UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HAITIAN-AMERICANS UNITED, INC., BRAZILIAN WORKER CENTER, CHELSEA COLLABORATIVE, INC. and CENTRO PRESENTE, Plaintiffs, v. DONALD J. TRUMP, President of the United States in his Official Capacity, UNITED STATES DEPARTMENT OF COMMERCE, UNITED STATES BUREAU OF THE CENSUS, STEVEN DILLINGHAM, Director of the U.S. Census Bureau in his Official Capacity, and WILBUR ROSS, Secretary of the Department of Commerce in his Official Capacity, Defendants.	Case No. 20-11421-DPW

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR THE APPOINTMENT OF A THREE-JUDGE COURT

By accompanying Application, Plaintiffs Haitian-Americans United, Inc., Brazilian Worker Center, Chelsea Collaborative, Inc., and Centro Presente request the appointment of a three-judge court to adjudicate this action, pursuant to 28 U.S.C. § 2284(a). In this action, Plaintiffs are challenging a Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum") on a variety of grounds, including that it purports to exclude undocumented immigrants from the basis for congressional apportionment in violation of the U.S. Constitution. Section 2284(a) requires the appointment of a three-judge court in actions challenging "the

constitutionality of the apportionment of congressional districts," as this action plainly does. Indeed, in recent weeks the United States District Courts for the Southern District of New York and for the District of Columbia issued orders granting applications for the appointment of three-judge courts in separate cases asserting claims that are substantially similar to those that Plaintiffs have asserted here. *See Common Cause v. Trump*, 1:20-cv-02023-CRC-GGK-DLF, ECF No. 33 (D.D.C. Aug. 20, 2020) (copy attached at Tab 1); *New York v. Trump*, 1:20-CV-05770-JMF, ECF No. 68 (S.D.N.Y. Aug. 7, 2020) (copy attached at Tab 2).

Like the claims asserted by the plaintiffs in the *Common Cause* and *New York v. Trump* cases, Plaintiffs' claims in this action require adjudication by a three-judge court, and their Application for the appointment of such a court should be granted.

BACKGROUND

Plaintiffs have brought this action to enjoin and restrain Defendants from carrying out their unlawful plan, set forth in the Memorandum, to exclude undocumented immigrants from the congressional apportionment base for the first time in our nation's history. The actions contemplated and ordered in the Memorandum are in violation of the Constitution, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state," and excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2. Those actions also violate two federal statutes: 13 U.S.C. § 141, which requires the Department of Commerce to "tabulat[e] the total population by States . . . as required for the apportionment of Representatives in Congress," and 2 U.S.C. § 2a(a), which requires the President to transmit to Congress apportionment tables "showing the whole number of persons in each State." Previous Departments of Justice under the administrations of both parties, and at least one federal court, have held that the exclusion of undocumented

immigrants from the apportionment base would be unconstitutional. *See Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980).

In addition, because the federal government has no mechanism for conducting an actual, direct count of the undocumented population within the States—and in fact has been prevented by the Supreme Court from inquiring about citizenship in the 2020 census[1]—implementation of the Memorandum would violate Article I, § 2 of the Constitution, which requires all figures used in congressional apportionment to be determined via "actual Enumeration." *See Utah v. Evans*, 536 U.S. 452, 477 (2002) (recognizing that "the Framers expected census enumerators to seek to reach each individual household," and not to use substitute "statistical methods"). Also, because the Defendants can only effectuate the Memorandum's instructions by using statistical sampling, their implementation of those instructions would violate the Census Act, which "directly prohibits the use of sampling in the determination of population for purposes of [congressional] apportionment." *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338 (1999); *see* 13 U.S.C. § 195.

ARGUMENT

I. Section 2284 requires that a three-judge court be convened.

In Section 2284, Congress provided that "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). The proposed actions at issue here, as described in the Memorandum, purport to alter the way in which members of Congress are

[1] *See Department of Commerce v. New York*, 139 S. Ct. 2551 (2019).

apportioned across the several states, with the inevitable (and intended) result that some states will lose representatives in Congress. In this action, Plaintiffs allege (among other things) that this alteration of the congressional apportionment base violates Article I, Section 2 of the U.S. Constitution, as well as the equal protection guarantees of the Fifth and Fourteenth Amendments. *See* Complaint (Docket No. 1) at ¶¶ 158-64, 175-78. These claims constitute a "challeng[e] the constitutionality of the apportionment of congressional districts" within the meaning of Section 2284(a), and thus require adjudication by a three-judge court.

Courts hearing constitutional challenges to Executive Branch decisions that affect congressional apportionment have routinely appointed three-judge courts under Section 2284(a). *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992) (reviewing decision of three-judge court regarding challenge to practice of allocating overseas federal employees to their designated home states); *Utah v. Evans*, 182 F. Supp. 2d 1165, 1167-68 (D. Utah 2001), *aff'd*, 536 U.S. 452 (2002) (three-judge court convened to address claims that defendants violated statutory provisions and the Constitution by refusing to count missionaries serving missions abroad); *see also Massachusetts v. Mosbacher*, 785 F. Supp. 230, 234-38 (D. Mass. 1992) (three-judge court statute applies to interstate apportionment of House seats). Indeed, as noted above, Judge Cooper of the U.S. District Court for the District of Columbia and Judge Furman of the U.S. District Court for the Southern District of New York have concluded that claims similar to those that Plaintiffs have asserted here should be heard by a three-judge court, based on Section 2284(a) and the Memorandum's exclusion of "the whole number of persons in each State" from the congressional apportionment base. *See Common Cause*, Case No. 1:20-cv-02023-CRC-GGK-DLF, slip op. at 1-2; *New York*, Case No. 1:20-cv-05770-JMF, ECF No. 68 20, slip op. at 2-3. As Judge Furman held, after observing that the Memorandum would have a direct effect on

the calculation of the apportionment base, "[t]o the extent that Plaintiffs challenge the constitutionality of the Presidential Memorandum, . . . it would seem that they are challenging the 'constitutionality of the apportionment of congressional districts'" within the meaning of Section 2284(a). *New York*, Case No. 1:20-cv-05770-JMF, ECF No. 68 20, slip op. at 2; *see also Common Cause*, Case No. 1:20-cv-02023-CRC-GGK-DLF, slip op. at 2 (holding that the plaintiffs' challenge to the Memorandum on the grounds that it purports to exclude undocumented immigrants from the congressional apportionment base violates the Constitution "is squarely a challenge to the 'constitutionality of the apportionment of congressional districts'" under Section 2284(a)).

II. A three-judge court is necessary to confer jurisdiction over Plaintiffs' claims.

When an action falls within Section 2284(a) and requires a three-judge court, "a single judge shall not . . . enter judgment on the merits" of any claim in the action. 28 U.S.C. § 2284(b)(3); *see Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015). If it is found that the "district court erroneously refused to convene a three-judge court" under Section 2284, "any "subsequent merits ruling by the appellate panel is void." *Igartua v. Obama*, 842 F.3d 149, 152 (1st Cir. 2016); *accord Kalson v. Paterson*, 542 F.3d 281, 286 (2d Cir. 2008). Thus, if there were any doubt that a three-judge court is required here under Section 2284—and there is not—prudence and judicial economy would favor convening a three-judge court over denying Plaintiffs' Application. *See New York*, Case No. 1:20-cv-05770-JMF, ECF No. 68 20, slip op. at 2-3 (noting that the three-judge court requirement is jurisdictional, and concluding that if the court "cannot definitively conclude that 'three judges are *not* required,'" an application for a three-judge court should be granted) (emphasis in original).

Further, the Supreme Court has approved a procedure by which a three-judge court, once convened, can ensure that its ruling will be valid, even if a reviewing court subsequently

determines that a three-judge court was not required. *See Swift & Co. v. Wickham*, 382 U.S. 111, 114 n.4 (1965). Under that procedure, the originally assigned District Judge can certify, out of "abundant caution," that "he [or she] individually arrived at the same conclusion that [the three-judge court] collectively reached." *Federation for Am. Immigration Reform*, 486 F. Supp. At 577-78 (citing *Swift & Co. v. Wickham*, 230 F. Supp. 398, 410 (S.D.N.Y. 1964)). This procedure ensures that even if a three-judge court is "mistaken[ly]" convened, its efforts will not be wasted and "an appeal can still be expeditiously taken in the appropriate forum." *See id.* By contrast, there is no equivalent procedure for a single-judge court to prevent its merits decision from being voided if an appellate court concludes that a three-judge court was required.

In sum, an order appointing a three-judge court to preside over this action is both necessary and appropriate to ensure the Court's jurisdiction.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant its Application for appointment of a three-judge court to preside over this action.

HAITIAN-AMERICANS UNITED, INC., BRAZILIAN WORKER CENTER, CHELSEA COLLABORATIVE, INC., and CENTRO PRESENTE

By their attorneys,

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Dated: September 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, the within document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent by mail to those indicated as non-registered participants on September 8, 2020.

/s/ Patrick M. Curran, Jr.
Patrick M. Curran, Jr.

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TAB 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.*, Plaintiffs, v. **DONALD J. TRUMP, *et al.*,** Defendants.	Case No. 20-cv-2023 (CRC)

ORDER

On July 21, 2020, President Donald J. Trump released a memorandum (the "Memorandum") regarding the 2020 Census with the subject line, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). The Memorandum directs Secretary of Commerce, who oversees the U.S. Census Bureau, to exclude undocumented immigrants from the 2020 population data used to apportion the U.S. House of Representatives. Plaintiffs—non-profit organizations, individual cities, and U.S. citizens—contend that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and two federal statutes, 2 U.S.C. § 2a(a) and 13 U.S.C. § 141. Am. Comp. ¶¶ 176-210, ECF No. 28. On August 11, 2020, Plaintiffs moved for the appointment of a three-judge court, pursuant to 28 U.S.C. § 2284. Defendants—President Trump, the Secretary of Commerce, and the Director of the Census Bureau—do not oppose this request. Defs. Resp., ECF No. 30.

Section 28 U.S.C. § 2284(a) requires that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." It further

mandates that when a request for a three-judge panel is received, "the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." Id. § 2284(b)(1).

Here, Plaintiffs claim that "[b]y purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution," Compl. ¶ 179, which is squarely a challenge to the "the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a); see also Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576–77 (D.D.C.) ("This court is convened as a three-judge court to consider the constitutionality of the 1980 census, due to be conducted within a few weeks, insofar as it will fail to establish the number of illegal aliens in the country, or the states and districts within which they live."), appeal dismissed, 447 U.S. 916 (1980). Thus, this Court is obligated to notify the chief judge of the D.C. Circuit that a three-judge panel is required.

A three-judge panel is also required for a second reason. Plaintiffs allege that the Memorandum violates 13 U.S.C. § 195 because it requires the use of statistical sampling. Compl. ¶¶ 203-10. Congress has mandated that claims alleging unlawful use of statistical sampling in the census "shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, §§ 209(b), (e)(1), 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note). Therefore, convening of a three-judge court is also "otherwise required by Act of Congress" within the meaning of 28 U.S.C. § 2284(a).

For the foregoing reasons, it is hereby

ORDERED that [29] [Plaintiffs' Motion for a Three-Judge Panel is GRANTED. The Court further requests that the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit convene a three-judge court.

CHRISTOPHER R. COOPER
United States District Judge

Date: August 20, 2020

TAB 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, -v- DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (JMF) REQUEST TO THE CHIEF JUDGE OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT FOR APPOINTMENT OF A THREE-JUDGE PANEL PURSUANT TO 28 U.S.C. § 2248(b)

JESSE M. FURMAN, United States District Judge:

On July 21, 2020, President Donald J. Trump issued a memorandum (the "Presidential Memorandum") announcing that "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status" and directing the Secretary of Commerce to "take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out th[is] policy." Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). Plaintiffs in these consolidated cases challenge the Presidential Memorandum on various constitutional and statutory grounds. *See* ECF Nos. 34, 62. Among other things, Plaintiffs in 20-CV-5781 (the "NYIC Plaintiffs") allege that the Presidential Memorandum violates 13 U.S.C. § 195, which provides that, "[*e*]*xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States*, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." ECF No. 62, ¶ 252 (emphasis in original) (quoting 13 U.S.C.

§ 195); *see also id.* ¶¶ 11, 16, 181, 251, 253-62.

On August 5, 2020, Plaintiffs filed a letter-motion requesting that this Court notify the Chief Judge of the United States Court of Appeals for the Second Circuit that a three-judge court should be designated to hear these cases, pursuant to 28 U.S.C. § 2284. *See* ECF No. 58. Last night, Defendants filed a letter stating that they "do not oppose" the request. ECF No. 65. To the extent relevant here, Section 2284 mandates that a "district court of three judges" be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). More specifically, it provides that, "[u]pon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit." *Id.* § 2284(b)(1). The Second Circuit has held that Section 2284 is jurisdictional. *See, e.g.*, *Kalson v. Paterson*, 542 F.3d 281, 286-87 (2d Cir. 2008).

Plaintiffs' request is GRANTED, substantially for the two reasons set forth in their letter-motion. First, although a challenge to the conduct of the decennial census alone does not necessarily fall within the statute's scope, even where it may have an effect on apportionment, *see, e.g.*, *Fed'n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 577 (D.D.C. 1980), the Presidential Memorandum does not purport to change the conduct of the census itself. Instead, it relates to the calculation of the apportionment base used to determine the number of representatives to which each state is entitled. To the extent that Plaintiffs challenge the constitutionality of the Presidential Memorandum, therefore, it would seem that they are challenging "the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a); *see Massachusetts v. Mosbacher*, 785 F. Supp. 230, 234-38 (D. Mass.) (distinguishing, for purposes of three-judge requirement, between challenges to "precursors to

the ultimate apportionment decisions" and "direct challenge[s] to apportionment itself"), *rev'd on other grounds sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992); *FAIR*, 486 F. Supp. at 577-78 (explaining the three-judge requirement was intended to cover cases that "directly affect state reapportionment"). At a minimum, the issue is close, and the Court cannot definitively conclude that "three judges are *not* required," which is enough to trigger the notification requirement. 28 U.S.C. § 2284(b)(1) (emphasis added).

Second, and in any event, the NYIC Plaintiffs allege a violation of 13 U.S.C. § 195 on the ground that the Presidential Memorandum requires "the use of the statistical method known as 'sampling'" in connection with "the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195; *see* ECF No. 62, ¶¶ 11, 16, 181, 251-62. Congress has provided a private right of action to enforce that provision and has dictated that any action brought under the provision "shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, §§ 209(b), (e)(1), 111 Stat. 2440, 2481-82 (1997) ("1998 Appropriations Act") (codified at 13 U.S.C. § 141 note). The 1998 Appropriations Act further provides that "[i]t shall be the duty of a United States district court hearing an action brought under this section . . . to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter." *Id.* § 209(e)(2), 111 Stat. at 2482 (codified at 13 U.S.C. § 141 note).

Accordingly, and substantially for the reasons set forth in Plaintiffs' letter-motion, the Court respectfully requests that the Chief Judge of the United States Court of Appeals for the Second Circuit promptly appoint a three-judge panel to preside over the claims presented by this

litigation. Should the Chief Judge of the Second Circuit need any additional information or have any inquiries, this Court is available at any time.

RESPECTFULLY SUBMITTED.

Dated: August 7, 2020
New York, New York

JESSE M. FURMAN
United States District Judge