

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CITY OF SAN JOSE, CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 20-CV-05167-LHK

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 20-CV-05169-LHK

**REQUEST TO THE CHIEF JUDGE OF
THE U.S. COURT OF APPEALS FOR
THE NINTH CIRCUIT TO CONVENE
A THREE-JUDGE COURT UNDER 28
U.S.C. § 2284**

On July 21, 2020, President Donald J. Trump issued a memorandum (the “Presidential Memorandum”) stating “it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status” and ordering the Secretary of Commerce to

1 “take all appropriate action, consistent with the Constitution and other applicable law, to provide
2 information permitting the President, to the extent practicable, to exercise the President’s
3 discretion to carry out th[is] policy.” Excluding Illegal Aliens From the Apportionment Base
4 Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). Plaintiffs in the above-
5 captioned related cases challenge the Presidential Memorandum—and agency action under the
6 Memorandum—on several constitutional and statutory grounds. Plaintiffs name as Defendants the
7 President, Secretary of Commerce, and Director of the Census Bureau in their official capacities,
8 as well as the Department of Commerce and Census Bureau.

9 On August 17, 2020, the parties in both *San Jose* and *California* agreed in a joint case
10 management statement that, under 28 U.S.C. § 2284, a three-judge court should hear the cases.
11 Joint Case Management Statement at 2-3, 5:20-cv-05167-LHK, ECF No. 44. The parties offer two
12 reasons why.

13 *First*, the parties agree “that both Plaintiffs’ constitutional challenges fall within the
14 jurisdiction created by 28 U.S.C. § 2284.” *Id.* at 3. Section 2284(a) states that “[a] district court of
15 three judges shall be convened . . . when an action is filed challenging the constitutionality of the
16 apportionment of congressional districts.” As the parties correctly note, courts other than the Ninth
17 Circuit have held that § 2284’s three-judge requirement is jurisdictional. *See Karlson v. Paterson*,
18 542 F.3d 281, 286-87 (2d Cir. 2008).

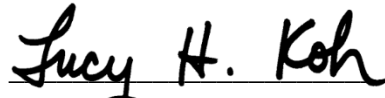
19 *Second*, the *San Jose* parties agree that statutory claims under 13 U.S.C. § 195 (prohibiting
20 statistical sampling for purposes of apportioning Representatives) require adjudication by a three-
21 judge court. *See* Joint Case Management Statement at 3, 5:20-cv-05167-LHK, ECF No. 44. This
22 requirement stems from another statute, which mandates that any action under § 195 “shall be
23 heard and determined by a district court of three judges in accordance with section 2284 of title
24 28, United States Code.” *Id.* (quoting Departments of Commerce, Justice, and State, The
25 Judiciary, and Related Agencies Appropriations Act, 1998, § 209(b), (e)(1), Pub. L. No. 105-119,
26 111 Stat. 2440, 2481–82 (1997) (codified at 13 U.S.C. § 141 note)).

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The Court agrees that a three-judge court should hear the cases. *See also Shapiro v. McManus*, 136 S. Ct. 450, 455–56 (2015) (holding that referral to the Chief Judge of the Circuit is required if relevant constitutional claim is not “frivolous”); Order of USCA, *New York v. Trump*, No. 1:20-CV-05770-JMF (Aug. 10, 2020), ECF No. 82 (designating three-judge court in analogous ongoing case); Vikram David Amar, 17A Federal Practice & Procedure: Jurisdiction § 4235 (3d ed. Apr. 2020 update) (“[U]ndoubtedly the cautious course for a district court in a reapportionment case or other case in which an Act of Congress seems to make a three-judge court mandatory would be to have such a court convened, even in the absence of request.”). Thus, the Court respectfully requests that the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit promptly convene a three-judge court to preside over the claims presented in *San Jose* (5:20-CV-05167-LHK) and *California* (5:20-CV-05169-LHK).

Dated: August 18, 2020



LUCY H. KOH
United States District Judge