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15  
16 UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
17 SAN JOSE DIVISION

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

Plaintiffs,

22 vs.

23 DONALD J. TRUMP, in his official capacity as  
President of the United States; WILBUR L.  
24 ROSS, JR., in his official capacity as  
Secretary of Commerce; U.S. DEPARTMENT OF  
25 COMMERCE, U.S. CENSUS BUREAU, STEVEN  
DILLINGHAM, in his official capacity as Director of  
26 the U.S. Census Bureau, and CHERYL L.  
JOHNSON, in her official capacity as Clerk of the  
27 U.S. House of Representatives,

28 Defendants.

CASE NO.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

## INTRODUCTION

1  
2           1.       On July 21, 2020, President Donald J. Trump issued a Presidential Order titled  
3 “Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020  
4 Census” (the “Apportionment Exclusion Order”). The Apportionment Exclusion Order states  
5 that, for the first time in this country’s history, undocumented immigrants no longer count as  
6 “persons” under the Constitution. In spite of the Constitution’s words, in spite of statutory  
7 command, and in spite of the unbroken practice of every administration since 1790, the President  
8 will “exclude from the apportionment base aliens who are not in a lawful immigration status.”  
9 He has ordered the Secretary of Commerce to provide him with 2020 decennial census  
10 information “to carry out” his objective. 85 Fed. Reg. 44679 (July 23, 2020) (Attachment 1).  
11 The President’s stated justification for reversing our country’s democratic tradition is his  
12 personal view of a nation “more consonant with the principles of representative democracy.”

13           2.       The Apportionment Exclusion Order is illegal. It violates the Constitution and the  
14 Census Act, and it discriminates against people based on race, ethnicity, and national origin in  
15 violation of the Due Process and Equal Protection Clauses. By this Complaint, Plaintiffs seek  
16 declaratory and injunctive relief invalidating the Order and ensuring that it does not taint or  
17 subvert the ongoing 2020 Census or the apportionment process.

18           3.       The Apportionment Exclusion Order violates the plain text of the Constitution,  
19 which consistently considers a person to be a person. The Constitution’s Apportionment Clause,  
20 as amended by the Fourteenth Amendment, states that Representatives “shall be apportioned  
21 among the several States . . . according to their respective Numbers,” U.S. Const. art. I, § 2, cl. 3;  
22 *id.* amend. XIV, § 2, which requires “counting the whole number of persons in each State,” U.S.  
23 Const. amend. XIV, § 2. When the drafters meant to exclude certain classes of persons, they said  
24 so expressly, e.g., “excluding Indians not taxed.” *Id.* No provision excludes undocumented  
25 immigrants residing in the United States. Furthermore, regardless of their immigration status,  
26 they have never before been deemed *non*-persons under the Constitution. *See, e.g., Plyler v.*  
27 *Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is  
28 surely a ‘person’ in any ordinary sense of that term.”).

1           4.       The Apportionment Exclusion Order also violates the plain text of the Census  
2 Act. 13 U.S.C. § 141; *see also* 2 U.S.C. § 2a(a). The Census Act directs the Secretary of  
3 Commerce to administer the census and to report to the President “the tabulation of total  
4 population by States . . . as required for the apportionment of Representatives in Congress among  
5 the several States.” 13 U.S.C. § 141(b). The President is then required to transmit to Congress  
6 “a statement showing the whole number of persons in each State, excluding Indians not taxed, as  
7 ascertained under the . . . decennial census of the population, and the number of Representatives  
8 to which each State would be entitled under an apportionment of the then existing number of  
9 Representatives by the method known as the method of equal proportions.” 2 U.S.C. § 2a(a).  
10 The Order violates the Act by directing the Secretary (and by extension the Department of  
11 Commerce and its officials), in the decennial census report, to transmit information that does not  
12 actually include the correct population for apportionment, so that the President can exercise his  
13 purported “discretion” to miscount persons.

14           5.       By excluding undocumented immigrants from the definition of persons for  
15 apportionment purposes, the Apportionment Exclusion Order abandons over two hundred years  
16 of consensus among all three branches of government, through Republican and Democratic  
17 administrations alike. Since the Nation’s founding, every administration has understood that  
18 requirement to mean what it says: “person” means “person.” And every administration that has  
19 addressed the issue, including those of Ronald Reagan and George H.W. Bush, has rejected any  
20 claim that undocumented immigrants are not among the “whole number of persons in each  
21 State.” U.S. Const. amend. XIV, § 2. But under this Apportionment Exclusion Order, all  
22 “persons” somehow becomes “all persons *except* those the sitting president in any given census  
23 year may deem unworthy of inclusion.” No President has ever been granted, and no President  
24 has, unfettered discretion to rewrite the Constitution and 200 years of history through such  
25 personal fiat.

26           6.       One year ago, the United States Supreme Court held that the Secretary of  
27 Commerce’s claimed justification for inserting a question about citizenship in the census was “a  
28 distraction” and “contrived.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

1 Here, once again, the stated reason for defining undocumented immigrants as non-persons is  
2 contrived. The Order itself reveals that the President’s intent is to reapportion congressional  
3 seats away from disfavored States such as California and to dilute the congressional  
4 representation of ethnic and racial minorities. That plan follows a consistent history of actions  
5 and statements by the President and his advisors showing that the Apportionment Exclusion  
6 Order is motivated by an intent to discriminate against these ethnic and racial minorities.

7 7. The Apportionment Exclusion Order advances an unprecedented effort to alter the  
8 basis of our representative democracy, heedless of the plain constitutional and statutory text,  
9 precedent, and unbroken historical practice. Plaintiffs seek declarative and injunctive relief to  
10 ensure that it does not succeed.

11 **JURISDICTION AND VENUE**

12 8. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346(a), and  
13 1361.

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

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

20 11. The proper intradistrict assignment for this action is the San Jose Division, in light  
21 of the location of Plaintiffs City of San Jose, Santa Clara County, and the Mayor of San Jose,  
22 Sam Liccardo.

23 **PARTIES**

24 **A. Plaintiffs**

25 12. Plaintiff City of San Jose is a municipal corporation in the County of Santa Clara,  
26 California. It is the tenth-largest city in the United States, with an estimated population of  
27 1,927,852. Since its founding, San Jose has always been a home to immigrant communities.  
28 Today, nearly 40% of its population was born in another country, and nearly one-third of its

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

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

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

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

28

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

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

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

10           **B. Defendants**

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

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

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

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

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

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

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

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

10           27. The Apportionment Exclusion Order requires Secretary Ross, the Department of  
11 Commerce, the Census Bureau, and Director Dillingham to provide the President with a census  
12 decennial report that excludes undocumented immigrants from the apportionment calculation.  
13 There is no reason to believe that these Defendants have refused to comply with the Order or  
14 subsequent directives related to the Order. Relief against Secretary Ross, the Department of  
15 Commerce, the Census Bureau, and Director Dillingham is necessary to ensure that the  
16 apportionment process is conducted lawfully.

17           28. Defendant Cheryl L. Johnson is the Clerk of the United States House of  
18 Representatives and is responsible for “send[ing] to the executive of each State a certificate of  
19 the number of Representatives to which such State is entitled” following a decennial  
20 reapportionment. 2 U.S.C. § 2a(b). She is sued in her official capacity.

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

27  
28

**ALLEGATIONS**

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

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

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

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

31. The Fourteenth Amendment, enacted in the wake of the Civil War, eliminated the Apportionment Clause’s three-fifths component and provided that Representatives must be apportioned based on “the whole number of *persons* in each State, excluding Indians not taxed.”

U.S. Const. amend. XIV, § 2 (emphasis added).

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

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



1 human race.”); *Person*, Merriam-Webster Online Dictionary (“1. Human, Individual”),  
2 <https://www.merriam-webster.com/dictionary/person> (last visited July 27,  
3 2020)[<https://perma.cc/S58J-7F97>]. That ordinary meaning of person does not exclude persons  
4 who are undocumented immigrants.

5 34. The broader text of the Constitution also makes clear that the Framers knew that  
6 the word “person” is broad and encompasses all human beings. When the Framers sought to  
7 exclude certain *classes* of persons, they did so expressly: They excluded “Indians not taxed,”  
8 and they discounted the value for enumeration purposes of persons who were not “free”—*i.e.*,  
9 slaves—by forty percent. U.S. Const. art. I, § 2, cl. 3. The drafters of the Fourteenth  
10 Amendment, in turn, retained the exclusion of “Indians not taxed,” but abolished the three-fifths  
11 clause. *See* U.S. Const. amend. XIV, § 2. Under basic interpretative principles, the drafters’  
12 choice to “explicitly enumerate[] certain exceptions” to the general rule that all persons are to be  
13 included means that “additional exceptions are not to be implied, in the absence of evidence of a  
14 contrary . . . intent.” *Class v. United States*, 138 S. Ct. 798, 808 (2018) (quoting *Andrus v.*  
15 *Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). *Cf. Pine Grove Tp. v. Talcott*, 86 U.S. 666,  
16 674-75 (1873) (applying to the Constitution the canon that when one or more things of a class  
17 are expressly mentioned, others of the same class are excluded).

18 35. The all-inclusive meaning of “persons” in the Apportionment Clause and Section  
19 2 of the Fourteenth Amendment is confirmed further by binding precedent interpreting the  
20 meaning of the same word used elsewhere in the Constitution and, specifically, the Fourteenth  
21 Amendment. “When seeking to discern the meaning of a word in the Constitution, there is no  
22 better dictionary than the rest of the Constitution itself.” *Ariz. State Legislature v. Ariz. Indep.*  
23 *Redistricting Comm’n*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting) (collecting  
24 cases); *see also Hurtado v. California*, 110 U.S. 516, 534-35 (1884) (“due process” had the same  
25 meaning in the Fourteenth and Fifth Amendments because “the same phrase was employed”);  
26 *Martin v. Hunter’s Lessee*, 14 U.S. 304, 329, 1 Wheat. 304, 329 (1816) (examining the use of  
27 the phrase “shall be vested” in locations across the Constitution to determine its consistent  
28 meaning).

1           36.     In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court held that the  
2 “persons” protected by Section 1 of the Fourteenth Amendment and the Fifth Amendment’s Due  
3 Process Clause include everyone in the United States: “The fourteenth amendment to the  
4 constitution is not confined to the protection of citizens. . . . [Its due process and equal  
5 protection] provisions are universal in their application, to all persons within the territorial  
6 jurisdiction, without regard to any differences of race, of color, or of nationality.” *Id.* at 369.  
7 The Court reiterated this principle in *Zadvydas v. Davis*, 533 U.S. 678 (2001), stating that  
8 “persons” under the Due Process Clause includes everyone “within the United States, including  
9 aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* at 693  
10 (collecting cases). There is a strong presumption that the word carries the same comprehensive  
11 meaning in the Apportionment Clause and Section 2 of the Fourteenth Amendment.

12           37.     The Framers of the Constitution reflected their understanding of the breadth of the  
13 term “persons” in another provision too. *See* U.S. Const. art. I, § 9, cl. 1 (using “persons” to  
14 refer to slaves who could be “[i]mport[ed]” into the United States until 1808). And, when the  
15 drafters of the Fourteenth Amendment intended to describe a narrower class than *all* persons,  
16 they chose a narrower term. Section 1, for instance, differentiates between “persons” in the  
17 Citizenship, Equal Protection, and Due Process Clauses, and “citizens” in the Privileges and  
18 Immunities Clause. U.S. Const. amend. XIV, § 1. Section 2 likewise differentiates between  
19 “persons” and “citizens.” The first sentence requires “counting the whole number of persons in  
20 each State, excluding Indians not taxed.” U.S. Const. amend. XIV, § 2. By contrast, the second  
21 sentence is limited to “citizens”: “But when the right to vote at any election . . . is denied to any  
22 of the male inhabitants of such State, being twenty-one years of age, and citizens of the United  
23 States, . . . the basis of representation therein shall be reduced in the proportion which the  
24 number of such male citizens shall bear to the whole number of male citizens twenty-one years  
25 of age in such State.” *Id.* The use of these two different words in Section 2 is not accidental. To  
26 the contrary, “[f]rom [a] difference of phraseology, . . . a difference of constitutional intention  
27 may, with propriety, be inferred. It is hardly to be presumed that the variation in the language  
28

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

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

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

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

1 the Fourteenth Amendment, began its first session on December 4, 1865, shortly after the Civil  
2 War (and two days before ratification of the Thirteenth Amendment). Cong. Globe, 39th Cong.,  
3 1st Sess. 1, 3 (Dec. 4, 1865). Because recently freed slaves had become “free Persons” and not  
4 “other Persons” under the Enumeration Clause, they had greater weight in apportionment, and  
5 Southern representation in Congress was expected to increase significantly. See William W. Van  
6 Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-*  
7 *Ninth Congress*, 1965 Sup. Ct. Rev. 33, 46 [“Van Alstyne, *The Fourteenth Amendment*”];  
8 Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth*  
9 *Amendment to Determine The Amendment’s Original Meaning*, 4 Conn. L. Rev. 1069, 1089-90  
10 (2017); *Oregon v. Mitchell*, 400 U.S. 112, 157 (1970) (Harlan, J., concurring in part and  
11 dissenting in part).

12 41. The 39th Congress actively debated several different methods for calculating  
13 apportionment, including whether to base apportionment on the population of voters, citizens, or  
14 all persons residing in a State. See generally Van Alstyne, *The Fourteenth Amendment*, 1965  
15 Sup. Ct. Rev. at 45-48; *Fed’n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp.  
16 564, 576 (D.D.C. 1980). At the time of the debate, non-citizens were counted in determining  
17 representation in Congress. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 353 (Jan. 22, 1866)  
18 (statement of Rep. Rogers) (“Every man in this House knows perfectly well in the several States  
19 a person under the age of twenty-one years cannot vote, citizens cannot vote, and the whole class  
20 of females, constituting nearly one half of the population of this country, cannot vote; yet for  
21 these persons the States are entitled to representation.”).

22 42. Some in Congress advocated apportionment based on the number of voters  
23 instead of the number of persons, for two reasons: to deal with the changing composition of  
24 Congress that would occur were the then-current population-based apportionment to continue,  
25 and to encourage expansion of the franchise to the freed slaves. See Van Alstyne, *The*  
26 *Fourteenth Amendment*, 1965 Sup. Ct. Rev. at 46-47. But the voter-based apportionment  
27 proposal was met with the objection that “population is the true basis of representation,” Cong.  
28 Globe, 39th Cong., 1st Sess. 141 (Jan. 8, 1866) (statement of Rep. Blaine), and practical

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

2 *Id.*

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

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

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

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

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

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

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

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

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

28

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

3 50. Throughout the two-hundred-year history of the United States, the census has  
4 always reflected the settled understanding that *all* persons residing in the United States—citizens  
5 and non-citizens alike—must be counted to fulfill the Constitution’s “actual Enumeration”  
6 mandate. U.S. Const., art. I, § 2, cl. 3; *Klutznick*, 486 F. Supp. at 576; *see also Plyler*, 457 U.S.  
7 at 210 (holding that the Equal Protection Clause applies to persons who are in the country  
8 without proper authorization because “[w]hatever his status under the immigration laws, an alien  
9 is surely a ‘person’ in any ordinary sense of that term”).

10 51. During the first half of the 20th century, a variety of proposals were made in  
11 Congress to exclude aliens from the apportionment base, but it was recognized that such a result  
12 would require a constitutional amendment. For example, in 1929, the Senate Legislative  
13 Counsel concluded that, without a constitutional amendment, “statutory exclusion of aliens from  
14 the apportionment base would be unconstitutional.” *Klutznick*, 486 F. Supp. 564, 576-77  
15 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980) (citing 71 Cong. Rec. 1821  
16 (1929)).

17 52. Again in 1940, Congress considered whether “aliens who are in this country in  
18 violation of law have the right to be counted and represented.” *Id.* (quoting 86 Cong. Rec. 4372  
19 (1940)). Representative Celler of New York explained:

20 The Constitution says that all persons shall be counted. I cannot  
21 quarrel with the founding fathers. They said that all should be  
22 counted. We count the convicts who are just as dangerous and just  
23 as bad as the Communists or as the Nazis, *as those aliens here*  
24 *illegally*, and I would not come here and have the temerity to say  
25 that the convicts shall be excluded, if the founding fathers say they  
26 shall be included. The only way we can exclude them would be to  
27 pass a constitutional amendment.  
28

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

1 491, 524 (2008) (analyzing presidential memorandum’s legal effects under *Youngstown* tripartite  
2 framework for executive action).

3 72. Section 1 of the Apportionment Exclusion Order provides the purported authority  
4 for the President’s action. It states that “Congress has charged the Secretary of Commerce (the  
5 Secretary) with directing the conduct of the decennial census in such form and content as the  
6 Secretary may determine (13 U.S.C. 141(a)).” Apportionment Exclusion Order § 1. It also  
7 states that “[t]he President, by law, makes the final determination regarding the ‘whole number  
8 of persons in each State,’ which determines the number of Representatives to be apportioned to  
9 each State, and transmits these determinations and accompanying census data to the Congress (2  
10 U.S.C. 2a(a)).” *Id.* The Apportionment Exclusion Order then asserts that the President has  
11 “discretion to settle the apportionment.” *Id.*

12 73. Section 1 of the Apportionment Exclusion Order observes that the Constitution’s  
13 requirement that “persons in each State, excluding Indians not taxed” be enumerated in the  
14 census “has been interpreted to mean that only the ‘inhabitants’ of each State should be  
15 included.” *Id.* The Order then claims that the President has discretion “to determine who  
16 qualifies as an ‘inhabitant.’” *Id.*

17 74. Purportedly in the exercise of that discretion, the Apportionment Exclusion Order  
18 announces that the President has “determined that respect for the law and protection of the  
19 integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment  
20 base,” without regard to whether they reside in the United States. *Id.* § 2. The Apportionment  
21 Exclusion Order also sets forth the President’s motivation: he wants to punish States like  
22 California and Washington that, he says, have adopted “policies that encourage illegal aliens to  
23 enter this country” by diminishing their “representation in the House of Representatives.” *Id.*  
24 Indeed, the Order specifically identifies “one State [that] is home to more than 2.2 million illegal  
25 aliens, constituting more than 6 percent of the State’s entire population,” and states that “two or  
26 three” congressional seats would be allocated in this State than would otherwise be allocated not  
27 counting those undocumented persons. On information and belief, that “one State” is California,  
28 where Plaintiffs City of San Jose, BAJI, Sam Liccardo, and Zerihoun Yilma are located. *See*

1 Pew Research Center, *U.S. unauthorized immigrant population estimate by state, 2016* (Feb. 5,  
2 2019), [https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-](https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/)  
3 [state/](https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/).

4 75. To implement the Apportionment Exclusion Order, the President orders the  
5 Secretary of Commerce, “[i]n preparing his report to the President under section 141(b) of title  
6 13 . . . to provide information permitting the President, to the extent practicable, to exercise the  
7 President’s discretion to carry the policy . . . .” Apportionment Exclusion Order § 3. In other  
8 words, the Secretary is directed to provide information in the census report he is statutorily  
9 required to transmit to the President—that will enable the President to unlawfully categorize  
10 undocumented immigrants as “non-persons” and thereby exclude them from the apportionment  
11 calculation.

12 76. The President’s stated legal justification for this action is that the Constitution’s  
13 requirement that “persons in each State, excluding Indians not taxed” be enumerated in the  
14 census “has never been understood to include in the apportionment base every individual  
15 physically present within a State’s boundaries at the time of the census. Instead, the term  
16 ‘persons in each State’ has been interpreted to mean that only the ‘inhabitants’ of each State  
17 should be included.” *Id.* § 1. The Apportionment Exclusion Order states that “[d]etermining  
18 which persons should be considered ‘inhabitants’ for the purposes of apportionment requires the  
19 exercise of judgment,” and it defends excluding undocumented persons as an exercise of that  
20 judgment. *Id.*

21 77. That rationale is contrived. Under the Constitution, Representatives are  
22 apportioned among the States by “counting the whole number of persons in each State.” U.S.  
23 Const. amend. XIV, § 2. Accepting that this means persons who actually reside in the United  
24 States, and that tourists are not included for these purposes, millions of undocumented persons in  
25 fact reside in California and the United States. They are not just tourists passing through. *See,*  
26 *e.g.,* Brian Baker, *Estimates of the Illegal Alien Population Residing in the United States:*  
27 *January 2015*, Office of Immigration Statistics, Dep’t of Homeland Security (Dec. 2018),  
28 [https://www.dhs.gov/sites/default/files/publications/18\\_1214\\_PLCY\\_pops-est-report.pdf](https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf)

1 (estimating 12 million undocumented immigrants living in the United States, and estimating 2.9  
2 million living in California).

3 78. The Order’s focus on “inhabitants” is misguided. To begin, the Constitution  
4 speaks of “persons,” not “inhabitants.” But even if the term used were “inhabitant,” the result  
5 would be the same. “Inhabitant” would be co-extensive with the definition of “person” in this  
6 context, which means (now, in 1787, and in 1865) persons who reside in a place—without any  
7 overlay or additional requirement of legal documentation or status. *See, e.g., Inhabitant*, Samuel  
8 Johnson, *A Dictionary of the English Language* (6th ed. 1785) (“Dweller; one that lives or  
9 resides [sic] in a place.”); *Inhabitant*, Noah Webster, *American Dictionary of the English*  
10 *Language* (1865) (“1. One who dwells or resides permanently in a place, or who has a fixed  
11 residence, as distinguished from an occasional lodger or visitor”); *Inhabitant*, Merriam-Webster  
12 Online Dictionary (“one that occupies a particular place regularly, routinely, or for a period of  
13 time”), <https://www.merriam-webster.com/dictionary/inhabitant> (last visited July 27, 2020).  
14 “Inhabitant” is not equivalent with “citizen,” which connotes a fundamentally different  
15 relationship with the government, and which lawmakers in 1787, again in 1865, and again now,  
16 know very well how to use when they want to limit the scope of persons to the smaller class of  
17 citizens of the United States alone. *See, e.g., 2 Records of the Federal Convention of 1787*, pp.  
18 182-83 (M. Farrand ed. 1911) (draft of Constitution providing “proportions of direct taxation  
19 shall be regulated by the whole number of white and other free citizens and inhabitants, of every  
20 age, sex and condition, including those bound to servitude for a term of years, and three fifths of  
21 all other persons not comprehended in the foregoing description, (except Indians not paying  
22 taxes) . . . .”); U.S. Const. art. I, § 2, cl. 2 & § 3, cl. 2 (qualifications to be a Representative or  
23 Senator include “be[ing] nine years a Citizen of the United States” as well as “an inhabitant of  
24 that State [in or for] which he shall be chosen”); U.S. Const. amend. XIV, § 2 (referring to “male  
25 inhabitants of [a] State, being twenty-one years of age, and citizens of the United States”).  
26  
27  
28

1           **E.     Harm to Plaintiffs**

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

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

4           81.     The voting power of Plaintiffs Sam Liccardo, Zerihoun Yilma, and Lovette  
5 Kargbo-Thompson will be diluted by the Apportionment Exclusion Order because, by excluding  
6 millions of persons from the apportionment count, it will likely cause California to have fewer  
7 Representatives spread across their home States of California and Georgia. *See Dep't of*  
8 *Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-33 (1999) (state's expected loss  
9 of a Representative following reapportionment conferred standing on the state's voters).

10          82.     BAJI is harmed because the Apportionment Exclusion Order causes BAJI to  
11 divert resources—including time and money—from other important matters that it ordinarily  
12 would be addressing through presentations, workshops, publications, technical assistance, and  
13 trainings. The Administration's decision to exclude all undocumented persons from the  
14 apportionment calculations, and to require that the Department of Commerce and by extension  
15 the Census Bureau report such information to the President, will discourage undocumented  
16 immigrants from responding to the ongoing 2020 Census because of fear that the government  
17 will identify and retaliate against undocumented persons who fill out the census. As another  
18 federal court has already found, and the Supreme Court has upheld on review, undocumented  
19 immigrants have a high nonresponse rate to the census and that rate is likely to increase  
20 disproportionately if the administration of the census involves questions about citizenship. *See*  
21 *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 578-85 (S.D.N.Y. 2019),  
22 *aff'd in relevant part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139  
23 S. Ct. 2551 (2019). BAJI has spent and will continue to spend additional time and resources  
24 educating and encouraging its partners and constituents to appropriately fill out the census in  
25 order to counteract the chilling effect of the Apportionment Exclusion Order.

26          83.     The exclusion of undocumented persons from the Representatives apportionment  
27 among the States will frustrate and undermine BAJI's core mission of promoting equal and just  
28 laws through building coalitions and initiating campaigns with African Americans and Black



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

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

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

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**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**

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

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

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

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

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

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

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

**SECOND CLAIM FOR RELIEF**

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

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

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

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

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

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

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

10 **THIRD CLAIM FOR RELIEF**  
 11 **Violation of Census Act—Ultra Vires**  
 12 **(2 U.S.C. § 2a; 13 U.S.C. § 141)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 119. But there is direct evidence, too. The motivation is laid out in the Apportionment  
2 Exclusion Order itself, which states point blank that it seeks to punish States that the President  
3 says have adopted “policies that encourage illegal aliens to enter this country.” And there is no  
4 question that the Apportionment Exclusion Order disproportionately impacts Black and Latino  
5 communities. *Id.* at 266 (citing to *Washington v. Davis*, 426 U.S. 229, 242 (1976)). States and  
6 communities that will suffer adversely from Defendants’ decision are those with large  
7 populations of undocumented immigrants. Undocumented immigrants are disproportionately  
8 located in States, like California and Texas, that also have large Latino and Black populations.  
9 Those States are most likely to be disadvantaged by Defendants’ action.

10 120. In light of the above, the Apportionment Exclusion Order issued by President  
11 Trump is predicated on intentional discrimination against non-white, non-European  
12 undocumented immigrants and has caused, is causing, and will continue to cause harm to  
13 Plaintiffs as alleged above. The acts of the other Defendants have been and will be necessarily  
14 tainted by the President’s animosity toward communities of color. *Ramos v. Nielsen*, 321 F.  
15 Supp. 3d 1083, 1123-24 (N.D. Cal. 2018).

16 121. There is a substantial likelihood that the requested relief will redress this harm.

17 **PRAYER FOR RELIEF**

18 Plaintiffs respectfully request that this Court:

- 19 1. Declare that the Apportionment Exclusion Order’s directive to exclude  
20 undocumented persons from the apportionment base violates the U.S. Constitution;
- 21 2. Declare that the Apportionment Exclusion Order’s directive to exclude  
22 undocumented persons from the apportionment base is *ultra vires* and violates 2 U.S.C. § 2a(a)  
23 and 13 U.S.C. § 141;
- 24 3. Declare that any statement from the President to the Congress under 2 U.S.C.  
25 § 2a(a) that excludes undocumented persons residing in the United States from the  
26 apportionment base is be null and void;
- 27 4. Enjoin Defendants Department of Commerce, Census Bureau, Ross, Dillingham,  
28 from excluding undocumented persons from the apportionment base following the 2020 Census,



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

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

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

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

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

12 Dated: July 27, 2020

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