**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

STATE OF MISSOURI, DAVID MASON, ANDREA MCCANN, JESSICA FISHER, and PHILLIP FISHER,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, HOWARD W. LUTNICK in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, and GEORGE COOK in his official capacity as Acting Director of the U.S. Census Bureau,

Defendants.

Case No. 4:26-cv-00131 (JAR)

**MOTION FOR LEAVE TO FILE PROPOSED MOTION TO DISMISS AND MEMORANDUM IN SUPPORT BY PROPOSED INTERVENORS NAACP, MISSOURI NAACP, SIREN, MIRA, H. VICTORIA MORGAN, GABE REISS, CARRIE NICOLAS, LUCIA ORNELAS, AND VERONICA ZAVALA**

National Association for the Advancement of Colored People ("NAACP"), National Association for the Advancement of Colored People Missouri State Conference ("Missouri NAACP"), Services, Immigrant Rights, and Education Network ("SIREN"), Massachusetts Immigrant and Refugee Advocacy Coalition ("MIRA"), H. Victoria Morgan, Gabe Reiss, Carrie Nicolas, Lucia Ornelas, and Veronica Zavala (collectively "NAACP Intervenors") respectfully move the Court for leave to file a Proposed Motion to Dismiss and Memorandum in Support.

NAACP Intervenors' motion to intervene, ECF No. 21, remains pending. Barring an order from the Court, Defendants are required to respond to the Complaint 60 days after service. Fed. R. Civ. Pro. 12(a)(2). Plaintiffs filed a document indicating service by certified mail sent on January 30, 2026, *see* ECF No. 19, which would trigger a response deadline no earlier than March 31,

2026. NAACP Intervenors understand from counsel for Defendants that service was perfected on February 3, 2026. Out of an abundance of caution, NAACP Intervenors file the present motion in accordance with the earliest possible response deadline. Because the Court has not yet ruled on NAACP Intervenors' Motion to Intervene, and to preserve their rights and avoid delay, NAACP Intervenors move for leave to file a Proposed Motion to Dismiss and Memorandum in Support. The Proposed Motion to Dismiss is attached as Exhibit 1, and the Memorandum in Support is attached as Exhibit 2.

NAACP Intervenors request that the Court accept these filings for consideration in the event that the Court grants their Motion to Intervene. *See, e.g.*, *United States v. Weber*, No. 2:25-cv-09149, 2026 WL 118807, at *5–6 & n.10 (C.D. Cal. Jan. 15, 2026) (noting that court granted motion to intervene and accepted for consideration proposed motion to dismiss); Order, *United States v. Benson*, No. 1:25-cv-1148 (W.D. Mich. Dec. 9, 2025), ECF No. 46 (granting motion to intervene and ordering Clerk to enter the intervenors' proposed motion to dismiss on the docket); *Am. Tradition Inst. v. Colorado*, No. 11-cv-00859-WJM-BNB, 2012 WL 555513, at *3 (D. Colo. Feb. 21, 2012) (granting motion to intervene and simultaneously accepting proposed motion to dismiss as filed).

**WHEREFORE**, NAACP Intervenors respectfully request that the Court grant the motion for leave to file.

Dated: March 31, 2026

Respectfully submitted,

/s/ Abha Khanna
Abha Khanna*
**ELIAS LAW GROUP LLP**
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
Telephone: (202) 656-0177
akhanna@elias.law

David R. Fox*
Christopher D. Dodge*
Branden D. Lewiston*
Kevin R. Kowalewski*
**ELIAS LAW GROUP LLP**
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001
Telephone: (202) 968-4490
dfox@elias.law
cdodge@elias.law
blewiston@elias.law
kkowalewski@elias.law

J. Andrew Hirth, #57807
TGH LITIGATION LLC
28 N. 8th St., Suite 200
Columbia, MO 65201
Telephone: (573) 256-2850
andy@tghlitigation.com

*Appearing *pro hac vice*

*Counsel for Proposed Intervenors*

# Exhibit 1

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | |
|---|---|
| STATE OF MISSOURI, DAVID MASON, ANDREA MCCANN, JESSICA FISHER, and PHILLIP FISHER,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, HOWARD W. LUTNICK in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, and GEORGE COOK in his official capacity as Acting Director of the U.S. Census Bureau,<br><br>Defendants. | Case No. 4:26-cv-00131 (JAR) |

**[PROPOSED] MOTION TO DISMISS BY PROPOSED INTERVENORS NAACP, MISSOURI NAACP, SIREN, MIRA, H. VICTORIA MORGAN, GABE REISS, CARRIE NICOLAS, LUCIA ORNELAS, AND VERONICA ZAVALA**

National Association for the Advancement of Colored People ("NAACP"), National Association for the Advancement of Colored People Missouri State Conference ("Missouri NAACP"), Services, Immigrant Rights, and Education Network ("SIREN"), Massachusetts Immigrant and Refugee Advocacy Coalition ("MIRA"), H. Victoria Morgan, Gabe Reiss, Carrie Nicolas, Lucia Ornelas, and Veronica Zavala (collectively "NAACP Intervenors") move to dismiss Plaintiffs' complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons discussed in the supporting memorandum filed alongside this motion, Plaintiffs' claims are nonjusticiable and time-barred, and Plaintiffs' complaint fails to state a claim upon which relief may be granted.

**WHEREFORE**, NAACP Intervenors respectfully request that the Court dismiss Plaintiffs' complaint.

Dated: March 31, 2026

Respectfully submitted,

/s/ Abha Khanna
Abha Khanna*
**ELIAS LAW GROUP LLP**
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
Telephone: (202) 656-0177
akhanna@elias.law

David R. Fox*
Christopher D. Dodge*
Branden D. Lewiston*
Kevin R. Kowalewski*
**ELIAS LAW GROUP LLP**
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001
Telephone: (202) 968-4490
dfox@elias.law
cdodge@elias.law
blewiston@elias.law
kkowalewski@elias.law

J. Andrew Hirth, #57807
TGH LITIGATION LLC
28 N. 8th St., Suite 200
Columbia, MO 65201
Telephone: (573) 256-2850
andy@tghlitigation.com

*Appearing *pro hac vice*

*Counsel for Proposed Intervenors*

# Exhibit 2

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | |
|---|---|
| STATE OF MISSOURI, DAVID MASON, ANDREA MCCANN, JESSICA FISHER, and PHILLIP FISHER,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, HOWARD W. LUTNICK in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, and GEORGE COOK in his official capacity as Acting Director of the U.S. Census Bureau,<br><br>Defendants. | Case No. 4:26-cv-00131 (JAR) |

**MEMORANDUM IN SUPPORT OF [PROPOSED] MOTION TO DISMISS**

## TABLE OF CONTENTS

INTRODUCTION & BACKGROUND ....................................................................................1

I. The complaint must be dismissed under Rule 12(b)(1) because the claims are nonjusticiable and time-barred. ....................................................................................2

A. Plaintiffs can no longer obtain relief from the 2021 Apportionment..................... 3

1. Claims directed to the 2021 Apportionment are non-redressable. ..................3

2. The statute of limitations bars the Plaintiffs' retroactive claims. ....................6

B. Plaintiffs' claims as to the 2031 Apportionment are premature. ........................... 8

1. Plaintiffs' prospective claims are nonjusticiable. ..............................................8

2. Plaintiffs' APA claims fail because there is no final agency action. .......................................................................................................9

II. The complaint fails to state a claim because federal law does not require excluding noncitizens from apportionment. ....................................................................10

A. The Apportionment Clause does not require excluding noncitizens. .................. 10

1. The plain text requires including the "whole number of persons," which extends to noncitizens residing in a state. ...........................................11

2. Legislative history and longstanding practice confirm that apportionment was never meant to exclude noncitizens. .............................13

B. Federal statutes mirroring the Apportionment Clause similarly do not require excluding noncitizens. ................................................................ 15

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Alabama v. U.S. Dep't of Com.*,
396 F. Supp. 3d 1044 (N.D. Ala. 2019) .......... 7

*Apter v. Dep't of Health & Hum. Servs.*,
80 F.4th 579 (5th Cir. 2023).......... 10

*ASARCO Inc. v. Kadish*,
490 U.S. 605 (1989) .......... 4

*Ashcroft v. Iqbal*,
556 U.S. 662 (2009) .......... 2

*Bell Atl. Corp. v. Twombly*,
550 U.S. 544 (2007) .......... 2

*Bennett v. Spear*,
520 U.S. 154 (1997) .......... 9

*Bostock v. Clayton County*,
590 U.S. 644 (2020) .......... 13

*Carney v. Adams*,
592 U.S. 53 (2020) .......... 9

*Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*,
603 U.S. 799 (2024) .......... 7

*Delker v. MasterCard Int'l, Inc.*,
21 F.4th 1019 (8th Cir. 2022).......... 2

*District of Columbia v. Heller*,
554 U.S. 570 (2008) .......... 12

*Evenwel v. Abbott*,
578 U.S. 54 (2016) .......... 14

*Faltermeier v. FCA US LLC*,
No. 4:15-CV-00491-DGK, 2016 WL 4771100 (W.D. Mo. Sep. 13, 2016).......... 10

*Franklin v. Massachusetts*,
505 U.S. 788 (1992) .......... 4

*Green v. Brennan*,
578 U.S. 547 (2016) .......... 7, 8

*Haaland v. Brackeen*,
599 U.S. 255 (2023) .......... 3, 4, 7

*Lujan v. Defs. of Wildlife*,
504 U.S. 555 (1992) .......... 4

*New York v. Trump*,
485 F. Supp. 3d 422 (S.D.N.Y. 2020) .......... 11, 12, 16

*Plyler v. Doe*,
457 U.S. 202 (1982) .......... 1, 12

*Ramos v. Louisiana*,
590 U.S. 83 (2020) .......... 14

Fed'n for Am. Immigr. Reform v. Klutznick,
486 F. Supp. 564, 576 (D.D.C. 1980) .......... *passim*

*San Jose v. Trump*,
497 F. Supp. 3d 680 (N.D. Cal. 2020) .......... *passim*

*South Dakota v. Alexander*,
968 F.2d 1 (8th Cir. 1992) .......... 9

*Stalley v. Cath. Health Initiatives*,
509 F.3d 517 (8th Cir. 2007) .......... 2

*State ex rel. Barker v. Chi. & A. R. Co.*,
178 S.W. 129 (Mo. 1915) .......... 7

*Steel Co. v. Citizens for a Better Env't*,
523 U.S. 83 (1998) .......... 4

*Stokeling v. United States*,
586 U.S. 73 (2019) .......... 15

*Texas v. United States*,
523 U.S. 296 (1998) .......... 9

*Titus v. Sullivan*,
4 F.3d 590 (8th Cir. 1993) .......... 2

*Trump v. New York*,
592 U.S. 125 (2020) .......... *passim*

*U.S. Army Corps of Eng'rs v. Hawkes Co.*,
578 U.S. 590 (2016) .......... 9

*Useche v. Trump*,
No. 8:20-CV-02225, 2020 WL 6545886 (D. Md. Nov. 6, 2020) .......... 11, 16

*Utah v. Evans*,
536 U.S. 452 (2002) .......... 5

*Valley Reg'l Ctr., LLC v. U.S. Dep't of Homeland Sec.*,
106 F.4th 1195 (D.C. Cir. 2024) .......... 10

*Wong Wing v. United States*,
163 U.S. 228 (1896) .......... 12

**Constitution**

U.S. Const. amend. XIV, § 2 .......... 1, 11, 12, 15

**Statutes**

2 U.S.C. § 2a .......... 3, 5, 15

5 U.S.C. § 704 .......... 7, 9

13 U.S.C. § 141 .......... 4

28 U.S.C. § 2401 .......... 1, 6

Mo. Rev. Stat. § 27.060 .......... 7

**Rules**

Fed. R. Civ. P. 12(b)(6) .......... 2

**Regulations**

Final 2020 Census Residence Criteria and Residence Situations,
83 Fed. Reg. 5525 (Feb. 8, 2018) .......... 6

**Other Authorities**

*The Federalist No. 54* (James Madison) .......... 14

## INTRODUCTION & BACKGROUND

"For over two hundred years, Congress, the Department of Justice, and the Census Bureau have all consistently concluded that the Constitution mandates that the apportionment base must include noncitizens." *San Jose v. Trump*, 497 F. Supp. 3d 680, 723 (N.D. Cal. 2020) (per curiam), *vacated*, 141 S. Ct. 1231 (2020). That is because the Constitution itself provides that "the whole number of persons in each State" must be included in the decennial apportionment. U.S. Const. amend. XIV, § 2. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). In this case, Missouri and a handful of its residents make arguments to the contrary that would require this Court to rewrite the Constitution's plain text, along with parallel federal statutes, to exclude classes of noncitizens. Their complaint must be dismissed.

First, Plaintiffs' claims are not justiciable. Their backward-looking claims—which seek to "redo" the 2020 Census and 2021 Apportionment more than half a decade later, Compl. at 95—are not redressable. The injunction they seek is barred by both federal law prohibiting this sort of mid-decade gamesmanship and the six-year statute of limitations for claims against the United States. *See* 28 U.S.C. § 2401(a). And Plaintiffs' forward-looking claims—which seek to set new ground rules for the 2030 Census and 2031 Apportionment—are premature. Defendants have made clear that the rules that will govern that process remain in flux. And in any event, the president elected in 2028 is the one who will carry out the relevant apportionment process. Plaintiffs are therefore shadow boxing with a future administration and making assumptions about what they might do.

Second, despite its imposing length, Plaintiffs' complaint is ultimately little more than sound and fury that fails to state a viable claim. The Constitution's text is clear, and unbroken

practice over two centuries reveals Plaintiffs' view to be contrived and groundless. Their effort to challenge one apportionment five years *after* it occurred, and another five years *before* it occurs, is meritless. The Court should therefore dismiss for lack of jurisdiction or, alternatively, for failure to state a plausible legal claim.

## LEGAL STANDARD

***Rule 12(b)(1).*** Under Rule 12(b)(1), "[t]he Plaintiff[s] must assert facts that affirmatively and plausibly suggest that the pleader[s] ha[ve] the right to jurisdiction." *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007)). Dismissal is required "if the plaintiff[s] fail[] to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993).

***Rule 12(b)(6).*** A complaint must be dismissed where it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). While the Court "must accept as true all of the allegations contained in a complaint" at this stage, it need not accept the complaint's "legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal is required when a complaint fails to allege a "viable legal theory." *Delker v. MasterCard Int'l, Inc.*, 21 F.4th 1019, 1024 (8th Cir. 2022) (quoting *Twombly*, 550 U.S. at 555).

## ARGUMENT

### I. The complaint must be dismissed under Rule 12(b)(1) because the claims are nonjusticiable and time-barred.

Plaintiffs' suit, brought at the mid-point between the 2021 and 2031 Apportionments, comes too late to undo the last apportionment, and too early to challenge the next one. Thus, Plaintiffs' claims are all either nonjusticiable or time-barred and must be dismissed.

### A. Plaintiffs can no longer obtain relief from the 2021 Apportionment.

#### 1. Claims directed to the 2021 Apportionment are non-redressable.

Plaintiffs lack standing to challenge the 2021 Apportionment because the Court is without power to redress their alleged injuries at this late date. Standing requires "a plaintiff to show that she has suffered an injury in fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Haaland v. Brackeen*, 599 U.S. 255, 291–92 (2023) (internal quotation marks omitted) (citation omitted). "Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Id.* (alteration omitted) (citation omitted). That element is not satisfied if a requested "injunction would not give [plaintiffs] legally enforceable protection from the allegedly imminent harm." *Id.* at 293.

Plaintiffs seek an injunction "requiring Defendants to redo the 2020 Census," this time excluding certain categories of immigrants, and to then "[]calculate a new apportionment of seats in the House of Representatives" and "submit that apportionment calculation to the President for subsequent transmittal to the clerk of the House and, from him, to the States." Compl., Prayer for Relief ¶ 4.[1] But this unprecedented injunction would not actually redress Plaintiffs' alleged injuries. As Plaintiffs acknowledge, the President and the Clerk of the House of Representatives are responsible for the final two steps in the apportionment process. *See* 2 U.S.C. § 2a. But Plaintiffs did not name either as a defendant, nor seek an injunction against them. The Supreme Court has squarely rejected the notion that parties can show standing when their purported redress

[1] Plaintiffs state that they merely request "re-conducting the 2020 census enumeration *if necessary*." Compl., Prayer for Relief ¶ 4 (emphasis added). To the extent Plaintiffs mean to suggest that the 2021 Apportionment could be redone based on some other data source or method besides a census enumeration, such a request would be contrary to the constitutional requirement that apportionment be based on the "actual Enumeration of population." U.S. Const. art. I, § 2, cl. 3. Plaintiffs thus fail to plausibly allege such a hypothetical and speculative form of redress.

"depends on the unfettered choices made by independent actors not before the courts." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion); *see also Haaland*, 599 U.S. at 293 (finding no redress when relevant actors were "not parties to the suit" and would not "be obliged to honor an incidental legal determination the suit produced" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 (1992))). Here, even if the Court granted the full injunction Plaintiffs request, that injunction would not require the President to accept and transmit the revised certificate to the Clerk, nor require the Clerk to accept it and submit it to the States. Thus, it would do *nothing* to remedy Plaintiffs' alleged injuries. The "psychic satisfaction" of Plaintiffs' requested relief "is not an acceptable Article III remedy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

Plaintiffs lack redress for another reason: Federal law forbids their request to jettison the 2020 Census and 2021 Apportionment and start over. To prevent "congressional battles" over reapportionment, Congress created an "automatic reapportionment" process, governed by rigid procedures to occur on a strict timeline. *Franklin v. Massachusetts*, 505 U.S. 788, 791–92 (1992). That statutory framework requires that, after completion of the decennial census and apportionment process, each State "shall be entitled" to the number of Representatives they are allotted "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). Congress also dictated that "[i]nformation obtained in any mid-decade census ***shall not be used for apportionment*** of Representatives in Congress among the several States." 13 U.S.C. § 141(e)(2) (emphasis added). Plaintiffs' request for a mid-decade do-over census, to be used for a mid-decade do-over apportionment, violates this carefully devised statutory scheme. It would supplant the prescribed timeline for apportionment, blow past the command that States are "entitled" to the number of seats received at the conclusion of the process, and flout the bar on using a mid-decade census for apportionment. Federal law forecloses the redress Plaintiffs seek.

Plaintiffs allege that the Supreme Court approved of post-census apportionment challenges in *Utah v. Evans*. *See* Compl. ¶ 66. But the narrow exception recognized in *Utah* only confirms the default rule that a plaintiff's injuries are *not* redressable if they require a redo of the census and apportionment. In that case, Utah challenged statistical methods employed for the 2000 Census. *Utah*, 536 U.S. 452, 457–59 (2002). The defendants argued that the State's injuries could not be redressed, pointing to the statutory scheme for converting census results into a reapportionment. *Id.* at 462 (citing 13 U.S.C. § 141(a)–(b); 2 U.S.C. § 2a(a)–(b)). The Court declined to read those statutes to "absolutely" bar revision to the certificates effecting reapportionment "in all cases no matter what." *Id.* It set forth three mandatory conditions that could permit a court to order a revision to the certificate: (i) the certificate contained a "a clerical, a mathematical, or a calculation error," (ii) the error were "uncovered before new Representatives are actually selected," *and* (iii) the error's "correction translates mechanically into a new apportionment of Representatives without further need for exercise of policy judgment." *Id.* Utah satisfied all three conditions: its claim was based on a calculation error stemming from a disputed statistical method; its suit was brought *before* the first election under the reapportioned districts; and revising the statistical method would automatically reapportion the States. The Court concluded that in "such cases," the federal census law "poses no legal bar to redress." *Id.* (internal quotation marks omitted)

None of *Utah*'s three conditions is satisfied here. Plaintiffs do not allege that the certificate that prompted the 2021 Apportionment contains a "clerical," "mathematical," or "calculation" error—they dispute the underlying choice to count the whole number of persons in each state without regard to immigration status, as even Plaintiffs admit has been standard practice since at least 1980. *See* Compl. ¶¶ 4–5, 12. Plaintiffs' challenge to that so-called error also did not come "before new Representatives are actually selected"—it came over ***two full election cycles*** later.

And their requested relief would not "translate[] mechanically into a new apportionment of Representatives without further need for exercise of policy judgment"—it would instead require a complete redo of the census, demanding a host of policy judgments from a wide range of actors about how to execute that herculean task in a compressed timeframe. Under *Utah*, Plaintiffs' retroactive claims are not redressable and, therefore, must be dismissed.

**2. The statute of limitations bars the Plaintiffs' retroactive claims.**

Plaintiffs' claims as to the 2020 Census and 2021 Apportionment also fall well outside the six-year statute of limitations. *See* 28 U.S.C. § 2401(a). Plaintiffs' claims accrued on February 8, 2018, when the Census Bureau finalized the Residence Criteria for the 2020 Census. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018). The Residence Criteria expressly required "foreign citizens" to be "considered to be 'living' in the United States if, at the time of the census, they are living and sleeping most of the time at a residence in the United States." *Id.* at 5531. As Plaintiffs allege, the Residence Criteria thus "caus[ed] the decennial apportionment to include illegal aliens and temporary visa holders." Compl. ¶ 174. Nonetheless, Plaintiffs waited to sue until January 30, 2026—nearly eight years after the Residence Criteria was promulgated. Their retroactive claims are thus untimely.

Plaintiffs seek to excuse their tardiness by alleging that even into 2020, it "still appeared that Missouri might avoid an injury from illegal aliens being included in the decennial apportionment," citing the Trump administration's later attempts to exclude certain immigrants from the apportionment. Compl. ¶ 60. That does not save their claims. The statute of limitations clock began to run when the Residence Criteria was promulgated because at that point Plaintiffs had "a 'complete and present cause of action'"—that is, "the right to 'file suit and obtain relief.'" *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 809 (2024) (quoting *Green*

*v. Brennan*, 578 U.S. 547, 554 (2016)). The Residence Criteria also constitutes "final agency action" for Plaintiffs' APA claims, 5 U.S.C. § 704, because it "mark[s] the consummation of the agency's decisionmaking process and is one by which rights or obligations have been determined, or from which legal consequences will flow." *Corner Post*, 603 U.S. at 808 (internal quotation marks omitted) (citation omitted). Indeed, elsewhere in their complaint, Plaintiffs admit this, alleging that the Residence Criteria "caus[ed]" their injuries. Compl. ¶ 174. Alabama's May 2018 suit proves the point: Just a few months after the Residence Criteria issued, that State sued the same Defendants here, raising similar claims, which the court held justiciable. *Alabama v. U.S. Dep't of Com.*, 396 F. Supp. 3d 1044, 1050–58 (N.D. Ala. 2019). Plaintiffs could have done the same, but they chose to sit on their hands.

Plaintiffs try to skirt the statute of limitations by including in their suit several individuals who moved to Missouri in 2020 or 2022. *See* Compl. ¶¶ 22–24. This obvious ploy to manufacture a timely claim fails. The Supreme Court has repeatedly held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" and so may not assert such claims "on behalf of its citizens." *Haaland*, 599 U.S. at 295 (alteration in original) (citation omitted). "That should make the issue open and shut." *Id.* Nor is the Missouri Attorney General permitted to represent individuals. *See, e.g.*, *State ex rel. Barker v. Chi. & A. R. Co.*, 178 S.W. 129, 136 (Mo. 1915) ("The state has no right to enforce mere private rights, and on this theory could not sue for others."); *see also* Mo. Rev. Stat. § 27.060 (authorizing the Attorney General to sue "in the name and on the behalf of the state"). The Court should not entertain this gamesmanship. Plaintiffs' retroactive claims should be dismissed as outside the statute of limitations.[2]

[2] Even if Individual Plaintiffs had timely claims, the State still would not. *See Green v. Brennan*, 578 U.S. 547, 563 (2016) (holding "limitations-period analysis is always conducted claim by

**B. Plaintiffs' claims as to the 2031 Apportionment are premature.**

**1. Plaintiffs' prospective claims are nonjusticiable.**

The Supreme Court's decision in *Trump v. New York* sounds the death-knell for Plaintiffs' challenge to the 2031 Apportionment. *See* 592 U.S. 125 (2020) (per curiam). In December 2020, the Court deemed nonjusticiable a challenge to a presidential memorandum requiring exclusion of noncitizens from the reapportionment scheduled for the following month. *Id.* at 131–33. Though the Court recognized that President Trump had "made clear his desire to exclude aliens without lawful status from the apportionment base," it nonetheless concluded the plaintiffs lacked standing and the case was unripe because it remained "riddled with contingencies and speculation that impede judicial review." *Id.* at 131. The Court faulted the plaintiffs' challenge for involving "a significant degree of guesswork" as to how apportionment would play out, *id.* at 132, and reasoned that delaying judicial review would "ensure[] that we act *as judges*, and do not engage in policymaking properly left to elected representatives," *id.* at 134 (citation omitted).

Plaintiffs' case presents tenfold the "contingencies," "speculation," and "guesswork" as in *Trump*, which compels dismissal here. The rules and regulations that will govern the years-away 2030 Census and 2031 Apportionment have yet to be promulgated, and it is speculative whether Defendants will ultimately seek to include the categories of immigrants Plaintiffs seek to exclude. In fact, the present administration's views on the issue align with Plaintiffs', *see* Compl. ¶ 64, n.14, and Defendants have represented that they are "actively preparing to promulgate the residence criteria and residence situations for the 2030 Census," which may "lead to the dismissal" of claims alleging that noncitizens must be excluded from the census and apportionment. Defs.' Opp'n to Lift Stay, *Louisiana v. Dep't of Com.*, No. 6:25-cv-00076-DCJ (W.D. La. Feb. 19, 2026). Further,

---

claim"). Its retroactive claims should be dismissed regardless of whether the Individual Plaintiffs' retroactive claims are within the statute of limitations.

the administration that will actually oversee the next census and apportionment will not take office until January 2029. Accordingly, Plaintiffs' lack standing because their alleged injuries are "conjectural [and] hypothetical," not "concrete, particularized, and imminent." *Trump*, 592 U.S. at 131 (quoting *Carney v. Adams*, 592 U.S. 53, 58 (2020)). And because their claims depend on "contingent future events that may not occur as anticipated, or indeed may not occur at all," *id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)), they are also not ripe.

**2. Plaintiffs' APA claims fail because there is no final agency action.**

Plaintiffs' prospective APA claims are premature for another reason: They do not challenge any "final agency action," as required under the APA. 5 U.S.C. § 704. Those claims must therefore be dismissed. *See South Dakota v. Alexander*, 968 F.2d 1, 2 (8th Cir. 1992) (per curiam).

Plaintiffs try to spin the FAQ page on the Census Bureau's website as final agency action, claiming it "confirms" that the Census Bureau will count all people in the 2030 Census without regard to immigration status. Compl. ¶¶ 56, 68–69, 163. But to constitute final agency action under the APA, "two conditions . . . generally must be satisfied . . . . 'First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The FAQ page flunks both. As noted, the agencies recently confirmed they have not issued final rules, saying instead that they are "actively preparing to promulgate" rules governing the upcoming Census. *See supra* at 8.[3] And in any event, informal, online posts by an agency do not determine any legal

[3] Even taken at face value, the portions of the FAQ page cited in the complaint merely describe the Census Bureau's longstanding, historical practice of counting everyone without regard to immigration status. *E.g.*, Compl. ¶ 56. Plaintiffs cite nothing in those FAQs indicating that the Bureau has already committed itself to do the same for the 2030 Census.

rights or obligations and so do not constitute final agency action. *See, e.g.*, *Del. Valley Reg'l Ctr., LLC v. U.S. Dep't of Homeland Sec.*, 106 F.4th 1195, 1206 (D.C. Cir. 2024) (finding no final agency action in "statements made by USCIS in the Q&A posted on its website"); *Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579, 594 (5th Cir. 2023) (finding no final agency action in social media posts by FDA); *Faltermeier v. FCA US LLC*, No. 4:15-CV-00491-DGK, 2016 WL 4771100, at *5 (W.D. Mo. Sep. 13, 2016) (finding no final agency action in "FAQ page statements" on NHTSA's website). Since Plaintiffs do not challenge a final agency action, their prospective claims under the APA claim must be dismissed.

## II. The complaint fails to state a claim because federal law does not require excluding noncitizens from apportionment.

On the merits, Plaintiffs' complaint is defeated by the text of the Constitution and the Census and Reapportionment Acts, the relevant drafting history, and over 230 years of practice. As courts have unanimously agreed, the Constitution and federal law require apportionment based on the "whole number of persons." Even if the Constitution and federal law could be read to *permit* the exclusion of non-citizens, they certainly do not *require* such an exclusion as would be necessary for this Court to enjoin their counting.

### A. The Apportionment Clause does not require excluding noncitizens.

Plaintiffs' complaint rests on arguments that have been extensively litigated and unanimously rejected over the past half century. *See Fed'n for Am. Immigr. Reform v. Klutznick* ("*FAIR*"), 486 F. Supp. 564, 576 (D.D.C. 1980) (rejecting "very weak" claim that the Constitution requires excluding noncitizen from apportionment). Most recently, a battery of courts held that President Trump's prior effort to exclude noncitizens from apportionment was unlawful. *New York v. Trump*, 485 F. Supp. 3d 422, 475 (S.D.N.Y. 2020), *vacated*, 592 U.S. 125 (2020); *City of San Jose v. Trump*, 497 F. Supp. 3d 680, 706 (N.D. Cal. 2020) (per curiam), *vacated*, 141 S. Ct. 1231

(2020); *Useche v. Trump*, No. 8:20-CV-02225, 2020 WL 6545886, at *10 (D. Md. Nov. 6, 2020), *vacated*, 141 S. Ct. 1231 (2020).[4] While the Supreme Court later vacated these decisions as premature, the Court did not cast any doubt on their merits analysis. *See Trump*, 592 U.S. at 134 ("[W]e express no view on the merits of the constitutional and related statutory claims presented."). Indeed, only the dissent in *Trump* discussed the merits, concluding that a policy Missouri now argues is compelled by the Constitution was "unlawful." *Trump*, 592 U.S. at 542 (Breyer, J., dissenting). No court has ever given credence to the view Missouri advances here. For good reason—plain text, legislative history, and past practice all cut against it.

**1. The plain text requires including the "whole number of persons," which extends to noncitizens residing in a state.**

The Fourteenth Amendment instructs that "[r]epresentatives 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. And the original Apportionment Clause, later modified by the Fourteenth Amendment, provided for an "actual Enumeration" every ten years with subsequent apportionment based on the "whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3.

This case hinges on the question of whether noncitizens are "persons." The obvious answer is yes. *See New York*, 485 F. Supp. 3d at 435 ("The merits of the parties' dispute are not particularly close or complicated."); *FAIR*, 486 F. Supp. at 576 ("[P]laintiff's case appears to be very weak on the merits."). "Whatever his status under the immigration laws, an alien is surely a 'person' in any

[4] Two of these decisions were resolved on statutory grounds. *See New York*, 485 F. Supp. 3d at 435; *Useche*, 2020 WL 6545886 at *9. But as those courts observed, the constitutional and statutory analyses here "overlap[]," *New York*, 485 F. Supp. at 435, because both turn on identical text referring to the "whole number of persons."

ordinary sense of that term." *Plyler*, 457 U.S. at 210. Dictionaries at the time that the Constitution and Fourteenth Amendment were enacted defined "person" to mean a "human being." *San Jose*, 497 F. Supp. 3d at 718 (collecting sources). And there is no reason to give "person" the convoluted definition ascribed to it by Missouri because "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (alteration in original) (citation omitted). The original public meaning of the word "person," the same as today, indisputably included noncitizens.

The Constitution confirms this understanding. For one, the use of "persons" instead of the narrower word "citizens" conveys that these terms have a different meaning. *See* U.S. Const. amend. XIV, § 2 (using both words); *see also San Jose*, 497 F. Supp. 3d at 716 ("We presume that differences in terminology reflect differences in meaning."); *cf. Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (explaining it "must be concluded" that where constitutional provision applies to "persons," then "all persons within the territory of the United States" are within such provision). Likewise, the use of "persons" followed by specific subsets demonstrates that "persons" means all persons not specifically excluded. *See* U.S. Const. amend. XIV, § 2 (excluding "Indians not taxed"); *id.* art. I, § 2, cl. 3 (same, and referencing enslaved people as "all other Persons"). Consequently, "[t]he absence of an exception for noncitizens demonstrates their inclusion." *San Jose*, 497 F. Supp. 3d at 717; *see also Trump*, 592 U.S. at 144–45 (Breyer, J., dissenting) ("Congress clearly knew how to exclude a certain population"). The ordinary definition of "person" and the four corners of the Constitution are enough to resolve this case.

Plaintiffs contend that "person" actually means "inhabitant," Compl. ¶ 109—which if true would mean "Plaintiffs still lose." *See San Jose*, 497 F. Supp. 3d at 719 ("[U]ndocumented persons

residing in the United States are 'inhabitants' of the United States."); *see also Trump*, 592 U.S. at 144 (Breyer, J., dissenting) ("Neither 'resident' nor 'inhabitant' takes account of whether someone is lawfully, as opposed to unlawfully, present."). Plaintiffs then say "inhabitant" actually means "domiciliary" (they still lose), and finally that "domiciliary" actually means citizen or "legal permanent resident" as defined by modern immigration law. *See* Compl. ¶¶ 109–23. Yet these terms are absent from the constitutional text, and Plaintiffs have no authority for their assertion that the Constitution somehow incorporates a view of domicile or immigration law that did not even exist at the Framing or the ratification of the Fourteenth Amendment. As Plaintiffs themselves admit, "the very 'concept of illegal aliens was unknown' until 1875." *Id.* ¶ 46 (quoting *FAIR*, 486 F. Supp. at 567); *see also id.* ¶ 11 (same); *id.* ¶ 137 ("[T]he modern conception of illegal aliens was completely unknown until the twentieth century."). Plaintiffs seem to believe this helps them because Congress may not have contemplated the effect of its clearly stated rule generations later, but "the limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock v. Clayton County*, 590 U.S. 644, 653 (2020). "Only the written word is the law, and all persons are entitled to its benefit." *Id.* Accordingly, "[t]he Constitution's text demonstrates that apportionment must be based on the number of all persons residing in a state, including undocumented immigrants." *San Jose*, 497 F. Supp. 3d at 716; *see also FAIR*, 486 F. Supp. at 576.

#### 2. Legislative history and longstanding practice confirm that apportionment was never meant to exclude noncitizens.

"For over two hundred years, Congress, the Department of Justice, and the Census Bureau have all consistently concluded that the Constitution mandates that the apportionment base must include noncitizens." *San Jose*, 497 F. Supp. 3d at 723; *see also FAIR*, 486 F. Supp. at 576 (similar). That is because the "Constitution's drafting history confirms what the text has already made clear." *San Jose*, 497 F. Supp. 3d at 716; *cf. Ramos v. Louisiana*, 590 U.S. 83, 97 (2020)

(consulting drafting history for purposes of constitutional construction). Extensive historical evidence shows the "Framers' clear intent to apportion based on the number of persons residing in each state, not the number of voters" or citizens. *San Jose*, 497 F. Supp. 3d at 722 (collecting sources); *see, e.g.*, *The Federalist No. 54* (James Madison) ("It is a fundamental principle of the proposed Constitution, that . . . the aggregate number of representatives allotted to the several States is to be . . . founded on the aggregate number of inhabitants . . . .").

The history of the Fourteenth Amendment is even clearer: Congress rejected a proposal that would have apportioned representatives according to respective legal voters after it "encountered fierce resistance from proponents of total-population apportionment." *Evenwel v. Abbott*, 578 U.S. 54, 66 (2016). And contemporaneous statements confirm that the drafters intended their language to expansively include immigrants regardless of citizenship. *See* Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (Representative Bingham) ("Under the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation."); *see San Jose*, 497 F. Supp. 3d at 689–90 (collecting similar quotes).

Plaintiffs attempt to evade this historical evidence and practice by claiming that they are merely challenging a "Carter Administration Policy" of (relatively) recent vintage. Compl. ¶ 11. But that claim is dubious: long before the Carter Administration, opponents of total-population apportionment introduced "constitutional amendments and legislative proposals that would have excluded noncitizens from the apportionment base." *San Jose*, 497 F. Supp. 3d at 690. For example, in 1929 Congress contemplated a pair of proposals that would have expressly excluded "aliens" from the apportionment base, yet "[n]either constitutional amendment was passed by Congress." *Id.*; *see also FAIR*, 486 F. Supp. at 576. Those amendments were proposed because apportionment had *always* been understood to require counting noncitizens, contrary to Plaintiffs'

theory that the practice originated in the 1980s. *See San Jose*, 497 F. Supp. 3d at 723. Far from some novel, modern-day approach, the traditional total-population method of apportionment has an unbroken historical pedigree that confirms the plain meaning of the Constitution's text. *See id.* (collecting cases where "the Supreme Court has emphasized the centrality of historical practice to resolving ambiguities in the meaning and application of the Constitution").

### B. Federal statutes mirroring the Apportionment Clause similarly do not require excluding noncitizens.

The Census Act directs that apportionment is based on the "tabulation of total population by States," 13 U.S.C. § 141(b), and the Reapportionment Act requires the president to provide "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population," 2 U.S.C. § 2a(a). Plaintiffs incorrectly assert that these statutes require exclusion of noncitizens. *See, e.g.*, Compl. ¶¶ 162, 194.

These statutes should be read in tandem with the Constitution to require counting of noncitizens. *See Stokeling v. United States*, 586 U.S. 73, 80 (2019) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (alteration in original) (citation omitted)). Congress adopted the Apportionment Clause's *identical* text by requiring the counting of "the whole number of persons in each State." 2 U.S.C. § 2a(a). This choice incorporated the public understanding that those words included all persons regardless of citizenship and endorsed a then-140-year-old practice that has continued for nearly another 100 years. *See San Jose*, 497 F. Supp. at 734. Accordingly, courts are united in concluding that the statutes require counting noncitizens. *Id.*; *New York*, 485 F. Supp. 3d at 435; *Useche*, 2020 WL 6545886 at *9; *see also Trump*, 592 U.S. at 145–46 (Breyer, J., dissenting).

## CONCLUSION

Plaintiffs' complaint should be dismissed under Rule 12(b)(1) and 12(b)(6).

Dated: March 31, 2026

Respectfully submitted,

*/s/ Abha Khanna*
Abha Khanna*
**ELIAS LAW GROUP LLP**
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
Telephone: (202) 656-0177
akhanna@elias.law

David R. Fox*
Christopher D. Dodge*
Branden D. Lewiston*
Kevin R. Kowalewski*
**ELIAS LAW GROUP LLP**
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001
Telephone: (202) 968-4490
dfox@elias.law
cdodge@elias.law
blewiston@elias.law
kkowalewski@elias.law

J. Andrew Hirth, #57807
TGH LITIGATION LLC
28 N. 8th St., Suite 200
Columbia, MO 65201
Telephone: (573) 256-2850
andy@tghlitigation.com

*Appearing *pro hac vice*

*Counsel for Proposed Intervenors*