

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT )  
OF THE UNITED STATES, ET AL., )  
Appellants, )  
v. ) No. 20-366  
NEW YORK, ET AL., )  
Appellees. )  
- - - - -

Pages: 1 through 97  
Place: Washington, D.C.  
Date: November 30, 2020

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Washington, D.C.

Monday, November 30, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

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2  
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 20-366,  
5 Trump versus New York.

6 General Wall.

7 ORAL ARGUMENT OF JEFFREY B. WALL

8 ON BEHALF OF THE APPELLANTS

9 GENERAL WALL: Mr. Chief Justice, and  
10 may it please the Court:

11 This case should be over. The  
12 district court held that appellees would be  
13 injured because illegal aliens would be chilled  
14 from participating in the enumeration. But that  
15 counting is now over, and whatever chill ever  
16 existed has fallen.

17 Appellees therefore pivot to possible  
18 future injuries, but as of this very morning,  
19 career experts at the Census Bureau confirmed  
20 with me that they still don't know even roughly  
21 how many illegal aliens it'll be able to  
22 identify, let alone how their number and  
23 geographic concentration might affect  
24 apportionment. And if they don't know,  
25 certainly, the other parties to this case do

1 not.

2           The Court, therefore, should follow  
3 the course charted by the three-judge D.C.  
4 district court last week: Vacate the judgment  
5 below, allow the Secretary to comply with the  
6 memorandum, and allow any effect on  
7 apportionment to be litigated as it normally  
8 would be in a post-apportionment lawsuit by  
9 parties with concrete injuries.

10           On the merits, there's no procedural  
11 problem with the memorandum. The President may  
12 direct the Secretary to send him two sets of  
13 numbers so that he may decide how to exercise  
14 whatever discretion he has.

15           The real fight here is substantive,  
16 over how much discretion the President has.  
17 Text, history, and precedent are all clear about  
18 the general test whether one is an inhabitant.  
19 The question is how to apply that test to people  
20 who are present in the country illegally.

21           Treating someone apprehended at the  
22 border on March 31 or scheduled to be removed on  
23 April 2 as a usual or settled resident of the  
24 United States on April 1 flies in the face of  
25 this Court's cases, common sense, and any sound

1 theory of political representation.

2 The President has at least some  
3 discretion to determine that at least some  
4 illegal aliens lack enduring ties to the states,  
5 which means that the judgment should be  
6 reversed.

7 I welcome the Court's questions.

8 CHIEF JUSTICE ROBERTS: General, my  
9 first question goes to the very first point you  
10 raised. We expedited this case in light of the  
11 December 31 deadline for the Secretary to  
12 transmit the census to the President.

13 Is that date still operative? Do you  
14 still need a decision by that date?

15 GENERAL WALL: Well, the situation is  
16 fairly fluid, Mr. Chief Justice. We -- because  
17 of the two weeks that we lost to the California  
18 injunction and some subsequent issues in  
19 processing the data, we are not currently on  
20 pace to send the report to the President by the  
21 year-end statutory deadline.

22 But just this morning, I confirmed  
23 with senior leadership at the Department of  
24 Commerce and the Census Bureau that we are  
25 hopeful, and it remains possible, that we can

1 get at least some of the PM-related data to the  
2 President in January, so we do still need relief  
3 from the Court, yes.

4 CHIEF JUSTICE ROBERTS: Sounds like  
5 you had a busy morning. What -- what -- what do  
6 you mean, "PM data"?

7 GENERAL WALL: I'm sorry. The  
8 Presidential Memorandum data. So the data the  
9 President has requested in order to -- to  
10 potentially back out illegal aliens from -- from  
11 the apportionment base.

12 CHIEF JUSTICE ROBERTS: On the  
13 standing question, if the Court doesn't  
14 intervene now before the Secretary transmits the  
15 information to the President, I don't know when  
16 the Court would be able to intervene. All --  
17 all that would be left after that transmittal is  
18 the transmittal by the President to -- to the  
19 House.

20 So, if -- if the injury can't be  
21 redressed at this point, when could it be?

22 GENERAL WALL: In a post-apportionment  
23 lawsuit, just as in Franklin or Wisconsin or --  
24 or Utah versus Evans, if the -- if the -- the  
25 Bureau is able to feasibly identify enough



1 aliens and the President excludes those  
2 categories and that affects the apportionment --  
3 those are all three unknowns -- but, if that  
4 happens, then you have a post-apportionment  
5 challenge just as in Franklin for the Secretary  
6 to revise his report and for the President to  
7 send a new report to the House, in effect, to  
8 redo the apportionment.

9 CHIEF JUSTICE ROBERTS: But isn't that  
10 going to be like having to unscramble the eggs?  
11 I mean, the apportionment, any -- any change in  
12 any one state, of course, is going to have  
13 ripple effects all across the country, and it  
14 does seem like it would be more manageable at an  
15 earlier stage.

16 GENERAL WALL: Well, Mr. Chief  
17 Justice, I don't want to resist this too much  
18 because we would prefer for the Court to reach  
19 the merits and uphold the Presidential  
20 Memorandum. We just think, for the reasons  
21 given by the D.C. district court last week,  
22 there are too many unknowns here.

23 I do -- I take the point that there --  
24 there is a bit of an omelet to unscramble, but  
25 we do unscramble that in post-apportionment

1 lawsuits. So it's possible to enter relief.

2           And on the flip side, you could have  
3 the Court issuing an opinion on what the  
4 President may or may not do, only to discover  
5 days or weeks later that it's effectively  
6 advisory because the numbers aren't large enough  
7 to affect the apportionment and the appellees  
8 here and other potential appellees wouldn't be  
9 injured, either with respect to apportionment or  
10 funding.

11           That strikes us as a fairly serious  
12 problem, either as a matter of Article III  
13 standing or prudential ripeness.

14           CHIEF JUSTICE ROBERTS: General, just  
15 very quickly, should we assume that we're not  
16 going to be talking about all illegal aliens in  
17 the country but some subset, some uncertain  
18 subset, like the ones in ICE detention?

19           GENERAL WALL: I think it is -- I  
20 think it is very fair to say, Mr. Chief Justice,  
21 that the President has not made a determination  
22 yet, because we don't know what's feasible,  
23 about excluding all illegal aliens and has  
24 recognized that some subsets are going to be  
25 much stronger cases for the exercise of his

1 discretion than other subsets. And that's --

2 CHIEF JUSTICE ROBERTS: Thank -- thank  
3 you, General.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief  
6 Justice.

7 General Wall, I -- I'd like you just  
8 to discuss a bit as you understand the -- what  
9 Respondent is arguing.

10 How does their alleged injury would be  
11 redressable without including the or enjoining  
12 the President? Because it's actually his  
13 decision that it seems that they're ultimately  
14 concerned about.

15 GENERAL WALL: Well, I think that's a  
16 fair point, Justice Thomas, but the Court  
17 crossed that bridge in Utah v. Evans over a  
18 dissent by Justice Scalia that the relief wasn't  
19 redressable because relief couldn't run against  
20 the President.

21 And the Court held in Utah, and no one  
22 has asked here that that decision be overruled,  
23 that it was fair -- that you could obviously  
24 enjoin the Secretary as a subordinate official  
25 and that the judiciary would assume that the

1 President would comply.

2 And so too here there's no reason to  
3 believe that the President would not comply with  
4 this Court's judgment either now or in a  
5 post-apportionment context.

6 JUSTICE THOMAS: The -- in Utah, is my  
7 understanding, that that was actually the  
8 census, wasn't it?

9 GENERAL WALL: Yes, it was a -- it was  
10 a challenge to certain procedures that were  
11 being used with respect to the -- the census.  
12 It was, in effect, a sampling claim.

13 JUSTICE THOMAS: Okay. But, here,  
14 we're talking about something separate from the  
15 census, or am I -- am I mistaken?

16 GENERAL WALL: No, I -- I think that's  
17 the other side's argument, Justice Thomas. I  
18 think they have -- they have seized on the fact  
19 that we've sometimes used the word "census" to  
20 refer to the counting and said, a-ha, look, the  
21 Census Bureau came up with a final number, and  
22 the President essentially accepted that but then  
23 sought to back out illegal aliens.

24 And I don't think that's right. The  
25 Presidential Memorandum makes clear that he was

1 exercising his authority under Franklin to  
2 determine the apportionment base after the  
3 counting.

4 And so I -- I don't think -- it is  
5 certainly our position that this is not somehow  
6 outside or stands apart from the census.

7 JUSTICE THOMAS: Could you actually,  
8 though, get the exact same information in a memo  
9 that's from the Commerce Department or the  
10 Census Bureau that says this is not the  
11 Section 141 report, but here's our what we think  
12 those numbers look like?

13 GENERAL WALL: The statutory scheme  
14 seems to contemplate that the President will  
15 rely on the Secretary's report in sending his  
16 submission to Congress.

17 Now Franklin says he's entitled to  
18 reform the data that the Secretary gives him.

19 But I think it would be a much more  
20 difficult question if he tried to act entirely  
21 outside of the process that the statute set up.  
22 And, obviously, here, he hasn't done that. He's  
23 just exercised his authority under Franklin to  
24 tell the Secretary that he wants to look at  
25 different sets of numbers so that he can make a

1 decision about the apportionment base.

2 JUSTICE THOMAS: Well, it just seems  
3 to me that, you know, the -- I don't understand  
4 why you couldn't get the exact -- the President  
5 couldn't get the exact same advice outside of  
6 the context of a formal report with -- with  
7 separate numbers and then make his decision.

8 But, beyond that, the Chief Justice  
9 asked you about the subset, subcategories of --  
10 or subsets of illegal aliens. But could you  
11 give us your idea of what the President means  
12 generically by "illegal alien"?

13 GENERAL WALL: He means people who are  
14 present in this country unlawfully, and that --  
15 that -- that includes a number of different  
16 subsets. We've named several of them in our  
17 brief which I think are the clearest cases for  
18 the exercise of the President's discretion, but  
19 there are a number of other set -- subsets too.

20 But the entire category is -- is  
21 people who are present in this country in  
22 violation of federal law.

23 JUSTICE THOMAS: Thank you, General  
24 Wall.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Yes, thank you.

3 I was also concerned with what Justice  
4 Thomas brought up, and so, to clear away some  
5 weeds from my mind, would you tell me where I  
6 missed this or if I'm right.

7 We're looking at a statute, 141. A  
8 says the Secretary shall take a Decennial  
9 Census, okay? B says the tabulation of the  
10 population that he just took, as required for  
11 the apportionment of representatives, that  
12 tabulation shall be reported to the Secretary --  
13 by the Secretary to the President.

14 That's the report we're concerned  
15 about. That's the tabulation we're concerned  
16 about. And it is based on that, where you go to  
17 2a, the President shall transmit a statement  
18 showing the whole number of persons for the  
19 purpose, again, of apportionment.

20 So we're not interested in other ways.  
21 We're interested in this report, in this  
22 tabulation, under 141(b).

23 Now, if I'm right so far, the  
24 President's order says I'll tell you why I want  
25 that. I want that because it's our policy that

1 illegal aliens will not be included in the  
2 census. I can't tell you exactly what ones. It  
3 doesn't say that. It just says illegal aliens  
4 will not be included. And he asked for the  
5 report so he can do that.

6 Now, if the Constitution forbids him  
7 to, or if the statutes forbid him to, subtract  
8 from the tabulation for purposes of the  
9 statement, if it forbids him to subtract those  
10 illegal aliens, or to the extent it does, the  
11 tabulation and the report are not the tabulation  
12 required for the apportionment of the census  
13 and, therefore, he cannot ask -- he cannot ask  
14 the Secretary for that report to contain that  
15 information.

16 Right or wrong and, if wrong, why?

17 GENERAL WALL: I think I agreed with  
18 you up to the very end, Justice Breyer. I think  
19 you correctly understand how the statutory  
20 provisions, which were passed together in 1929,  
21 work.

22 And I -- I think it's true that if the  
23 Constitution or the statutes constrain the  
24 President's ability to back them out, then that  
25 would mean that his statement -- setting aside



1 judicial review, his statement to Congress under  
2 2a(a) would be unlawful.

3 But I don't know that any of that is a  
4 constraint on his ability to simply request the  
5 information from the Secretary.

6 JUSTICE BREYER: Well, it is not the  
7 information if it's unlawful that is required  
8 for the apportionment of rep -- the House of  
9 Representatives because it is illegal.

10 Now whether it's illegal or not is a  
11 different question. All we have on that is  
12 about 40 briefs that show that the history, the  
13 language, the consequences, the purposes, and a  
14 bunch of other things argue against you, but you  
15 have arguments against that.

16 But, if that side wins, then I don't  
17 see how the information he's requested could be  
18 the information required for the apportionment  
19 of representatives, quoting the statute.

20 GENERAL WALL: I think all I would  
21 say, Justice Breyer, is I don't want to run  
22 together the procedural and the substantive  
23 issues. I think what you're really getting at  
24 is the substantive issue of what the President's  
25 powers are here, not any of the procedural

1 issues that they've raised with respect to the  
2 -- to the memorandum.

3 So I -- I agree with you that what's  
4 really at issue here is that substantive  
5 question that you're focused on.

6 JUSTICE BREYER: Well, maybe, but  
7 we're not suing the President. They're not.  
8 They're suing the Secretary. And they're  
9 saying: Mr. Secretary, you cannot give to the  
10 President this requested information and also  
11 say that that piece of paper that you send him  
12 is the tabulation as required for the  
13 apportionment of representatives. It may be  
14 something else, but it isn't that. And that's  
15 what he's asked you to do, and that's what  
16 you're trying to do. And, Mr. Secretary, if  
17 it's illegal, you can't do it.

18 GENERAL WALL: That's right, Justice  
19 Breyer. My only point was that doesn't have  
20 anything to do with their procedural arguments  
21 about the use of administrative records or  
22 whether this is somehow part of the census.

23 JUSTICE BREYER: No, it doesn't.

24 GENERAL WALL: That's all just their  
25 substantive claim --

1 JUSTICE BREYER: Yeah.

2 GENERAL WALL: -- that the President  
3 doesn't have the power to ask for the --

4 JUSTICE BREYER: Okay, okay. Then  
5 they don't -- on that one, it says "persons,"  
6 this started in 1820, you know, and they've  
7 always counted people who were here and not --  
8 and not naturalized, and this has never happened  
9 before that you excluded illegal aliens, and it  
10 has a lot of negative effects on the states.  
11 You know all those arguments. And they're fair  
12 -- I think they're fairly strong ones.

13 GENERAL WALL: Justice --

14 JUSTICE BREYER: I mean, what do you  
15 -- what do you want to say? They're persons,  
16 aren't they?

17 CHIEF JUSTICE ROBERTS: Briefly,  
18 counsel.

19 GENERAL WALL: So just very briefly,  
20 Justice Breyer, there's two different things  
21 there. One is the historical practice, which I  
22 hope I'll be able to address later because I  
23 think Franklin takes care of that. The other is  
24 the text and the history. None of that goes  
25 specifically to the question of illegal aliens.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: General Wall, if I  
3 can, I want to try to press you a little bit on  
4 some of the answers you gave to the Chief  
5 Justice because I find the posture of this case  
6 quite frustrating.

7 It could be that we are dealing with a  
8 possibility that is quite important. It could  
9 be that this is much ado about very little. It  
10 depends on what the Census Bureau and the  
11 Department of Commerce are able to do.

12 If I just take the numbers from the  
13 district court in D.C.'s opinion last week, they  
14 said that the -- the plaintiffs in that case  
15 were claiming that there are 10.5 million people  
16 in this country who would be counted as being  
17 here illegally. But, if you look at the smaller  
18 number of -- of those who are held in detention  
19 facilities, it's -- it's something like 60,000.

20 The first number could easily change  
21 the apportionment of representatives. The  
22 second one, it's much more doubtful that it  
23 would change the apportionment of  
24 representatives.

25 There are only 31 days left in the

1 year. To exclude the 10.5 million seems to me a  
2 monumental task, to do that without sampling, to  
3 take 300 million plus names and determine  
4 individually for each of those people whether  
5 they are lawfully in the United States.

6 And I would think you would be able to  
7 tell us whether that remains a realistic  
8 possibility at this point.

9 GENERAL WALL: Justice --

10 JUSTICE ALITO: Can you not provide us  
11 with any more information than what you provided  
12 in your answer to the Chief Justice, was that,  
13 basically, they're working on it?

14 GENERAL WALL: Well, I can provide you  
15 with a little bit more. I don't know how  
16 satisfying it'll be, but I think it is very  
17 unlikely that the Bureau will be able to  
18 identify all or substantially all illegal aliens  
19 present in the country, so anything like the 10  
20 or 11 or 12 million numbers that are flying  
21 around.

22 They will be able, I think, to do ICE  
23 facilities, which, as you say, is some number in  
24 the tens of thousands. The question is where it  
25 will fall in the middle. And we don't know, and

1 the reason we don't know is because it -- it --  
2 it -- it turns a great deal on the level of  
3 detail that we got in doing the enumeration.

4 And until we actually take the census  
5 master file and these various administrative  
6 records, once they're all cleaned up and ready  
7 to go, and we actually run the models in a few  
8 weeks or, you know, whenever it is, we won't  
9 actually know how many people we pick up.

10 And so, you know, I pressed the deputy  
11 director of the Census Bureau on this very  
12 question, and the simple fact is that the  
13 experts don't know. They don't know whether  
14 it'll be 50,000 or 100,000 or 500,000 or a  
15 million. So there's just substantial  
16 uncertainty.

17 JUSTICE ALITO: Well, before my time  
18 runs out, I -- I'm -- I have no expertise  
19 whatsoever in this area. I could understand if  
20 they say all we can determine is how many people  
21 are in detention facilities or subject to final  
22 orders of removal.

23 If they're going for the bigger  
24 picture and trying to identify everybody who is  
25 in this country unlawfully, I don't see how that

1 -- they can provide a partial answer to that.  
2 If they were to say, well, you know, we've done  
3 this for 200 million people, but we don't know  
4 about the 100 million plus additional people,  
5 there's no way an apportionment could be based  
6 on that, is there?

7           GENERAL WALL: They're trying to get  
8 the categories of illegal aliens that you could  
9 identify based on the kinds of records we have,  
10 so final orders of removal, for instance, or  
11 people who have been removed who are found here  
12 again and haven't been given any lawful status.

13           So it's not that we can pick up  
14 everyone. There will be some undetected illegal  
15 aliens who -- who we aren't even attempting to  
16 screen for because they wouldn't be picked up,  
17 obviously, by any record.

18           It's the categories that would be  
19 shown by some sort of record that we have. And  
20 the question is just, how feasible is it going  
21 to be to capture large numbers within those  
22 categories? And, unfortunately, we don't know  
23 at this point.

24           And it's a feature, by the way,  
25 though, I have to say, not of the government's

1 conduct. It's a feature of the fact that  
2 appellees brought a pre-apportionment challenge  
3 on the basis of this injury that was always  
4 going to cease in the past --

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor.

7 GENERAL WALL: -- before the judgment  
8 would take effect.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Yes. Mr. Wall, as  
12 I understand and read the memo, the President's  
13 memo, he says he intends to exclude every alien  
14 who does not have permission to be here in the  
15 United States.

16 Now, yes, he limits this to where it's  
17 feasible to identify that, but right now his  
18 policy is, if I can identify them, no matter  
19 what the reason is for them being illegal -- an  
20 illegal alien, I'm going to exclude them from  
21 the census.

22 Following up on Justice Alito's  
23 question, aren't those the very categories that  
24 you already say that we've been told there have  
25 been some of them who's in ICE is going to come



1 by December 31, and then, by January 11, the  
2 Census Bureau says that it intends to provide  
3 the President with the information "necessary to  
4 fully implement the Presidential Memorandum."

5 I'm quoting the Census Bureau. So, if  
6 I take that at its face, it means that the  
7 number's not going to be 60,000. The number  
8 intended is substantially large. And I think  
9 that was Justice Alito's point, which is the  
10 Census Bureau has been collecting data about  
11 undocumented immigrants from other agencies for  
12 over a year.

13 I don't see how you can represent to  
14 us that you don't think it's going to be a  
15 substantial number.

16 GENERAL WALL: Three quick points,  
17 Justice Sotomayor.

18 First, that's -- I don't think that's  
19 actually an accurate statement of the  
20 memorandum. You're certainly right that that's  
21 the policy, but there are two built-in  
22 limitations. One is whether it's feasible, and  
23 the second is whether the President decides that  
24 he has the legal discretion to exclude all of  
25 these subsets. And the subsets might have

1 different legal analysis depending on the kind  
2 of ties they have or the type of status they --  
3 they -- they have.

4 But the second, the fact --

5 JUSTICE SOTOMAYOR: Mr. Wall, I -- I'm  
6 a little bit questioning of that for the  
7 following reason: The Census Bureau already  
8 defines what residency is, where you're living  
9 as a snapshot date of April 1, 2020.

10 Now, whether you're in a prison, in  
11 ICE detention, we're told by one of our amici  
12 that 57 percent of the people in detention will  
13 eventually be released to the United States  
14 either through asylum or through some other  
15 mechanism.

16 So I am not sure how you can identify  
17 any class of immigrant that isn't living here in  
18 its traditional sense, that this is where they  
19 are, this is where they were on April 1 and  
20 where they intend to stay if they can find any  
21 way to do it.

22 GENERAL WALL: Justice Sotomayor,  
23 based on my understanding from the Census  
24 Bureau, there is a real prospect that the  
25 numbers will not affect the apportionment. But,

1 as I said earlier to the Chief Justice, I'm  
2 perfectly happy if the Court disagrees with us  
3 on that and disagrees with the analysis of the  
4 D.C. district court last week and moves to the  
5 merits because we think, on the merits, the  
6 Court should uphold the Presidential Memorandum  
7 because at least some of the illegal aliens  
8 captured by the Presidential Memorandum don't  
9 satisfy the test for inhabitancy either as a  
10 matter of the Constitution or the statutes.

11 JUSTICE SOTOMAYOR: Well, what you're  
12 saying is the memo says, I think anyone -- the  
13 Presidential memo says, I think anyone without  
14 papers should not be counted. Now you're  
15 saying: Well, maybe the President will limit  
16 that sub-category.

17 But that's not what he's asking for.  
18 He's asking for all of those illegal aliens that  
19 can be unidentified.

20 And wouldn't Heller defeat this  
21 argument that we shouldn't rule? In Heller, we  
22 knew that there were certain people who states  
23 could legitimately bar from possessing guns in  
24 their homes, but we didn't say because there's  
25 that subset we're not going to declare what the

1 general law is.

2 So why shouldn't we do the same thing  
3 here, you can't exclude illegal aliens may --  
4 because they're undocumented?

5 GENERAL WALL: The Court would have to  
6 conclude, in order to say that, as the district  
7 court here did, that the President doesn't have  
8 the discretion to exclude any illegal aliens  
9 from the apportionment base, even some subset,  
10 because the injunction here prohibits him from  
11 getting any of the information he needs to  
12 exclude any subset.

13 And he did make clear in the  
14 memorandum that although, as a matter of policy,  
15 he wanted to exclude the entire set, that he had  
16 not yet made a judgment on whether he had the  
17 legal discretion to do that for the entire  
18 class. He wanted to see what the people --

19 CHIEF JUSTICE ROBERTS: Justice Kagan.

20 GENERAL WALL: -- in the Bureau --

21 JUSTICE KAGAN: General Wall, I guess  
22 I'd like to keep going with the line of  
23 questioning that the Chief Justice and Justice  
24 Alito talked about as to what categories we're  
25 talking about.

1           As I read you, you're saying, well,  
2       yes, there's this small category of ICE  
3       detainees, that seems pretty feasible, but  
4       that's just tens of thousands of people.

5           So how about a few others? As I  
6       understand it, there are almost 200,000 persons  
7       who are subject to final orders of removal.  
8       Will the Bureau be able to report on those?

9           GENERAL WALL: It is working very hard  
10      to try to report on that subset, yes.

11          JUSTICE KAGAN: Okay. There are  
12      700,000 DACA recipients. Will the Bureau be  
13      able to report on those?

14          GENERAL WALL: It is working on that  
15      too. We can't be certain at this point, and we  
16      don't know what the President will decide to do  
17      with respect to that set. He hasn't --

18          JUSTICE KAGAN: Right. I mean, you --  
19      I mean, obviously, you have papers, all kinds of  
20      records on those people, so I -- I would think  
21      that that sounds pretty feasible to me.

22          GENERAL WALL: But -- but the problem  
23      is the matching, Justice Kagan, right? We -- we  
24      have the administrative records. What we don't  
25      know is the number that participated in the

1 census, either through questionnaires or other  
2 proxies, and that provided sufficient detail to  
3 do the matching. That's the problem here.

4 JUSTICE KAGAN: Okay. How about the  
5 3.2 million non-detained individuals in removal  
6 proceedings?

7 GENERAL WALL: It's the same thing.  
8 We have to have reliable information on them and  
9 that information has to match up with what they  
10 provided to the census. So we --

11 JUSTICE KAGAN: Okay. So what I'm --  
12 what I'm getting from you is we can get very  
13 easily to 4 or 5 million people who you have  
14 extensive administrative records on, and you're  
15 saying, well, there's a matching problem.

16 So I guess this goes back to Justice  
17 Alito's question. You're 30 days out. It seems  
18 to me you either know whether you can do  
19 matching or you don't know whether you can do  
20 matching. Why the uncertainty on this?

21 GENERAL WALL: Be -- because, until  
22 you actually compare the one set against the  
23 other set, you just don't know how many hits  
24 you'll get.

25 But, again, Justice Kagan, I'd -- I'd

1 love to move to the merits because, if the Court  
2 decides we're wrong and that this really is teed  
3 up constitutionally or prudentially, even though  
4 there may not be an effect on apportionment, I  
5 think that there are good reasons that we  
6 haven't yet talked about why the entire category  
7 of illegal aliens shouldn't be thought to  
8 qualify under the inhabitancy test.

9 JUSTICE KAGAN: Can I ask you, before  
10 we go to the merits, Mr. Wall, how would a  
11 post-apportionment challenge of the kind you  
12 talked about earlier work? It seems to me that  
13 the time period, once it's post-apportionment,  
14 is very crunched. States have to do their own  
15 redistricting. How exactly does that work?  
16 What's the time line on it?

17 GENERAL WALL: Well, here, the time  
18 line's even easier than in a normal case because  
19 the district courts have already decided the  
20 merits. So I think this is going to move even  
21 more quickly than this round of litigation,  
22 which obviously only took a few months.

23 But you bring the -- you bring the  
24 case, you get the order to the Secretary to --  
25 to fix the report, and then the executive branch

1 would have the option of seeking review in this  
2 Court. That could all play itself out fairly  
3 quickly, I think.

4 JUSTICE KAGAN: Fairly quickly. Like,  
5 what -- what -- what do you think it would play  
6 itself out to?

7 GENERAL WALL: I think --

8 JUSTICE KAGAN: Like, when would the  
9 end date be?

10 GENERAL WALL: I -- I -- it's -- I  
11 couldn't say, Justice Kagan, because it depends  
12 on when the report gets to the President, how  
13 quickly the district courts enter relief, and  
14 then the party that's, you know, aggrieved comes  
15 up to this Court, but I would think a matter of  
16 a few months.

17 JUSTICE KAGAN: Do you think that  
18 given that you're uncertain when the report will  
19 go to the President -- this goes back to the  
20 Chief Justice's first question -- that there's  
21 something to be said for not following the  
22 expedate -- expedited procedures that -- that  
23 you asked us to follow and just sort of keeping  
24 this around in a normal way and you could tell  
25 us whether expedition was necessary when you



1 knew?

2                   GENERAL WALL: I think the problem,  
3 Justice Kagan, is this is all fairly  
4 fast-moving, and if the Court doesn't enter some  
5 kind of relief, we would face a real prospect  
6 that the Secretary would never be able to send  
7 the report to the President, and the President  
8 then wouldn't be able to turn around and send a  
9 -- a report to Congress.

10                   So, no, there's a live -- you know,  
11 there's a live controversy between the parties  
12 in -- in that sense, which is we want to be able  
13 to have the President exercise his power, and  
14 the injunction currently blocks us from doing  
15 that. It's just no longer founded on some  
16 injury to the appellees that is sufficient for  
17 standing or ripeness purposes.

18                   JUSTICE KAGAN: Thank you, General.

19                   CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch.

21                   JUSTICE GORSUCH: Good morning, Mr.  
22 Wall. I'd -- I'd -- I'd like you, just to press  
23 a little bit further, on what are the -- what  
24 are the practical difficulties and -- and -- and  
25 likelihood of actually being able to do the

1 matching process with respect to various  
2 categories?

3           It -- it -- it seems like the one  
4 common ground is the 10,000 or whatever number  
5 it is currently in ICE detention is something  
6 you think will -- will happen.

7           Beyond that, can you give us any sense  
8 of the difficulties or likelihoods?

9           GENERAL WALL: I can't, Justice  
10 Gorsuch. I -- I -- I -- the Bureau is working  
11 very hard, but, as I say, until they actually do  
12 the comparison, we just won't know how many  
13 identifications we're able to make and whether  
14 that stands to affect the apportionment.

15           JUSTICE GORSUCH: So is -- is -- is it  
16 a reasonable -- reasonable prospect to think  
17 that it would be limited to the number of  
18 persons currently in ICE detention?

19           GENERAL WALL: I think that's  
20 possible, but it is also very possible that they  
21 will be able to do more. As I say, we just --  
22 we don't know at this point.

23           I wish I could provide the Court with  
24 more certainty. I can't. That's why we think  
25 that the -- the Court should vacate the judgment

1 and not get into this.

2 But, if the Court disagrees, as I say,  
3 I -- I would love an opportunity to turn to the  
4 merits and talk about why I think they can't  
5 satisfy either half of the usual resident test,  
6 either the residency or the usual or settled  
7 requirement.

8 JUSTICE GORSUCH: I -- I have a  
9 question in a -- in an entirely different  
10 direction. Your -- your colleagues on the other  
11 side pointed in a footnote, I believe it was, in  
12 their briefs, to the Federal Reports Elimination  
13 and Sunset Act of nine -- in the 1990s, which  
14 looks like it may have well repealed Section 2.

15 And so are we arguing over the meaning  
16 of a statute that doesn't exist? I had hoped to  
17 get some response from the government on that in  
18 its reply brief but didn't see any. Perhaps I  
19 missed it.

20 And what -- what is the government's  
21 view about the status of Section 2? New York  
22 suggests, well, maybe it is repealed, but to the  
23 extent the government wishes to comply with the  
24 repealed statute, it has to follow the repealed  
25 statute's terms, as one response.

1           Another response is that -- that the  
2           only thing repealed were reports and this is a  
3           statement.

4           Does the government have any views on  
5           any of that?

6           GENERAL WALL: Yes. In -- in our  
7           view, it's not an annual, semi-annual, or other  
8           periodic report covered by FRSA, the statement,  
9           which is why, in 2001, in 2011, the executive  
10          branch sent over the statement and the House  
11          reapportioned as the statutes require. It's  
12          never been litigated.

13          I'm -- I'm not aware if we've even  
14          ever briefed it. But we have -- in our view,  
15          there were various things on the clerk's list  
16          that I think do -- clearly do not qualify as the  
17          type of report covered by FRSA.

18          And in our view, this statement under  
19          2a(a) is like those things. It's -- it's not a  
20          other periodic report.

21          JUSTICE GORSUCH: What do we do about  
22          the fact that it appears to be expressly  
23          referenced by statute in -- in the -- in the  
24          reports the President continues, the Decennial  
25          Census report, Section 2a, right -- right there

1 listed?

2 GENERAL WALL: So, sorry, just to be  
3 more clear, we don't think the language picked  
4 up everything in the clerk's list because there  
5 were things on the clerk's list that wouldn't  
6 qualify. It only picked up things on the  
7 clerk's list that said -- that qualify as an  
8 annual, semi-annual, or other periodic report.  
9 We don't --

10 JUSTICE GORSUCH: And periodic doesn't  
11 include every 10 years?

12 GENERAL WALL: We don't think --

13 JUSTICE GORSUCH: Is that the -- is  
14 that the government's view?

15 GENERAL WALL: We don't think the  
16 other periodic report picks up the statement  
17 which there's a deadline under this statute, but  
18 it's not as if it has to go over at -- at some  
19 set period or on a particular date every time.  
20 So we don't think that statement qualifies.

21 JUSTICE GORSUCH: Okay. If -- if I --  
22 if I were to disagree with you and think that  
23 every 10 years does appear to be a regular  
24 periodic report specified by -- by -- by -- on a  
25 list, what -- what then?

1                   GENERAL WALL: I suppose there'd have  
2 to be supplemental briefing from the parties,  
3 Justice Gorsuch. It's not jurisdictional.

4                   JUSTICE GORSUCH: All right. All  
5 right.

6                   GENERAL WALL: And nobody's raised or  
7 addressed it.

8                   JUSTICE GORSUCH: Thank -- thank you,  
9 Mr. Wall.

10                  CHIEF JUSTICE ROBERTS: Justice  
11 Kavanaugh.

12                  JUSTICE KAVANAUGH: Thank you, Chief  
13 Justice.

14                  And good morning, General Wall. You  
15 -- you forcefully argue that there's too much  
16 uncertainty, that the dispute will become a  
17 concrete Article III controversy only after the  
18 President transmits the statement. But I want  
19 to button up some things on that to make sure  
20 we're on the same page and follow up a bit on  
21 what Justice Kagan was asking you.

22                  First of all, you're not saying, as to  
23 judicial review, not now, not ever. You're just  
24 saying not now as I understand it.

25                  But, as Justice Breyer indicated, the

1 posture of this will change after the President  
2 transmits the statement, and there's a question  
3 about injunctive relief against the President.

4           So I think you're saying that we can  
5 assume, as the Court has before, that the  
6 President would comply by a declaratory judgment  
7 requiring him to transmit calculations that  
8 include those non-citizens living -- living  
9 unlawfully within the country if we were to  
10 issue such an order after the President  
11 transmits the statement. Is that accurate?

12           GENERAL WALL: Yes.

13           JUSTICE KAVANAUGH: Your argument for  
14 waiting is based on uncertainty, uncertainty,  
15 again, as Justice Kagan and the Chief Justice  
16 and Justice Alito were asking about the numbers,  
17 but one thing that was in the D -- D.C. opinion  
18 of Judge Katsas, joined by Judge Friedrich, was  
19 that it will be not possible to exclude all  
20 non-citizens living in -- unlawfully in the  
21 country because that would require the use of  
22 sampling, is what the opinion said, and that the  
23 memorandum, the Presidential Memorandum, rules  
24 out the possibility of using an unlawful method.

25           Is that accurate, or what's your

1 response to that?

2 GENERAL WALL: We're not sampling.  
3 This is what I was trying to say to Justice  
4 Kagan earlier. We're taking the records from  
5 the -- the -- the administrative agencies and  
6 we're taking the data given by individuals with  
7 respect to the census and we're comparing them.  
8 We're literally trying to individually identify  
9 people who are present in the United States in  
10 violation of federal law.

11 And because we are not sampling and we  
12 are doing this fairly cumbersome matching  
13 process, it's just not clear what results we're  
14 going to get or whether it's going to affect the  
15 apportionment.

16 JUSTICE KAVANAUGH: Well, is it  
17 possible to exclude -- is it possible to get the  
18 information to exclude all non-citizens living  
19 unlawfully in the country, or is it possible  
20 only to get information as to subsets at this  
21 point? You may not know the answer to that.

22 GENERAL WALL: No, the latter. It is  
23 only possible -- the records will only cover  
24 particular subsets.

25 JUSTICE KAVANAUGH: Okay. So it's not



1 possible to exclude all non-citizens living  
2 unlawfully in the country, correct?

3 GENERAL WALL: No. If you took  
4 somebody who crossed the border illegally, was  
5 undetected, and did not participate in the  
6 census, that person might not be found in any  
7 administrative record, and they wouldn't be on  
8 the other side of the ledger either because they  
9 didn't participate in the census.

10 That person just would not be captured  
11 by this process, not even arguably.

12 JUSTICE KAVANAUGH: And then, on the  
13 question of ripeness or standing, our -- our  
14 doctrine, as I see it, parts of the ripeness  
15 inquiry are really similar, if not identical, to  
16 parts of the standing inquiry if you look at the  
17 phrasing in cases like Ohio Forestry on ripeness  
18 and cases like Susan B. Anthony on standing.

19 The key point, I think, is that the  
20 memorandum imposes no obligations on the  
21 plaintiffs to do anything at that -- at this  
22 point, unlike, for example, a typical agency  
23 regulation that might, say, impose some duties  
24 or requirements on the plaintiffs and we allow  
25 pre-enforcement challenges.

1                   We've called that lack of ripeness.  
2                   We've called that no standing. Do you think it  
3                   matters which we call it, and do you agree that  
4                   the two inquiries overlap on that particular  
5                   kind of analysis?

6                   GENERAL WALL: Yes, there is  
7                   substantial overlap. We framed it as a  
8                   constitutional matter because we don't think  
9                   they satisfy the constitutional minima, but if  
10                  you thought they got the toe over that line,  
11                  then you'd get the same analysis, I think, as  
12                  the -- as Judges Katsas and Friedrich did as a  
13                  matter of prudential ripeness.

14                  So I -- I agree that there is a lot of  
15                  overlap. And, obviously, under Steel Co. and  
16                  Senken, you can do prudential ripeness before  
17                  the merits because it's -- it's a threshold  
18                  doctrine. So nothing requires the Court to do  
19                  Article III rather than to do it as a prudential  
20                  matter.

21                  JUSTICE KAVANAUGH: Thank you,  
22                  General.

23                  CHIEF JUSTICE ROBERTS: Justice  
24                  Barrett.

25                  JUSTICE BARRETT: Good morning,

1 General Wall. I'm going to let you talk about  
2 the merits for a minute here. You know, as  
3 Justice Breyer said, a lot of the historical  
4 evidence and longstanding practice really cuts  
5 against your position. And, you know, there's  
6 evidence that in the founding era, an inhabitant  
7 was a dweller who lives or resides in a place.

8           You do have this Vattel quote that  
9 defines an inhabitant as a -- distinguished from  
10 a citizen, as a stranger who's permitted to  
11 settle and stay in the country.

12           Do you think that Vattel quote is your  
13 best evidence?

14           GENERAL WALL: Well, if you look only  
15 at the founding, I think the Vattel quote is  
16 good. I think Madison in Federalist 42, when he  
17 talks about a state allowing you to become an  
18 inhabitant, is fairly powerful.

19           And what I'd say is, look, there isn't  
20 a lot of attention given to the specific  
21 question of illegal aliens for the first half of  
22 the country for obvious reasons, but the Court  
23 does have to deal with the residence or dwelling  
24 question in other statutes. And the answer it  
25 consistently comes back with is, if you've

1 entered illegally, you are not treated as if  
2 you're dwelling or residing here; you're treated  
3 as if you're stopped at the border.

4           And the other side doesn't really have  
5 any answer to why those cases shouldn't equally  
6 apply here and say, look, if the test is usual  
7 or settled resident, you're not thought to be a  
8 resident, and even if you are, there's nothing  
9 usual or settled about your residence if your  
10 presence is violating federal law and the  
11 sovereign hasn't agreed to let you stay.

12           JUSTICE BARRETT: But, if -- if an  
13 undocumented person has been in the country for,  
14 say, 20 years, you know, even if illegally, as  
15 you say, why would some person not have a --  
16 such a person not have a settled residence here?

17           GENERAL WALL: So take long-term  
18 embassy personnel, so somebody who's worked at  
19 an embassy for 15 or 20 years, Justice Barrett.  
20 That person certainly has ties to the community,  
21 and yet we have excluded them in some past  
22 censuses because they're not the sort of ties,  
23 just as with illegal aliens, that amount to  
24 residence or dwelling or what Franklin calls  
25 allegiance or an enduring tie.

1           And so too federal personnel overseas.  
2           They're not residing here. They may spend years  
3           at a time abroad, but we still think they have  
4           the kind of tie that counts here.

5           And so I think -- I'm not disputing at  
6           all that illegal aliens form ties to the  
7           community in -- in the sense you're talking  
8           about. But they're not the sort of ties that  
9           are sufficient to qualify you within the  
10          apportionment base because they don't count for  
11          residence or dwelling within the meaning of  
12          these federal statutes.

13          JUSTICE BARRETT: But you concede that  
14          illegal aliens have never been excluded as a  
15          category from the census?

16          GENERAL WALL: Well, yes, we have  
17          taken account of alienage in certain ways  
18          before, but, yes, and that's the best argument  
19          on the other side. There is a historical  
20          practice. And if we didn't have Franklin, it  
21          could be tougher for us. But we know from  
22          Franklin that the fact that you've got a fairly  
23          unbroken practice doesn't necessarily mean it's  
24          constitutionally compelled.

25          They need some evidence that that has

1 to be the rule as a constitutional or statutory  
2 matter, and that's what they don't have. They  
3 have a bunch of historical evidence that they --  
4 that the founders and the framers of the  
5 Fourteenth Amendment didn't want to limit it to  
6 citizens or voters, completely agreed with --  
7 with all of that.

8 But what they don't have is any  
9 evidence that they specifically wanted to  
10 include illegal aliens because they thought even  
11 if you came here in violation of the law, you  
12 were nevertheless an inhabitant. That's the  
13 very question that in other contexts the Court  
14 has answered in the negative by saying you're  
15 not a resident.

16 JUSTICE BARRETT: So it's just been an  
17 unexercised discretion; all along they could  
18 have been excluded from the sentence -- census,  
19 and the fact they had not been excluded before  
20 doesn't mean the President can't make the choice  
21 to do so now?

22 GENERAL WALL: Well, so too in  
23 Franklin, Justice Barrett, but I guess I'd  
24 qualify it a little bit. For the first half of  
25 the -- the nation's history, the question

1 doesn't come up because you don't have federal  
2 immigration restrictions. And for the second --  
3 much of the second half, it doesn't matter  
4 nearly as much as it matters now.

5           So, look, I'll certainly grant that no  
6 President has made this judgment before. No  
7 President's ever focused on it before. But I  
8 think, in order to say, as in Franklin, that the  
9 President can't do this, he can't include --  
10 there, it was federal overseas personnel, even  
11 though they hadn't been included for, you know,  
12 a host of censuses, they need to point to  
13 something in the text or the history that  
14 clearly mandates that they be included in the  
15 apportionment base.

16           And that's every illegal alien. It's  
17 not the only -- only the ones you were talking  
18 about that have ties to the community. It's  
19 somebody who's apprehended at the border and in  
20 an ICE detention facility, sometimes only for a  
21 day or two, before being sent back to Mexico or  
22 the northern triangle.

23           CHIEF JUSTICE ROBERTS: A minute to --

24           GENERAL WALL: They need --

25           CHIEF JUSTICE ROBERTS: -- a minute to

1 wrap up, General Wall.

2 GENERAL WALL: Thank you, Mr. Chief  
3 Justice.

4 So, just as I was saying earlier, we  
5 think that there are a handful of unknowns here:  
6 what will be feasible for the Bureau to do,  
7 whether the President will decide to exclude all  
8 of the subsets that are feasible -- the  
9 memorandum clearly indicates that the President  
10 hasn't made that legal judgment; it's made a  
11 policy call but not the legal judgment -- and  
12 the effect on apportionment.

13 And as I said to Justice Kavanaugh, we  
14 don't think it matters whether the Court labels  
15 that under Article III or prudential ripeness,  
16 but we're happy for the Court to disagree and go  
17 to the merits because there is a fairly small  
18 window of time here for the Court to decide the  
19 merits. On the merits, they can't satisfy  
20 either half of the test. They're not residents  
21 and there's nothing settled about their  
22 residence. And they've not offered any coherent  
23 theory of political representation why all  
24 illegal aliens should be included in the  
25 apportionment base.



1                   For those reasons, if the Court  
2 reaches the merits, we think it should reverse  
3 and uphold the memorandum.

4                   CHIEF JUSTICE ROBERTS: Thank you,  
5 General Wall.

6                   General Underwood.

7                   ORAL ARGUMENT OF BARBARA D. UNDERWOOD  
8 ON BEHALF OF THE GOVERNMENT APPELLEES

9                   MS. UNDERWOOD: Mr. Chief Justice, and  
10 may it please the Court:

11                   The Constitution and laws require the  
12 seats in the House be apportioned according to  
13 the number of persons in each state. The  
14 President's new policy of refusing to count  
15 people who are not in a lawful immigration  
16 status is flatly inconsistent with that command.

17                   Our laws reflect a deliberate choice  
18 not to base apportionment on citizenship, voter  
19 eligibility, or any other legal status but  
20 instead to count the number of people living in  
21 a state. That has always included people who  
22 are ineligible to vote, including non-citizens,  
23 and it has also included people who were present  
24 in violation of law.

25                   The memorandum treats counting people

1 as a reward to be withheld from states that  
2 house undocumented immigrants. But our law  
3 views counting people for apportionment as  
4 finding fact, not giving and withholding  
5 rewards.

6 The memorandum pretends that if under  
7 the law a person should not be here, then the  
8 person is not here. The government can do many  
9 things to induce undocumented immigrants to  
10 leave, but it cannot declare them to be gone  
11 when, in fact, they're here and likely to  
12 remain.

13 My friend says the policy must be  
14 upheld because some undocumented immigrants  
15 could be excluded from the count. Whether they  
16 could is disputed, but, in any case, that would  
17 not support this policy, which applies to all  
18 undocumented immigrants and refuses to count  
19 them solely on the basis of undocumented status.  
20 As this Court recognized in Shelby County, an  
21 unlawful policy can't be saved by the  
22 possibility that a lawful policy could be  
23 written.

24 The question here is whether a blanket  
25 policy of not counting undocumented immigrants

1 is lawful, and it's not because undocumented  
2 status alone doesn't tell us where a person  
3 usually resides. This policy ignores the  
4 undisputed fact that millions of undocumented  
5 immigrants have lived here for decades and have  
6 substantial community ties. Their undocumented  
7 status doesn't erase their presence.

8 CHIEF JUSTICE ROBERTS: General  
9 Underwood, could you tell me precisely what the  
10 relief is that you seek? An order from the  
11 Court saying what?

12 MS. UNDERWOOD: Well, an affirmance of  
13 the injunction below, which was to declare the  
14 policy invalid, in violation of law and the  
15 Constitution as well, but the statute would do,  
16 and an injunction against transmitting the  
17 information about undocumented persons as part  
18 of the report on which --

19 CHIEF JUSTICE ROBERTS: Well, that's  
20 -- that's the precise issue I want to focus on.  
21 It -- it -- it seems to me that you're asking  
22 really for a gag order on the Secretary of  
23 Commerce concerning his communications to the  
24 President.

25 MS. UNDERWOOD: No --

1 CHIEF JUSTICE ROBERTS: Let's suppose  
2 -- let's suppose that the Secretary conducts the  
3 census and prepares the tabulation exactly as  
4 you would have it and puts that in an envelope  
5 to send to the President, but it also, in a  
6 separate envelope, puts information on the  
7 number of illegal aliens and he sends both of  
8 those envelopes to the President.

9 Is that fine with you?

10 MS. UNDERWOOD: That does -- yes, that  
11 does not violate the injunction. There is no  
12 gag order to be placed on the Secretary of  
13 Commerce. He can be asked for and respond with  
14 all sorts of information.

15 But the 141 -- the -- the particular  
16 statements and transmittals that are operative,  
17 they aren't just the transmission of  
18 information. They operate as steps in the  
19 apportionment.

20 CHIEF JUSTICE ROBERTS: Well, but then  
21 the President is --

22 MS. UNDERWOOD: Those the President  
23 cannot --

24 CHIEF JUSTICE ROBERTS: -- the -- the  
25 -- the President, I would assume, is then free

1 to report to the Congress information for the  
2 apportionment, and he can -- it's okay, he can  
3 do the math. He can take what the census that  
4 the Secretary has transmitted, as you would have  
5 it, and subtract the number of illegal aliens or  
6 subcategories and use that information, can't  
7 he?

8 MS. UNDERWOOD: Well, we are now at  
9 the point where, if -- if you issued a  
10 declaratory judgment saying that that policy is  
11 unlawful, and my friend on the other side has  
12 said the President would comply with such a  
13 declaratory judgment, then the answer is, well,  
14 he would have the information, and in principle,  
15 he could use it. He couldn't issue a report to  
16 Congress that was in violation of the  
17 Constitution or law.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 General.

20 Justice Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief  
22 Justice.

23 General Underwood, I'm a little  
24 confused. The -- did I understand you to say  
25 that if the Census Bureau sent the information

1 in a separate envelope, that would be fine, at  
2 least if -- if it was labeled not the 1 --  
3 Section 141 report?

4 MS. UNDERWOOD: It would not -- yes,  
5 it would not violate the law. It would be a  
6 transmission of information.

7 JUSTICE THOMAS: So what does that  
8 accomplish? Because I thought your -- your --  
9 your major concern is the use of that  
10 information by the President.

11 MS. UNDERWOOD: That's correct, that  
12 -- the concern is that. And in the course of  
13 directing the Secretary not to transmit this as  
14 part of a report, this Court would presumably  
15 also declare that the use of it was unlawful  
16 without enjoining the President, because there  
17 is that problem about injunctions against the  
18 President.

19 JUSTICE THOMAS: So I'm trying to --  
20 your -- so I -- your argument is that if it's  
21 sent separately, it can't be used?

22 MS. UNDERWOOD: In the apportionment,  
23 that's correct. It might be usable for many  
24 other things, but not as part of the  
25 apportionment.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Breyer.

4 JUSTICE BREYER: Thank you.

5 General Underwood, I think, are there  
6 not, many statutes which divide funds among the  
7 states on the basis of population, and then they  
8 say something like "as shown by the most recent  
9 Decennial Census," and does that tie that to the  
10 141(b) report? I think it does.

11 Do you know any -- are there not many  
12 instances where it does?

13 MS. UNDERWOOD: There are many  
14 instances where the distribution of funds is  
15 talked -- is -- is -- has to be derived from the  
16 census. I suppose we have an argument about  
17 whether -- we would argue that if the  
18 information is used in the census and in the  
19 report that is sent to Congress, it also will  
20 have an effect on the distribution of funds.

21 If the information is sent separately,  
22 then --

23 JUSTICE BREYER: That's not what I'm  
24 thinking of. I'm thinking of, suppose this  
25 141(b) report has both the number of illegal

1 immigrants, the illegal aliens, and also the  
2 total census. Okay. What do you use?

3 MS. UNDERWOOD: I don't think it can  
4 have both. I -- the -- the --

5 JUSTICE BREYER: I know. But on the  
6 -- I didn't think that was your theory. I  
7 thought that's the government's theory.

8 MS. UNDERWOOD: Right. Right.

9 JUSTICE BREYER: So what happens under  
10 their theory?

11 MS. UNDERWOOD: Well, I don't know  
12 what happens under their theory. They have  
13 sometimes said that a transmission of two sets  
14 of numbers is all part of the 141(b) report, and  
15 they have sometimes said it's separate. And I  
16 don't know --

17 JUSTICE BREYER: Okay. If we both  
18 don't know --

19 MS. UNDERWOOD: -- what we're to do.

20 JUSTICE BREYER: -- let -- let us go  
21 to a different question, which is I'd like to  
22 know what you have to say about Franklin versus  
23 Massachusetts.

24 MS. UNDERWOOD: Well, Franklin/  
25 Massachusetts, of course, said that the



1 Secretary has -- and the President have some  
2 discretion, but it's not unlimited discretion.

3 Franklin recognized usual residents as  
4 the test and then treated overseas government  
5 workers like other situations recognized at the  
6 founding, people absent from the state where  
7 they have a residence and continuing ties and  
8 intend to return. They think of themselves as  
9 away from home. And Franklin recognized that  
10 that situation was suitable for the exercise of  
11 executive discretion.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 MS. UNDERWOOD: There is no support in  
15 that --

16 CHIEF JUSTICE ROBERTS: Justice --  
17 Justice Alito.

18 JUSTICE ALITO: Thank you.

19 I have two questions that are  
20 important to me. I hope I'm going to be able to  
21 squeeze them both in in my time.

22 The first concerns your answer that it  
23 would be fine for the Secretary of Commerce to  
24 submit numbers that exclude illegal aliens if it  
25 was done in a separate document.

1           Once you concede that, unless you are  
2 asking us to overrule what Franklin said about  
3 the President's directing the Secretary to  
4 reform the census, then I don't really  
5 understand where your argument is going.

6           Suppose the -- suppose the tables were  
7 turned. Suppose the President wanted to count  
8 every single person who was in the United States  
9 on census day, but the Secretary of Commerce  
10 took it upon himself to give the President  
11 numbers that excluded every illegal alien.

12           Do you think the President would then  
13 be unable to direct the Secretary of Commerce to  
14 reform those numbers and make them comply with  
15 the theory that the President accepted?

16           MS. UNDERWOOD: The President would,  
17 under Franklin, have the ability to direct a  
18 reformation of the census. There would be the  
19 question -- the same question -- well, it would  
20 be a different question.

21           There's always the question whether  
22 that reformation is constitutional or not. You  
23 know, it --

24           JUSTICE ALITO: Yeah. Well, that goes  
25 to the substance of the -- of the issue, which I

1 do want to get to, but if the Secretary -- once  
2 you concede that two documents are possible and  
3 that the President can ask the Secretary to  
4 reform the numbers that are sent to him, I don't  
5 understand why there isn't a -- why -- why the  
6 situation where both sets of figures are  
7 submitted in a single document is any different?  
8 It seems like a totally meaningless formality.

9 MS. UNDERWOOD: It's not a meaningless  
10 formality in the sense that this is the moment  
11 in the process when judicial intervention can  
12 operate. The problem arises because once the --  
13 the President -- because -- because of the  
14 reluctance of the Court to enjoin the President.

15 So the injunction operates against the  
16 Secretary and what he can transmit. And then  
17 the President -- and -- and in telling the  
18 Secretary what he can put in the -- in the 141  
19 report, the Court will also be telling the  
20 President what is lawful to use in his report to  
21 Congress.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor.

24 JUSTICE ALITO: If I can -- if I can  
25 move on to my second -- my second point. I want

1 to give you six categories of people and ask you  
2 to answer yes or no, to the extent you can,  
3 whether you think each of these -- people in  
4 each of these categories must be counted for  
5 apportionment purposes.

6 First category is a foreign diplomat  
7 who is posted here for three years?

8 MS. UNDERWOOD: No, because he's --  
9 for several reasons. Because he's --

10 JUSTICE ALITO: Okay. Well, he's a  
11 no, all right. A tourist who's here on a valid  
12 visa?

13 MS. UNDERWOOD: No.

14 JUSTICE ALITO: A tourist who  
15 overstays her visa and is therefore here  
16 illegally?

17 MS. UNDERWOOD: Well, that person is  
18 now outside the realm of -- we expect them to  
19 leave, and so that person is a resident like any  
20 other undocumented person.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor.

23 JUSTICE ALITO: Chief --

24 CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor.

1 JUSTICE SOTOMAYOR: General, I see  
2 this as being very similar to Franklin because I  
3 think you're arguing, and I think the Solicitor  
4 General agreed, that the President has to use  
5 only the numbers that are given to him by the  
6 Secretary.

7 If the Secretary gives him illegal  
8 numbers to exclude, then he can't use an outside  
9 report to exclude those people from the  
10 apportionment. Is that correct?

11 MS. UNDERWOOD: Cannot use -- he  
12 cannot do an illegal report, yes. And -- and --

13 JUSTICE SOTOMAYOR: He can't use a  
14 separate report. The tabulation has to provide  
15 him with the numbers that he uses, correct?

16 MS. UNDERWOOD: Correct.

17 JUSTICE SOTOMAYOR: And so, if it is  
18 illegal for him to exclude illegal aliens --  
19 sorry for -- for -- for that -- then we can do  
20 exactly what we said could be done previously,  
21 which is to order the Secretary not to give the  
22 President illegal numbers, correct?

23 MS. UNDERWOOD: Correct.

24 JUSTICE SOTOMAYOR: So that's your  
25 point, which is, if he's going to tabulate and

1 exclude illegal aliens, we have to decide as a  
2 matter of law whether the word "person," as used  
3 in the statute and Constitution, who live here  
4 permits the exclusion of illegal aliens,  
5 correct? That's the legal question?

6 MS. UNDERWOOD: Correct.

7 JUSTICE SOTOMAYOR: If he later  
8 decides that he wants a particular category of  
9 people to be excluded who are illegal aliens,  
10 then he gives a memo to the Census Secretary  
11 earlier that says: This category, I think,  
12 should not be here for these reasons.

13 And if the Secretary says, I'll give  
14 you those numbers, then we would have an  
15 identical Franklin decision where they could  
16 come in and sue and say to the Secretary: No,  
17 you shouldn't permit those illegal aliens, or  
18 yes, you should, whatever the answer is,  
19 correct?

20 MS. UNDERWOOD: Agreed, yes.

21 JUSTICE SOTOMAYOR: And that's what's  
22 missing here, which is the President is asking  
23 to exclude -- to give numbers on the category of  
24 illegal -- illegal aliens that -- of any kind,  
25 and some of those numbers legitimately cannot be

1 included; that's your argument, correct?

2 MS. UNDERWOOD: Yes.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: General Underwood, if  
5 I could take you back to the standing question.  
6 This is the way I understood what came out of  
7 General Wall's minutes.

8 You -- the government has tons of  
9 records on tons of people. I mean, we're not  
10 just talking about ICE detainees. By the time  
11 you think about DACA recipients and people in  
12 removal proceedings and a number of other  
13 categories, you easily get over 4 million  
14 people.

15 But General Wall says that that's not  
16 the problem. The problem is a matching problem.  
17 And, essentially, the -- the Department has not  
18 yet sort of gone through this process of trying  
19 to match those numbers with the answers to the  
20 census questionnaire.

21 Now I don't really quite understand  
22 how that process works, so I'm wondering, if you  
23 do, if you can tell me whether you think it's  
24 credible that they, the Census Bureau, at this  
25 point would not know approximately how many

1 people they'll be able to exclude of all the  
2 people that they have administrative records on.  
3 And I guess the second question would be, is  
4 that what we should be focused on, or is that an  
5 unimportant question?

6 MS. UNDERWOOD: Well, I am not a  
7 master of the technology here. I do know that  
8 there is a process by which matching occurs, and  
9 I do not know -- I cannot opine on how  
10 successful they will be.

11 I can only say that what we have is a  
12 lot of evidence that they have a lot of numbers  
13 available, that they are working as hard as they  
14 can to do as much of this as they can, that  
15 subtracting just some of that 4 million or so  
16 from the count would be enough to take a seat  
17 away from one or more states, and that  
18 speculation at this point -- what we have on the  
19 side of uncertainty is speculation.

20 We have repeated representations from  
21 the Census Bureau and the Department of Justice  
22 that -- and -- that they are -- they've been  
23 working on this since July 2019, and they're now  
24 starting to tell us about the categories that  
25 they will be able to identify and match and



1 that, if there turns out to be a problem, there  
2 isn't enough here to be the basis for any  
3 judicial action. It's speculation that they  
4 won't be able to do it at this point.

5 So it seems to me that it would make  
6 sense, it might make sense, for this Court to  
7 wait a couple of weeks and find out whether  
8 there's more information that would shed some  
9 light on this question.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch.

12 JUSTICE KAGAN: Thank you, General.

13 JUSTICE GORSUCH: Good morning,  
14 Ms. Underwood. If it is a matter of speculation  
15 whether they're going to be able to include or  
16 exclude, why isn't that a standing problem or a  
17 ripeness problem now, if -- if we must rule now?

18 MS. UNDERWOOD: Because it's a  
19 substantial --

20 JUSTICE GORSUCH: As I understand it,  
21 they can't use statistical sampling, so they're  
22 going to have to match their detention records  
23 or their docket records against the actual  
24 enumeration in -- in -- in the census.

25 And at the present, they tell us that

1 they might not be able to -- to do more than  
2 maybe the aliens in ICE detention facilities,  
3 which would be in the tens of thousands and  
4 perhaps not affect any apportionment at all.

5 MS. UNDERWOOD: Well, I think that  
6 they're not saying they're only going to be able  
7 to do ICE detention. They're saying that that's  
8 a group they already know they'll be able to do  
9 and that they're working feverishly to do the  
10 same for other groups.

11 And we know from the last round of  
12 census litigation that they have the ability to  
13 do matching. Now I can't speak to the  
14 technology of it, but they were quite confident  
15 that they were going to be able to do matching.

16 So it seems to me that --

17 JUSTICE GORSUCH: But -- but,  
18 Ms. Underwood, I guess -- my question is, you  
19 know, you -- you -- you concede that it's  
20 speculative as to how much they're going to be  
21 able to do. And once we've -- once we're in  
22 that world, then it's speculative whether  
23 there's going to be any effect on the  
24 apportionment. And -- and in that world, we  
25 have a standing problem, don't we?

1 MS. UNDERWOOD: Well, I think that's  
2 not quite the world we're in. I think we have a  
3 substantial risk of injury. But all the  
4 evidence until very recently was that they were  
5 going to be able to do -- to implement the  
6 Presidential Memorandum and that they are now,  
7 just now, saying that they're not sure how fully  
8 they're going to be able to do it.

9 So I think that's a substantial risk  
10 of injury sufficient for Article III standing,  
11 and I think there could be, as a matter of  
12 prudence, some interest in waiting to get more  
13 information since they seem to also be saying  
14 there will be more information very soon.

15 But I think --

16 JUSTICE GORSUCH: Thank you.

17 MS. UNDERWOOD: -- we have Article III  
18 standing. We have a substantial risk.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Thank you, Chief  
23 Justice.

24 And good morning and welcome, General  
25 Underwood. As Justice Barrett's questioning

1 illuminated, I think, you have advanced forceful  
2 constitutional and statutory arguments on the  
3 merits of a categorical exclusion of all  
4 unlawful non-citizens. But I'm not sure that's  
5 going to be the dispute, and so I want to  
6 explore that.

7           If we said now, as you want us to say,  
8 that the Secretary and the President cannot  
9 exclude all non-citizens living here unlawfully,  
10 suppose we say that, and then the President  
11 excludes not all but some subsets, then we'll be  
12 right back here with litigation, correct?

13           MS. UNDERWOOD: Well, I think that  
14 what you would have is you would have  
15 invalidated this policy and he couldn't act --  
16 and the Secretary couldn't act pursuant to this  
17 policy.

18           JUSTICE KAVANAUGH: But couldn't --

19           MS. UNDERWOOD: And he'd have --

20           JUSTICE KAVANAUGH: I'm sorry to  
21 interrupt -- couldn't he then substitute a new  
22 policy consistent with the decision on all by  
23 saying we're going to exclude some subsets, and  
24 then there will be litigation on that and we'll  
25 be right back here, which is --

1 MS. UNDERWOOD: Perhaps. Perhaps. I  
2 mean, now we're -- now we're speculating more  
3 about what he might -- might do. I think that  
4 --

5 JUSTICE KAVANAUGH: Well, I think it's  
6 -- sorry to interrupt -- but I think the  
7 Solicitor General has indicated it's going to be  
8 very difficult, if not impossible, to exclude  
9 all.

10 And I guess I'm wondering then, it  
11 seems like part of this is -- and you -- you've  
12 acknowledged this forthrightly -- is the  
13 difficulty of an injunction against the  
14 President if we wait to post-apportionment but  
15 -- or post-transmission, but the President,  
16 we've assumed in the past, would comply with a  
17 declaratory judgment. We've said that. The  
18 Solicitor General confirmed that today.

19 Does -- does that eliminate the  
20 problem that has forced or encouraged you to  
21 bring this litigation now?

22 MS. UNDERWOOD: Well, it could  
23 mitigate it, but even, I mean, a declaratory  
24 judgment action has to be addressed to somebody  
25 who -- who can act. I don't think you -- we

1 would -- you would issue a declaratory judgment  
2 action against the President.

3 And if the Secretary has already done  
4 everything he's going to do, then it's not clear  
5 exactly who the appropriate recipient of that  
6 declaration is.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett.

9 JUSTICE BARRETT: Good morning. I  
10 have one question that's a follow-up to Justice  
11 Kavanaugh's question, and that has to do with  
12 the feasibility of counting all of these  
13 categories of illegal aliens.

14 If, as General Wall said, the  
15 President and the Secretary of Commerce are only  
16 able to identify certain categories and, as  
17 Justice Kavanaugh said, if that means that there  
18 would be litigation on a case-by-case basis  
19 about whether such categories should be in or  
20 out, doesn't that cut in favor of waiting, that  
21 maybe there's no injury here because we're not  
22 really sure what the contours of the decision  
23 would be?

24 MS. UNDERWOOD: Well, I -- I -- I  
25 think I should just object to the idea that the

1 categories are so small that they won't make a  
2 difference and that they would be litigated one  
3 by one.

4 I -- I think that the policy that the  
5 President articulated is as many as possible.  
6 The memorandum -- while -- while Mr. Wall said  
7 he was going to exercise -- the President would  
8 exercise discretion after the information came  
9 in, the memo says to the maximum extent of the  
10 President's discretion.

11 So the policy is clearly not to  
12 identify subcategories. It's to do as much as  
13 possible. And the categories that are available  
14 are just going to be whatever they can find.

15 And I think this Court can speak to  
16 that policy now. Is it likely that they would  
17 come back with other new policies? Perhaps. I  
18 don't think -- that would always be true. I  
19 don't think that's a reason not to decide the  
20 question that's here now.

21 JUSTICE BARRETT: But what if -- what  
22 if we say that he cannot categorically exclude  
23 all illegal aliens? He says, fine, I'm not  
24 going to do that. I'm going to count everyone  
25 who's in an ICE detention facility, everyone

1 who's in removal proceedings, and maybe say all  
2 DACA recipients. But I agree, you know, I have  
3 reasons for thinking each of these don't satisfy  
4 the inhabitancy requirement.

5           Wouldn't you just be back litigating  
6 those specific issues?

7           MS. UNDERWOOD: Yes, I think we would,  
8 yes.

9           JUSTICE BARRETT: Okay. Thank you.  
10 My time's up.

11           CHIEF JUSTICE ROBERTS: A minute to  
12 wrap up, General Underwood.

13           MS. UNDERWOOD: The Constitution and  
14 law provide that House seats should be allocated  
15 on the basis of total population. The framers  
16 wanted a system that could not easily be  
17 manipulated, so they decided to count just the  
18 persons living in each state.

19           The policy here would for the first  
20 time in this nation's history reject that  
21 choice. People who live in a state without  
22 lawful immigration status still live there.  
23 They are not invisible. And, like other  
24 residents, voting and non-voting, their presence  
25 requires attention from the government and the



1 need for representatives to give that attention.

2 That is the rationale for -- one  
3 rationale for including them. The decision to  
4 refuse to count them has produced a live  
5 controversy from the moment it was announced to  
6 now.

7 This Court should resolve the  
8 controversy and reject a policy that would  
9 refuse to count millions of people who have  
10 lived here for decades, have jobs, mortgages,  
11 families, and community ties and reside in a  
12 state under any reasonable interpretation of  
13 those words.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 General.

16 Mr. Ho.

17 ORAL ARGUMENT OF DALE E. HO

18 ON BEHALF OF THE PRIVATE APPELLEES

19 MR. HO: Mr. Chief Justice, and may it  
20 please the Court:

21 For 230 years, dating to the founding,  
22 states have always held seats in the House  
23 according to the number of persons in each state  
24 without regard to immigration status.

25 Now, with respect to standing, the

1 test under Susan B. Anthony is whether there is  
2 a substantial risk of injury. And past  
3 experience shows that it's easy to risk changing  
4 the apportionment.

5 In Utah versus Evans, according to the  
6 parties' summary judgment briefs, the practice  
7 of imputation added a total of 32,000 people in  
8 North Carolina and 5,000 in Utah, and that  
9 difference was enough to shift one seat from the  
10 latter to the former.

11 We know that the numbers -- the  
12 numbers here are much bigger. As Justice Kagan  
13 pointed out, the government has information on  
14 millions of undocumented immigrants. And  
15 one-and-a-half years ago, when the President  
16 issued an executive order in July of 2019, he  
17 stated that the government could already match  
18 citizenship records for 90 percent of the  
19 population.

20 So there's substantial risk of injury  
21 now, and it will be better to resolve this issue  
22 now rather than in six months during the  
23 redistricting process, which could be  
24 disruptive.

25 CHIEF JUSTICE ROBERTS: Mr. Ho, what

1 is the problem with post-apportionment  
2 litigation? Right now, as the questions have  
3 shown, we don't know what the Secretary's going  
4 to do. We don't know what the President is  
5 going to do. We don't know how many aliens will  
6 be excluded. We don't know what the effect of  
7 that will be on apportionment.

8 All these questions would be resolved  
9 if we wait until the apportionment takes place.  
10 So why aren't we better advised to do that?

11 MR. HO: Well, I think waiting a  
12 couple of weeks wouldn't be very disruptive, Mr.  
13 Chief Justice, but the record establishes that  
14 there's at least a substantial risk of a shift  
15 in the apportionment now, which is enough for  
16 standing.

17 And if the question is should the  
18 Court wait now or send this back for another  
19 round of expedited proceedings, then there are  
20 many good reasons to decide this case now.

21 The government argued that waiting  
22 would deprive the nation of prompt notice of  
23 reapportionment, as required by statute, and  
24 that it could be very disruptive to  
25 redistricting processes in a number of states.

1 In Texas --

2 CHIEF JUSTICE ROBERTS: Well, waiting  
3 a couple of weeks isn't going to give us much  
4 more information than we have now. Waiting  
5 until apportionment will give us all that  
6 information that we -- we don't have.

7 MR. HO: I'm sorry, Mr. Chief Justice.  
8 I did mean waiting the four weeks or so, maybe  
9 four-and-a-half or five weeks, depending upon  
10 when the apportionment report is delivered, to  
11 see what those numbers look like. I'd agree  
12 that that short of a wait wouldn't be  
13 disruptive.

14 But, if we're talking about sending  
15 this case back for additional proceedings in the  
16 district court, another expedited appeal, and  
17 doing this all over again over a period of  
18 several months, then that would be, I think,  
19 disruptive to ongoing redistricting processes.  
20 In fact, the --

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Yes, thank you, Mr.  
25 Chief Justice.

1           Mr. Ho, if the additional information  
2 would be beneficial in a few weeks, wouldn't it  
3 be beneficial to actually resolving this case?

4           As the questioning seems -- seems to  
5 suggest, there's some difficulty in assessing  
6 exactly what information will be available and  
7 what that information will be.

8           MR. HO: Well, Justice Thomas, the  
9 challenge here is to a policy that broadly  
10 mandates the exclusion of undocumented  
11 immigrants to the maximum extent under law.

12           And the government's position is that,  
13 under law, all undocumented immigrants may be  
14 excluded. As Solicitor General Wall noted,  
15 their view is that the entire category of  
16 undocumented immigrants are not inhabitants.

17           So the Court is presented with a  
18 facial challenge to a categorical policy. The  
19 government's been free to issue a narrower  
20 memorandum excluding one or more subgroups as  
21 purported non-residents rather than taking aim  
22 at undocumented immigrants writ large, and it  
23 hasn't done that. It's the categorical policy  
24 that's at issue, and it's unlawful.

25           JUSTICE THOMAS: Well, it -- I think

1 it would be the -- I think your argument would  
2 be that the implementation of a categorical  
3 policy would be unlawful, but what I'm hearing  
4 is that we don't exactly know which category or  
5 subcategory will be excluded.

6 MR. HO: Well, as I take Solicitor  
7 General Wall's representations here, it's that  
8 the government will exclude to the maximum  
9 extent that's feasible and that's permitted  
10 under law, and the government's view is that the  
11 entire category of undocumented immigrants may  
12 be excluded under law.

13 Even if we take the government's three  
14 proposed subcategories of undocumented  
15 immigrants who are supposedly per se excludable,  
16 those categories are quite heterogeneous.  
17 They're overbroad. I don't think that they are  
18 all categorically non-inhabitant.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer.

22 JUSTICE BREYER: Thank you.

23 What do you think about excluding --  
24 the -- the lawfulness of excluding just the  
25 50,000 or so who are in ICE centers or under

1 final order to remove?

2 MR. HO: Well, Justice Breyer, the  
3 population of people in ICE detention, as I  
4 noted, is quite heterogeneous. Even under the  
5 government's definition of inhabitant, many of  
6 those people would qualify. You can be a lawful  
7 permanent resident and be in ICE detention.  
8 Even a person who is, say, detained at the  
9 border, that person can apply for asylum. In  
10 some years, more than half of asylum claims --

11 JUSTICE BREYER: So suppose you -- you  
12 change it slightly and say we are going to  
13 exclude, not count, people who are under a legal  
14 order to remove.

15 MR. HO: Well, people under final  
16 orders of removal can actually reside in the  
17 country for quite a long time. They can  
18 petition for review to courts of appeal. They  
19 can seek other forms of relief. They can  
20 challenge their orders collaterally. Some are  
21 never actually deported even after going through  
22 all of the -- those processes because their home  
23 country --

24 JUSTICE BREYER: All right. So what  
25 line would you draw between those whom they

1 could legally deport -- not count and those whom  
2 they can't?

3 MR. HO: Well, the constitutional  
4 standard, as this Court explained in Franklin,  
5 is usual residence, and the plain meaning of  
6 that term turns on whether or not someone  
7 commonly resides in the United States. It  
8 doesn't turn on their lawful immigration status.

9 Those -- that term, "usual residence,"  
10 was defined at the founding as where a person  
11 commonly lives or sleeps. That's in both the  
12 Johnson and the Bailey dictionaries that we  
13 cite. And if you look at the dictionary that  
14 the government relies on, Webster's 1828, which  
15 they rely on for the definition of inhabitant,  
16 it defines residence as distinct from  
17 nationality, offering the example of the  
18 residence of an American in France or Italy for  
19 a year.

20 So residence doesn't admit of  
21 exclusions on the basis of lawful immigration  
22 status. It turns on whether a person's physical  
23 presence is transient or not.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: I'm going to try to



1 see if I can get you to answer Justice Breyer's  
2 question. Last term, we had a case involving an  
3 alien, Mr. Thuraissigiam, who crossed the border  
4 unlawfully and was almost immediately  
5 apprehended and then placed in detention.

6 Would he have to be counted?

7 MR. HO: Well, under the Bureau's  
8 current residence rules, he would. But I -- I  
9 just would note that the Court's holding in  
10 Thuraissigiam, you know, was about whether or  
11 not someone, you know, had entered for purposes  
12 of --

13 JUSTICE ALITO: No, I understand that.  
14 So is it your position that every single person  
15 who is in -- every single alien who is in the  
16 United States on census day must be counted?

17 MR. HO: I would say that every person  
18 who is an alien in the United States under -- on  
19 census day is subject to the same residence  
20 requirements as anyone else who is a person  
21 inside of a state.

22 If a United States citizen is usually  
23 a resident abroad and is temporarily visiting  
24 the country on April 1, on census day, to see  
25 family or something like that, that person's not

1 counted in the census. I think the same would  
2 apply --

3 JUSTICE ALITO: Well, you're saying  
4 that for -- for each of these people, there has  
5 to be a very specific -- a very fact-specific  
6 determination about whether they -- whether they  
7 are a resident or not. Is that administrable at  
8 all?

9 MR. HO: Well, the rules that were  
10 administered by the federal marshals in the  
11 first census in 1790, Justice Alito, were to ask  
12 whether or not a person usually resides at the  
13 dwelling that's being visited. If not, where do  
14 they actually usually reside? And if the person  
15 has no stable residence, to count them simply  
16 where they're found on April 1.

17 That's been the practice since the  
18 founding. But I would agree, I just want to  
19 make clear, I would agree that there is  
20 discretion to make decisions on the basis of  
21 residence, but the plain language of the  
22 operative constitutional and statutory  
23 provisions don't turn on lawful immigration  
24 status. They turn on the facticity of a  
25 person's residential circumstances.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Mr. Ho, I'd like  
5 to follow up on the effect of waiting in this  
6 case. Is -- is the waiting problem that the --  
7 the census apportionment doesn't happen until  
8 April 1, is that correct?

9 MR. HO: No, Justice Sotomayor. The  
10 Commerce Secretary's report is due to the  
11 President on December 31, and then the President  
12 must submit a report to Congress within seven  
13 days of the beginning of Congress's term.  
14 That's either on January 10th or 11th. And then  
15 the clerk of the House must, within 15 days of  
16 that, send certificates to each of the states  
17 notifying them how many seats in -- in Congress  
18 each state can get.

19 So we're talking about --

20 JUSTICE SOTOMAYOR: So the  
21 apportionment already begins once the report is  
22 issued, and so we would have to unscramble the  
23 egg --

24 MR. HO: I -- I think that's right.

25 JUSTICE SOTOMAYOR: -- to have -- all

1 right. Now can we go back to the -- the  
2 question that seems to be at the nub of what  
3 many of my colleagues are asking about, which is  
4 can and should we rule that simply -- that not  
5 counting illegal aliens because they're  
6 undocumented, that that is a violation of the  
7 statute and the Constitution? Is that enough  
8 relief to you?

9 MR. HO: I -- I -- I think it is,  
10 Justice Sotomayor, because the policy that we're  
11 challenging is broad and -- and unequivocal.  
12 We're bringing a facial challenge to it.

13 And the policy lacks a plainly  
14 legitimate sweep. The vast majority of  
15 undocumented immigrants qualify as usual  
16 residents under any plausible interpretation of  
17 that term, 66 percent --

18 JUSTICE SOTOMAYOR: Assume I even  
19 agree with that, however. Could -- would that  
20 just mean -- what does that mean practically?  
21 Does the -- what does the Secretary do? He  
22 doesn't send anything? How about if the  
23 President comes back and says just send it to me  
24 on these categories? What happens then?

25 MR. HO: Well, the injunction

1 prohibits merely the inclusion of information to  
2 implement the existing Presidential Memorandum  
3 in the Secretary's 141 report for apportionment.  
4 It's not a gag order on the Commerce Secretary.  
5 There's nothing that would prohibit the Commerce  
6 Secretary from publishing various counts of  
7 subcategories of undocumented immigrants on the  
8 Internet. That's not something that's  
9 prohibited by the injunction.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Mr. Ho, I guess I  
12 would like you to -- to comment on -- on General  
13 Wall's view of the feasibility of the matching  
14 process, you know, whether you have any insight  
15 into that, into how the process works, and --  
16 and maybe as part of that, whether you have any  
17 insight into the question of why it is that the  
18 government knows now that it can do that  
19 matching with respect to the ICE detainees but  
20 isn't sure it can do that matching with respect  
21 to categories of people for whom it has equally  
22 good administrative records.

23 MR. HO: Well, Justice Kagan, I'm not  
24 a social scientist, but here's what I know. In  
25 July of 2019, the President issued an executive

1 order on the collection of administrative  
2 records as they relate to citizenship, with one  
3 of the goals being to ascertain the number of  
4 undocumented immigrants in each state.

5           And the text of that memorandum states  
6 that the Census Bureau at that time -- this was  
7 in July of 2019, so about a year-and-a-half ago  
8 -- the Census Bureau had determined based on  
9 experience that administrative record to which  
10 it already had access would enable it to  
11 determine citizenship status for approximately  
12 90 percent of the population.

13           So we know that the Bureau has a lot  
14 of experience with matching. It can do it for  
15 the vast majority of the population already.  
16 That's with administrative records maintained by  
17 the Social Security Administration and other  
18 executive branch agencies.

19           They've been collecting more records  
20 for the last year and a half. And, as Your  
21 Honor noted, the -- the government has  
22 information on millions of undocumented  
23 immigrants. I think, when you add all of that  
24 together, that's at least a substantial risk of  
25 injury, because it doesn't take much to change

1 the apportionment. As Justice Breyer noted in  
2 his opinion last year in the citizenship  
3 question case, the difference of a few thousand  
4 people in a state can mean the difference  
5 between gaining or losing a seat.

6 JUSTICE KAGAN: Thank you, Mr. Ho.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch.

9 JUSTICE GORSUCH: Thank you, Chief.  
10 No questions.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief  
14 Justice.

15 And good morning, Mr. Ho. First, I  
16 want to make one point in response to something  
17 General Underwood said, and I'm hope -- hoping  
18 the Solicitor General can address this on reply,  
19 about the declaratory judgment after  
20 apportionment, who that would be addressed to  
21 and how that would work. That's something that  
22 I would appreciate more from the Solicitor  
23 General on but not going to be able to ask at  
24 that point.

25 As to -- as to you, I want to ask you

1 about your point that we should rule now because  
2 the memo expresses the intent to exclude  
3 non-citizens who are here unlawfully to the  
4 maximum extent under law, is what you said, and  
5 you quoted that a couple times.

6           You also referenced -- I think this is  
7 important -- the memorandum says feasible. And  
8 I think the argument has revealed, as did the  
9 briefs, but the argument even more clearly, it's  
10 going to be very difficult -- it's not going to  
11 be particularly feasible to exclude all of the  
12 non-citizens. We're going to be left with  
13 categories.

14           How -- how do we think about  
15 feasibility?

16           MR. HO: Well, the government's  
17 identified three cat- -- subcategories of  
18 undocumented immigrants, which -- in the -- in  
19 the last few pages of their reply brief. So I  
20 assume those are the ones that the government  
21 thinks are the most feasible.

22           But each of those groups, I -- I  
23 think, is overbroad. Those groups are  
24 heterogeneous. And to exclude any of them would  
25 violate constitutional and statutory commands.



1 There's people detained at the border, but, as I  
2 mentioned, a lot of people --

3 JUSTICE KAVANAUGH: But --

4 MR. HO: -- who don't --

5 JUSTICE KAVANAUGH: I'm sorry to  
6 interrupt, but could we --

7 MR. HO: Sorry.

8 JUSTICE KAVANAUGH: -- could we rule  
9 to that effect now? We really haven't had  
10 briefing and argument on the particular  
11 subcategories.

12 MR. HO: I -- I'd agree that, to the  
13 extent the government wants to rely on saving  
14 this policy with respect, you know, by citing  
15 one or two purportedly valid subcategories to  
16 exclude, it would be better for this Court to  
17 get full briefing on those categories. But  
18 there's nothing that stops this Court from  
19 ruling on the facial validity of this policy  
20 because it plainly lacks legitimate sweep. It  
21 applies broadly --

22 JUSTICE KAVANAUGH: And then -- and  
23 then, in litigation in January, we would deal  
24 with the subcategories? Is that how you foresee  
25 this?

1           MR. HO:  If that's what the President  
2 ultimately ends up doing and issues a new  
3 memorandum, I think that would be something  
4 that, you know, we'd have to deal with one way  
5 or another because the injunction in this case  
6 that was issued by the district court doesn't  
7 prohibit the exclusion of particular  
8 subcategories under a different memo than the  
9 blanket categorical one that's at issue in this  
10 case.

11           JUSTICE KAVANAUGH:  Thank you.

12           CHIEF JUSTICE ROBERTS:  Justice  
13 Barrett.

14           JUSTICE BARRETT:  Mr. Ho, you -- do  
15 you agree that there would be nothing wrong or  
16 there would be no legal prohibition against the  
17 President issuing a new memo articulating new  
18 bases for excluding subcategories?

19           MR. HO:  Well, the injunction in this  
20 case doesn't so preclude the President, Justice  
21 Barrett.  I -- I -- I don't know if I would  
22 commit to there being nothing wrong or it being  
23 unlawful -- not being unlawful.

24           I -- I think that we would have to see  
25 what the memo does, if it excludes people on the

1 basis of transient residence within the realm of  
2 the President's discretion, as this Court held  
3 in --

4 JUSTICE BARRETT: Let me -- let me  
5 just clarify.

6 MR. HO: Yes.

7 JUSTICE BARRETT: I didn't -- I didn't  
8 mean that the lawfulness of whatever the new  
9 memorandum said would be determined. I just  
10 meant that there would be nothing unlawful about  
11 his switching positions and articulating a new  
12 rationale for why certain categories of illegal  
13 aliens were excluded.

14 MR. HO: In that hypothetical, Justice  
15 Barrett, it wouldn't just be a new rationale.  
16 It would be an entirely new policy with a -- a  
17 different scope in addition to different  
18 reasoning. So I --

19 JUSTICE BARRETT: He could do that,  
20 right?

21 MR. HO: The injunction in this case  
22 doesn't prohibit that, that -- that's right.  
23 Now whether or not that particular policy would  
24 be lawful, I think, would depend upon the --

25 JUSTICE BARRETT: It would be -- it

1 would be a different question. As you told  
2 Justice Kavanaugh, that would be a bridge we  
3 would have to cross later, right?

4 Like, if he said, listen, it's just  
5 not feasible, we haven't been able to get the  
6 information, so this is why we're going to  
7 exclude those in ICE detention facilities, say?

8 MR. HO: Well, if the reason were  
9 simply feasibility, but the basis for exclusion  
10 were that they were undocumented and their lack  
11 of lawful status, then I think that would run  
12 into the same kind of reasoning that this Court  
13 pointed to in Shelby County. It didn't matter  
14 --

15 JUSTICE BARRETT: Right, but that --  
16 but that -- excuse me, Mr. Ho -- but, in that  
17 instance, you're saying that the policy itself  
18 would be unlawful, but you're not taking the  
19 position that he is precluded at this point from  
20 changing positions and issuing a new policy, the  
21 lawfulness of which would be a separate  
22 question?

23 MR. HO: Yes, of course, that's right,  
24 Justice Barrett --

25 JUSTICE BARRETT: Okay.

1           MR. HO: -- because the -- the -- the  
2           injunction below, you know, is specific to the  
3           policy that's been issued and its categorical  
4           nature.

5           JUSTICE BARRETT: Thank you, Mr. Ho.

6           CHIEF JUSTICE ROBERTS: A minute to  
7           wrap up, Mr. Ho.

8           MR. HO: In closing, Your Honors, no  
9           court, no Congress, and no executive branch  
10          before now has ever thought that undocumented  
11          immigrants could be excluded from the whole  
12          number of persons in each state.

13          In 1868, the Fourteenth Amendment  
14          based apportionment on person, not citizens,  
15          specifically to embrace the entire immigrant  
16          population and to secure -- to secure  
17          ratification by states with large immigrant  
18          populations.

19          And in 1929, Congress mandated  
20          apportionment on total population, the plain  
21          meaning of which does not permit exclusions for  
22          immigration status. While the President may  
23          have some discretion in borderline cases, he  
24          does not have authority to erase millions of  
25          state residents from the apportionment based

1 solely on unlawful immigration status.

2 As the Latino justice amicus brief  
3 notes, undocumented immigrants contribute \$1  
4 trillion in GDP, \$20 billion in federal taxes.  
5 Eighty percent are essential workers. One in  
6 four are homeowners and pay property taxes.

7 They're our neighbors, our coworkers,  
8 and our family members. They are usual  
9 residents under any plausible definition of that  
10 term.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Rebuttal, General Wall?

14 REBUTTAL ARGUMENT OF JEFFREY B. WALL  
15 ON BEHALF OF THE APPELLANTS

16 GENERAL WALL: Thank you, Mr. Chief  
17 Justice.

18 So, as I think appellees' responses  
19 confirm, there's no live or ripe case now. So  
20 they seem to accept that the Court should just  
21 hold for a couple of weeks. But, as you said,  
22 Mr. Chief Justice, by the time we actually run  
23 the matching and have more information, the  
24 Secretary will be ready to send his report.

25 This is all going to happen on an

1 extremely compressed time line in January. And  
2 I don't think prudential ripeness should be used  
3 to await a ripe claim that could run out the  
4 clock on the President's opportunity to send a  
5 statement to Congress.

6 On the merits, if the President can  
7 consider immigration status for any subset, then  
8 the Court needs to reverse the injunction below  
9 and take just three categories: those in ICE  
10 facilities, those who have committed crimes and  
11 are subject to final orders of removal, and  
12 those who have overstayed visas.

13 The President could decide that it's  
14 consistent with his discretion, as the memo  
15 says, to exclude those categories from the  
16 apportionment base. And the question then is:  
17 Do they have an enduring tie under Franklin?

18 They don't. They don't have a tie.  
19 We know that from Kaplan. And even if they do,  
20 it's not enduring because they can be removed.

21 The other side's test, which they  
22 haven't spent a lot of time defending today, is  
23 where you live or sleep most of the time. But  
24 that doesn't fit long-term embassy personnel,  
25 federal personnel overseas, even college and

1 boarding school students or members of Congress.

2 The test isn't just where you lay your  
3 head at night. It is, as Franklin says, where  
4 you have allegiance or an enduring tie.

5 And there's no coherent theory of  
6 political representation that says every illegal  
7 alien, no matter how little time they've been  
8 here or no matter that they are imminently  
9 facing removal, is a usual or settled resident.

10 It's the sovereign's prerogative to  
11 define the political community, as Thuraissigiam  
12 says, and the other side is left to say, look,  
13 this is just what the founders wanted. But they  
14 don't have an explanation for why the founders  
15 would have wanted it, and that should give us  
16 pause because, whatever the founders were, they  
17 were not aimless people given to purposeless  
18 structures.

19 The Court should vacate or reverse the  
20 judgment and the other judgments in the other  
21 cases and allow the Secretary to send his  
22 report.

23 Finally, to you, Justice Kavanaugh,  
24 that would open up the possibility of  
25 post-apportionment litigation in the event that



1     there is an effect on apportionment or funding.  
2     And if appellees prevail in that litigation on  
3     the basis of whatever categories are excluded  
4     and they then bring as-applied challenges, they  
5     would be asking for the same relief as in  
6     Franklin. They'd be asking for a declaratory  
7     judgment against the Secretary of Commerce to  
8     reform his Section 141 report. It would not be  
9     a declaratory judgment against the President.  
10    Franklin doesn't allow that.

11             But Utah tells us that we assume that  
12    the President will comply with that judgment.  
13    There's no reason to form a -- a -- a different  
14    assumption here. The -- the President would  
15    comply with a post-apportionment judgment.

16             In the event that litigation ever  
17    happens -- again, we think there is a real  
18    prospect that it will not -- but, if it does,  
19    there is time enough for that to happen when you  
20    have concrete injuries and you have a definitive  
21    decision from the President on which groups will  
22    be excluded from the apportionment base.

23             We ask that the Court vacate or  
24    reverse the judgment here and the judgments in  
25    the parallel cases.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 General. The case is submitted.  
3 (Whereupon, at 11:33 a.m., the case  
4 was submitted.)  
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## Official - Subject to Final Review

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<b>1</b> <sup>[7]</sup> 5:24 <b>25</b> :9,19 <b>53</b> :2 <b>80</b> :24 <b>81</b> :16 <b>82</b> :8	<b>9</b>	<b>aimless</b> <sup>[1]</sup> 95:17	<b>18</b> <b>95</b> :7
<b>10</b> <sup>[3]</sup> 20:19 <b>36</b> :11,23	<b>90</b> <sup>[2]</sup> 73:18 <b>85</b> :12	<b>AL</b> <sup>[2]</sup> 1:4,7	<b>21</b> <b>96</b> :1,22
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