

No. 20-366

In the Supreme Court of the United States

◆

DONALD J. TRUMP,
President of the United States, et al.,
Appellants,

v.

STATE OF NEW YORK, et al.,
Appellees.

◆

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

◆

**BRIEF OF FORMER DIRECTORS OF THE
U.S. CENSUS BUREAU KENNETH PREWITT,
VINCENT P. BARABBA, AND ROBERT M. GROVES AS
AMICI CURIAE
IN SUPPORT OF APPELLEES**

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November 16, 2020

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INTEREST OF AMICI CURIAE¹

Amici curiae are three former Directors of the U.S. Census Bureau who served under both Democratic and Republican administrations: Kenneth Prewitt, Vincent P. Barabba, and Robert M. Groves.²

Amici's collective experience in that position spans decades. They took part in planning and conducting the decennial census, post-enumeration survey, and the American Community Survey, as well as other surveys regularly administered by the Census Bureau. The former Directors therefore have unique expertise in the practices of the Census Bureau and the research and testing processes and procedures required to conduct an accurate, high-quality census. They write to assist the Court by describing the practices of the Census Bureau, which support the appellees' construction of the constitutional and statutory provisions at issue in this case, and the harm to the Bureau's nonpartisan mission that appellants' plan to implement the Memorandum³ at issue would cause.

¹ Pursuant to Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of amicus briefs.

² Former Director John Thompson (2013 - 2017) was unable to join this amicus brief because he was an expert witness in this litigation.

³ Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (July 23, 2020).

SUMMARY OF ARGUMENT

This Court should interpret the constitutional and statutory provisions at issue in this case in light of the longstanding practice of the U.S. Census Bureau and its predecessor entities and officials, which is to count each person who resides in each State, regardless of lawful immigration status. The President’s Memorandum sharply departs from that settled practice and would harm the nonpartisan Census Bureau and its mission to provide relevant, accurate, objective, and trusted statistical information to the public.

ARGUMENT

I. The Census Bureau’s Settled Practice Is to Count Each Person for Purposes of Apportionment, Regardless of Immigration Status

The goal of the 2020 census is to count “every person” who resides in the United States “once, only once, and in the right place.”⁴ The Bureau counts people who live here, not people who should or should not live here under the immigration law.

The Census Bureau’s understanding of its mission flows from its longstanding interpretation of the constitutional and statutory provisions at issue in

⁴ Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018); U.S. Dep’t of Commerce, Bureau of the Census, *2020 Census Operational Plan* 5 (Dec. 31, 2018), <https://bit.ly/3eHX4E3>.

this case.⁵ Those provisions require the Bureau to count all residents, regardless of immigration status, for purposes of apportionment.⁶ Census Bureau Directors have consistently—over the course of decades and under both Republican and Democratic administrations—reaffirmed that understanding.

As former Director John Keane testified before a Senate subcommittee in 1985, “[t]raditional understanding of the Constitution and the legal direction provided by the Congress has meant that for every census since the first one in 1790, we have tried to count residents of the country, regardless of their status.”⁷ Director Keane continued: “The Census Bureau has never sought to count separately the number of undocumented aliens in the United States as a discrete group or to differentiate

⁵ See 83 Fed. Reg. 5526.

⁶ See *Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (noting Bureau’s argument “that it is constitutionally required to include all persons, including illegal aliens, in the apportionment base”); *Enumeration and Residence Rules for the 1990 Census*, 1990 Decennial Census Policy Memorandum No. 12, U.S. Dep’t of Commerce, Bureau of the Census, at 13 (1987) (“The Census Bureau’s traditional understanding of the Constitution and statutory law concerning the census is that it must attempt to count all residents, regardless of legal status. Throughout the past 20 censuses we have followed this traditional understanding of the Constitution.”).

⁷ *Enumeration of Undocumented Aliens in the Decennial Census: Hearing before the Subcomm. on Energy, Nuclear Proliferation, and Gov’t Processes*, S. Comm. on Governmental Affairs, 99th Cong. 19 (1985) (statement of John Keane, Director, U.S. Census Bureau).

respondents in any way based on the legality of residence in the United States.”⁸ Likewise, in 1989, the Under Secretary of Commerce for Economic Affairs testified that “[t]he United States Department of Commerce stands by our existing policy of counting all persons in the 1990 Decennial Census,” *i.e.*, regardless of immigration status.⁹

The Bureau’s planning for the 2020 census incorporated and relied upon the same understanding of the law and practices that guided past administrations. In its statement of the final 2020 census residence criteria, the Bureau reiterated that citizens of foreign countries living in the United States are counted “at the U.S. residence where they live and sleep most of the time.”¹⁰ The Bureau has applied its residence or “place of abode” criteria consistently since the very first census in 1790.¹¹

The history of the census that was before the Court last Term further illustrates the point. The Court observed in *Department of Commerce v. New York* that “[e]very census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of

⁸ *Id.* at 20.

⁹ *Census Equity Act: Hearing on H.R. 2661 before the Subcomm. on Census & Population, H. Comm. on Post Office & Civil Serv.*, 101st Cong. 68 (1989) (statement of Michael R. Darby, Under Sec’y of Commerce for Econ. Affairs).

¹⁰ 83 Fed. Reg. 5533.

¹¹ *Enumeration and Residence Rules for the 1990 Census*, 1990 Decennial Census Policy Memorandum No. 12, *supra*, at 2.

birth.” 139 S. Ct. 2551, 2561 (2019). But the Bureau and its predecessor entities and officials counted noncitizens and foreign-born persons during this same time period for purposes of apportionment if they lived in the United States, regardless of their answers to those questions.¹²

For instance, in 1820, the census survey asked the head of household for the “Number of foreigners not naturalized,” and in subsequent years, the census survey asked questions about place of birth, naturalization status, first language, and number of years residing in the United States.¹³ But in none of those censuses did the respondents’ answers operate to exclude them from the apportionment base. Moreover, between 1960 and 2000, only about one-fourth to one-sixth of the population was asked a citizenship question (*Dep’t of Commerce*, 139 S. Ct. at 2561), demonstrating that the Bureau had no intent to ascertain the legal status of all counted persons and exclude them if they were removable under the immigration law.

The longstanding implementation of the constitutional and statutory provisions at issue here

¹² See *Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration’s Unconstitutional Attacks: Hearing before the H. Oversight Comm.*, 116th Cong. (July 29, 2020) (statement of Robert M. Groves, Former Director, U.S. Census Bureau (2009-2012)) (“This goal, a complete enumeration of all persons resident in the country has been the basis of all censuses since 1790. It has been the basis of reapportionment decade after decade.”).

¹³ U.S. Dep’t of Commerce, Bureau of the Census, Index of Questions, <https://bit.ly/2GX5Stn> (follow links for years).

is a “practice of the government” that represents an “exposition of the constitution.” *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819). Rarely does an executive agency’s history and practice so directly follow from and reflect a constitutional command. This longstanding “practice of the government” can inform this Court’s determination of what the law is. *NLRB v. Canning*, 573 U.S. 513, 525 (2014). And it should.

II. In Accordance with Its Settled Practice, the Census Bureau Did Not Design and Plan the 2020 Census to Count Persons with Unlawful Immigration Status

Enumerating the population in a country as large, diverse, and transitory as the United States is difficult. Thus, planning for the decennial census begins years in advance, such that the modern Census Bureau works on two censuses at the same time: the last one and the next one.¹⁴ The Census Bureau began planning for the 2020 census as part of the 2010 census.¹⁵

Both law and sound statistical practice required the Census Bureau to design and plan the census years before the actual enumeration date, *i.e.*, April 1, 2020. For example, state officers or entities

¹⁴ Margo J. Anderson & Stephen E. Fienberg, *Who Counts? The Politics of Census-Taking in Contemporary America* 191 (Russell Sage Foundation 2001).

¹⁵ American Statistical Association, *2020 Census Quality Indicators: A Report from the American Statistical Association* 17 (2020), <https://bit.ly/3eJApHr>.

with responsibility for redistricting may submit a plan to the Secretary requesting tabulations of population for specific geographic areas no less than three years before the census date. 13 U.S.C. § 141(c). And the Secretary “shall furnish” criteria to such officers and entities for development of their plans no less than four years before the enumeration date. *Ibid.*

In addition, the Secretary “shall” determine and report to Congress his determination of subjects and questions to be covered by the decennial census no less than three years and two years in advance of the census date, respectively. 13 U.S.C. § 141(f)(1)-(2). The Secretary may depart from these determinations only if he finds that “new circumstances” require a modification to the census, and he must report that determination to Congress as well. 13 U.S.C. § 141(f)(3); *Dep’t of Commerce*, 139 S. Ct. at 2573.

These statutorily-required determinations and reports to Congress and state officers are the culmination of years of rigorous planning and testing, not the beginning. As an overview, to conduct the census, the Census Bureau:

(1) Identifies addresses or locations where people could live. The Bureau compiles a master address file and then canvasses the addresses using satellite imagery, administrative records, and in-field visits to occupied addresses, group-living quarters, and transitory locations. The Bureau began testing its

address/contact data no later than 2013 and concluded this testing in 2018.¹⁶

(2) Counts the population. The Bureau distributes cards inviting Internet responses to the census survey and printed questionnaires, which it collects and processes. It sends enumerators to addresses that have not responded (non-response follow-up, or NRFU) or are otherwise difficult to contact or count. The Bureau began testing these enumeration components in 2012 and largely concluded this testing in 2018.¹⁷

(3) Reviews, analyzes, and reports the census results to the President, the States, and the public. The Bureau reviews the collected data to identify duplicate, miscoded, incomplete, or conflicting responses, misstatements, or other items that could affect the accuracy of the data. It tabulates the population data for use in apportionment, redistricting, and public consumption.¹⁸

In 2018, as the end of the decade and enumeration date neared, the Bureau conducted an extensive, “end-to-end” test to validate its operations, procedures, systems, and infrastructure together. The test had a census date of April 1, 2018, and was conducted in Providence County, Rhode Island.¹⁹ The 2018 end-to-end test marked the finalization of the

¹⁶ U.S. Dep’t of Commerce, Bureau of the Census, *2020 Census Operational Plan* 34-51, 91-93 (2018), <https://bit.ly/3eHX4E3>.

¹⁷ *See id.* at 34-51, 132.

¹⁸ *See id.* at 132-34, 139-43.

¹⁹ *See id.* at 48-49.

census design process, to be followed only by performance testing, defect resolution testing, and limited NRFU testing.²⁰

Throughout this entire decade-long process of planning, preparing, testing, and refining the 2020 census, the Bureau never planned or tested a design or process for ascertaining the lawful immigration status of each person in each State. To the contrary, as the Bureau's public operational plans reflect, the apportionment population includes "the U.S. resident population plus the counts of federally affiliated overseas population and their dependents living with them."²¹ The Bureau calculates apportionment of seats in the House of Representatives based exclusively on the population of the States.²²

In March 2018, shortly after the Bureau had *concluded* its end-to-end testing, the Secretary announced that he would place a citizenship question on the 2020 census form for purposes of enforcing the Voting Rights Act. *Dep't of Commerce*, 139 S. Ct. at 2562. With the benefit of proper research, planning, tests demonstrating that asking about citizenship would not erode participation rates and the quality of census data, and a non-contrived rationale for asking

²⁰ U.S. Dep't of Commerce, Bureau of the Census, *2020 Census Operational Plan, Executive Summary* 17-20, 51 (Feb. 2018), <https://bit.ly/3lajDUq>.

²¹ U.S. Dep't of Commerce, Bureau of the Census, *2020 Detailed Census Operational Plan for: Data Products and Dissemination Operation* 28 (Jan. 10, 2019), <https://bit.ly/3lghFC2>; *see also id.* at 20-21, 28-30.

²² *See id.* at 28-35.

the question, the Secretary might have placed that question on the census survey. But those elements were not present, and the 2020 census survey form ultimately did not include a citizenship question. Thus, the census responses themselves provide no basis for excluding survey respondents from the apportionment base.

Because the Census Bureau endeavors to count each person in each State, it has not designed or tested a methodology for excluding people from the census based on immigration status. And given that the census for 2020 is nearly complete, the Bureau lacks sufficient time to develop a reliable and scientific methodology for excluding persons based on immigration status from the 2020 apportionment. Any such undertaking would be complex and require careful study and testing to meet the Bureau's rigorous standards.

For example, one could estimate the number of persons with unlawful immigration status by estimating (1) the total number of foreign-born persons in the United States and (2) the number of such foreign-born persons who are lawfully present in the United States. The difference between the two would be an estimate of the number of persons with unlawful immigration status.²³ But just as counting all persons in each State requires careful design and testing, so would estimating (1) and (2) above.

²³ See, e.g., Jeffrey S. Passel, *Measuring Illegal Immigration: How Pew Research Center counts unauthorized immigrants in the U.S.*, Pew Research Center (July 12, 2019), <https://pewrsr.ch/3ph8inQ>.

A commonly-used tool for estimating the number of foreign-born persons in the United States is the American Community Survey (ACS), which the Census Bureau has sent to a sample of addresses on a rolling basis every year since 2005.²⁴ The ACS asks whether each person at the responding address was born in the United States and, if not, whether the person is a U.S. citizen.²⁵ The ACS does not ask whether persons are lawfully admitted or present in the United States.

The ACS data concerning place of birth and citizenship are subject to sampling error, coverage error, and response error.²⁶ Moreover, the ACS sample data represent rolling averages from the past, not the number of foreign-born persons in the United States on the enumeration date.²⁷ Thus, if the foreign-born population in a State is growing or

²⁴ U.S. Dep't of Commerce, Bureau of the Census, American Community Survey, Design and Methodology, at 1, 32 (Jan. 2014), <https://bit.ly/2K2GRhP>.

²⁵ *See id.* at 72; *see also* U.S. Dep't of Commerce, Bureau of the Census, Questionnaire Archive, <https://bit.ly/38IkOqM> (online archive of ACS questionnaires by year).

²⁶ *See, e.g.*, Katherine Nesse & Mallory L. Rahe, *Conflicts in the Use of the ACS by Federal Agencies Between Statutory Requirements and Survey Methodology*, 34 *Population Research and Policy Review* 461, 464 (2015), www.jstor.org/stable/43671628; Jennifer Van Hook & James D. Bachmeier, *How well does the American Community Survey count naturalized citizens?*, 29 *Demographic Research* 1, 7-9 (2013), www.jstor.org/stable/26348145.

²⁷ *See* Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 *U.C. Davis L. Rev.* 1395, 1409-10 (2017).

declining, the ACS could under- or over-estimate that population, even after taking various survey-based errors and biases into account. The Bureau would have to account for these factors if it wanted to use ACS data in this way.

Even assuming the Bureau could surmount these challenges in time to implement a different method of counting for apportionment than it has used previously, however, statutory law bars the Secretary from using “sampling” to determine the population for purposes of apportionment. 13 U.S.C. § 195; see *Dept’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999). Congress’s ban on “sampling” for apportionment purposes, which precludes estimation of the unlawful-status population based on the method described above, is yet another indication that Congress never intended to base apportionment on the number of persons with lawful immigration status.

Counting persons with unlawful immigration status (as opposed to sampling and estimating) would also present challenges that the Bureau would have to address. Some administrative records show citizenship status, as when the government requires proof of citizenship to obtain a passport, employment, or government benefit.²⁸ The most comprehensive database of citizenship status is Census Numident, which is a record of applications for social security

²⁸ See J. David Brown et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census*, at 12 (Aug. 2018), www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf.

cards and corresponding social security numbers.²⁹ But not all U.S. citizens and lawful permanent residents have a social security number, and therefore matching census records to Numident records would exclude persons with lawful status.³⁰ Missing or misreported data would cause additional failures to match a person who counted for the census with an administrative record reflecting his or her legal status.³¹ Thus, any count that relies solely on proof of citizenship in existing administrative records would undercount the citizen population, especially those communities that are less likely to obtain proof of citizenship or accurately report their citizenship status.

In accordance with its settled practice to count each person in each State, regardless of immigration status, the Census Bureau has not designed or planned a methodology to use administrative records to count the number of persons with unlawful immigration status, much less has it published any such methodology for evaluation by other experts and census stakeholders. This means that the President would be deploying his own methodology, and not one that the Census Bureau has adequately reviewed or tested. That procedure would be unique in American census history and contrary to the settled practice of the Bureau and past presidential administrations. This sharp break from past practice is another

²⁹ *See id.* at 12-13.

³⁰ *See id.* at 19.

³¹ *See ibid.*

reason to conclude that the President’s construction of his own authority under the Constitution and statutes at issue here is incorrect.

III. The President’s Rushed Effort to Change the Law and Practice of the Census Bureau Would Cause Lasting Harm to the Bureau and Its Mission

Congress created a permanent Census Bureau in 1902 to develop and deploy scientific and statistical methods for counting the population.³² Today, it is a federal statistical agency, which means that its work must be relevant, accurate, objective, and trusted.³³

As a federal statistical agency, “neither the culture nor the competencies of the Census Bureau are suited to advancing a partisan agenda.”³⁴ It has thousands of employees, but only one, the Director, is a presidential appointee.³⁵ Although the Director is a “political” appointee in the sense that the President appoints him or her, the President and Senate must appoint, advise, and consent “without regard to political affiliation” and the individual they nominate

³² Act of Mar. 6, 1902 (To provide for a permanent Census Office), Pub. L. No. 57-27, 32 Stat. 51.

³³ Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units, 79 Fed. Reg. 71610, 71614-16 (Dec. 2, 2014).

³⁴ Kenneth Prewitt, *What is political interference in federal statistics?*, 631 Annals Am. Acad. Pol. & Soc. Sci. 225, 232 (Sept. 2010).

³⁵ 13 U.S.C. § 21.

and confirm must have “experience in the collection, analysis, and use of statistical data.”³⁶

As these statutes reflect, the Census Bureau cannot fulfill its nonpartisan mission without the public’s trust and cooperation.³⁷ The Bureau depends upon the voluntary work of millions of Americans to complete and return census survey forms honestly and completely. If a significant portion of the public lost faith that the Bureau would maintain the confidentiality of their responses or use them to advance partisan objectives, the consequences would be disastrous for the accuracy of the enumeration and apportionment in 2030 and beyond. The Census Bureau has worked to build public trust for decades; once lost, it would not easily be restored.

For example, to engender public trust, the Census Bureau publicly discloses its plans, methods, and results. As relevant here, “[f]or 50 years the Bureau has publicly announced the apportionment numbers nearly simultaneously with transmittal to the President (who in turn has immediately made them available to the Congress).”³⁸ In this way, the Census

³⁶ 13 U.S.C. § 21(a)(1)-(2).

³⁷ The Census Bureau is a widely trusted institution. A large majority, 78% of those surveyed in January 2020, said that they “definitely or probably” would participate in the 2020 census. Pew Research Center, *Intention to Participate in Census*, <https://pewrsr.ch/38G6v68>.

³⁸ *Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration’s Unconstitutional Attacks: Hearing before the H. Oversight Committee*, 116th Cong. (July 29, 2020) (statement of Kenneth Prewitt, Former Director of the U.S. Census Bureau (1998-2001)).

Bureau demonstrates that the American people are the source of the census and have full rights to know the resulting apportionment of representatives in Congress. And they can have confidence that the enumeration is what the Constitution and Congress direct, not the output of a political party.

The President's Memorandum ends this tradition of transparency by requiring the Secretary to provide "information" that will permit the President to exercise his "discretion."³⁹ Because the Bureau cannot implement the Memorandum in time to provide a statistically valid enumeration of persons who have lawful immigration status, it is not clear what "information" the Secretary would provide or how the President would unilaterally apportion the representatives, although the Memorandum indicates that the President would reallocate "two or three" congressional seats from California to other States.⁴⁰

The President and Secretary concede in their principal brief here that they either have no methodology for excluding persons with unlawful immigration status or refuse to disclose their plan, arguing that the extent of any such exclusion is "unknown." Brief for Appellants 11, 14, 19. At the same time, however, appellants claim "virtually unlimited discretion as to what data will be used" in each State for apportionment. *Id.* at 12, 22. And they

³⁹ Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679, 44680 (July 23, 2020).

⁴⁰ *Ibid.*

promise to exclude *some* number of persons from the apportionment; only the “size” and “extent” of their planned exclusion is unknown or concealed. *Id.* at 11, 19. Appellants’ refusal to disclose any apportionment methodology, combined with their broad assertion of nearly unlimited discretion, guarantees that their planned apportionment based on the Memorandum would be, or at least would be perceived to be, just a standardless partisan exercise.

Abandoning the actual enumeration that the Constitution and statutes prescribe in favor of one administration’s partisan program would severely impair the Census Bureau’s ability to provide relevant, accurate, objective, and trusted information for many years to come. Because of these impairments and the Memorandum’s violation of settled law and practice, the district court rightly enjoined the President’s effort to transform the census into a matter of executive discretion on the eve of the apportionment.

CONCLUSION

This Court should affirm the judgment of the district court.

Dated: November 16, 2020

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