELIEF

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

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

B. A declaration that Defendants' exclusion of undocumented immigrants from (a) the tabulation of the total population of the states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states, is unauthorized by and violates the Constitution and laws of the United States;

C. A declaration that Defendants' use of statistical sampling and/or other methods that do not qualify as "actual Enumeration" in connection with the determination of congressional apportionment is unauthorized by and violates the Constitution and laws of the United States;

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

1. That Defendant Ross, Defendant U.S. Department of Commerce, Defendant Census Bureau, Defendant Dillingham, their employees and agents, and all others acting in concert with them: (a) not collect, assemble, prepare, or transmit to the President any data or analysis regarding citizenship or immigration status; (b) not collect, assemble, prepare, or transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status; and (d) make no use of statistical sampling, modeling, estimation, or other techniques or methodologies besides "actual Enumeration," or any data generated, prepared, or calculated using such techniques, in connection with the census or any data or analysis based thereon; and

2. That Defendant Trump, and all others acting in concert with him, (a) include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and (b) make no use of statistical sampling, modeling, estimation, or other techniques or methodologies besides "actual Enumeration," or any data generated, prepared, or calculated using such techniques, in connection with the enumeration and apportionment calculations that he prepares and transmits to Congress.

G. A writ of mandamus:

1. Compelling the Secretary of Commerce to tabulate and report only the total population of each state, based only on the actual enumeration of the total population as determined by the 2020 census, including undocumented immigrants who live in the United States as their usual residence, without employing statistical sampling, modeling, estimation, or other techniques or methodologies besides "actual Enumeration," or any data generated, prepared, or calculated using such techniques; and

2. Compelling the President to prepare and transmit apportionment tables to Congress using only the total population of each state, based only on the actual enumeration of the total population as determined by the 2020 census, including undocumented immigrants who live in the United States as their usual residence, without employing statistical sampling, modeling, estimation, or other techniques or methodologies besides "actual Enumeration," or any data generated, prepared, or calculated using such techniques; and

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

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

DATED: September 18, 2020

/s/ *Daniel S. Ruzumna*

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