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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CITY OF SAN JOSE, CALIFORNIA, et al.

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.

Defendants.

STATE OF CALIFORNIA, et al.

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.

Defendants.

Case No. 5:20-cv-05167-LHK-RRC-EMC

Case No. 5:20-cv-05169-LHK-RRC-EMC

**LEAGUE OF WOMEN VOTERS’
AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS’ MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: October 8, 2020

Time: 1:30 p.m.

Place: Courtroom 8, 4th Floor

Judge: Honorable Richard R. Clifton

Honorable Lucy H. Koh

Honorable Edward M. Chen

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DISCLOSURE STATEMENT

No party to this filing has a parent corporation. No publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

STATEMENT OF INTEREST

This amicus brief is submitted on behalf of the League of Women Voters of the United States, the League of Women Voters of Texas, the League of Women Voters of Florida, and the League of Women Voters of California (collectively, “the League”).¹ The League is a nonpartisan, community-based political organization that encourages informed and active participation of citizens in government and attempts to influence public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and exists in every state, with more than 400,000 members and supporters nationwide.

One of the League’s primary goals is to promote government that is representative, accountable, responsive, and that assures opportunities for effective and inclusive voter participation in government decision-making. A bedrock principle of the League is the “one person, one vote” guarantee of *Reynolds v. Sims*, 377 U.S. 533 (1964), which encompasses both mathematical proportionality in congressional districts, as well as the right to an effective vote and responsive representation. This grounding principle is long held, dating back to 1966 when the League established its apportionment position: **apportionment should be based solely on population**, and the U.S. Constitution should not be amended to base apportionment on other factors.²

President Trump’s Memorandum, dated July 21, 2020,³ directs the Secretary of Commerce to unconstitutionally exclude all undocumented immigrants from the apportionment base of the decennial census. If implemented, the Memorandum would unfairly and artificially reduce certain states’ representation in Congress, while improperly increasing the representation of other states. As a result,

¹ All parties have consented to the filing of this brief. No party’s counsel authored this brief in whole or in part. No party, party counsel, or person other than the League or its counsel contributed money that was intended to fund this brief’s preparation or submission

² See League of Women Voters of the United States, *Impact on Issues (2018-2020)*, at 20, <https://www.lwv.org/sites/default/files/2019-04/LWV%202018-20%20Impact%20on%20Issues.pdf>.

³ *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the “Memorandum”)

1 the impact of the Memorandum will be felt not only by undocumented immigrants, but all citizens in
2 every state. Ultimately, the Memorandum would result in decreased political representation and
3 substantial losses in federal funding for states with sizable populations of undocumented immigrants—
4 including California—as their apportionment base would be artificially lowered (the “Artificially-
5 Lowered Apportionment States” or “ALA States”). Further, the Memorandum would have severe
6 negative effects on how Americans view and interact in this democracy—through decreased
7 participation in the census and voting in elections—throughout the country.

8 Implementing the Memorandum would have broad effects on voters and residents of every
9 state in the country because excluding a large number of residents from the apportionment base—in
10 violation of the Constitution on which our system of government is premised—will erode faith and
11 trust in our democracy and Constitutional system. *See Part II, infra.* In addition, implementation of
12 the Memorandum will likely cause societal withdrawal of families with undocumented members,
13 which will likewise harm everyone. *See Part III, infra.* The League itself will be directly impacted
14 because it maintains important public education, advocacy and social work programs in ALA States
15 that will be undermined as a result of the Memorandum.

16 In addition, if the Memorandum is implemented, it will cause direct economic harm to
17 American voters, including members of the League, not just undocumented immigrants. For ALA
18 States, implementation of the Memorandum would strain state and local public health, education and
19 welfare systems, which provide services for *all* residents in those states. The Memorandum’s effect
20 would be to allocate federal funding in accordance with the number of documented individuals only,
21 thereby under-funding the ALA States and decreasing their representation. Indeed, many members of
22 the League reside in ALA States that will see their representation in Congress, as well as receipt of
23 federal benefits, diminished unjustly. *See Part IV, infra.*

1 **SUMMARY OF ARGUMENT**

2 The case before this Court is not just an “immigrant” issue. Ensuring an accurate census and
3 apportionment base is at the heart of the American democratic process and the principle of full and
4 fair representation. As the U.S. District Court for the Southern District of New York recently
5 explained:

6 [T]he Constitution mandates that every ten years the federal government
7 endeavor to count every single person residing in the United States,
8 whether citizen or noncitizen, whether living here with legal status or
9 without. The population count derived from that effort is used not only
10 to apportion Representatives among the states, but also to draw political
11 districts and allocate power within them. And it is used to allocate
12 hundreds of billions of dollars in federal, state, and local funds. Given
the stakes, the interest in an accurate count is immense. Even small
deviations from an accurate count can have major implications for
states, localities, and the people who live in them — indeed, for the
country as a whole.⁴

13 President Trump’s Memorandum states “[f]or the purpose of the reapportionment of
14 Representatives following the 2020 census, it is the policy of the United States to exclude”
15 undocumented immigrants from the congressional apportionment base “to the maximum extent
16 feasible and consistent with the discretion delegated to the executive branch.”⁵ The Memorandum
17 asserts that “[i]ncreasing congressional representation based on the presence of aliens who are not in
18 a lawful immigration status would also create perverse incentives encouraging violations of Federal
19 law,” and that “states adopting policies . . . that hobble Federal efforts to enforce the immigration laws
20 passed by the Congress should not be rewarded with greater representation in the House of
21 Representatives.”⁶

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23 _____
24 ⁴ *New York v. United States Dep’t of Commerce*, 351 F. Supp. 3d 502, 514-15 (S.D.N.Y. 2019), *aff’d*
25 *in part, rev’d in part and remanded sub nom. Dep’t of Commerce v. New York*, 139 S. Ct. 2551
(2019), and *appeal dismissed*, No. 19-212, 2019 WL 7668098 (2d Cir. Aug. 7, 2019).

26 ⁵ Memorandum.

27 ⁶ *Id.*

1 The Memorandum directs the Secretary of Commerce, “[i]n preparing his report to the
2 President under Section 141(b) of Title 13,” to “take all appropriate action, consistent with the
3 Constitution and other applicable law, to provide information permitting the President, to the extent
4 practicable,” to exclude undocumented immigrants from the final determination regarding the “whole
5 number of persons in each state” that the President transmits to Congress pursuant to 2 U.S.C. § 2(a).⁷

6 If allowed to go into effect, the Memorandum will erode Americans’ trust in the government,
7 depressing participation in the census as well as dampening voter turnout and civic involvement—
8 undermining our democracy at a particularly tumultuous time.⁸ *See* Part II. Further, the Memorandum
9 will likely cause withdrawal of undocumented immigrants and their families from society—including
10 political and civic engagement—which will harm everyone. *See* Part III. Finally, the Memorandum
11 will cause severe and irreparable injury to all residents in the ALA States by unconstitutionally
12 reducing their political representation in Congress through the exclusion of undocumented immigrants
13 in the apportionment base. This reduction in representation will have an impact on the federal funding
14 that these states receive, resulting in ALA States lacking resources necessary to carry out vital
15 functions in areas such as healthcare, education, and social welfare. These repercussions will be felt
16 not only by undocumented immigrants residing in ALA States, but also U.S. citizens and lawful
17 residents (including League members) in these states. *See* Part IV.

18 ARGUMENT

19 **I. THE LEAGUE’S MISSION IS TO PROTECT DEMOCRACY THROUGH THE** 20 **RIGHT TO VOTE AND EMPOWER ALL AMERICAN VOTERS.**

21 Since The League’s founding in 1920, six months before the Nineteenth Amendment was
22 ratified and women won the national right to vote, the League has been advocating for voting rights

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24 ⁷ *Id.*

25 ⁸ Given the history of federal government-sanctioned discrimination towards communities of color,
26 it is likely that dampened participation in the census, voter turnout, and malapportionment of federal
resources will disproportionately impact racial minorities, especially African-American and Hispanic
communities.

1 and political empowerment. Initially, the League’s advocacy focused on women’s suffrage, but in the
 2 decades since, the League has advocated for voting rights and political empowerment of all voters
 3 regardless of gender, race, class, or political ideology. Through more than 700 state and local League
 4 chapters, the League has established robust programs to educate communities about their voting rights.
 5 Ensuring the accuracy of the census and apportionment base is central to the League’s voting rights
 6 and political empowerment work because the census is used to apportion political representation
 7 among the states and delimit Congressional districts.⁹

8 The League performs its census-related work in three phases. First, the League spearheads
 9 numerous education programs to inform the public about what the census is, who is counted, and why
 10 it is important for political and economic representation. Second, through the League’s “Get Out to
 11 Count” initiative, as well as other outreach activities, the League encourages all eligible persons to fill
 12 out their census forms. The League has established or joined local “Complete Count Committees” to
 13 organize and encourage people to fill out their census forms, particularly by identifying and targeting
 14 efforts towards those communities most likely to be undercounted. Third, the League has formed a
 15 watchdog group to ensure the census is operating in accordance with the Constitution and applicable
 16 law. The goal of each of these activities is to ensure that the census and apportionment base accurately
 17 reflect total population and, in turn, accurately reflects the needs of states and local communities, all
 18 of which depend on federal funding.

19 **II. THE MEMORANDUM UNDERMINES DEMOCRACY AND ERODES TRUST IN**
 20 **OUR CONSTITUTIONAL SYSTEM.**

21 The Memorandum’s clear intent—and its likely effect—is to shift the political representation
 22 among the states, reducing representation in Congress of states with sizable undocumented immigrant
 23 populations.¹⁰ The directive to not count undocumented immigrants in the apportionment base is
 24 constructed on President Trump’s “determin[ation] that respect for the law and protection of the

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 26 ⁹ League of Women Voters of the United States, *Census*, <https://www.lwv.org/other-issues/census>.

27 ¹⁰ See Memorandum.

1 integrity of the democratic process warrant the exclusion” of undocumented immigrants from the
2 apportionment base.¹¹ In fact, the Memorandum has the opposite result, violating the Constitution and
3 hundreds of years of precedent thereunder.¹² The Memorandum’s practical effect is an erosion of
4 democracy through a reduction in political representation, diminution of federal funding, and
5 increased political apathy, distrust and disinterest.

6 This result impacts all Americans.¹³ Excluding undocumented immigrants from the
7 apportionment base runs counter to the fundamental principle of representative democracy: accurate
8 representation. In addition, the broader societal impact of the Memorandum, following the
9 Administration’s efforts to include a citizenship question on the census, should be considered. The
10 Administration’s repeated attacks on undocumented immigrants and the census have caused
11 undocumented immigrants and legal residents alike to lose faith in and even become fearful and
12 distrustful of the government. Those who become apathetic or distrustful are likely to be less
13 politically involved across all levels of civic life, including voting.

14 In short, this is not just an “immigrant” issue, this is a democracy issue—an issue that the
15 League throughout its history has worked hard to support. The Memorandum stands to erode faith in
16 our democracy and Constitution.

17 **A. Representation Based on Accurate Apportionment Is the Bedrock of Our**
18 **Democracy.**

19 Representative democracy depends on an accurate count of the population that is to be
20 governed through its elected representatives. Indeed, the Founders of this country viewed the idea of
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22
23 ¹¹ *Id.*

24 ¹² While this amicus brief focuses on certain of the “policy” consequences of the Memorandum, we
25 agree with the Constitutional and statutory arguments made by plaintiffs.

26 ¹³ The negative effects of the Memorandum will be most acutely and directly felt by states whose
27 populations include sizable numbers of undocumented immigrants, *i.e.* the ALA States (*infra*, Part
28 IV), but all will be affected.

1 representation as even more important than suffrage itself.¹⁴ From the start, representation was meant
 2 to extend further than the right to vote; indeed, women were counted in the first census, though they
 3 did not have the right to vote at that time. Similarly, children are counted today in the census. The
 4 Constitution makes clear that all persons should be counted for purposes of apportionment and makes
 5 no reference to their documentation status.¹⁵ Therefore, excluding undocumented immigrants from
 6 the congressional apportionment base undermines the “representative” core of representative
 7 democracy.

8 The Founders based apportionment on numbers from the actual enumeration in order to “limit
 9 political chicanery.”¹⁶ By attempting to exclude undocumented immigrants from the congressional
 10 apportionment base, the Memorandum exemplifies the exact form of political chicanery that the
 11 Founders sought to avoid. The Memorandum makes clear that reallocating political power away from
 12 states with larger undocumented immigrant populations is not just a predictable impact, but the explicit
 13 purpose of excluding undocumented immigrants from the apportionment base. Exploiting
 14 congressional apportionment for political gain is an affront to our democracy that impacts all residents
 15 of the United States.

16 **B. The Exclusion of Undocumented Immigrants from the Apportionment Base**
 17 **Would Create a Loss of Faith in the Democratic Process and Constitution.**

18 The census is critical for the equitable and accurate distribution of political power based on
 19 population. The exclusion of undocumented immigrants from the apportionment base will create a
 20 loss of faith in the democratic process. ALA States such as Texas and California will almost certainly
 21 lose congressional seats and, thus, suffer loss of political power.¹⁷ In turn, those lost seats will shift
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 24 ¹⁴ Charles A. Beard, Mary Ritter, *American Citizenship* (1914).

25 ¹⁵ U.S. CONST. amend. XIV, § 2; *see id.* Art. I, § 2, cl. 3.

26 ¹⁶ *Utah v. Evans*, 536 U.S. 452, 500 (2002) (Thomas, J., concurring in part and dissenting in part).

27 ¹⁷ *See* Section IV.A., *infra*.

1 to other states whose political power will increase by windfall.¹⁸ This inequity can be expected to
2 discourage residents of ALA States from participating in a system tilted against them.

3 American democracy was built on the idea that our representatives would be “apportioned
4 among the several states according to their respective numbers, counting the whole number of persons
5 in each state.”¹⁹ The Supreme Court has stated that to establish a representative democracy, “the
6 Framers chose to use population . . . as the basis for representation,”²⁰ and that “representatives serve
7 all residents,”²¹ not only citizens. The exclusion of undocumented immigrants from the apportionment
8 base is contrary to the U.S. Constitution and the foundational principles which guide our democratic
9 system. Such flagrant disregard for the Constitution and representative democracy can be expected to
10 breed distrust and discourage participation in civil institutions including—most immediately—
11 participation in the census.²²

12 Indeed, the Memorandum, together with the Administration’s other attacks on the census, has
13 already dampened participation. The League is heavily involved in promoting awareness and
14 engagement in voting and the census, and the League has observed increasing levels of disinterest and
15 apathy in responding to the current census. The Administration’s attempt to include a “citizenship
16 question” and, most recently, the exclusion of undocumented immigrants from the apportionment
17 base, has generated fear in immigrant communities around census participation—*i.e.* that immigrants

18 ¹⁸ Expert Declaration of Ruth Gilgenbach, Ph.D., in Support of Plaintiffs’ Motion for Partial
19 Summary Judgment (“Gilgenbach Decl.”), ¶¶ 22, 23, 30, 32, & 33, *City of San Jose, California v.*
20 *Trump*, No. 5:20-cv-05167-LHK-RRC-EMC (N.D. Cal. August 27, 2020), ECF No. 63-2; and
21 *California v. Trump*, No. 5:20-cv-05169-LHK-RRC-EMC (N.D. Cal. August 27, 2020), ECF No.
37-1.

22 ¹⁹ U.S. CONST. amend. XIV, § 2; *see id.* Art. I, § 2, cl. 3.

23 ²⁰ *Utah*, 536 U.S. at 478.

24 ²¹ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

25 ²² Expert Declaration of Matthew A. Barreto, Ph.D. (“Barreto Decl.”), at ¶ 14, *City of San Jose,*
26 *California v. Trump*, No. 5:20-cv-05167-LHK-RRC-EMC (N.D. Cal. August 27, 2020), ECF No.
63-3; *see also* Telemundo 62, *Implicaciones De Remover a Los Indocumentados Del Censo 2020*
(July 22, 2020), <https://www.telemundo62.com/videos/videos-noticias/implicaciones-de-remover-a-losindocumentados-del-censo-2020/2063236/>.

1 cannot benefit from participating, but could face retaliation or other negative consequences.
 2 Decreased participation due to fear of immigration consequences (and no benefits based on the
 3 Memorandum) is especially impactful in the ALA States, given the proportion of undocumented
 4 immigrants among their total population.²³ The Memorandum has already made the League's efforts
 5 to galvanize the public to fill out the census (and vote) even more difficult.

6 Worse, the impacts of the Memorandum are likely to extend beyond just the next decade. Fear
 7 and distrust of the federal government is already entrenched among the African-American community,
 8 which has experienced long-term discrimination in many different contexts, including distribution of
 9 federal benefits (*e.g.*, VA benefits and farm subsidies, among others). The Memorandum will lead to
 10 decreased participation in the census and other government-based interactions, such as registering to
 11 vote and voting, which will likely impact immigrant communities and racial minorities
 12 disproportionately. As people choose not to respond to the census due to fear or a belief that their
 13 response will not matter, the enumeration becomes less accurate, and undercounting and under-
 14 representation spreads, eroding our representative democracy.

15 The League is adversely impacted as it becomes more difficult to convince distrustful and
 16 discouraged citizens—especially among immigrant communities and racial minorities—to participate
 17 in the census. Indeed, the League has already been forced to deal with confusion resulting from the
 18

19 ²³ In Texas alone there are 2.7 million people, including 1.4 million U.S. citizens, who live with at
 20 least one undocumented family member (based on data from 2010 to 2014). *See* American
 21 Immigration Council, *Immigrants in Texas* (August 6, 2020),
 22 <https://www.americanimmigrationcouncil.org/research/immigrants-in-texas>. In California,
 23 undocumented immigrants comprised nine percent of the state's workforce in 2016. *See* American
 24 Immigration Council, *Immigrants in California* (August 6, 2020),
 25 <https://www.americanimmigrationcouncil.org/research/immigrants-in-california>. In Florida, there
 26 are nearly one million people, including almost 500,000 U.S. citizens, who lived with at least one
 27 undocumented immigrant between 2010 and 2014. *See* American Immigration Council, *Immigrants*
 28 *in Florida* (August 6, 2020), [https://www.americanimmigrationcouncil.org/research/immigrants-](https://www.americanimmigrationcouncil.org/research/immigrants-florida)
 29 *florida*. The Memorandum's effort to exclude undocumented immigrants from the congressional
 30 apportionment base will intimidate those families and citizens who live with an undocumented
 31 immigrant, as well as immigrants who are here legally, from participating not only in the census, but
 32 in civic life more broadly. *See infra*, Part III.

1 census operations being suspended in March due to COVID-19 and subsequently resuming only
2 recently. The Memorandum aggravates this problem.

3 **III. THE MEMORANDUM WILL CAUSE SOCIETAL WITHDRAWAL OF FAMILIES**
4 **WITH UNDOCUMENTED MEMBERS, HARMING EVERYONE.**

5 The Memorandum is likely to cause tangible social harm to states across the country, regardless
6 of whether their Congressional representation is compromised, due to the withdrawal of immigrant
7 families from civic and economic activity for fear of government monitoring, retaliation or other
8 consequence. Just as legalization of immigration status causes social and economic benefits to society
9 as a whole through *increased* immigrant participation—*e.g.*, through a surge in investment in language
10 skills, education, training, and general economic assimilation²⁴—the converse is also true: increased
11 spotlighting and delegitimization of undocumented status causes a reactionary *withdrawal* of
12 undocumented immigrants, their families, and their communities, leading to overall social retraction
13 and social and economic harm.²⁵ This, in turn, jeopardizes public health, public education and public
14 safety, and will likely have a disparately negative impact on Hispanic communities and other people
15 of color.

16 Studies show that withdrawal behavior—where immigrants and their families disengage from
17 interactions with government officials for fear of being persecuted, prosecuted or deported—occurred
18 in 2019, when the Administration announced its intention to add a question to the census form
19 inquiring about the respondent’s citizenship status.²⁶ The addition of the question caused distrust

20 ²⁴ Raúl Hinojosa-Ojeda, *Labor Market Impacts of Amnesty: A Comparative Analysis of IRCA and*
21 *Current Conditions*, 5 DE LAS AMÉRICAS 1, 6-9 (2000),
<http://www.naid.ucla.edu/uploads/4/2/1/9/4219226/b46.pdf>.

22 ²⁵ *See, e.g.*, Sarah Holder, *What the Fear Campaign Against Immigrants Is Doing*, BLOOMBERG (July
23 25, 2019), [https://www.bloomberg.com/news/articles/2019-07-25/how-fear-of-ice-is-gripping-](https://www.bloomberg.com/news/articles/2019-07-25/how-fear-of-ice-is-gripping-immigrant-communities)
24 *immigrant-communities* (describing the broad societal withdrawal effect of the threat of immigration
raids) (hereinafter “Holder, *Fear Campaign*”).

25 ²⁶ Matt Barreto et al., *New Research Shows Just How Badly a Citizenship Question Would Hurt the*
26 *2020 Census*, THE WASHINGTON POST (April 22, 2019, 7:45 AM),
<https://www.washingtonpost.com/politics/2019/04/22/new-research-shows-just-how-badly->

1 among noncitizens and fear of deportation, leading to a substantially lower likelihood they would fill
 2 out a census form.²⁷ Civic organizations and state governments have worked hard through public
 3 relations and educational campaigns to reverse the withdrawal effect after the Supreme Court rejected
 4 the addition of the citizenship question.²⁸ However, some of this damage cannot be undone, no matter
 5 the efforts taken by the League or other organizations. For some people, once faith and trust in the
 6 government is lost, and potentially replaced with fear, that change cannot be reversed.

7 The Memorandum could have an even greater chilling effect²⁹ on public participation than the
 8 citizenship question. Because the government cannot tell one’s citizenship or immigration status from
 9 a completed census form, immigrant communities may fear that the government will try to determine
 10 their legal status through other means, thus chilling public participation in civic life generally.³⁰ Such
 11 a fear is hardly unwarranted: The Administration has already instructed federal agencies to seek state
 12 and federal records to determine citizenship status, an effort with which at least four states are
 13 complying.³¹ Experts have suggested that, considering the legal rationale for the Memorandum is

14
 15
 16 citizenship-question-would-hurt-census/ (hereinafter “Barreto, *New Research*”); see also *New York*
v. Dep’t of Commerce, 351 F. Supp. 3d at 578-593.

17 ²⁷ Barreto, *New Research*, *supra* n. 26; Edith Honan, *Citizenship Question Dropped from Census,*
 18 *but Advocates Fear ‘Damage Has Been Done,’* ABC NEWS (July 12, 2019, 10:50 AM),
 19 [https://abcnews.go.com/Politics/citizenship-question-dropped-census-advocates-fear-](https://abcnews.go.com/Politics/citizenship-question-dropped-census-advocates-fear-damage/story?id=64225417)
 20 [damage/story?id=64225417](https://abcnews.go.com/Politics/citizenship-question-dropped-census-advocates-fear-damage/story?id=64225417) (“[L]ike a bell tha[t] can’t be unring, the mere discussion of [a
 citizenship question], coupled with the President’s Muslim ban and policies on immigrants at the
 southern border, has left people on edge.”).

21 ²⁸ Gabrielle Jacobovitz & Sam Levine, *Activists Blocked Census Citizenship Question. Now They*
 22 *Have to Repair Trump’s Damage*, HUFFPOST (July 17, 2019, 3:15 PM), https://www.huffpost.com/entry/2020-census-citizenship-question_n_5d2f378ce4b02fd71ddd974.

23 ²⁹ J.M. Hagan, N. Rodriguez, & B. Castro, *Social Effects of Mass Deportations by the United States*
 24 *Government, 2000-10*, 34 ETHNIC AND RACIAL STUDIES, No. 8, 1374-1391 (August 2011).

25 ³⁰ Barreto Decl. at ¶ 34.

26 ³¹ Hansi Lo Wang, *Four States Are Sharing Driver’s License Info to Help Find Out Who’s a Citizen*,
 27 NPR (July 14, 2020), [https://www.npr.org/2020/07/14/890798378/south-dakota-is-sharing-drivers-](https://www.npr.org/2020/07/14/890798378/south-dakota-is-sharing-drivers-license-info-to-help-find-out-who-s-a-citizen)
 28 [license-info-to-help-find-out-who-s-a-citizen](https://www.npr.org/2020/07/14/890798378/south-dakota-is-sharing-drivers-license-info-to-help-find-out-who-s-a-citizen).

1 specious, the Administration’s goal may not be to actually enact it, but to “create uncertainty or
2 confusion among immigrants already wary of responding to the census.”³²

3 Withdrawal from public participation does not just mean that immigrant communities will fill
4 out the census forms at lower rates. It also means that parents will be more reluctant to take their
5 children to the hospital if they become sick or injured³³—with negative long-term public health effects
6 in the best cases, and tragic consequences in the worst ones, especially while the COVID-19 pandemic
7 rages.³⁴ It means fear-induced psychological trauma, especially in children, for those who live in
8 trepidation of interacting with the community outside their door.³⁵ It means that individuals and
9 families will be chilled from seeking redress of grievances in the legal system or appearing in court
10 for any reason, even in cases of blatant inequity and harm.³⁶ It means that immigrant parents will
11 more often avoid sending their kids to school.³⁷ And it means that victims of crime will be less likely
12 to contact the police, jeopardizing public safety.³⁸

13 ³² Sam Levine, *Trump Orders Undocumented Immigrants Excluded From Key Census Count*, THE
14 GUARDIAN (July 21, 2020), <https://www.theguardian.com/us-news/2020/jul/21/trump-executive-order-census-undocumented-immigrants>.

15 ³³ Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented*
16 *Latino Immigrants*, JOURNAL OF IMMIGRANT HEALTH 3, 151-56 (2001) (finding 39% of
undocumented adult immigrants fearful of receiving medical services due to undocumented status).

17 ³⁴ Miriam Jordan, “*We’re Petrified*”: *Immigrants Afraid to Seek Medical Care for Coronavirus*,
18 N.Y. TIMES (March 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html>.

19 ³⁵ Holder, *Fear Campaign*, *supra* n. 25.

20 ³⁶ *See, e.g.*, Angela Irvine et al., *The Chilling Effect of ICE Courthouse Arrests: How Immigration*
21 *and Customs Enforcement (ICE) Raids Deter Immigrants from Attending Child Welfare, Domestic*
22 *Violence, Adult Criminal, and Youth Court Hearings*, CERES POLICY RESEARCH, at 3 (October
2019), <https://static1.squarespace.com/static/58ba8c479f7456dff8fb4e29/t/5dae6ba65642ea5d1cef9705/1571711914510/ice.report.final.21oct2019.pdf>.

23 ³⁷ *See, e.g.*, Pedraza & Osorio, *Courted and Deported: The Salience of Immigration Issues and*
24 *Avoidance of Police, Health Care, and Education Services among Latinos*, 42 AZTLÁN: A JOURNAL
25 OF CHICANO STUDIES 2, 255-59 (2017) (study found that 25.9% of Latino non-citizens without a
green card reported they were more likely to avoid school upon being primed to think about
immigration issues) (hereinafter “Pedraza & Osorio”).

26 ³⁸ *Id.* at 255-59 (study found that 31.9% of Latino non-citizens without a green card reported they

1 The League of Women Voters has significant direct experience guiding and advocating for
 2 vulnerable individuals and families who are timid or outright terrified—even under normal
 3 circumstances—of interacting with the government or putting themselves in situations where they may
 4 come in contact with authorities, especially in the arena of child public health. The specter of a
 5 government microscope conjured by this Memorandum will likely cause many of these individuals
 6 and families to avoid civic life and engagement, or seek assistance from public programs or authorities,
 7 even when in dire need. This withdrawal from social and economic life adversely impacts society as
 8 a whole, as well as the immigrants themselves.

9 **IV. IMPLEMENTATION OF THE MEMORANDUM WILL HARM INDIVIDUAL**
 10 **STATES AND THEIR CITIZENS, REGARDLESS OF POLITICAL AFFILIATION**
 11 **OR LEGAL STATUS.**

12 **A. Loss of Congressional Representation in Individual States.**

13 The Memorandum, if implemented, will cause some ALA States to lose representation in the
 14 U.S. House of Representatives. The Memorandum compels undocumented immigrants to be excluded
 15 from the apportionment base, which will substantially affect many individual states. An estimated
 16 5.2%, 4.9%, and 5.4% of the populations of New Jersey, California, and Texas, respectively, would
 17 be inappropriately excluded by this mandate—an extraordinary change to the population count.³⁹
 18 While ALA States will experience the most significant impacts, *all* state populations will be
 19 incorrectly calculated for purposes of apportioning representatives to varying degrees because at least
 20 some portion of the population of every state is made up of undocumented immigrants.⁴⁰

21
 22
 23 were more likely to avoid police services upon being primed to think about immigration issues).

24 ³⁹ Gilgenbach Decl., ¶¶ 11 & 17, Tables 2 & 4.

25 ⁴⁰ Gilgenbach Decl., ¶ 17, Table 4; Jeffrey S. Passel and D’Vera Cohn, *U.S. Unauthorized*
 26 *Immigrant Total Dips to Lowest Level in a Decade*, Pew Res. Ctr., (Nov. 27, 2018), Appendix C,
https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

1 Undercounting the actual population unlawfully impacts how congressional seats are
 2 apportioned among states. Article I, Section 2, of the United States Constitution provides:
 3 “Representatives and direct Taxes shall be apportioned among the several states which may be
 4 included within this Union, according to their respective Numbers.” Coupled with the Fourteenth
 5 Amendment’s requirement that “Representatives shall be apportioned among the several states
 6 according to their respective numbers, counting the *whole number of persons in each state . . .*”
 7 (emphasis added), apportionment must be based on the number of all people residing in the United
 8 States regardless of whether they are here lawfully. Indeed, the Supreme Court recently held that “the
 9 Fourteenth Amendment calls for the apportionment of congressional districts based on the total
 10 population,” which includes non-citizen residents, irrespective of legal status.⁴¹

11 The wholesale omission of undocumented immigrants renders the apportionment “numbers”
 12 flawed. The ALA States will have their populations artificially decreased which, in turn, will cause
 13 those states to have less Congressional representation in the U.S. House of Representatives than they
 14 otherwise would.⁴² The result will be immediate malapportionment within the House of
 15 Representatives; this result is repugnant to fundamental principles of representative democracy. It
 16 will also directly result in the reduction of federal and state financial support to these states for essential
 17 services.

18 For example, California and Texas are almost certain to lose a seat if undocumented
 19 immigrants are excluded from the apportionment base.⁴³ (Just two-and-a-half years ago, it was
 20 estimated that Texas—based on recent population trends—would *gain* at least two, possibly three,
 21 congressional seats following the 2020 census.⁴⁴) New Jersey is also likely to lose seats if

22 ⁴¹ *Evenwel*, 136 S. Ct. at 1129.

23 ⁴² Gilgenbach Decl., ¶¶ 22, 23, 29, 30, 32, 33, & Tables 5-9.

24 ⁴³ *Id.*

25 ⁴⁴ Election Data Service, *Some Change in Apportionment Allocations with New 2017 Census*
 26 *Estimates; But Greater Change Likely by 2020*, at 2-3 (Dec. 26, 2017),
<https://www.electiondataservices.com/wp-content/uploads/2017/12/>

1 undocumented immigrants are excluded from the apportionment base.⁴⁵ Florida and New York may
 2 lose a seat, as well.⁴⁶ Thus, the ramifications of malapportionment will likely be felt by a large
 3 percentage of the U.S. population who live in and vote in the ALA States.

4 The Memorandum directly and fundamentally affects political representation in Congress by
 5 leaving residents of ALA States artificially underrepresented. This removal of representation affects
 6 every single state resident—even those legal residents who will not be excluded from the
 7 apportionment base—by creating an unbalanced distribution of power that will subsequently lead to a
 8 decrease in the ALA States’ share of federal funds.

9 This decrease in political power is tangible.⁴⁷ Studies have shown that the loss of a
 10 congressional seat likely decreases a state’s share of federal outlays due to its reduction in voting
 11 power in Congress.⁴⁸ The distribution of federal funds is based, in part, on the number of seats a
 12 geographic area holds in Congress.⁴⁹ Studies show that an increase in a state’s share of the number of
 13 representatives leads to an increase in that state’s share of the federal budget.⁵⁰

14 _____
 15 NR_Appor17c3wTablesMapsC2.pdf.

16 ⁴⁵ Gilgenbach Decl., ¶¶ 22, 23, 30, 32, 33, & Tables 5-9.

17 ⁴⁶ *Id.* at ¶¶ 23, 30, & 32.

18 ⁴⁷ The aftermath of the 1962 case in which the U.S. Supreme Court ordered a correction to
 19 Tennessee’s apportionment law, *Baker v. Carr*, 396 U.S. 186 (1962), illustrates this. Following the
 20 court-ordered apportionment correction, counties that were underrepresented prior to the suit due to
 21 malapportionment saw their representation increase when apportionment was corrected. *Id.* (citing
 22 Roy Elis, Neil Malhotra, Marc Meredith, *Apportionment Cycles as Natural Experiments*, 4
 23 POLITICAL ANALYSIS 17, 358–376 (2009)). Further, previously underrepresented counties also saw
 24 their share of state spending increase—the result of a transfer of about \$7 billion from
 25 overrepresented to underrepresented counties. *Id.* (citing Stephen Ansolabehere, Alan Gerber, and
 26 Jim Snyder, 4 AMERICAN POLITICAL SCIENCE REVIEW 96, 767-777 (2002)).

27 ⁴⁸ Roy Elis, Neil Malhotra, Marc Meredith, *Apportionment Cycles as Natural Experiments*, 4
 28 POLITICAL ANALYSIS 17, 358-376 (2009) (hereinafter “Elis, Malhotra, and Meredith”). It is a well-
 established finding in political science and political economy that the loss of political power as a
 result of the loss of representation leads to the loss of funding. *See New York v. United States Dep’t*
of Commerce, 351 F. Supp. 3d at 516.

⁴⁹ Elis, Malhotra, and Meredith, *supra* n. 48, at p. 360.

⁵⁰ *Id.*

1 A further ripple effect of the malapportionment of Congressional seats is that states whose
 2 population is artificially decreased will receive fewer Electoral College votes in future elections.
 3 Article II, Section 1, Clause 2 of the U.S. Constitution specifies that the sum of each state’s electors
 4 is equal to the sum of the state’s membership in Congress; the number of Electoral College votes is
 5 directly related to the size of a state’s congressional delegation. Thus, a loss of representation
 6 stemming from the Memorandum manipulates states’ importance and influence in future presidential
 7 elections. California and Texas, the two most populous states in the U.S., would be harmed by this
 8 artificial manipulation of the Electoral College.

9 This artificial shift in political power will significantly harm the League’s own members in
 10 ALA States. The loss in representation will be felt directly—in the form of reduced political power
 11 and reduced federal funding on a per-resident basis—by League members who reside in the ALA
 12 States. The League’s mission will also be undermined because it will be more difficult to persuade
 13 individuals to vote—especially in the ALA states—if their votes are expected to count for less.

14 These negative impacts will be long-lasting. For at least the next decade, the ALA States will
 15 suffer from reduced representation in Congress (relative to representation that reflects an accurate
 16 apportionment base). “Fairness in representation, embodied in the concept of one person, one vote, is
 17 one of the most important normative standards against which democratic institutions are measured.”⁵¹
 18 When a state is facing underrepresentation in Congress, all of its constituents suffer from the inequity
 19 in power of having to “share” their representative and their resources with more of their neighbors
 20 than do residents of other states.⁵² The malapportionment resulting from the Memorandum will force
 21 underrepresentation by eliminating congressional seats outright in California and Texas, most likely
 22 New Jersey, and possibly other ALA States, as well.

25 ⁵¹ *Id.* at 373.

26 ⁵² Andrew Hacker, *Congressional Districting: The Issue of Equal Representation* (1963).

B. The Implementation of the President’s Directive Will Decrease Federal Funding to ALA States for Public Services.

At least 300 federally funded programs created by Congress rely on census-specific data to apportion approximately \$800 billion dollars annually to state and local governments.⁵³ In Texas, Florida and California, state and local governments received \$59 billion, \$44 billion and \$115 billion, respectively, through federal spending programs guided by data derived from the 2010 census.⁵⁴ States rely on an accurate count of their population and demographic representation of their residents for the provision of dollars for these vitally important programs.

For example, certain grant programs, including Medicaid, the Children’s Health Insurance Program (“CHIP”) and the Child Care and Development Fund (“CCDF”), use the Federal Medical Assistance Percentage (“FMAP”), which is based on the decennial census, to determine funding to the states.⁵⁵ Each state’s FMAP is inversely related to its per capita income (“PCI”).⁵⁶ PCI is determined by dividing state residents’ total income by total state population.⁵⁷ Thus, an undercount of a state’s population results in an overestimate of its PCI.⁵⁸ As a result, an undercount will lead to a state’s

⁵³ Andrew Reamer, GW Institute of Public Policy, *Counting For Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds, Report # 2: Estimating Fiscal Costs of a Census Undercount to States*, at 1-2 (Mar. 19, 2018), <https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/GWIPP%20Reamer%20Fiscal%20Impacts%20of%20Census%20Undercount%20on%20FMAP-based%20Programs%2003-19-18.pdf> (hereinafter “Reamer, *Role of Decennial Census*”).

⁵⁴ Andrew Reamer, GW Institute of Public Policy, *Counting For Dollars 2020: Texas, Florida, and California Reports* (January 30, 2019), https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/IPP-1819-3%20CountingforDollars_FL.pdf (“Florida Report”), https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/IPP-1819-3%20CountingforDollars_TX.pdf (“Texas Report”); and https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/IPP-1819-3%20CountingforDollars_CA.pdf (“California Report”).

⁵⁵ Reamer, *Role of Decennial Census*, *supra* n. 53, at 2.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.* To be clear, the Memorandum does not prohibit undocumented immigrants from filling out a census form, but because of this Administration’s hostility towards undocumented immigrants, along

1 calculated FMAP being underestimated, and that state will lose out on federal funds. For example,
 2 studies have estimated that for FY2015, Texas and Florida lost out on \$1,161 and \$946, respectively,
 3 in federal funds for FMAP-guided programs for every person missed by the 2010 census.⁵⁹ An
 4 undercount of just 1% equated to total losses of \$291,908,615 for Texas and \$177,848,466 for Florida
 5 in FY2015.⁶⁰ These losses are likely to be even greater as a result of the Memorandum because
 6 undocumented immigrants account for an estimated 5.4% of Texas and 3.4% of Florida's population.⁶¹
 7 With Medicaid alone comprising about 40% of Texas and 30% of Florida's total funds received from
 8 federal spending programs, an undercount would result in huge losses thereby directly impacting the
 9 ability to care for those that live in these states.⁶² Thirty-seven other states stand to lose out on similar
 10 proportions of their state budgets due to undercounting and will similarly experience the negative
 11 ramifications of underfunding.⁶³

12 Moreover, the fiscal impact of an undercount extends beyond FMAP-related funding
 13 programs. Many other programs use census data in formulas to allocate funds or determine eligibility.
 14 For example, the U.S. Department of Housing and Urban Development uses measures of income,
 15 population, housing overcrowding, age, and population growth to allocate funding through
 16

17 _____
 18 with the Memorandum's advancement of such hostility, undocumented immigrants are effectively
 19 discouraged from filling out census forms.

20 ⁵⁹ Reamer, *Role of Decennial Census*, *supra* n. 53, at 3.

21 ⁶⁰ *Id.* at 4. California is one of thirteen States currently receiving the minimum FMAP rate, so,
 22 barring any other federal policy changes, FMAP-guided funding in California would not be affected
 23 by an undercount.

24 ⁶¹ See Gilgenbach Decl., Tables 2 & 4.

25 ⁶² Reamer, *Texas Report* at 2, and *Florida Report* at 2, *supra* n. 54. Funding for Medicaid is separate
 26 from funding for other vital health and wellness programs, including CHIP, Women Infant and
 27 Children, and State Nutritional Assistance Program, all of which also rely on census data.

28 ⁶³ Reamer, *Role of Decennial Census*, *supra* n. 53, at 2-3. Increased withdrawal, discussed in
 Section III *supra*, will not offset the strain on resources caused by undercounting and under-
 allocation because *any* use of public resources by an uncounted individual would be one for which
 there was no allocation. See, e.g., Reamer, *Role of Decennial Census*, *supra* n. 53, at 3 (listing the
 fiscal losses by state in FMAP-guided programs per person missed in the 2010 Census).

1 Community Development Block Grants.⁶⁴ In addition, the calculation and distribution of Section 8
 2 (and other housing programs) is based on data supplied by the Census Bureau.⁶⁵ In FY2016, California
 3 received \$4,641,696,018, Texas received \$1,389,424,513, and Florida received \$1,203,603,162 for
 4 administration of their Section 8 Voucher and Housing Assistance Payment programs.⁶⁶ An
 5 undercount of population in the data that dictate this funding would cause a major loss of housing
 6 resources for communities that most need them.

7 Education programs will also be affected by a census undercount. State education departments
 8 and offices of children and families rely on an accurate count of the state's population, and an accurate
 9 count of children living in low-income households, to receive adequate funding for educational
 10 programs. For example, Title I Grants to Local Education Agencies and the National School Lunch
 11 Program provide funds based on poverty data generated by the decennial census.⁶⁷ In FY2016,
 12 California, Texas, and Florida received \$3.2 billion, \$2.8 billion and \$1.6 billion, respectively, in
 13 federal funds for these programs.⁶⁸ Special education grant funding is also awarded to education
 14 departments based on census data. In FY2016, California, Texas, and Florida received approximately
 15 \$1.3 billion, \$1 billion and \$659 million, respectively, for special education.⁶⁹

16 An undercount in the decennial census will reduce funds for not just the programs highlighted
 17 above, but for hundreds of other vitally important programs. These inaccuracies will persist for at
 18 least 10 years, resulting in chronic underfunding of state and local agencies as they work to serve their
 19

20 ⁶⁴ Marissa Hotchkiss and Jessica Phelan, United States Census Bureau, *Uses of Census Bureau Data*
 21 *in Federal Funds Distribution* (September 2017), at 10, [https://www2.census.gov/programs-](https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf)
 22 [surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-](https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf)
 23 [Federal-Funds-Distribution.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf).

24 ⁶⁵ Reamer, *California Report* at 2, *Texas Report* at 2, and *Florida Report* at 2, *supra* n. 54.

25 ⁶⁶ *Id.*

26 ⁶⁷ *Id.*

27 ⁶⁸ *Id.*

28 ⁶⁹ *Id.*

1 residents, particularly those who are most vulnerable.⁷⁰ Federally funded health, housing, and
 2 education programs are critical to supporting the health and economic needs of communities facing
 3 hardships due to COVID-19 pandemic. Census data is critical for planning standard public health
 4 needs, addressing social inequities, and identifying and managing emergent public health threats.⁷¹
 5 Accurate population counts are needed to determine disease prevalence rates; inaccurate counts limit
 6 states' ability to track disease.

7 Demographic factors assessed through the census are also critical to assessing social risk
 8 factors to disease and creating appropriate responses. Inaccuracies threaten public health in at least
 9 four ways: (1) hindering planning efforts for standard population health needs; (2) hindering
 10 monitoring and planning to address particular health needs for at-risk populations; (3) delaying
 11 identification and response to novel public health threats such as COVID-19; and (4) compromising
 12 effective tracking and management of emergent public health threats such as natural disasters.⁷² Thus,
 13 undercounting leaves states vulnerable not only to a lack of funding to address their residents' ongoing
 14 health and economic needs during the pandemic, but may also lead to misguided and misinformed
 15 responses to the pandemic and other crises that emerge in the future.

16 In sum, while the Memorandum proposes to exclude undocumented immigrants from the
 17 apportionment base, these individuals will remain part of their respective communities, will continue
 18 to contribute to society, and will be entitled to available social services, including healthcare and
 19 education. Yet federal funding for state- and locally-provided healthcare and education will be
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21 _____
 22 ⁷⁰ Vic Miller, *FY 2013 Federal Medical Assistance Percentages; Decennial Census Data Affect the*
 23 *Flow of Medicaid Funds* (National Association of Medical Directors, October 2011),
 24 [https://medicaiddirectors.org/wp-content/uploads/2015/08/vjm_the_impact_of_](https://medicaiddirectors.org/wp-content/uploads/2015/08/vjm_the_impact_of_decennial_census_data_on_federal_medical_assistance_percentages.pdf)
 25 [decennial_census_data_on_federal_medical_assistance_percentages.pdf](https://medicaiddirectors.org/wp-content/uploads/2015/08/vjm_the_impact_of_decennial_census_data_on_federal_medical_assistance_percentages.pdf).

26 ⁷¹ See Gregory H. Cohen et al., *Census 2020—A Preventable Public Health Catastrophe*, 109
 27 *AMERICAN JOURNAL OF PUBLIC HEALTH*, No. 8 (August 1, 2019), at 1077-1078,
 28 <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2019.305074>.

⁷² *Id.*

1 artificially limited to citizens only. As a result, all residents—citizens and non-citizens alike—who
2 access and share the public healthcare and education system will be adversely affected.

3 **CONCLUSION**

4 For the reasons set forth herein, the League of Women Voters of the United States, the League
5 of Women Voters of Texas, the League of Women Voters of Florida, and the League of Women Voters
6 of California pray that this Court grant partial summary judgment in favor of the Plaintiffs.

7
8 Dated: September 1, 2020

Respectfully submitted,

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