No. 20-366

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Appellants*,

v.

NEW YORK, *ET AL.*, *Appellees*.

On Appeal from the United States District Court for the Southern District of New York

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Appellants

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United is a non-for-profit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a not-for-profit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). The Presidential Coalition, LLC is a IRC section 527 political organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Citizens United and Citizens United Foundation filed an *amicus* brief in this Court on March 6, 2019 in Department of Commerce, *et al.,* v. New York, *et al.*, 139 S. Ct. 2551, 204 L.Ed. 2d 978 (2019).

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[1] It is hereby certified that counsel for Petitioners and Respondents have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief as soon as practicable, but due to the expedited nature of this proceeding were not able to provide at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

COURSE OF PROCEEDING

The three-judge district court granted summary judgment to an assemblage of Democrat-controlled state and local governmental units and pro-immigration nongovernmental Plaintiffs, as well as granting declaratory relief on their statutory claims. New York v. Trump, 2020 U.S. Dist. LEXIS 165827 at *130 (Sept. 10, 2020). Additionally, the court granted a permanent injunction prohibiting all federal government Defendants, except the President of the United States, from implementing President Trump's Memorandum of July 21, 2020 which directed he would be provided the data necessary to ensure the nation's Decennial Census could be employed to exclude illegal aliens from the reapportionment of the House of Representatives. *Id*. at *129.

In his July 21, 2020 Memorandum, President Trump declared:

> For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and National Act ... to the maximum extent feasible and consistent with the discretion delegated to the executive branch. [Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, Section 2 (July 21, 2020).]

He explained the reasons for that policy:

> Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. [*Id.*]

Lastly, President Trump directed the Secretary of Commerce to provide him with information permitting him to exercise his discretion to implement that policy. *See* Memorandum, Section 3.

SUMMARY OF ARGUMENT

Before reaching the merits, the three-judge district court declined to adopt plaintiffs' claim to standing

based on the loss of seats in the House of Representatives as being speculative. *Id*. at *15.[2] But the three-judge court then ruled plaintiffs have standing based on an even more speculative ground — that the mere issuance of the President's Memorandum could somehow chill the actual enumeration of the people then being conducted. *Id*. Even if this injury once existed, it no longer supports standing, as the field work for the census is completed.

In considering the merits, the district court addressed only the statutory claims, finding that the Presidential Memorandum violated the statutory scheme in two closely related ways. First, the court believed the President was precluded from submitting two sets of population numbers to the Congress — even though that approach was required to ensure that the House of Representatives was apportioned lawfully reflecting "the People" (a constitutional term with a well-established meaning discussed in Section II.E., *infra*). New York at *103. Second, the district court ruled that the act of excluding illegal aliens violates the requirement that the "whole number of persons in each State" be used as the apportionment base. *Id*. at *121.

These *amici* disagree with the court's statutory interpretation for the reasons set out by the

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[2] The court ruled that this claim "might not satisfy the requirements of standing and ripeness," and expressed "considerable doubt" regarding this assertion of standing, but ultimately concluding "we need not, and do not, decide the issue." *Id*. at *15, *59-60.

government. *See* Jurisdictional Statement at 18-23. These *amici* also agree with the President's Memorandum that it is a valid exercise of his right to set such a policy. *See* Jurisdictional Statement at 11. However, these *amici* also contend that the President's policy was compelled by the Constitution, which requires that the House be apportioned based on a count of "the People" — not including persons found in the country in defiance of its laws. Thus, while the district court decision meets the political objectives of the Democrat-led plaintiff state and city governments in granting them extra seats in the House, and meets the pro-illegal immigration objectives of the nongovernment plaintiffs who oppose meaningful enforcement of the nation's laws, it does violence to the Constitutional scheme devised by the Framers.

In making its ruling based exclusively on the statutory claims divorced from their constitutional contexts, the three-judge court found it unnecessary to reach the constitutional issues. *Id.* at *99. Had the court carefully evaluated the constitutional scheme underlying the Decennial Census and the apportionment of the House, it would have been compelled to consider and resolve whether the Constitution permitted the People's House to be apportioned based on a count that included illegal aliens as it read the Census Act to require. Irrespective of how the matter has been handled by prior Administrations when the number of illegal aliens presented a relatively minor problem, by no means may illegal aliens be considered "inhabitants" or part of the "the People" of the United States.

If the *per curiam* opinion of the three-judge district court is left to stand, the federal judiciary will have not just usurped the President's role in conducting the nation's Decennial Census, but also directed that the composition of the House of Representatives be determined in a manner which violates Article I, Section 2, Clause 3, as modified by Section 2 of the Fourteenth Amendment.

Accordingly, these *amici* urge this Court to summarily reverse the decision of the district court, with instructions to dismiss the case. Alternatively, they urge the Court to note probable jurisdiction and set an expedited hearing schedule as requested by the Appellants.

ARGUMENT

I. THE LOWER COURT'S ERRONEOUS FINDING THAT PLAINTIFFS HAVE STANDING REQUIRES SUMMARY REVERSAL.

Applying the standard three-element standing test under Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the court below determined that the plaintiffs have standing. New York at *37-38. However, as the late Justice Ginsburg explained in Arizonans for Official English v. Arizona, 520 U.S. 43 (1997), "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id*. at 64.

The court examined both of plaintiffs' theories of injury offered to support standing. First, it refused to agree with plaintiffs that the possibility of plaintiff states losing seats in Congress based on the Presidential Memorandum could establish injury for standing. New York at *15. However, it then relied on plaintiffs' affidavits and declarations to find that the President's Memorandum would impose some kind of "chilling effect," impairing responses to the census:

> [T]he record supports a conclusion that the Presidential Memorandum has created, and is likely to create, widespread confusion among illegal aliens and others as to whether they should participate in the census, a confusion which has obvious deleterious effects on their participation rate. [New York at *47.]

By itself, any such speculative chilling effect alone would not constitute an injury. Rather, the injury claimed by the plaintiffs, and accepted by the court below, is that an undercount of certain persons could result from that chilling effect unless nongovernmental plaintiffs expend more resources to counteract so-called "misinformation" (*id.* at *51). Tellingly, the court pointed to no such misinformation in the President's Memorandum.[3] Likewise, the governmental plaintiffs claim they were forced to expend additional resources to promote participation

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[3] Plaintiffs did not put on evidence of how much of the chilling effect on census responses they claim was caused by the issuance of the Memorandum as distinguished from the publicity they generated to criticize the President for issuing it.

in the census. The court below accepted the assertions, concluding that chilling effect results in "increasing costs for census outreach programs run by NGOs and governments." New York at *48. Even if true, as field operations for the census have already ended (on September 30, 2020, unless extended by order of another court), and there is no need for plaintiffs to continue to expend any further resources on census outreach efforts.

In contesting standing, the Jurisdictional Statement properly stressed that "the redressability element requires the plaintiff to demonstrate that 'prospective relief will remove the harm' or that the plaintiff 'personally would benefit in a tangible way from the court's intervention.'" Jurisdictional Statement at 12 (citing Warth v. Seldin, 422 U.S. 490, 505, 508 (1975)). Whether the purported injury could be remedied by the court's order is even more speculative than the fact of an injury. Accordingly, the district court concluded since the relief sought included "a declaration that the Presidential Memorandum is unlawful and an injunction barring any effort to implement it," that relief "would reduce 'to some extent' their risk of suffering injuries relating to the census.... A court order invalidating the Presidential Memorandum would redress that harm [that some people will not participate in the census] in a straightforward manner." *Id.* at *88-89.

However, even if the district court's invalidation of the President's Memorandum resulted in increased participation in the 2020 Census, that would not remedy the plaintiffs' claimed injury in having

expended additional resources that would not otherwise have been required to be expended. Invalidating the Memorandum will not restore funds already expended, and there is no claim for monetary damages. Moreover, as the field enumeration has concluded, there are no further expenses to be incurred.

Lastly, the court below also found that the governmental plaintiffs will experience injury due to degradation of the census data. New York at *67-75 ("imminent injury to their sovereign interests"). The Government explains why much of the injury claimed here is moot. *See* Jurisdictional Statement at 14-15. To be sure, this Court's decision last year in Department of Commerce v. New York, 139 S. Ct. 2551 (2019), found there was an injury to states when some percentage of noncitizen households that would not respond to the census. *Id.* at 2566. Here, however, the purported injury is much more speculative, as the lower court admitted that "on the present record, the Court cannot calculate with precision the number of people that will" take steps to avoid being counted in the census. New York at *66. It concluded that "no doubt" (*id.*) that number was more than zero, but even that is a little too vague for a federal court to be asserting jurisdiction over an equal branch of government.

The district court's ruling is based on speculation stacked upon speculation. None of plaintiffs' contentions establish standing for either the governmental units or nongovernmental entities.

II. THE THREE-JUDGE DISTRICT COURT ERRONEOUSLY ASSUMED THAT THE DECENNIAL CENSUS IS REQUIRED TO COUNT ILLEGAL ALIENS.

A. The Three-Judge Court Supported Its Decision Not from the Constitution, but on a Practice that Developed under Different Circumstances and by Different Administrations.

The court opened its decision first by reciting without analysis the text of Article I, Section 2, Clause 3, and 2 U.S.C. § 2a(a) — and then by assuming that both the constitutional provision and the statute require counting illegal aliens, because that is how it has been done in the past:

> Throughout the Nation's history, the figures used to determine the apportionment of Congress — in the language of the current statutes, the "total population" and the "whole number of persons" in each State — have included every person residing in the United States at the time of the census, whether citizen or non-citizen and **whether living here with legal status or without**. [New York at *10 (emphasis added).]

The record does not appear sufficient for the district court to make such findings, but even if true, the court, focusing on practice, diverted attention away from the central legal issues: What does the Constitution require, and what authority does the

Census Act[4] confer upon the President? The court erroneously believed that the role of the President was ministerial only, giving him no discretion to provide a definition as to which persons should be considered "inhabitants." New York at *100-01. The constitutional context for the census is discussed in Section II.B., *infra*, and following, but first, note should be taken of the very different circumstances that existed when the "long-standing practice" relied on by the district court developed. New York at *10.

The Pew Research Center, whose statistics are often relied on by pro-immigrant groups, reports that the number of what they term "unauthorized immigrants" was quite small compared to the population, and thus not consequential in apportioning the House, until quite recently. For example, Pew reports there were a relatively modest 3.5 million "unauthorized immigrants" in 1990. That number exploded to 8.6 million in 2000, and grew even further to 11.4 million in 2010.[5] (Another immigration source estimated that as of last year, there were 14.3 million illegal aliens residing in the United States — more than four times the number estimated in 1990.[6]) Thus, the existence of a "long-standing practice" of Presidents not addressing a problem that then was *de*

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[4] The Census Act was most recently amended in 90 *Stat*. 2459 (Oct. 17, 1976), and is codified in Title 13 of the U.S. Code.

[5] *See* A. Budiman, *et al.*, "Facts on U.S. immigrants, 2018," Pew Research Center (Aug. 20, 2020).

[6] *See* M. O'Brien, "How Many Illegal Aliens Live in the United States?," FAIR (Sept. 2019).

minimis provides no support for continuing that same practice when the problem has become serious. As the population of illegal aliens increased dramatically, and because that population is not spread evenly over the nation, its inclusion in the base population for the 2020 apportionment presents a significant threat of distorting legislative power as reflected in the distribution of House seats among the states.

A political factor is also at work. When the number of illegal aliens first swelled in 2000, that census was conducted by the Clinton Administration, and the 2010 census was conducted by the Obama Administration. It is not speculation to conclude that neither of these Democrat Administrations had little motivation to exclude illegal aliens from the House apportionment as a strategic matter, as that would grant additional House seats to states controlled by Democrats, because the illegal alien population is concentrated in a handful of states such as New York and Illinois — both plaintiffs in this litigation, and both dominated by Democrats.

Lastly, the district court selectively focused on only one aspect of past practice, ignoring other aspects of that practice. President Trump's Memorandum described the treatment of other categories of aliens in the United States: "Aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are 'persons' [but they] have been excluded from the apportionment base in past censuses." Memorandum of July 21, 2020, Section 1. As to this practice, the district court never even tried to explain why under its decision foreign

nationals in the United States **illegally** should be counted, while foreign nationals **lawfully** in the United States are not.

B. The Constitutional and Statutory Provisions Do Not Envision, and Certainly Do Not Mandate, the Counting of Illegal Aliens.

The constitutional provisions provide for a decennial census for the purpose of "apportion[ing] among the several states ... according to their respective Numbers," and thus vested Congress with the power to direct an "actual Enumeration" — counting "the whole Number of persons in each State, excluding Indians not taxed." Art. 1, Sec. 2, cl. 3 and Fourteenth Amendment, Sec. 2. To that end, Congress enacted the Census Act authorizing the Secretary of Commerce to "take a decennial census of population as of the first day of April of such year, [requiring] the tabulation of total population by States." Department of Commerce v. U.S. House of Representatives, 525 U.S. 316, 321 (1999).

Justice Joseph Story observed that the count should be made of "inhabitants" or "the population":

> [T]he enumeration or census of the **inhabitants** of the United States shall be taken ... in order to provide for new apportionments of representatives, according to the relative increase of the **population** of the States.... The importance of this provision ... can scarcely be overvalued. It is the only

> effectual means by which the relative power of the several States could be justly represented. [1 J. Story, Commentaries on the Constitution, Section 644, p. 471 (5th ed. 1891) (emphasis added).]

Illegal aliens do not fall into the categories of "inhabitants" or "the population" as shown by the government (*see* Jurisdictional Statement at 26-28), and their being counted does not serve what the district court admitted was the "primary purpose" of the census — "to apportion congressional representatives among the States 'according to their respective numbers.'" New York at *16.

C. The Purpose of the Decennial Census.

Constrained both by (i) the purpose that representation of the States in the House of Representatives be proportionate to the populations of each State, and (ii) the requirement to determine the numbers of persons State by State, the decennial census was not designed to count willy-nilly "every person residing in the United States at the time of the census" as the district court assumes to be the practice. New York at *10. Rather, the constitutional text contemplates a count of the number of persons who constitute the "population" of each State. The district court's position disregards the central purpose of the decennial census, namely, to ensure that membership in the House of Representatives is based upon the principle of popular sovereignty that its members from each State would truly be "chosen every

second year by the **People** of the several States." *See* Art. I, Sec. 2, cl. 1 (emphasis added).

James Madison aptly concluded in Federalist 52:

> As it is essential to liberty, that the government in general should have a **common interest** with the **people**; so it is particularly essential, that the branch ... should have an immediate dependence on, and an intimate sympathy with, the **people**. [The Federalist, No. 52, p.273 (G. Carey & J. McClellan, eds.: Liberty Press 2001) (emphasis added).]

Madison's "common interest" test would not include those foreign nationals unlawfully in the country.

D. The "Persons" of the Decennial Census.

The use of the word "persons" in the Fourteenth Amendment does not support opening the floodgates to illegal aliens. Employed in the context of the constitutionally prescribed decennial census, "person" should be understood contextually — not abstractly as denoting just any human being, but relationally, with respect to the government as an "inhabitant" or "constituent." "Inhabitant" connotes a person who "dwells or resides permanently in a place,"[7] in contrast with one who is an occasional lodger or visitor. Surely the decennial census should not be counting a foreigner who is on a tourist visa who just happened to

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[7] Webster's Dictionary of 1828.

be on American soil on April 1, 2020. Likewise, an illegal alien who could be deported at any time should not be counted. *See* discussion of the more than 3.2 million aliens either in custody or likely in the process of being deported as identified by the government, Jurisdictional Statement at 29 n.4. The decennial census is designed to number "constituents," denoting that those persons who are an essential part of the political community. The district court envisions a census counting the lawful permanent resident and the trespasser alike — each to be counted as one of the population of his respective State and therefore, each to be counted in the apportionment of members of the House of Representatives for the next 10 years. This is not the kind of decennial census contemplated by the nation's founders. *See* J. Madison, Census Bill, House of Representatives 25-26, Jan.-Feb. 1790, reprinted in 2 The Founder's Constitution; item 19, p. 139, P. Kurland & R. Lerner (Univ. Chi. 1987).

E. The "People" in the Decennial Census.

Indeed, the language in the Fourteenth Amendment cannot be viewed in isolation, but must be viewed in the context of the original constitutional text to determine if a substantive change was intended by that Amendment's use of the word "persons." Immediately after vesting "[a]ll legislative power in a Congress," the Constitution of 1789 establishes that:

> The House of Representatives shall be composed of members **chosen** every second year **by the People** of the several states.... [Art. I, Sec. 2, cl. 1 (emphasis added).]

As Chief Justice William Rehnquist explained in 1990:

> **"[T]he people"** seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "**the People** of the United States." The Second Amendment protects "the right of **the People** to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved by "**the people**." See also U.S. Const., Amdt. 1 ("Congress shall make no law ... abridging ... *the right of* ***the people*** peaceably to assemble") (emphasis added).... [United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (emphasis added).]

Then, turning to the composition of the House, the Chief Justice addressed Art. I, Sec. 2, cl. 1, again italicizing the key words: "The House of Representatives shall be composed of Members chosen every second year *by* ***the People*** *of the several States* (emphasis added)" (*id.*). Based on all this, Chief Justice Rehnquist concluded:

> While this textual exegesis is by no means conclusive, it suggests that "**the people**" ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. [*Id.* (emphasis added).]

And to clarify who would not be part of that community, the Chief Justice cited United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 292 (1904), for the proposition that:

> (Excludable alien is not entitled to First Amendment rights, because "he does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of [the First, Second, Ninth, and Tenth] Amendments contrasts with the words "person" and "accused" in the Fifth and Sixth Amendments.... [Verdugo-Urquidez at 265-266.]

The Fourteenth Amendment did not denigrate the concept of citizenship, but rather was designed to clarify entitlement to national and state citizenship of the former slave class. It would be a serious mistake to assume that, solely based on the single use of the word "persons," Congress and the ratifying states intended to apportion House seats by a count of all persons, rather than a count of "the People." Indeed, even following the ratification of the Fourteenth Amendment, the 1870 census asked about the citizenship of each respondent, as well as whether the respondent's parents were foreign born, and also inquired whether the respondent was a male citizen of the United States 21 years old and older "whose right to vote is denied or abridged on other grounds than rebellion or other crime." *Id*.

CONCLUSION

Among the principal reasons the People elected President Trump was to return constitutional order to our nation's immigration policies. The district court had no business impeding the President as he works to carry out that mandate.

For the reasons stated above, the Court should summarily reverse the three-judge district court and remand with instructions to dismiss the case, or in the alternative, the Court should note probable jurisdiction.

Respectfully submitted,

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