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 EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS

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## INTEREST OF *AMICUS CURIAE*

Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For almost forty years, EFELDF has defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community and the decennial census that underlies them, EFELDF has supported efforts to ensure equality of citizen voters consistent with the written Constitution and validly enacted laws. For the foregoing reasons, *amicus* EFELDF has direct and vital interests in the issues before this Court.

## STATEMENT OF THE CASE

In the district court, several states, cities, and counties and several non-profit organizations (collectively, "Plaintiffs") sued various federal agencies and officers (collectively, the "Government") to challenge a memorandum that the President issued to establish "the policy of the United States to exclude" illegal aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *See* Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

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[1] *Amicus* files this brief with the written consent of all parties. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to the preparation or submission of this brief.

The district court granted Plaintiffs' motion for summary judgment and denied the Government's motion to dismiss. This appeal followed.

## SUMMARY OF ARGUMENT

Although *amicus* EFELDF questions the district court's jurisdiction, *amicus* EFELDF also argues that this Court potentially can reach the merits because jurisdiction intertwines with the merits.

On the merits, illegal aliens are not part of this nation's political community and – as such – do not count for the enumeration of that community for the purpose of setting representation in Congress. *See* Section I.A. The enactment of 2 U.S.C. § 2a(a) in 1929 and that Congress's rejection of an amendment to exclude *all aliens* did not close the door to the Government's excluding illegal aliens now for three reasons: (a) the difference between legal and illegal aliens is constitutionally relevant, such that the Government can treat the two differently; (b) the legislative history from 1929 shows that Congress did, in fact, distinguish between legal and illegal aliens as a general matter; and (c) the statute that Congress enacted merely adopted constitutional phrases, which therefore import the full constitutional scope absent some express basis for limiting that scope. *See* Section I.B.

On jurisdiction, an Article III case or controversy is lacking for three reasons: (a) Plaintiffs' differential-undercount injury is both too speculative and time-limited, such that any relief would become moot when the census counting stops and the Government begins to evaluate and report census data; (b) Plaintiffs' diverted-resource injury under *Havens Realty Corp. v.*

*Coleman*, 455 U.S. 363 (1982), is inapposite here because of the differences between the *Havens* statute (with a cause of action, a right to the defendant's compliance, and a waiver of prudential standing) and this statute; and (c) the lack of ripeness because there is as yet no clear indication that the Government will exclude any illegal alien or, if it does, the basis for doing so. *See* Sections II.A.1-II.A.3.

Even if Plaintiffs could clear the Article III threshold, they would nonetheless lack a cause of action for judicial review against the Government. First, with respect to the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), there is no final agency action for Plaintiffs to challenge while the Government merely evaluates the extent to which illegal aliens can be excluded. *See* Section II.B. Similarly, with respect to an "officer suit" under the *Ex parte Young*, 209 U.S. 123, 149 (1908), exception to sovereign immunity, there is no current and ongoing violation of federal law for Plaintiffs to seek to enjoin. *See* Section II.C.

## ARGUMENT

### I. THE GOVERNMENT HAS NOT VIOLATED ANY STATUTORY OR CONSTITUTIONAL REQUIREMENT.

Depending on the jurisdictional issues the Court decides to address, *see* Section II, *infra*, it could be relevant that the Government has not violated any law, either statutory or constitutional. *See Land v. Dollar,* 330 U.S. 731, 735 (1947) (federal courts must resolve jurisdictional and merits issues together when the two "intertwine"). If the Court weighs the merits, it should find that excluding illegal aliens from the

census would be within the Government's discretion. *A fortiorari*, the Government has not violated any law when it merely *evaluates* the extent to which illegal aliens may – or should or must – be excluded.

### A. Illegal aliens are not "the People" of the United States.

The Constitution requires an "actual Enumeration" every 10 years, U.S. CONST. art. I, §2, cl. 3, which Congress has directed the Secretary of Commerce to undertake "in such form and content as he may determine." 13 U.S.C. § 141(a). The census "ensure[s] fair representation of the people." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). Except for the odious three-fifths compromise, the enumeration originally excluded that era's aliens subject to the jurisdiction of different sovereigns (namely, "Indians not taxed"). Clearly, then, the constitutional phrase "person" does not include every living soul, such as diplomats, invading armies, sojourners, tourists and the like, all of which share – with illegal aliens – the defining characteristic of falling under the jurisdiction of a foreign sovereign. *See U.S. v. Wong Kim Ark*, 169 U.S. 649, 664-65, 682 (1898); *cf. McGrath v. Kristensen*, 340 U.S. 162, 177 (1950) ("if an alien is not a mere sojourner but acquires residence here in any permanent sense, he submits himself to our law and assumes the obligations of a resident toward this country") (Jackson, J., concurring).

Where the Constitution refers to "the people," it means our national political community. Excludable aliens "do[] not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law." *U.S. ex rel. Turner*

*v. Williams*, 194 U.S. 279, 292 (1904); *accord U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (same). No more than any other exercise of immigration authority, this is simply an act of sovereignty. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Nothing in the Constitution expressly provides that illegal aliens count for census purposes.

### B. Neither § 2a nor the legislative history relied on below provide an answer.

The district court found it relevant that Congress rejected Sen. Sackett's proposed amendment to exclude all aliens in 1929. *See* App. 88a. For at least three reasons, the rejection of an amendment to exclude *all aliens* is not dispositive – or even particularly relevant – here.

First, no one has proposed excluding lawful permanent residents, which the 1929 amendment would have excluded. Precedents that regulate *legal* aliens – while perhaps not always entirely *irrelevant* – are not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler v. Doe,* 457 U.S. 202, 223 (1982). Excluding only illegal aliens is an entirely different proposition than excluding all aliens.[2]

Second, the legislative history of the 1929 bill also includes instances where Members of Congress made

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[2] Moreover, the Government has in no way yet determined to exclude *all* illegal aliens. Instead, it might exclude only aliens in removal proceedings or under order of removal. The unknown scope of future Government action goes to ripeness and finality, not – at present – to the merits. *See* Sections II.A.3, II.B, *infra*.

or submitted distinctions between legal and illegal aliens. *See*, *e.g.*, 71 CONG. REC. 1603, 1832-33 (1929). Accordingly, even if Congress's rejection of the Sackett amendment were relevant, it would not establish congressional intent to include *illegal* aliens.

Third, the statute that Congress did enact merely adopts the constitutional language in statutory form. Such enactments do not import *sub silentio* a vague and unstated congressional intent to limit the scope of existing law or discretion:

> "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it[.]"

*Hall v. Hall*, 138 S.Ct. 1118, 1128 (2018) (*quoting* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)). This Court must read the 1929 enactment consistent with that principle because there is absolutely no evidence that Congress intended to limit the constitutional range of possible actions.

## II. THE DISTRICT COURT DID NOT HAVE JURISDICTION.

Before considering the merits, this Court must first consider not only its own jurisdiction but also the jurisdiction of the district court. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). When the Court does so, it could find the basis for this suit too insubstantial for a federal court to entertain:

> "All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different

> though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

*Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Under the facts of this case, the question of the finality of agency action also overlaps with the Article III issues to require this Court to remand with instructions to dismiss for lack of Article III jurisdiction.

### A. The district court lacked Article III jurisdiction.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Similarly, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). Under both principles, a plaintiff must show that it "has sustained or is immediately in danger of sustaining some direct injury" from the challenged action, and that injury must be "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (interior quotations

omitted). For three reasons, Plaintiffs cannot meet these threshold tests for bringing suit in federal court.

**1. Plaintiffs cannot show a differential-undercount injury.**

While *amicus* EFELDF does not doubt that states that lose a seat in the House of Representatives would have standing to challenge that future effect, even the district court found that possibility too speculative for Article III. *See* App. 43a. Instead, the district court tied Plaintiffs' standing to a differential undercount that purportedly will result from the Government's evaluating the extent to which a census may exclude illegal aliens. While this interest might suffice in an appropriate case, *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2566 (2019), it does not suffice here.

In this Court's most recent census case, the likely effect of a citizenship question on undercounting non-citizens was enough for the Government action to be deemed a *de facto* cause of the individual actions of third parties who would illegally decline to answer the census. *Compare id. with* 13 U.S.C. § 221(a). In that case, however, the challenged question went to the census itself, which would either have or not have the citizenship question. Here, once the census is done, the Government will or will not exclude categories of illegal aliens. Unless the census will never finish, any injunctive relief against Government's evaluating the census data will become moot when the counting ends. At that point, the Government could exclude illegal aliens, but no one would be further undercounted because the counting will have stopped.

Moreover, the data in the prior census case led the Court to assume that a statistically significant undercount would occur. Here, the undercount is not nearly as well-documented. *See* App. 48a (suggesting that the undercount would be "nonzero" and "appreciable"). But more would be required under *Dep't of Commerce*, 139 S.Ct. at 2566, even if any injunctive would not become moot once the Government completes the census counting and begins to evaluate the data and any exclusions.

Insofar as federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), this Court should find a lack of Article III standing with respect to the differential-undercount injury that Plaintiffs allege.

**2. Plaintiffs cannot show a diverted-resource injury.**

The district court found standing for diverted-resource injuries for organizational Plaintiffs, App. 55a, but voluntary expenditures are self-inflicted injuries that do not – in normal circumstances such as this case – provide standing. *Clapper. v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013) (self-censorship due to fear of surveillance insufficient for standing); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (financial losses state parties could have avoided insufficient for standing). While this type of standing is said to derive from *Havens*, "[t]he problem is not *Havens*[; the] problem is what [lower-court] precedent has done with *Havens*." *People for the Ethical*

*Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., *dubitante*). Because the statutes here are unlike the statute in *Havens*, *Havens* does not apply.

*First*, the *Havens* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right[,] … the alleged deprivation of [such rights] can confer standing." *Warth v. Seldin,* 422 U.S. 490, 514 (1975). Under a typical statute, by contrast, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

*Second*, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information given in violation of the statute). By contrast, under the census statutes (or any typical statute), there are no rights even *remotely* related to a third-party organization's discretionary spending.

*Third*, and most critically, relying on *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens* held that the Fair Housing Act at issue there extends "standing under § 812 … to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in

suits brought under that section." 455 U.S. at 372. Thus, in that case, the standing inquiry reduced to a question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* When a plaintiff – whether individual or organizational – sues under a statute that *does not eliminate prudential standing*, that plaintiff cannot bypass the zone-of-interests test or other prudential limits on standing.[3] Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests.

**3. Plaintiffs' claim is not ripe.**

Insofar as the Government has not yet decided to exclude anyone, Plaintiffs have sued prematurely for an injury based on the exclusion of illegal aliens. The exclusion "may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300. Even the district court recognized that. App. at 43a. Instead, the district court relied on the Government's planned evaluation triggering a differential undercount and the expenditure of Plaintiffs' resources. Since neither of those injuries is cognizable, *see* Sections II.A.1-II.A.2, *supra*, Plaintiffs lack a ripe Article III dispute.

[3] For example, applying *Havens* to diverted resources in *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (R.B. Ginsburg, J.), then-Judge Ginsburg correctly recognized the need to ask whether those diverted resources fell within the zone of interests of the Age Discrimination Act. 789 F.2d at 939.

### B. No final action has occurred for APA review.

Assuming *arguendo* that Plaintiffs could meet the zone-of-interests test,[4] the APA still would not provide review because the Government has not taken final agency action and no statute makes the Government's action reviewable now:

> *Agency action made reviewable by statute* and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704 (emphasis added). Because no statute provides "special statutory review," the APA requires finality for judicial review. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980).

As this Court has explained, finality requires the decisionmaking process's *consummation*:

> The bite in the phrase "final action" … is not in the word "action," which is meant to cover comprehensively every manner in which an agency may exercise its power. It is rather in the word "final," which requires that the action under review mark the consummation of the agency's decision-making process.

*Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (interior quotations omitted). The President's direction to agencies to evaluate an issue is not final action under that test. *Cf. Lujan v. Nat'l Wildlife*

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[4] Like the standing inquiry, the APA includes the zone-of-interest test as part of showing that the plaintiff is aggrieved within the meaning of the relevant statute. 5 U.S.C. § 702.

*Fed'n*, 497 U.S. 871, 891-92 (1990) (discussing ripeness in the context of the application of agency rules). Without final action (or special statutory review), there is no APA review.

### C. Plaintiffs lack both the direct injury and the ongoing violation of federal law required for equity review.

With APA unavailable, a plaintiff with a direct injury may sue in equity to enjoin an ongoing violation of federal law. Here, however, Plaintiffs lack both a direct injury and an ongoing violation to enjoin.

First, to sue in equity, Plaintiffs need more than an interest that would – or at least *could* – suffice to confer standing under the APA. Instead, an equity plaintiff or petitioner must invoke a statutory or constitutional *right* for equity to enforce, such as life, liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or its federal equivalent in the Fifth Amendment. *See*, *e.g.*, *U.S. v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. at 149 (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by [government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Plaintiffs' claimed injuries here fall short of what equity requires.

Unlike the APA and this Court's liberal modern interpretation of Article III, pre-APA equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right."

*Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Without that elevated level of direct injury, there is no equity review:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

*Id.* (alterations, citations, and interior quotation marks omitted); *cf. Blessing v. Freestone,* 520 U.S. 337, 340 (1997) ("to seek redress through §1983, [plaintiffs] must assert the violation of a federal *right,* not merely a violation of federal *law*") (emphasis in original); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) ("§1983 permits the enforcement of '*rights,* not the broader or vaguer 'benefits' or 'interests'") (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002)) (emphasis in *Gonzaga*). In short, Plaintiffs would not have an action in equity even if they suffer Article III injury from the President's memorandum *de facto* causing third parties to not respond to the census. The statutes on which Plaintiffs rely do not confer rights that a plaintiff can enforce in equity.

Second, the officer-suit exception to sovereign immunity requires an *ongoing* – that is, current – violation of federal law for a plaintiff to sue in equity. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985). A hypothetical future violation does not suffice. *Morales v. TWA*, 504 U.S. 374, 382 (1992). For the Government to evaluate the extent to which it has discretion to exclude illegal aliens from the census does not itself violate any federal laws.

For both reasons, Plaintiffs cannot sue federal officers in equity prior to an APA action's arising, if indeed those officers ever take final agency action that Plaintiffs oppose.

## CONCLUSION

For the foregoing reasons and those argued by the Government, the Court should reverse the district court's judgment.

October 30, 2020

Respectfully submitted,

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