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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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 15 STATE OF CALIFORNIA, by and through
 Attorney General Xavier Becerra, CITY OF
 16 LOS ANGELES, CITY OF LONG BEACH,
 CITY OF OAKLAND, LOS ANGELES
 17 UNIFIED SCHOOL DISTRICT,

18 Plaintiffs,

19 v.

20
 21 DONALD J. TRUMP, in his official capacity
 as President of the United States, WILBUR L.
 ROSS, JR., in his official capacity as Secretary
 22 of the U.S. Department of Commerce; U.S.
 DEPARTMENT OF COMMERCE; STEVEN
 23 DILLINGHAM, in his official capacity as
 Director of the U.S. Census Bureau; U.S.
 24 CENSUS BUREAU; DOES 1-100,

25 Defendants.
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 27
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**COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF**

(Fourth and Fifth Claims for Relief –
 Violations of Administrative Procedure Act)

1 INTRODUCTION

2 1. For 230 years, since the first national census in 1790, the United States has included
3 in the census count not only citizens, but all immigrants, regardless of their legal immigration
4 status.

5 2. The U.S. Constitution mandates this historical practice by requiring an “actual
6 Enumeration” that “count[s] the whole number of persons in each State” for the purpose of
7 apportioning members of the U.S. House of Representatives among the states. U.S. Const. art. I,
8 § 2, cl. 3, and amend. XIV, § 2.

9 3. Thus, it is well settled that *all* persons residing in the United States must be counted
10 to fulfill the Constitution’s “actual Enumeration” mandate for congressional apportionment. *See*
11 U.S. Const. art. I, § 2, cl. 3, and amend. XIV, § 2; *see also Evenwel v. Abbott*, 136 S. Ct. 1120,
12 1127-29 (2016) (the Constitution requires the apportionment of Representatives based on the
13 “total population” in each state).

14 4. Despite this historical practice and longstanding precedent, President Donald J.
15 Trump issued a Presidential Memorandum (Memorandum) on July 21, 2020, announcing a
16 purported “policy of the United States to exclude from the apportionment base aliens who are not
17 in a lawful immigration status.” Excluding Illegal Aliens From the Apportionment Base
18 Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1). The
19 Memorandum orders the Secretary of Commerce to take steps in furtherance of this unlawful
20 policy, including by reporting to the President information that would permit the President to
21 exclude undocumented immigrants from the apportionment count. *Id.* at 44,680.

22 5. The Memorandum’s unprecedented policy and orders are unconstitutional and
23 otherwise unlawful. They threaten to seriously harm Plaintiffs State of California, City of Los
24 Angeles, City of Long Beach, City of Oakland, and Los Angeles Unified School District
25 (LAUSD), including by depriving them of their rightful share of congressional representatives
26 and by depressing the 2020 Census count itself, which remains ongoing.

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1 6. Plaintiffs therefore seek declaratory, injunctive, mandamus, and other relief to
2 prevent Defendants from taking any action to exclude undocumented immigrants from the 2020
3 Census apportionment count.

4 **JURISDICTION AND VENUE**

5 7. This Court has jurisdiction under 28 U.S.C. § 1331 (action arising under the laws of
6 the United States), 28 U.S.C. § 1361 (action to compel officer or agency to perform duty owed to
7 Plaintiff), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act (APA)). An actual
8 controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court
9 may grant declaratory relief, injunctive relief, and other relief against the Defendants under 28
10 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 705-706.

11 8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is a judicial
12 district in which the Plaintiffs State of California and City of Oakland reside, and this action seeks
13 relief against federal agencies and officials acting in their official capacity.

14 **INTRADISTRICT ASSIGNMENT**

15 9. Under Civil Local Rules 3-5(b) and 3-2(c), Plaintiffs allege that there is no basis for
16 assignment of this action to any particular location or division of this Court.

17 **PARTIES**

18 10. Plaintiff State of California, by and through Attorney General Xavier Becerra, brings
19 this action as a sovereign state in the United States of America. The Attorney General is the chief
20 law officer of the State and has the authority to file civil actions to protect public rights and
21 interests. Cal. Const. art. V, § 13; Cal. Gov't Code § 12511. This challenge is brought under the
22 Attorney General's independent constitutional, statutory, and common-law authority to bring suit
23 and obtain relief on behalf of the State.

24 11. Plaintiff City of Los Angeles is a municipal corporation organized and existing under
25 the laws of the State of California.

26 12. Plaintiff City of Long Beach is a municipal corporation organized and existing under
27 the laws of the State of California.

28

1 13. Plaintiff City of Oakland is a municipal corporation organized and existing under the
2 laws of the State of California.

3 14. Plaintiff LAUSD is a public entity duly existing under and by virtue of the laws of the
4 State of California and operating as a public school district providing educational services in the
5 County of Los Angeles, California.

6 15. Plaintiffs will suffer numerous, concrete harms from Defendants' actions described in
7 this Complaint. Plaintiffs will likely lose at least one seat in the U.S. House of Representatives
8 and, thus, at least one presidential elector in the Electoral College. Plaintiffs' share of political
9 power—and consequently, their share of federal funding—will be diminished. Plaintiffs'
10 congressional, state-level, and local redistricting efforts will be impaired. And the quality and
11 accuracy of census data will be harmed, further reducing the federal funding that Plaintiffs
12 receive and impeding their performance of critical government functions.

13 16. Defendant Donald J. Trump is the President of the United States of America and is
14 sued in his official capacity. President Trump is responsible for the actions and decisions that are
15 being challenged in this Complaint.

16 17. Defendant Wilbur L. Ross is the Secretary of the Department of Commerce and is
17 sued in his official capacity. Secretary Ross is responsible for fulfilling the Department of
18 Commerce's duties under the Constitution and the Census Act.

19 18. Defendant Department of Commerce is a federal agency. The Department of
20 Commerce, led by Secretary Ross, oversees the Census Bureau, which is tasked with executing
21 the 2020 Census.

22 19. Defendant Dr. Steven Dillingham is the Director of the U.S. Census Bureau and is
23 sued in his official capacity. Dr. Dillingham's duties include ensuring that the Bureau executes
24 the 2020 Census.

25 20. Defendant U.S. Census Bureau is an agency within, and under the jurisdiction of, the
26 Department of Commerce. The Bureau is responsible for planning and executing the decennial
27 census.

28

BACKGROUND

I. LEGAL BACKGROUND

21. In every census since 1790, the United States has counted *all* of its residents, including for the purpose of apportioning the U.S. House of Representatives, regardless of residents' citizenship or immigration status.¹ This practice, consistently followed for well over two centuries, is required by constitutional and statutory mandates.

22. The U.S. Constitution provides Congress with the power and responsibility to execute the decennial census for the purpose of apportioning the U.S. House of Representatives. In Article I, the Constitution provides, in relevant part, "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers." U.S. Const. art I, § 2, cl. 3. It goes on to state that "[t]he actual enumerations shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Id.*

23. The Fourteenth Amendment of the U.S. Constitution also governs the census count and its role in apportioning the U.S. House of Representatives. Section 2 of the Fourteenth Amendment provides, in relevant part, "Representatives shall be apportioned among the several States according to their respective numbers, *counting the whole number of persons in each State, excluding Indians not taxed.*" U.S. Const. amend. XIV, § 2 (emphasis added).

24. In Title 13 of the United States Code, also known as the Census Act, Congress delegated to the Secretary of Commerce the responsibility for conducting the Census, 13 U.S.C. § 141(a), and created the U.S. Census Bureau within the Department of Commerce, to which the Secretary may delegate his Census Act duties, 13 U.S.C. §§ 2, 4.

25. The Census Act also governs the Secretary's reporting of the census apportionment count addressed in Article I and the Fourteenth Amendment of the Constitution. It requires the

¹ This statement is subject to two qualifications, explicit in the Constitution, that are historically important, but do not relate to the counting of undocumented immigrants in 2020: the Three-Fifths Clause that was effectively nullified by the Fourteenth Amendment, and the "Indians not taxed" provision, which is generally not recognized. The inclusion of two express qualifications (one of which was subsequently nullified) reinforces the impropriety of the executive branch's attempt to add an unenumerated qualification.

1 Secretary to report to the President “[t]he tabulation of *total population* by States . . . as required
2 for the apportionment of Representatives in Congress among the several States.” 13 U.S.C.
3 § 141(b) (emphasis added).

4 26. In turn, the President “shall transmit to the Congress a statement showing *the whole*
5 *number of persons in each State*, excluding Indians not taxed, as ascertained under the . . .
6 decennial census of the population, and the number of Representatives to which each State would
7 be entitled under an apportionment of the then existing number of Representatives by the . . .
8 method of equal proportions.” 2 U.S.C. § 2a(a) (emphasis added).

9 27. The Supreme Court and other courts have also made clear that the Fourteenth
10 Amendment requires the apportionment of Representatives based on the “total population” in
11 each state. *See Everwel*, 136 S. Ct. at 1127-29; *see also Fed’n for Am. Immigration Reform v.*
12 *Klutznick*, 486 F. Supp. 564, 576-78 (D.D.C. 1980) (three-judge court) (the Constitution “requires
13 the counting of the ‘whole number of persons’ for apportionment purposes, and while illegal
14 aliens were not a component of the population at the time the Constitution was adopted, they are
15 clearly ‘persons’”); *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2018)
16 (reversed in part on other grounds) (“the Constitution mandates that every ten years the federal
17 government endeavor to count every single person residing in the United States, whether citizen
18 or noncitizen, whether living here with legal status or without,” and “[t]he population count
19 derived from that effort is used . . . to apportion Representatives among the states”).

20 28. The Census Bureau similarly recognizes that “[a]pportionment is based on the
21 resident population, plus a count of overseas federal employees, for each of the 50 states.” Final
22 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 n.1 (Feb. 8,
23 2018). That is why the Census Bureau promulgated a rule requiring all residents of the United
24 States, including all “foreign citizens,” to be counted in the 2020 Census. *Id.* at 5533. This rule,
25 which was adopted in accordance with the notice-and-comment rulemaking process, is known as
26 the “Residence Rule.” The Residence Rule is designed to ensure that the Census Bureau counts
27 all U.S. residents at their “usual residence”—“the place where a person lives and sleeps most of
28 the time.” *Id.* at 5526.

1 29. The Secretary of Commerce himself has reiterated to Congress, while under oath, the
2 established rule that all residents must be counted. On March 14, 2019, the Secretary testified,
3 “The constitutional mandate, sir, for the census is to try to count every person residing in the U.S.
4 at their place of residence on the dates when the census is conducted.” *Hearing Before the H.*
5 *Comm. on Oversight & Reform*, 116th Cong. 31 (Mar. 14, 2019). He further testified, “The
6 Department of Commerce is fully committed to administering as complete and accurate [a]
7 decennial census as we can. We intend to try to count every person, taking all necessary actions
8 to do so.” *Id.*

9 **II. THE ADMINISTRATION’S UNLAWFUL ATTEMPT TO ADD A CITIZENSHIP QUESTION**
10 **TO THE 2020 CENSUS**

11 30. The Memorandum at issue in this action is directly related to Defendants’ earlier
12 efforts to exclude immigrants from the census count by adding a question to the 2020 Census
13 questionnaire on citizenship status.

14 31. On March 26, 2018, setting aside decades of practice, Secretary Ross and the
15 Department of Commerce announced that a question on citizenship status would be added to the
16 2020 Census. The Secretary claimed that the decision was due to a request from the Department
17 of Justice for the purpose of obtaining data to enforce the Voting Rights Act.²

18 32. Lawsuits to vacate and enjoin the Secretary’s decision were filed by numerous
19 plaintiffs in three district courts (including a suit in this Court by Plaintiffs in this case). Each
20 court struck down Secretary Ross’s decision to add the citizenship question to the 2020 Census.
21 *State of California v. Ross*, 358 F. Supp. 3d 965, 973-76 (N.D. Cal. 2019) (vacated and remanded
22 on other grounds); *New York v. Dep’t of Commerce*, 351 F. Supp. 3d at 679-80; *Kravitz v. Dep’t*
23 *of Commerce*, 366 F. Supp. 3d 681, 691, 756 (D. Md. 2019) (vacated and remanded on other
24 grounds). Among many other reasons for enjoining the decision, each court found that the
25 Secretary’s reason for adding the citizenship question—to aid Voting Rights Act enforcement—
26 was pretextual.

27 _____
28 ² In the three-and-a-half years of President Trump’s administration, the Department of
Justice has filed zero cases to enforce the Voting Rights Act.

1 33. The Supreme Court agreed and affirmed the vacatur of the Secretary's decision.
2 *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019). As a result, no citizenship
3 question appears on the 2020 Census questionnaire.

4 34. The citizenship question litigation before this Court resulted in numerous findings
5 that are relevant to this case. Among other findings of injury, the Court determined that adding a
6 citizenship question to the 2020 Census would cause a disproportionate undercount of Plaintiffs'
7 residents, which, in turn would create "a substantial risk that California will lose its fair share of
8 political representation in Congress, and by extension, the Electoral College," cause Plaintiffs to
9 lose federal funding, require Plaintiffs to expend funds to mitigate the effects of the citizenship
10 question, and harm the quality of the census data. *State of California v. Ross*, 358 F. Supp. 3d at
11 992-93, 1003-1005.

12 **III. PRESIDENT TRUMP ORDERS FEDERAL AGENCIES TO ASSIST THE CENSUS BUREAU'S**
13 **COLLECTION OF CITIZENSHIP DATA FROM GOVERNMENT RECORDS**

14 35. On June 11, 2019, President Trump held a press conference in the White House Rose
15 Garden to announce that, following the Supreme Court's decision in the citizenship question
16 litigation, he would discontinue his efforts to add the question to the 2020 Census. He also
17 announced, however, that he was issuing an executive order on the Census Bureau's collection of
18 citizenship data.

19 36. Accordingly, on June 11, 2019, President Trump issued Executive Order 13880,
20 "Collecting Information About Citizenship Status in Connection With the Decennial Census." 84
21 Fed. Reg. 33,821. In that order, the President stated, "we shall ensure that accurate citizenship
22 data is compiled in connection with the census by other means." *Id.* He noted that the Secretary
23 of Commerce had already directed the Census Bureau "to further enhance its administrative
24 record data sets" and "to obtain as many additional Federal and state administrative records as
25 possible." *Id.* To facilitate this effort, the President therefore ordered all federal agencies to
26 "promptly provide the [Commerce] Department the maximum assistance permissible, consistent
27 with law, in determining the number of citizens, non-citizens, and illegal aliens in the country,
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1 including by providing any access that the Department may request to administrative records that
2 may be useful in accomplishing that objective.” *Id.* at 33,824.

3 **IV. THE JULY 21, 2020 PRESIDENTIAL MEMORANDUM TO EXCLUDE UNDOCUMENTED**
4 **IMMIGRANTS FROM THE APPORTIONMENT COUNT**

5 37. On July 21, 2020, Defendant Trump issued a Presidential Memorandum to the
6 Secretary of Commerce entitled, “Excluding Illegal Aliens From the Apportionment Base
7 Following the 2020 Census,” 85 Fed. Reg. 44,679 (July 21, 2020), and an accompanying
8 statement. *See* Ex. 2. The statement began:

9 Last summer in the Rose Garden, I told the American people that
10 I would not back down in my effort to determine the citizenship
11 status of the United States population. Today, I am following
12 through on that commitment by directing the Secretary of
Commerce to exclude illegal aliens from the apportionment base
following the 2020 census.

13 *Id.*

14 38. The Memorandum incorrectly asserts that “[t]he Constitution does not specifically
15 define which persons must be included in the apportionment base,” that the phrase “persons in
16 each state” has been interpreted to mean “inhabitants,” that the scope of the term “inhabitants”
17 requires “the exercise of judgment,” and that the President purportedly has discretion to exercise
18 that judgment to exclude entire categories of persons who reside in the United States. 85 Fed.
19 Reg. at 44,679.

20 39. On this asserted basis, the Memorandum declares that for reapportionment following
21 the 2020 Census, “it is the policy of the United States to exclude from the apportionment base
22 aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as
23 amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible and consistent with the
24 discretion delegated to the executive branch.” *Id.* at 44,680.

25 40. The Memorandum then directs the Secretary of Commerce and the Department of
26 Commerce (and, through them, the Census Bureau) to take steps to allow the President to exclude
27 undocumented immigrants in his apportionment report to Congress issued under 2 U.S.C. § 2(a).
28 *Id.* This includes, but is not limited to, “provid[ing] information” in the report that the Secretary

1 must provide to the President under 13 U.S.C. § 141(b) that will “permit[] the President” to
2 exclude undocumented immigrants in calculating the number of U.S. House seats to which each
3 state is entitled. *Id.*

4 41. Upon information and belief, following receipt of the Memorandum, the
5 Department of Commerce has issued (or will imminently issue) directives to the Census Bureau,
6 constituting final agency action, to implement the policy of excluding undocumented immigrants
7 from the census count used for congressional apportionment, as set forth in the Memorandum.

8 42. Defendants cannot reliably exclude undocumented immigrants from the
9 apportionment count. Even before the Memorandum issued, the Census Bureau’s head of field
10 operations acknowledged that the Bureau will be unable to meet its statutory deadline to report
11 the census count. And just months ago, the federal government represented in separate litigation
12 that there is a “lack of accurate estimates of the resident undocumented population” on a state-by-
13 state basis.³

14 43. Indeed, the federal government admits that it has not yet formulated a methodology
15 for how to exclude undocumented immigrants from the apportionment count. It has suggested
16 that it may be required to use statistical modeling to comply with the Memorandum. Defendants
17 have not articulated how such statistical modeling will comport with their constitutional
18 obligation to conduct an “actual Enumeration,” U.S. Const. art. 1, § 2, cl. 3, or their obligations
19 under the Census Act, *see Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316,
20 342 (1999) (“the Census Act prohibits the use of sampling for apportionment purposes”).

21 **V. PLAINTIFFS WILL BE HARMED BY THE EXCLUSION OF UNDOCUMENTED**
22 **IMMIGRANTS FROM THE CENSUS APPORTIONMENT COUNT**

23 44. Plaintiffs each have a high number and percentage of residents who are
24 undocumented immigrants, as compared to other states and localities. These residents enrich
25 Plaintiffs’ communities, support their economies, and pay taxes. The Memorandum and the
26 exclusion of undocumented immigrants from the census apportionment count will cause

27 ³ Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.’ Supp. Rule 26(a)(1)
28 Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep’t of Commerce*, No. 2:18-cv-
00772-RDP (N.D. Ala. Mar. 13, 2020).

1 numerous harms to Plaintiffs. The harms are due both to the apportionment consequences
2 themselves, and to the chilling effect that the Memorandum will have on the responses of
3 Plaintiffs' residents to the still-ongoing 2020 Census. Defendants' decision to exclude
4 undocumented immigrants from the apportionment count was announced just weeks before
5 Census Bureau enumerators were scheduled to go into the field to encourage households to
6 respond to the census, creating confusion and further increasing the risk of a differential
7 undercount harmful to Plaintiffs.

8 45. The Memorandum and the exclusion of undocumented immigrants from the census
9 apportionment count will likely cause Plaintiffs to lose one or more seats in the U.S. House of
10 Representatives and, consequently, one or more electors in the Electoral College. President
11 Trump expressly states in the Memorandum that this is a primary purpose of excluding
12 undocumented immigrants from the apportionment count:

13 Current estimates suggest that one State is home to more than 2.2
14 million illegal aliens, constituting more than 6 percent of the
15 State's entire population. Including these illegal aliens in the
16 population of the State for the purpose of apportionment could
17 result in the allocation of two or three more congressional seats
18 than would otherwise be allocated.

17 85 Fed. Reg. at 44,680. Upon information and belief, the State referred to in this passage is the
18 State of California.

19 46. The Memorandum and the exclusion of undocumented immigrants from the census
20 apportionment count will likely cause Plaintiffs to lose federal funding, due to both Plaintiffs' loss
21 of political power in Congress and the differential undercount of Plaintiffs' residents. A complete
22 and accurate count of all persons is critical to determine grant amounts provided to states and
23 localities for various federal programs.

24 47. The Memorandum and the exclusion of undocumented immigrants from the census
25 apportionment count will impair Plaintiffs' congressional, state-level, and local redistricting
26 efforts. The exclusionary apportionment count and differential undercount will harm Plaintiffs'
27 ability to redistrict based on the total number of residents in the state and to comply with
28 Plaintiffs' related constitutional obligations for redistricting.

1 55. Defendants' violations of the Enumeration Clause and the Apportionment Clause
2 cause ongoing, irreparable harm to Plaintiffs and their residents, including the denial of
3 California's proportionate share of congressional representatives and Electoral College electors.

4 **SECOND CLAIM FOR RELIEF**

5 **VIOLATION OF SEPARATION OF POWERS**
6 **(U.S. Const. art. I, § 1; U.S. Const. art. II, § 3)**

7 56. Plaintiffs re-allege and incorporate herein by reference each and every allegation and
8 paragraph set forth previously.

9 57. Article I, Section 1 of the Constitution enumerates that "[a]ll legislative Powers
10 herein granted shall be vested in [the] Congress."

11 58. Article II, Section 3 of the Constitution requires the President to "take Care that the
12 Laws be faithfully executed."

13 59. The Constitution's Enumeration Clause, as amended by the Fourteenth Amendment,
14 "vests Congress with virtually unlimited discretion in conducting the decennial 'actual
15 Enumeration.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (quoting *Wisconsin v. City of*
16 *New York*, 517 U.S. 1, 19 (1996)).

17 60. Within nine months of the census date, Congress requires the Secretary to report to
18 the President "[t]he tabulation of total population by States . . . as required for the apportionment
19 of Representatives in Congress among the several States . . ." 13 U.S.C. § 141(b). Based on
20 that tabulation, Congress mandates that the President "shall transmit to the Congress a statement
21 showing the whole number of persons in each State . . . and the number of Representatives to
22 which each State would be entitled under an apportionment" calculated by "the method of equal
23 proportions." 2 U.S.C. § 2a(a).

24 61. Congress did not authorize the President to exclude undocumented immigrants from
25 the apportionment base. Yet the Memorandum proclaims that when the President calculates "the
26 number of Representatives to which each State would be entitled" and "transmits to the Congress
27 a statement" providing that calculation, he will exclude undocumented immigrants from the
28

1 apportionment base in disregard of the congressional mandate in 2 U.S.C. § 2a(a). 85 Fed. Reg.
2 at 44,680.

3 62. Under the separation of powers, the executive branch “may not decline to follow a
4 statutory mandate . . . simply because of policy objections. *In re Aiken Cty.*, 725 F.3d 255, 259
5 (D.C. 2013). The President’s unilateral exclusion of undocumented immigrants from the
6 apportionment base is “incompatible” with Congress’s will. *See Youngstown Sheet & Tube Co. v.*
7 *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

8 63. Nor has Congress delegated to the President the authority to take the census or to
9 dictate what is included in the Secretary’s report to him. By requiring the Secretary, in preparing
10 his report to the President, to “take all appropriate action” to implement the Memorandum’s
11 unconstitutional policy of excluding undocumented immigrants from the apportionment base, and
12 to include in the report estimates of the number of undocumented immigrants in each state, 85
13 Fed. Reg. at 44,680, the President disregards Congress’s intent in the Census Act that all persons
14 be counted in the apportionment. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

15 64. When the President usurps Congress’s authority in this manner, “his power is at its
16 lowest ebb,” *id.*, and he has failed his duty to “take Care that the Laws be faithfully executed,”
17 U.S. Const. art. II, § 3. The Memorandum thus violates the Constitution’s separation of powers.

18 65. The President’s violations of separation of powers principles cause ongoing,
19 irreparable harm to Plaintiffs and their residents, including the denial of California’s
20 proportionate share of congressional representatives and Electoral College electors.

21 THIRD CLAIM FOR RELIEF

22 VIOLATION OF CENSUS ACT (ULTRA VIRES) 23 (2 U.S.C. § 2a(a); 13 U.S.C. § 141)

24 66. Plaintiffs re-allege and incorporate herein by reference each and every allegation and
25 paragraph set forth previously.

26 67. The Census Act requires the Secretary of Commerce to report to the President, within
27 nine months of the census date, “[t]he tabulation of total population by States . . . as required for
28 the apportionment of Representatives in Congress among the several States” 13 U.S.C.

1 § 141(b). Based on that tabulation, the President “shall transmit to the Congress a statement
2 showing the whole number of persons in each State . . . and the number of Representatives to
3 which each State would be entitled under an apportionment” calculated by “the method of equal
4 proportions.” 2 U.S.C. § 2a(a).

5 68. To determine “[t]he tabulation of total population by States,” 13 U.S.C. § 141(b),
6 persons were counted at their “usual residence” under “the first enumeration Act and ha[ve] been
7 [so counted] by the Census Bureau ever since” *Franklin v. Massachusetts*, 505 U.S. 788,
8 804 (1992). The Census Bureau has adopted this methodology in its Residence Rule, which
9 requires that each person is counted in “the place where [the] person lives and sleeps most of the
10 time.” 83 Fed. Reg. at 5526.

11 69. Under the Residence Rule, “[c]itizens of foreign countries living in the United States”
12 are “[c]ounted at the U.S. residence where they live and sleep most of the time.” 83 Fed. Reg. at
13 5533. Undocumented immigrants are thus counted at their usual residence and included in the
14 tabulation of total population reported to the President. *Id.*

15 70. The Memorandum violates 13 U.S.C. § 141. It directs the Secretary, in preparing his
16 report to the President, to “take all appropriate action” to implement the Memorandum’s
17 unconstitutional policy of excluding undocumented immigrants from the apportionment base, and
18 to include in the report estimates of the number of undocumented immigrants in each state. These
19 directives violate 13 U.S.C. § 141’s requirements that the Secretary conduct an actual
20 Enumeration to determine the “total population by States”—including undocumented
21 immigrants—“as required for the apportionment of Representatives in Congress among the
22 several States,” and report only that tabulation to the President.

23 71. The Memorandum also violates 2 U.S.C. § 2a(a). It proclaims that when the
24 President calculates “the number of Representatives to which each State would be entitled” and
25 “transmits to the Congress a statement” providing that calculation, 2 U.S.C. § 2a(a), he will
26 exclude undocumented immigrants from the apportionment base. 85 Fed. Reg. at 44,680. This
27 policy violates 2 U.S.C. § 2a(a)’s requirements that the President use only the actual Enumeration
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1 of “the whole number of persons in each State” to calculate the apportionment of congressional
2 representatives, and to perform that calculation “by the . . . method of equal proportions.”

3 72. Neither the President nor an agency can take any action that exceeds the scope of
4 constitutional or statutory authority. *See Youngstown*, 343 U.S. at 588-89. By violating the
5 Census Act, the President and the Secretary act ultra vires.

6 73. Defendants’ violations of the Census Act cause ongoing, irreparable harm to
7 Plaintiffs and their residents, including the denial of California’s proportionate share of
8 congressional representatives and Electoral College electors.

9 **FOURTH CLAIM FOR RELIEF**

10 **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**
11 **(Action Not in Accordance with Law in Violation of 5 U.S.C. § 706)**

12 74. Plaintiffs re-allege and incorporate herein by reference each and every allegation and
13 paragraph set forth previously.

14 75. The Constitution’s Enumeration Clause, as amended by the Fourteenth Amendment,
15 is implemented through the Census Act. The Census Act requires the Secretary of Commerce to
16 report to the President, within nine months of the census date, “[t]he tabulation of total population
17 by States”—including undocumented immigrants—“as required for the apportionment of
18 Representatives in Congress among the several States” 13 U.S.C. § 141(b). Based on that
19 tabulation, the President “shall transmit to the Congress a statement showing the whole number of
20 persons in each State . . . and the number of Representatives to which each State would be entitled
21 under an apportionment” calculated by “the method of equal proportions.” 2 U.S.C. § 2a(a).

22 76. The Administrative Procedure Act provides that a court must “hold unlawful and set
23 aside agency action” that is not in accordance with law, contrary to constitutional right, in excess
24 of statutory authority, or without observance of procedure required by law. 5 U.S.C. § 706(2).

25 77. The Memorandum’s policy of excluding undocumented immigrants from the
26 enumeration used for apportionment is not in accordance with and exceeds the President’s
27 authority under the Census Act, and it is contrary to the Enumeration Clause.

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1 78. Upon information and belief, the Department of Commerce has directed or will direct
2 the Census Bureau, in a final agency action, to implement the Memorandum's policy of excluding
3 undocumented immigrants from the enumeration used for apportionment, in violation of these
4 provisions of the Administrative Procedure Act.

5 79. Among the violations is Defendants' failure to observe the Administrative Procedure
6 Act's notice-and-comment rulemaking requirement before dispensing with the Census Bureau's
7 long-established Residence Rule. Absent sufficient notice and comment, the Census Bureau is
8 prohibited from implementing the Memorandum's unconstitutional policy of excluding
9 undocumented immigrants from the enumeration used for apportionment and superseding the
10 Residence Rule's requirement to count all persons—including undocumented immigrants—"at
11 the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. at 5533.

12 80. Defendants have or imminently will also violate the Administrative Procedure Act to
13 the extent that, in order to exclude undocumented immigrants from the apportionment,
14 Defendants utilize any statistical method to that fails to comport with the constitutional obligation
15 to conduct an "actual Enumeration," U.S. Const. art. 1, § 2, cl. 3, or obligations under the Census
16 Act.

17 81. The Secretary's actions to implement the Memorandum's policy are additional final
18 agency actions that violate these provisions of the Administrative Procedure Act.

19 82. Defendants' violations of the Administrative Procedure Act cause ongoing,
20 irreparable harm to Plaintiffs and their residents, including the denial of California's
21 proportionate share of congressional representatives and Electoral College electors.

22 **FIFTH CLAIM FOR RELIEF**

23 **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**
24 **(Action that Is Arbitrary and Capricious in Violation of 5 U.S.C. § 706)**

25 83. Plaintiffs re-allege and incorporate herein by reference each and every allegation and
26 paragraph set forth previously.

27 84. The Constitution's Enumeration Clause, as amended by the Fourteenth Amendment,
28 is implemented through the Census Act. The Census Act requires the Secretary of Commerce to

1 report to the President, within nine months of the census date, “[t]he tabulation of total population
2 by States”—including undocumented immigrants—“as required for the apportionment of
3 Representatives in Congress among the several States” 13 U.S.C. § 141(b). Based on that
4 tabulation, the President “shall transmit to the Congress a statement showing the whole number of
5 persons in each State . . . and the number of Representatives to which each State would be entitled
6 under an apportionment” calculated by “the method of equal proportions.” 2 U.S.C. § 2a(a).

7 85. The Administrative Procedure Act provides that a court must “hold unlawful and set
8 aside agency action that is arbitrary and capricious, an abuse of discretion, runs counter to the
9 evidence before the agency, or fails to consider an important aspect of the problem. 5 U.S.C.
10 § 706; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

11 86. Upon information and belief, the Department of Commerce has directed or will direct
12 the Census Bureau, in a final agency action, to implement the Memorandum’s policy of excluding
13 undocumented immigrants from the enumeration used for apportionment, in violation of these
14 provisions of the Administrative Procedure Act.

15 87. Defendants act arbitrarily and capriciously because, among other things, they acted or
16 will imminently act without sufficient data, and without sufficient time to produce such data, to
17 determine the total number of undocumented immigrants in each state to exclude from the
18 apportionment base.

19 88. The Secretary’s actions to implement the Memorandum’s policy are additional final
20 agency actions that violate these provisions of the Administrative Procedure Act.

21 89. Defendants’ violations of the Administrative Procedure Act cause ongoing,
22 irreparable harm to Plaintiffs and their residents, including the denial of California’s
23 proportionate share of congressional representatives and Electoral College electors.

24 **SIXTH CLAIM FOR RELIEF**

25 **DECLARATORY RELIEF**
26 **(28 U.S.C. § 2201)**

27 90. Plaintiffs re-allege and incorporate herein by reference each and every allegation and
28 paragraph set forth previously.

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Dated: July 28, 2020

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