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

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CITY OF SAN JOSE, CALIFORNIA, et al.,

Plaintiffs,

vs.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. 5:20-cv-05167-LHK

**JOINT CASE MANAGEMENT
STATEMENT**

Date: August 18, 2020

Time: 10:30 a.m.

Courtroom: Videoconference

Judge: Hon. Lucy H. Koh

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STATE OF CALIFORNIA, et al.,

Plaintiffs,

vs.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. 5:20-cv-05169-LHK

**JOINT CASE MANAGEMENT
STATEMENT**

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1 Pursuant to the Court’s August 12, 2020 Order (Dkt. 38) and August 14, 2020 Order
2 (Dkt. 43) in Case No. 5:20-cv-05167-LHK, the parties in the above-captioned cases, by their
3 respective counsel, respectfully submit the following Joint Case Management Statement for the
4 Initial Case Management Conference set for August 18, 2020 at 10:30 a.m. This Joint Case
5 Management Statement only addresses the topics identified in the Court’s Orders (Dkts. 38 and
6 43), and not the sections required by the Standing Order for All Judges of the Northern District
7 of California. The Plaintiffs in Case No. 5:20-cv-05167-LHK are referred to herein as the “San
8 Jose Plaintiffs.” The Plaintiffs in Case No. 5:20-cv-05169-LHK are referred to herein as the
9 “California Plaintiffs.”

10 **I. SCHEDULING FOR DISPOSITIVE MOTIONS**

11 The San Jose Plaintiffs intend to move for partial summary judgment on two of their
12 claims: (1) violation of the Apportionment Clause, as amended by the Fourteenth Amendment;
13 and (2) violation of Census Act.

14 The California Plaintiffs intend to move for partial summary judgment on three of their
15 claims: (1) violation of Article I and the Fourteenth Amendment; (2) violation of separation of
16 powers; and, (3) violation of Census Act.

17 Defendants intend to file a dispositive motion pursuant to Federal Rule of Civil
18 Procedure 12(b)(1), 12(b)(6), and/or 56.

19 The parties submit below competing briefing schedules for these early dispositive
20 motions for both cases. The parties also request that the Court allow for the page limits for each
21 brief as set forth below.

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Event	Plaintiffs' Proposal	Defendants' Proposal	Page Limit
Plaintiffs file a joint brief in support of their respective motions for partial summary judgment	August 27, 2020	August 27, 2020	40 pages
Defendants file a single brief opposing both summary judgment motions and in support of Defendants' dispositive motion	September 10, 2020	September 14, 2020	50 pages
Plaintiffs file a joint brief replying in support of their partial summary judgment motions, and opposing Defendants' dispositive motion	September 21, 2020	September 25, 2020	35 pages
Defendants file a single reply brief in support of their dispositive motion	September 28, 2020	October 5, 2020	25 pages
Hearing on all motions for both cases	October 8, 2020	October 15, 2020	

Plaintiffs' Position: Plaintiffs are willing to discuss at the Case Management Conference measures to increase efficiency in electronic filings. Plaintiffs seek to ensure that under any order it will continue to be clear which filings apply to which action.

Defendants' Position: To improve efficiency in these matters, Defendants request that the Court enter an order providing that any filing that is applicable to both of the related actions shall be filed in the lowest-numbered action, *City of San Jose, California, et al. v. Trump, et al.*, No. 5:20-cv-05167-LHK, and shall automatically be deemed to be a filing in both actions, unless denoted otherwise. The parties may, however, file in the individual actions as well at their option.

II. THREE-JUDGE COURT

San Jose Plaintiffs will file prior to the Case Management Conference a First Amended Complaint that includes a request for a three-judge court on the basis of San Jose Plaintiffs' constitutional challenges to President Trump's Apportionment Exclusion Order, as well as San Jose Plaintiffs' new claim challenging the use of any statistical sampling method in the enumeration for apportionment in violation of 13 U.S.C. § 195. The California plaintiffs also intend to file a request for a three judge panel and seek the Court's direction on the Court's preferred form for the request. A three-judge court is warranted for two reasons.

1 First, Title 28 U.S.C. § 2284(a) states that “[a] district court of three judges shall be
2 convened when otherwise required by Act of Congress, or when an action is filed challenging the
3 constitutionality of the apportionment of congressional districts” The parties agree that the
4 case law addressing the issue suggests that both Plaintiffs’ constitutional challenges fall within
5 the jurisdiction created by 28 U.S.C. § 2284. If those claims are adjudicated by a single district
6 judge when they should have been heard by a three-judge court, it could be a jurisdictional error
7 requiring reversal. *See Karlson v. Paterson*, 542 F.3d 281, 286-87 (2d Cir. 2008). The parties
8 therefore agree that the prudent course is to convene a three-judge court in both cases because an
9 ultimate decision by the three-judge court could be certified by this Court as one the Court would
10 independently reach, allowing for prompt appeal to the Ninth Circuit or the Supreme Court. *See*
11 *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 577-78 (D.D.C. 1980) (three-
12 judge court) (including certification from District Judge that “he individually arrived at the same
13 conclusion that we collectively reached” out of “abundant caution” to ensure “that in the event
14 we are mistaken, an appeal can still be expeditiously taken in the appropriate forum” (quoting
15 *Swift & Co. v. Wickham*, 230 F. Supp. 398, 410 (S.D.N.Y. 1964 (three-judge court))).

16 Second, 13 U.S.C. § 195 prohibits “the use of the statistical method known as
17 ‘sampling’” in the “determination of population for purposes of apportionment of
18 Representatives in Congress among the several States.” The parties in Case No. 5:20-cv-05167-
19 LHK agree that Congress has provided a right of action to enforce this provision, and has further
20 provided that any action brought under that section “shall be heard and determined by a district
21 court of three judges in accordance with section 2284 of title 28, United States Code.”
22 Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies
23 Appropriations Act, 1998, § 209(b), (e)(1), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997)
24 (codified at 13 U.S.C. § 141 note). Thus, for this second reason also, the parties in Case No.
25 5:20-cv-05167-LHK agree that a three-judge court should be convened.

26 **III. CONSOLIDATION OF THESE CASES**

27 The parties agree that formal consolidation of the cases is unnecessary, but agree that the
28 cases can be handled together and on the same schedule. Plaintiffs in both cases intend to

1 cooperate as much as possible to avoid redundancy of submissions to ease the burdens on the
2 Court and the Defendants.

3 **IV. INTERPLAY WITH OTHER CASES**

4 While the cases previously identified by Plaintiffs pending in other Districts (*see* Dkt. 33)
5 raise overlapping issues and claims with this case, the parties agree that the Court (or three-judge
6 court) should proceed to the merits in this case regardless of those other cases.

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Dated: August 17, 2020

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

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