UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

COMMON CAUSE, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	No. 1:20-cv-02023-CRC

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56(c) and Local Civil Rule 7(h)(1), Plaintiffs Common Cause et al. submit the following statement of material facts as to which there is no genuine issue to be tried.

BACKGROUND

1. Throughout American history, documented and undocumented noncitizen immigrants have been counted in every census and in the base for every resulting congressional apportionment. *See, e.g.*, *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg. 28,950, 28,950, (2015) (showing that "[c]itizens of foreign countries living in the U.S." will be "[c]ounted at the U.S. residence where they live and sleep most of the time"); *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018); *Fed'n. for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.) (three-judge court) (stating that, for over "two centuries," the Census Bureau "has always attempted to count every person residing in [each] state," and that "the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully

within our borders"), *appeal dismissed*, 447 U.S. 916 (1980); Expert Declaration of John Thompson ¶ 19 (Ex. 23).[1]

2. In 2015, Dr. Thomas B. Hofeller prepared a study titled "The Use of Citizen Voting Age Population in Redistricting." Dr. Thomas B. Hofeller, "The Use of Citizen Voting Age Population in Redistricting," *available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed August 19, 2020). In the study, Dr. Hofeller, analyzed "the practicality of the use of citizen voting age population (CVAP) as a basis for achieving population equality for legislative redistricting." *Id.* at 1. Dr. Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base for redistricting would be advantageous to Republicans and non-Hispanic whites" and would dilute the political power of Hispanics. *Id.* at 9. Further, because precinct-by-precinct data on citizenship did not exist, he concluded, such a switch would be "functionally unworkable" without "add[ing] a citizenship question to the 2020 Decennial Census form." *Id.* at 4, 9.

3. When Donald J. Trump was elected to the presidency in 2016, Dr. Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." 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 19, 2020); *see also Kravitz v. Dep't of Commerce*, 382 F. Supp. 3d 393, 398 (D. Md. 2019).

4. The transition staffer with whom Dr. Hofeller spoke, Mark Neuman, then discussed the issue with Secretary of Commerce Wilbur L. Ross, Jr. and his advisors several times in the

[1] Citations to "Ex. __" are to the exhibits to the accompanying Declaration of Peter A. Nelson dated August 19, 2020.

early days of the new administration. Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*; *see also Kravitz*, 382 F. Supp. 3d at 398.

5. Soon thereafter, Dr. Hofeller ghostwrote "the key portion of a draft Justice Department letter" that falsely and pretextually claimed 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. Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*; *see also Kravitz*, 382 F. Supp. 3d at 398.

6. In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, issued a Memorandum in which he announced his intention to reinstate a question about citizenship on the 2020 decennial census questionnaire. Memorandum from W. Ross on Reinstatement of a Citizenship Question on the 2020 Decennial Census (March 26, 2018), *available at* https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf (last accessed August 19, 2020). In that Memorandum, Secretary Ross stated that he was acting at the request of the Department of Justice, which purportedly sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act. *Id.*

7. After a bench trial on the validity of the citizenship question, the United States District Court for the Southern District of New York ruled that Secretary Ross's decision to add the citizenship question "was unlawful for a multitude of independent reasons." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 679 (S.D.N.Y. 2019). Among those reasons, the Court found, "perhaps most egregiously, the evidence is clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts." *Id.* at 660.

8. The Supreme Court reversed some portions of the District Court's ruling, but

agreed that "the Secretary's rationale for reinstating the citizenship question was pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward in his memorandum, namely enhancement of DOJ's VRA enforcement efforts." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2578 (2019) (internal quotation marks omitted). The Court found that

> evidence showed that 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. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA.

Id. at 2574. The Court further explained that "agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction." *Id.* at 2576.

9. On July 5, 2019, at a press conference, President Trump was asked: "What's the reason . . . for trying to get a citizenship question on the census?" *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 19, 2020). The President answered: "Congress. You need it for Congress, for districting. You need it for appropriations. Where are the funds going?" *Id.*

10. 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." 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 19, 2020). He went on to say: "As shocking as it may be, far-left 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." *Id.*

11. On July 11, 2019, the President issued Executive Order 13880, *Collecting Information About Citizenship Status in Connection With the Decennial Census*, 84 Fed. Reg. 33821 (July 11, 2019). In that Executive Order, the President acknowledged that collecting citizenship data was important to enable the "design … [of] legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

12. In Executive Order 13880, the President further acknowledged that the Supreme Court's ruling in *New York*, 139 S. Ct. 2551, "made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire." 84 Fed. Reg. at 33821. The President asserted that

> [n]evertheless, we shall ensure that accurate citizenship data is compiled in connection with the census by other means. To achieve that goal, I have determined that it is imperative that all executive departments and agencies (agencies) provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country, including by providing any access that

> the [Commerce] Department may request to administrative records that may be useful in accomplishing that objective.

Id.

13. The President further "order[ed] all agencies to share information requested by the [Commerce] Department to the maximum extent permissible under law." *Id.* The President also "direct[ed] the [Commerce] Department to strengthen its efforts … to obtain State administrative records concerning citizenship." *Id.* at 33822.

14. The President further proclaimed that "[i]t is the policy of the United States to develop complete and accurate data on the number of citizens, non-citizens, and illegal aliens in the country." *Id.* at 33824.

15. On July 21, 2020, President Trump issued a Memorandum, *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020) (the "Memorandum"), *available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed August 19, 2020). In the Memorandum, President Trump declared that "it is the policy of the United States to exclude from the [congressional] apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* at 44680. The justification proffered for this "policy" is the President's belief that "[e]xcluding … illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.*

16. The Memorandum further states that "[a]ffording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of

aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles." *Id.* The Memorandum specifies that "one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.*

17. The Memorandum declares that the relevant constitutional language—"the whole number of persons in each State"—is ambiguous based on the fact that "aliens who are only temporarily in the United States, such as for business and tourism, and certain foreign diplomatic personnel are 'persons' who have been excluded from the apportionment base in past censuses." *Id.* at 44679. The Memorandum concludes that determining the true meaning of the constitutional language "requires the exercise of judgment." *Id.*

18. The Memorandum further states that, following the 2020 census, 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.*

19. The Memorandum further asserts that these 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.*

20. The Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* at 44680. The Memorandum also notes that in Executive Order 13880, the

President "instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country." *Id.*

21. In a statement accompanying the Memorandum, President Trump stated: "Today, I am . . . directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/ (last accessed August 19, 2020). He further stated: "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." *Id.*

22. 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." Hansi Lo Wang (@hansilowang), Twitter (July 23, 2020, 3:34 PM), https://twitter.com/hansilowang/status/1286384297314844672 (last accessed August 19, 2020). 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." *Id.* The email asserted that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens." *Id.*

23. At a recent congressional hearing, Census Bureau Director Steven Dillingham

testified that the Secretary of Commerce had already "giv[en] [the Bureau] the directive … to proceed with the requirements of the Presidential Memorandum," and that the "process [was] underway" and "moving [as] rapidly as possible." 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), *available at* https://www.youtube.com/watch?v=SKXS8e1Ew7c (last accessed August 19, 2020) (relevant exchanges at 2:53:36-3:02:07). In particular, he testified that the Bureau "ha[d] received most of the data" and that its experts were "beginning the process of looking at methodologies." *Id.*

24. At a hearing in another related litigation, the Census Bureau's counsel stated that "[t]here may need to be some statistical modeling," but that the Bureau "ha[sn't] formulated a methodology." 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-omit-unauthorized-immigrants-from-a-key-census-count (last accessed August 19, 2020).

25. The statutory deadline for the President to prepare and transmit his apportionment tables to Congress is in early January 2021, *i.e.*, "[o]n the first day, or within one week thereafter, of the first regular session of the [next] Congress." 2 U.S.C. § 2a(a). On August 3, 2020—less than two weeks after the Memorandum was issued—the Census Bureau abruptly reversed its earlier decision to extend all census deadlines in light of the COVID-19 pandemic, shortening data collection by a month and putting the integrity of the decade-long census effort at severe risk. U.S. Census Bureau, "Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count" (Aug. 3, 2020), *available at* https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.

html (last accessed August 19, 2020); *see also* Alexa Ura, *An abrupt change to the census deadline shortened the response period by a month, increasing fears of an undercount in Texas*, The Texas Tribune (Aug. 4, 2020), *available at* https://www.texastribune.org/2020/08/04/texas-census-deadline-hispanic/ (last accessed August 19, 2020); Mike Schneider, *Worries about 2020 census' accuracy grow with cut schedule*, AP News (Aug. 4, 2020), *available at* https://apnews.com/c564b5c4a2318215360dec1a0529a124 (last accessed August 19, 2020); Dartunorro Clark, *'An insidious ploy': Trump admin's decision to cut census short could have dire consequences*, NBC News (Aug. 8, 2020), *available at* https://www.nbcnews.com/politics/politics-news/insidious-ploy-trump-admin-s-decision-cut-census-short-could-n1236156 (last accessed August 19, 2020). The Administration has offered no public explanation for this sudden about-face, but the only plausible motivation is to ensure that the census count is finalized in time for President Trump to finish implementing the Memorandum before his current term in office ends on January 20, 2021. Hansi Lo Wang, *Census Cuts All Counting Efforts Short By A Month*, NPR (Aug. 3, 2020), *available at* https://www.npr.org/2020/08/03/898548910/census-cut-short-a-month-rushes-to-finish-all-counting-efforts-by-sept-30 (last accessed August 19, 2020); Michael Wines & Richard Fausset, *With Census Count Finishing Early, Fears of a Skewed Tally Rise*, New York Times (Aug. 4, 2020), *available at* https://www.nytimes.com/2020/08/04/us/2020-census-ending-early.html (last accessed August 19, 2020).

PLAINTIFFS

26. Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Declaration of Karen Hobert Flynn ¶ 2 (Ex. 1).

27. 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 who are voters or who are eligible to vote in all 50 states and in every congressional district. *Id.* at ¶ 3.

28. Common Cause's mission is to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process. *Id.* at ¶ 5. This includes undocumented immigrants. *Id.* at ¶ 4.

29. Because 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. *Id.* at ¶ 6.

30. By discouraging immigrants (both documented and undocumented) from responding to the census, and by seeking to exclude undocumented immigrants from the apportionment base, the Memorandum directly impairs and undermines Common Cause's organizational mission of ensuring equal representation for all. 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. *Id.* at ¶ 7.

31. Specifically, Common Cause has increased its efforts to promote census participation among communities that are likely to be adversely affected by the Memorandum, including urban and immigrant communities. *Id.* at ¶ 8.

32. Because Common Cause has members who are voters or who are eligible to vote

in all 50 states, including California, Texas, Florida, New York, and New Jersey, it has some members that will lose a congressional representative because of the exclusion of undocumented immigrants from the apportionment calculations. *Id.* at ¶ 14.

33. Plaintiff Paula Aguirre is a natural-born U.S. citizen, and a resident of Queens, New York City, New York. Declaration of Paula Aguirre ¶ 1 (Ex. 2). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

34. Plaintiff Roberto Aguirre is a naturalized U.S. Citizen, and a resident of Queens, New York City, New York. Declaration of Roberto Aguirre ¶ 1 (Ex. 3). He is a member of Common Cause. *Id.* at ¶ 3. He is a registered voter, and regularly exercises his right to vote. *Id.* at ¶ 5.

35. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. Declaration of Sheila Aguirre ¶ 1 (Ex. 4). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

36. Plaintiff Angelo Ancheta is a natural-born U.S. citizen and a resident of San Francisco, California. Declaration of Angelo Ancheta ¶ 1 (Ex. 5). He is a registered voter, and regularly exercises his right to vote. *Id.* at ¶ 4.

37. Plaintiff Cynthia Ming-Hui Dai is a natural-born U.S. citizen and a resident of San Francisco, California. Declaration of Cynthia Ming-Hui Dai ¶ 1 (Ex. 6). She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 4.

38. Plaintiff Simon Fischer-Baum is a natural-born U.S. citizen and a resident of Houston, Texas. Declaration of Fischer-Baum ¶ 1 (Ex. 7). He is a registered voter, and regularly exercises his right to vote. *Id.* at ¶ 4.

39. Plaintiff Connie Galambos Malloy is a natural-born U.S. citizen and a resident of

Pasadena, California. Declaration of Connie Galambos Malloy ¶ 1 (Ex. 8). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 4.

40. Plaintiff Raquel Morsy is a U.S. citizen and a resident of Hillside, New Jersey. Declaration of Raquel Morsy ¶ 1 (Ex. 9). She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 4.

41. Plaintiff Norma (Robin) Mote is a natural-born U.S. citizen and a resident of Dallas, Texas. Declaration of Norma (Robin) Mote ¶ 1 (Ex. 10). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

42. Plaintiff Lilbert (Gil) Roy Ontai is a natural-born U.S. citizen and a resident of San Diego, California. Declaration of Lilbert (Gil) Roy Ontai ¶ 1 (Ex. 11). He is a registered voter, and regularly exercises his right to vote. *Id.* at ¶ 4.

43. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. Declaration of Sara Pavon ¶ 1 (Ex. 12). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

44. Plaintiff Coleen P. Stevens Porcher is a naturalized U.S. citizen and a resident of Montclair, New Jersey. Declaration of Coleen P. Stevens Porcher ¶ 1 (Ex. 13). She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 4.

45. Plaintiff Jeanne Ellen Raya is a natural-born U.S. citizen and a resident of San Gabriel, California. Declaration of Jeanne Ellen Raya ¶ 1 (Ex. 14). She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 4.

46. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York. Declaration of Jonathan Allan Reiss ¶ 1 (Ex. 15). He is a member of

Common Cause. *Id.* at ¶ 3. He is a registered voter, and regularly exercises his right to vote. *Id.* at ¶ 5.

47. Plaintiff Inge Spungen is a naturalized U.S. citizen and a resident of Patterson, New Jersey. Declaration of Inge Spungen ¶ 1 (Ex. 16). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

48. Plaintiff Irene Sterling is a U.S. citizen and a resident of Belleville, New Jersey. Declaration of Irene Sterling ¶ 1 (Ex. 17). She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 4.

49. Plaintiff Dennis Vroegindewey is a U.S. citizen and a resident of Whippany, New Jersey. Declaration of Dennis Vroegindewey ¶ 1 (Ex. 18). He is a registered voter, and regularly exercises his right to vote. *Id.* at ¶ 4.

50. Plaintiff Susan N. Wilson is a natural-born U.S. citizen and a resident of Princeton, New Jersey. Declaration of Susan N. Wilson ¶ 1 (Ex. 19). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

51. Plaintiff Myra Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Declaration of Myra Young ¶ 1 (Ex. 20). She is a member of Common Cause. *Id.* at ¶ 3. She is a registered voter, and regularly exercises her right to vote. *Id.* at ¶ 5.

ARGUMENT

52. The Census Bureau did not inquire about census respondents' citizenship, let alone about their compliance with immigration laws (*i.e.*, their documented/undocumented status), in connection with the 2020 census. *See* Exec. Order No. 13880, 84 Fed. Reg. 33821 (noting that citizenship question will not appear on the 2020 census); *see also New York*, 139 S. Ct. 2551.

53. It is far too late to add a citizenship question to the census now. As of July 2019,

the President acknowledged that the Supreme Court's ruling in *New York*, 139 S. Ct. 2551, made it "impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire." Exec. Order No. 13880, 84 Fed. Reg. at 33821; *see also* Expert Declaration of Dr. D. Sunshine Hillygus ¶ 14 (Ex. 22).

54. Plaintiff's expert, Dr. Christopher Warshaw, has been an Assistant Professor of Political Science at George Washington University since August 2017, and will become a tenured Associate Professor on September 1, 2020. Expert Declaration of Dr. Christopher Warshaw ¶ 1 (Ex. 21). Prior to working at George Washington University, Dr. Warshaw was an Associate Professor at the Massachusetts Institute of Technology from July 2016 – July 2017, and an Assistant Professor at MIT from July 2012 – July 2016. *Id.* Dr. Warshaw earned his Ph.D. in Political Science from Stanford University, where his graduate training included courses in political science and statistics. *Id.* at ¶ 5. Dr. Warshaw also has a J.D. from Stanford Law School. *Id.* Dr. Warshaw's academic research and teaching focuses on public opinion based on surveys and census data, as well as the study of representation, elections, and polarization in American politics. *Id.* Dr. Warshaw has also taught courses on statistical analysis. *Id.*

55. In order to assess the consequences of excluding undocumented immigrants from the count of people in the United States used for apportionment, Dr. Warshaw (a) estimated the baseline population of each state in 2020 based on the Census Bureau's annual estimates of the population of each state from the past three decades, which included overseas federal employees and their dependents; (b) used data from the Pew Research Center ("Pew"), which is the most widely used data in the academic literature on the undocumented immigrant population, to estimate the number of undocumented immigrants in each state in 2020; (c) estimated the proportion of each state's population that would be excluded from the enumeration used for apportionment due

to the Memorandum, and then used the official apportionment table published by the U.S. Census Bureau to estimate the number of congressional seats that states would gain or lose; and (d) evaluated the robustness of the findings to a variety of alternative data sources and modeling strategies. *Id.* at ¶ 11.

56. While the estimated numbers of undocumented immigrants from Pew and other sources (e.g., Migration Policy Institution ("MPI"), Center for Migration Studies ("CMS"), and others) may be used for research and analysis, the Census Bureau cannot use such estimated numbers to exclude undocumented immigrants for the purpose of counting the actual apportionment base because they are not "enumerations." *Id.* at ¶ 25.

57. The estimated numbers of Pew, MPI and CMS all rely on the American Community Survey ("ACS") dataset, which is constructed based on surveys of a sample of the American public. *Id.* at ¶¶ 31, 52. Therefore, the estimated numbers derived by Pew, MPI and CMS necessarily rely on statistical sampling and are subject to sampling error. *Id.*

58. The exclusion of undocumented immigrants from the apportionment base (i.e., the population enumeration used for apportionment) is likely to have substantial effects on the population counts of each state, and the apportionment of representatives across states for the U.S. House of Representatives. *Id.* at ¶ 12.

59. The exclusion of undocumented immigrants from the apportionment base will almost certainly (98.3% probability) lead Texas to lose a seat. *Id.* at ¶¶ 12, 44. It is likely to lead California (72.1% probability) and New Jersey (69.8% probability) to lose a congressional seat. *Id.* It also could lead other states, such as Arizona, Florida, New York, or Illinois, to lose seats. *Id.*

60. There is a 100% probability that the exclusion of undocumented immigrants from

the apportionment base will lead at least one of the states where the individual Plaintiffs in this lawsuit live (Texas, California, New Jersey, New York, and Florida) to lose a seat. *Id.* at ¶¶ 12, 45.

61. There is a 99.1% probability that at least one of California, Florida, New Jersey, or New York (i.e., the four states other than Texas where the individual Plaintiffs in this lawsuit live) would lose a seat. *Id.* at ¶¶ 12, 45.

62. There is a 97.4% probability that Texas would lose a seat and that at least one of California, Florida, New Jersey, or New York would also lose a seat. *Id.* at ¶ 45.

63. There is a 100% probability that the exclusion of undocumented immigrants from the apportionment base will lead at least one state in the United States to lose a seat. *Id.* at ¶¶ 12, 45.

64. Dr. Warshaw's overall conclusions are similar across multiple data sources on the prevalence of undocumented immigrants, across different estimates of undocumented immigrants, and across different modeling strategies. *Id.* at ¶¶ 50-58.

65. They are also similar to the conclusions reached by a variety of independent analysts and organizations. *Id.* at ¶¶ 63-65.

66. The exclusion of undocumented immigrants from the apportionment base would affect political representation in Congress. *Id.* at ¶ 12.

67. It is likely to affect the distribution of federal funds to each state, and the general power that each state holds in Congress. *Id.*

68. Plaintiffs' expert, Dr. D. Sunshine Hillygus, has been a Professor of Political Science and Public Policy at Duke University since 2015. Hillygus Decl. ¶ 1. Before that, she was an associate professor at Duke from 2009 – 2015 and a faculty member at Harvard University

from 2003 – 2009. *Id*. Dr. Hillygus earned a Ph.D. in political science from Stanford University in 2003. *Id*. Dr. Hillygus has over 20 years of experience in survey design, implementation, and analysis, including publishing research on the topics of census participation, survey methodology, survey non-response, and data quality in respected academic journals including *Public Opinion Quarterly*, *Journal of Survey Statistics and Methodology*, *Statistical Science*, *Political Analysis*, and *Annals of Applied Statistics*. *Id*. From 2012 – 2018, she served as a member of the Census Scientific Advisory Committee (CSAC), a committee that advises the director of the U.S. Census Bureau on the uses of scientific developments in statistical data collection, survey methodology, geospatial and statistical analysis, econometrics, cognitive psychology, business operations, and computer science as they pertain to the full range of Census Bureau programs and activities, including census tests, policies, and operations. *Id*.

69. Any attempt to count undocumented immigrants for producing an apportionment count would leave the Census Bureau with only a few options: (a) using the 2020 Census, (b) using existing estimates from outside of the Census Bureau, and (c) using administrative records. *Id*. at ¶ 13. None of these options would constitute an enumeration as required by the Constitution. *Id*. Moreover, using existing estimates from outside of the Census Bureau or administrative records would require statistical sampling, which is prohibited for use in apportionment by statute. *Id*. There is therefore no feasible way to produce an accurate and reliable 2020 apportionment count that excludes undocumented immigrants that does not violate the mandates of the Constitution and the governing statutory framework. *Id*.

70. The proposed citizenship question that the Trump administration unsuccessfully attempted to add to the census questionnaire would not have enabled the production of apportionment numbers excluding undocumented immigrants because it did not distinguish

foreign-born residents with formal legal status from those without formal legal status (i.e., undocumented immigrants). *Id*.

71. The decennial census questionnaire does not ask, nor has it ever asked, about the legal status of foreign-born residents. *Id*. at ¶ 14. It is too late to ask such a question on the 2020 questionnaire, so producing an apportionment count that excludes undocumented immigrants will necessarily require a methodology that departs from the 2020 Operational Plan. *Id*. The 2020 Operational Plan "covers all operations required to execute the 2020 Census, starting with precensus address and geographic feature updates, and ending once census data products are disseminated and coverage and quality are measured." 2020 Census Operational Plan, U.S. Census Bureau (Dec. 31, 2018), https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/operational-plan.html.

72. Although the Census Bureau does not currently have a data product that would allow for the exclusion of undocumented persons from the apportionment count, estimates of the undocumented population have been produced outside the Census Bureau. *Id*. at ¶ 16. While these estimates may be useful for research and analysis, they are not adequate or permissible for use in apportionment. *Id*.

73. Although several organizations have produced estimates of the undocumented population, including Pew, CMS, MPI, and The Office of Immigration Statistics ("OIS"), these estimates were not produced to estimate the undocumented population *as of Census Day* (April 1, 2020), as the Census Act requires. *Id*. at ¶ 17.

74. These estimates are not reliable enough to be used for purposes of apportionment. *Id*. at ¶ 18.

75. Broadly, the available estimates rely on a methodology called the "residual

technique," which estimates the number of undocumented immigrants by subtracting the number of immigrants in compliance with immigration laws (typically estimated from government records) from the total number of immigrants in the country, as estimated from self-report responses to sample surveys (most often, the Census Bureau's ACS). *Id*. at ¶¶ 18 – 19.

76. The ACS is a survey designed and conducted by the Census Bureau that collects social, economic, housing, and demographic characteristics from a sample of approximately 1.6% of households annually. *Id*. That is, the ACS data product is a result of sampling. *Id*.

77. As such, existing estimates of undocumented populations that rely on the ACS would necessarily use sampling, are subject to significant uncertainty from sampling error and are prohibited from use for purposes of apportionment. *Id*. These estimates cannot be used for purposes of apportionment because they rely on statistical sampling and adjustment. *Id*. at ¶ 24. Any method that relies on statistical sampling and/or adjustment is not an actual enumeration, as the Constitution requires. *Id*.

78. In *Department of Commerce v. U.S. House of Representatives* (1999), the Supreme Court ruled that the Census Act precluded the use of sampling to produce the apportionment count "[w]hether used as a 'supplement' or as a 'substitute.'" *Id*.

79. As a matter of accuracy, a sample of the population, in contrast to a census, is subject to uncertainty from random sampling error. *Id*. That sampling error is often reported as a margin-of-error with survey statistics. The greater the margin of error, the less confidence one should have in the resulting statistical estimate. *Id*.

80. Without an actual enumeration, there is no known method of excluding undocumented immigrants from the 2020 census count for purposes of apportionment, including the use of administrative records, that does not rely on statistical sampling. *Id*. at ¶ 29.

81. Administrative records concerning citizenship and immigration status are often incomplete, outdated, and inaccurate—they are a flawed and biased sample from which to attempt extrapolation. *Id*. Specifically, very few administrative records directly identify those individuals with undocumented status, and the few that do so are fundamentally flawed, so it would not be possible to perform a direct enumeration of the number of undocumented immigrants from the available administrative records. *Id*.

82. The administrative records identifying citizens and legal non-citizens are also a nonrandom sample with known inaccuracies, and include data sources that explicitly rely on statistical sampling. *Id*.

83. Any method to extrapolate from this sample to the population necessarily requires extensive statistical modeling in ways that are fundamentally different than the kind of imputation that the Supreme Court has permitted for apportionment purposes. *Id*.

84. Among other reasons, the scale of the population that would need to be filled in using statistical modeling if undocumented immigrants were to be excluded from the apportionment base is orders of magnitude larger than what has been permitted by the Supreme Court and cannot be considered a "sparing" use. *Id*.

85. The census deadlines do not leave sufficient time to follow requirements for testing and stakeholder engagement before apportionment numbers are due to the President by the end of the year. *Id*.

86. Accordingly, it is not currently feasible for the Census Bureau to produce estimates of undocumented immigrants from administrative records that would be lawful or of sufficient quality to use for the 2020 apportionment count. *Id*.

87. The Census Bureau is not able to conduct an actual enumeration of undocumented

immigrants based on administrative records. *Id*. at ¶ 30.

88. There are very few administrative records that directly document those with undocumented status. *Id*. Among the limited sources available are administrative records of individuals who entered the country undetected but were subsequently apprehended. *Id*. The Census Bureau has received such administrative data from the Department of Justice, Department of Prisons, and the Bureau of Justice Statistics National Corrections Reporting Program ("NCRP"). *Id*. However, apprehended undocumented immigrants represent a tiny fraction of those in the country without formal legal immigration status. *Id*.

89. Scrutiny of these records also highlights that—even for those in federal custody—the administrative records do not provide accurate, reliable, and timely information. *Id*. at ¶ 31.

90. Given the grossly incomplete coverage of administrative records identifying undocumented immigrants, any attempt to produce a count of the undocumented population for purposes of exclusion from the 2020 apportionment count would require extensive statistical modeling. *Id*. at ¶ 34.

91. Even in the limited Census Bureau documentation available about how administrative records will be used to estimate citizenship and immigration status, there is explicit mention of reliance on data collected by sampling. *Id*. at ¶ 40.

92. Because the potential data sources that the Census Bureau is likely to use to estimate citizenship and immigration status through statistical modeling rely on statistical sampling techniques, any population estimates of citizenship and immigration status that depends on these data sources would necessarily incorporate sampling at some level in the analysis and would not be an enumeration or imputation. *Id*. at ¶ 41.

93. The statistical modeling and adjustment required to produce population estimates

of undocumented immigrants differ in fundamental ways from the current use of statistical modeling and administrative records used in counting the household size of U.S. addresses. *Id*. at ¶ 42.

94. These differences parallel the differences between sampling and imputation discussed in the Supreme Court's decision to prohibit sampling (but not imputation) for producing apportion counts: the nature, scope, immediate objective of the statistical methods, and impact on accuracy of the resulting counts. *Id*.

95. The Census Bureau does not use administrative records on their own to enumerate a household—administrative records are used only after giving the entire population an opportunity to self-respond and after an attempt to enumerate the household by field staff. *Id*. at ¶ 44. In other words, they are used solely for processing data, not collecting it in the first place. *Id*.

96. In contrast, the use of administrative records for producing counts of undocumented immigrants is data collection. *Id*. No one is asked to self-respond about their legal status or citizenship status in the decennial census, so administrative records are collected separately from the decennial census, for purposes of gathering information about citizenship and legal status from the sample of administrative records available to extrapolate about the characteristics of the population. *Id*.

97. Characteristic imputation, as currently practiced by the Census Bureau, is a "downstream" procedure—that is, it occurs *after* and *entirely separate from* the determination of the apportionment count required by the Constitution. *Id*. at ¶ 47. Rather, it is used only for generating auxiliary population statistics that are not part of the census's constitutional role. *Id*.

98. The scope of any statistical modeling required to estimate the number of

undocumented immigrants would be unprecedented for use in enumerating the apportionment population. *Id*. at ¶ 48.

99. Count imputation is used sparingly, and only after giving the entire population an opportunity to self-respond, and attempting to follow up with anyone who does not respond. *Id*.

100. Given the scarcity of administrative records that directly document unauthorized immigrants, under any methodology that the Census Bureau might use to identify the number of undocumented immigrants in each state, *almost all* individuals identified as undocumented, and thus excluded from apportionment numbers, will have been estimated based on extrapolated data from a sample of administrative records. *Id*. at ¶ 49.

101. The scale of the population that would be enumerated through statistical methods rather than traditional methods is orders of magnitude larger than anything the Census Bureau has ever attempted before, and certainly cannot be considered "sparing" use. *Id*. For individuals in the census who are unable to be linked to administrative records, the extent of the exercise is even more striking: they could be excluded from the apportionment count based only on their demographic characteristics (e.g., their race or ethnicity) and local area information (the only information available in the decennial questionnaire), if the Census Bureau's modeling formula identifies them as a probable undocumented immigrant based on this information. *Id*.; *see also id*. ¶¶ 25, 37, 47, 63-64 (discussing Defendants' intent to use data on race and ethnicity in connection with predicting citizenship).

102. Whereas the current use of count imputation makes the census more accurate, the exclusion of undocumented immigrants through statistical modeling of administrative records will make the census less accurate. *Id*. at ¶ 51. Fundamental shortcomings in the availability, accuracy, reliability, and timeliness of administrative records concerning citizenship and legal status will

impact the predictive accuracy of the model results. *Id*.

103. Plaintiffs' expert, John Thompson, served as Director of the U.S. Census Bureau from August 2013 to June 2017. Thompson Decl. at ¶¶ 1, 7. Before that, Thompson worked at the Census Bureau for 27 years (1975 –2002) and as the Executive Vice President (2002 – 2008) and President (2008 – 2013) of the National Opinion Research Center ("NORC") at the University of Chicago. *Id*. at ¶ 7. Thompson spent the majority of his employment at the Census Bureau focused on the Decennial Census and ultimately served as the Associate Director for the 2000 Decennial Census, a role in which Thompson was the senior career executive in charge of management of all aspects of the 2000 Decennial Census. *Id*. at ¶¶ 7, 9.

104. It is critical for the Census Bureau and the Department of Commerce to describe the methodology that they intend to utilize to estimate the numbers of undocumented persons enumerated in the 2020 Census and what are appropriate measures of accuracy that would support the usage of such methodologies. *Id*. at ¶ 15.

105. The Memorandum does not provide any specific directions and the Census Bureau has not publicly described how it will comply with the Memorandum. *Id*.

106. The Census Bureau has always understood the Constitution to require an actual enumeration of all persons in the United States for purposes of apportionment. *Id*. at ¶ 19.

107. This actual enumeration has always included immigrants, including undocumented immigrants. *Id*.

108. No actual enumeration that identifies the number of undocumented immigrants has been undertaken by the Census Bureau and, at this late date, it is too late to undertake such an actual enumeration of undocumented immigrants for purposes of apportionment based on the 2020 census. *Id*.

109. There is no known methodology consistent with the Census Bureau's standards that would allow the Census Bureau to determine the number of undocumented persons that are included in the 2020 Census in order to comply with the Memorandum's instruction. *Id*. at ¶ 20.