Exhibit 4

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

SUPPLEMENTAL EXPERT DECLARATION OF DR. D. SUNSHINE HILLYGUS

1. I have reviewed the Government's motion to dismiss and opposition to Plaintiffs' partial motion for summary judgment, and the declarations of Albert Fontenot and John Abowd in support. I offer the following supplemental opinions.

2. In their brief, the Government offers examples of how the Census Bureau might identify undocumented immigrants. The Government argues, "if the Census Bureau finds it feasible to identify unlawfully present aliens who resided in a Customs and Border Patrol (CBP) or Immigration and Customs Enforcement (ICE) facility within a State on census day after being arrested while illegally entering the country, it would be permissible to exclude them."[1] The Government also proposes that the Census Bureau could rely on administrative records from ICE's non-detained docket.[2] It is my opinion that these sources do not provide reliable, accurate, or timely information that would allow "actual enumeration" of undocumented immigrants for exclusion from the 2020 apportionment count; indeed, they further illustrate that the Memorandum cannot be implemented in a lawful manner.[3]

3. First, neither those detained in an ICE or CBP facility[4] on census day nor those on the non-detained docket constitute a list of "undocumented immigrants." These groups include individuals wrongfully detained or incorrectly included on the non-detained docket as well as

[1] Gov. Br. at 31. In footnote 4, the Government claims that "[t]hese populations may be significant. During fiscal year 2019, ICE held in custody an average daily population of 50,165 aliens."

[2] The Government claims, "if feasibly identified, the Executive may exclude aliens who have been detained for illegal entry and paroled into the country pending removal proceedings, or who are subject to final orders of removal." In footnote 5, they argue "ICE's non-detained docket surpassed 3.2 million cases in fiscal year 2019, a population large enough to fill more than four congressional districts under the 2010 apportionment." *Id.* at 32.

[3] Presidential Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, July 21, 2020 (the "Memorandum").

[4] The Census Bureau explicitly says people residing at ICE Service Processing Centers and ICE contract detention facilities are enumerated as part of the Group Quarters enumeration, indicating these individuals were intended to be included in the 2020 apportionment count. See https://2020census.gov/content/dam/2020census/materials/group-quarters/code-types/2020%20Census%20Group%20Quarters%20Type%20Codes.pdf

individuals who will ultimately be determined to have legal authorization to be in the United States through change in legal status or other relief.

4. There are many documented cases of ICE wrongfully detaining U.S. citizens and legal permanent residents.[5] According to a Cato Institute report, more than 3,500 U.S. citizens in Texas were wrongfully detained by ICE between 2006 and 2017.[6] Between 2012 and 2018, ICE released more than 1,480 people from custody after investigating their citizenship claims—more than 20% of the claims reviewed by the agency.[7] An even larger number of legal permanent residents are held in immigration detention. According to the Transactional Records Access Clearinghouse (TRAC Immigration), a non-partisan organization that releases information about federal enforcement, ICE detainers were mistakenly placed on more than 28,000 legal permanent residents between 2008 and 2012.[8]

5. These unlawful detentions have been attributed to "incomplete Government records, bad data, and lax investigations."[9] In February, a federal judge determined that the

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[5] Stevens, Jacqueline. "US Government unlawfully detaining and deporting US citizens as aliens." Va. J. Soc. Pol'y & L. 18 (2010): 606. For examples of specific cases, *See* Darlena Cunha. ICE Is Dangerously Inaccurate: Even American citizens are not immune from immigration raids. New York Times. July 12, 2019. https://www.nytimes.com/2019/07/12/opinion/ice-raids.html; Eyder Peralta. You Say You're An American, But What If You Had To Prove It Or Be Deported? NPR. December 22, 2016. https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported#foot2.

[6] David Bier. U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas. Cato Immigration Research and Policy Brief No. 8 (August 29, 2018). https://www.cato.org/publications/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted.

[7] Paige St. John and Joel Rubin. ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship. Los Angeles Times. April 27, 2018. https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html.

[8] An ICE detainer or "immigration hold" is a written request that local or state law enforcement detain an individual beyond the time the person would otherwise be released (e.g., because charges were dropped, the person was released on bail or recognizance, the person was acquitted, or the person completed a jail or prison sentence) to facilitate transferring the individual into federal custody for deportation purposes. Statistics take from Laura Romero. Marine veteran was among US citizens detained by ICE, ACLU says. ABC News. December 12, 2019. https://abcnews.go.com/Politics/marine-veteran-us-citizens-detained-ice-aclu/story?id=67465583.

[9] St. John and Rubin. "ICE held an American man."

"inaccurate, incomplete, and error-filled" federal databases used by ICE to issue detainers are "insufficient for establishing probable cause" that an individual is deportable.[10] Yet, the Government now wants to use many of these same "inaccurate, incomplete, and error-filled" administrative records to exclude individuals from the apportionment count. The flaws that the court deemed "fatal" in that case are precisely the same flaws that make these records inadequate for identifying undocumented immigrants for exclusion from apportionment: 1) the available administrative records provide static, often outdated, information; 2) the administrative records are incomplete, often missing crucial pieces of information; and 3) the administrative records were not intended to be used to identify undocumented immigrants.[11]

6. As noted above, many individuals in detention facilities or on the non-detained docket will be determined by immigration courts to have authorization to reside in the United States. For example, some individuals in detention or on the non-detained docket have legal immigration status that simply requires recognition or have been accused of immigration law violations that will be subsequently vacated. According to TRAC Immigration's compilation of deportation proceeding outcomes, 27.8% of removal proceedings in 2019 resulted in the immigration court granting the individual permission to stay in the country.[12] Most strikingly, there were 23,837 cases (roughly 10% of all cases) in 2019 in which an immigration court judge simply terminated a case, finding no grounds for removal.[13] Those on the non-detained docket (whether never detained or released after detention) are especially likely to be granted

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[10] *Gonzalez v. ICE,* 416 F. Supp. 3d 995, 1016 (C.D. Cal. 2019), p. 30.

[11] *Id*. at 1018.

[12] TRAC Immigration. Outcomes of Deportation Proceedings in Immigration Court. Syracuse University. https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php.

[13] Another 11,093 received an administrative closure of the case, such as the individual receiving temporary protected status, and 34,163 cases were granted relief from removal. *Id.*

permission to stay in the country—since 2001, more than 40% of cases ended with termination, a grant of relief, or administrative closure.[14]

7. Residing in an ICE or CBP detention facility or being listed on the non-detained docket indicates only that a person is ***potentially*** removable; it is not itself a determination of immigration status. Many individuals cannot be put into a discrete category of legal or not legal immigration status until adjudication of the case.[15] For example, many in detention are in the defensive asylum process, awaiting determination of a pending application. In the congressional testimony of Border Patrol Chief Carla Provost, she notes that "80 percent of individuals meet the initial credible fear bar in the asylum process," indicating they have potentially valid claims for asylum.[16]

8. Immigration status is complex and fluid, sometimes changing multiple times over the course of a lifetime, sometimes even without the knowledge of the individual.[17] The Department of Homeland Security and Department of Justice acknowledge the difficulty of determining immigration status, even for those in federal custody; in their latest *Alien*

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[14] TRAC Immigration. State and County Details on Deportation Proceedings in Immigration Court. Syracuse University. https://trac.syr.edu/phptools/immigration/nta/. Moreover, in 2019, 51.4% of all people issued a "notice to appear" in immigration court were never detained. *See* https://trac.syr.edu/phptools/immigration/remove/.

[15] Since March 2020, there has been a dramatic decline in immigration court completions because of COVID-19. Case completions dropped from about 42,000 per month to under 27,000 in March, and fewer than 7,000 per month in April, May, June, and July. This means that thousands of individuals who would have otherwise received a determination allowing them to legally reside in the United States in time for enumeration in the 2020 census would instead potentially be excluded from the apportionment count by the Government. *See* TRAC Immigration. Immigration Court Completions Remain at Historic Lows Through July 2020. Syracuse University. https://trac.syr.edu/immigration/reports/620/.

[16] Testimony of Carla Provost, Border Patrol Chief, Customs and Border Protection (CBP), before the U.S. House of Representatives Committee on Appropriations Subcommittee on Homeland Security, "U.S. Customs and Border Protection – Border Patrol Oversight" (July 24, 2019), p. 3. https://docs.house.gov/meetings/AP/AP15/20190724/109834/HHRG-116-AP15-Wstate-ProvostC-20190724.pdf.

[17] Derivative citizenship, for instance, depends on the citizenship status of parents (and even grandparents) and can involve complex factors like marital status, custody, when a parent lived in the United States, and more. As explained by ICE's Deputy Director, "In light of the complexity of U.S. citizenship and nationality law, some individuals don't even know that they are U.S. citizens until well after they are encountered by ICE." https://assets.documentcloud.org/documents/5030194/Albence-Statement.pdf.

Incarceration Report (April 16, 2019), roughly one-third of the "known and suspected aliens in DOJ custody" still had their immigration status under investigation.[18] In response to a high-profile case in which a U.S. citizen was wrongfully detained, the head of ICE's Enforcement and Removal Operations, Matthew Albence, acknowledged this complexity:

> [I]t is ICE policy to carefully and expeditiously investigate and analyze the potential U.S. citizenship of individuals encountered by ICE, including those who make a claim to citizenship, as well as in cases in which certain indicia of potential U.S. citizenship are present…. These investigations may require in-depth research of electronic and paper records, in addition to personal interviews of the individual and other persons…. ***ICE does not make the ultimate determination regarding whether an individual is a U.S. citizen***. If an individual encountered by ICE claims to be a U.S. citizen, or if ICE identifies indicia of potential U.S. citizenship, ICE will analyze the facts to determine if there is probative evidence that supporters the claim. Importantly, U.S. citizenship determinations are made by U.S. Citizenship and Immigration Services, the U.S. Department of State, and the federal district courts.[19]

9. If determination of undocumented status is this difficult for ICE, and if the ultimate determination of citizenship is in the hands of other agencies and the judiciary, the Census Bureau cannot be expected to make such a determination based on incomplete and deficient information from ICE.

10. Second, information on the non-detained docket is especially inadequate for identifying undocumented immigrants to exclude from apportionment numbers. In addition to the flaws noted above, these records often do not include reliable information about where an individual resides on census day. Individuals on the non-detained docket report to ICE at least once per year, but the frequency of check-ins is at the discretion of the Enforcement and

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[18] *Alien Incarceration Report*. Fiscal Year 2018, Quarter 2. April 16, 2019. https://www.justice.gov/opa/page/file/1154711/download.

[19] Written statement of Matthew Albence, the head of ICE's Enforcement and Removal Operations, to *Los Angeles Times*. https://assets.documentcloud.org/documents/5030194/Albence-Statement.pdf.

Removal Operations (ERO) office.[20] Final orders of removal are often made *in absentia*, so ICE may have missing or inaccurate information about where a paroled individual is located—information that is necessary if the Census Bureau were to exclude the individual from a state's apportionment count.[21] Although ICE classifies these individuals as fugitives, a recent study found that 15% of those individuals who were ordered deported *in absentia* successfully reopened their cases and had their *in absentia* orders rescinded—again highlighting the inadequacy of these sources for identifying undocumented immigrants.[22] The docket also includes individuals who have died or left the country.[23] Given the backlog in immigration courts, individuals might choose to leave the country without applying for a formal "voluntary departure," which requires approval by an immigration judge.

11. Regardless, any undocumented immigrants in the country that could theoretically be identified from detention facilities or the non-detained docket represent a profoundly incomplete estimate of the population: even if we were to (wrongly) assume that all of the approximately 50,000 individuals residing in detention facilities on census day were

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[20] Audrey Singer Immigration: Alternatives to Detention (ATD) Programs. Congressional Research Service. R45804. July 8, 2019, p. 5. https://fas.org/sgp/crs/homesec/R45804.pdf. Only a small percentage of the non-detained docket have their geographic location consistently monitored through technology-based monitoring services (e.g., ankle bracelet or smartphone GPS) as part of the Alternatives to Detention Program.

[21] In December 2019, more than 600,000 were listed as fugitives. According to congressional testimony, ERO has "a 45 percent in absentia order of removal rate, and high numbers of aliens who violate their terms of release from ICE custody and abscond from the Alternatives to Detention (ATD) program." Statement of Matthew Albence, Immigration and Customs Enforcement, Regarding The Fiscal Year 2021 President's Budget Request, to U.S. House of Representatives Committee on Appropriations (March 11, 2020), p. 4. https://docs.house.gov/meetings/AP/AP15/20200311/110701/HHRG-116-AP15-Wstate-AlbenceM-20200311.pdf

[22] Ingrid Eagly and Steven Shafer. Measuring In Absentia Removal in Immigration Court. University of Pennsylvania Law Review. 168, no. 4 (March 2020): 817.

[23] Scholars have documented an increase in self-deportations of unauthorized Mexican immigrants. *See* Robert Warren. Reverse Migration to Mexico Led to U.S. Undocumented Population Decline: 2010 to 2018. Journal on Migration and Human Security. 8, no. 1 (2020): 32-41. It is also well-recognized that the deaths of undocumented immigrants are often missed in vital statistics. *See* Jennifer Van Hook and Frank D. Bean. "Estimating underenumeration among unauthorized Mexican migrants to the United States: Applications of mortality analyses." Migration Between Mexico and the United States, Binational Study 2 (1998): 551-570.

unauthorized to reside in the United States, this represents only a tiny fraction of the undocumented population.[24] The evidence reviewed above indicates that a sizeable share of those on the non-detained docket have authorization to reside in the United States; the number with final orders of removal (187,825 were issued in 2019[25]) is still orders of magnitude smaller than the estimated undocumented population in the United States. And because many of the removal orders were given in absentia, an even smaller percentage could be reliably located in a particular state on census day.[26]

12. Moreover, these individuals were not all apprehended at the border. ICE makes thousands of arrests each year in the interior of the country—either by assuming custody of an immigrant from another law enforcement agency or through community arrests, such as raids at a work place or arrests of an individual at a courthouse when an immigrant appears for an appointment. In 2019, 137,084 initial book-ins came from ICE (rather than CBP).[27] Of the detained population, arrests in the interior (rather than CBP arrests at the border) accounted for 40% of the average daily detained population in 2019 (54% in 2018).[28] It is difficult to determine the current percentage of the non-detained docket that was initially apprehended at the border—according to TRAC Immigration, ICE now withholds this information in responding to Freedom

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[24] For comparison, the Department of Homeland Security's most recent estimate of the unauthorized population was 12 million—an estimate they calculated in 2018 based on a combination of sample surveys, administrative records, and statistical modeling. Bryan Baker. Estimates of the Illegal Alien Population Residing in the United States: January 2015. Office of Immigration Statistics, Department of Homeland Security (December 2018). https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf

[25] TRAC Immigration. Removal Orders Granted by Immigration Judges as of July 2020. Syracuse University. https://trac.syr.edu/phptools/immigration/court_backlog/apprep_removal.php

[26] And many of those removal orders issued *in absentia* will be subsequently rescinded. *See* Ingrid Eagly and Steven Shafer. Measuring In Absentia Removal in Immigration Court. University of Pennsylvania Law Review. 168, no. 4 (March 2020): 817.

[27] U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report. https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf.

[28] *Id.*

of Information Act (FOIA) Requests—but historical data from 2003 until 2016 found that only 48% originated with apprehensions by Border Patrol agents, not all of which actually occurred at the border.[29] TRAC Immigration further notes that ICE "contends it doesn't track the state or county were the apprehension occurred."[30]

13. Given the small fraction of the total undocumented immigrant population that could even theoretically be identified and geographically located through the sources identified by the Government, any use of those sources to implement the Memorandum, whether in whole or in part, would necessarily require significant extrapolation from incomplete administrative records or survey data and the need for statistical sampling that may not be lawfully used for apportionment purposes.

14. In his declaration, John Abowd says that the Census Bureau is aware of the prohibition against sampling and will not use sampling, but this is a meaningless reassurance without some information about how the Census Bureau ***actually does*** plan to implement the Memorandum. As I have previously stated, there are no available methodologies that do not employ unlawful sampling, and nothing in Dr. Abowd's declaration or the Government's submission indicates otherwise. The examples provided in the Government's response simply reinforce my previous conclusion: given the absence of self-reported legal status in census survey data collections and the small number of administrative records that reliably document undocumented immigrants and their geographic location on April 1, 2020, there is no way to enumerate undocumented immigrants without violating the prohibition on sampling.

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[29] TRAC Immigration. Historical Data: Immigration and Customs Enforcement Removals. Syracuse University. https://trac.syr.edu/phptools/immigration/removehistory/. This includes apprehension by Border Patrol at interior traffic and transportation points.

[30] TRAC Immigration. About the Data - ICE Arrests. Syracuse University.https://trac.syr.edu/phptools/immigration/arrest/about_data.html.

DATE: September 15, 2020

D. Sunshine Hillygus, Ph.D