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 OF PROFESSOR ANDREW REAMER, Ph.D.,
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

Lee T. Friedman
D. Hunter Smith
   Counsel of Record
Anna L. Deffebach
Courtney Millian
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER &
SAUBER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500
hsmith@robbinsrussell.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—CONTINUED

Page(s)

BRIEF OF PROFESSOR ANDREW REAMER, Ph.D., AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE[1]

Amicus Andrew Reamer, Ph.D., is a research professor at the George Washington Institute of Public Policy at the George Washington University. His research concerns the federal statistical system, including the role of the decennial census in allocating federal funding. Amicus has a personal and professional interest in the integrity of that system. He submits this brief to provide the Court with information and analysis on how the decennial census is used to allocate federal funding among the States.

Amicus is a member of the U.S. Bureau of Economic Analysis (BEA) Advisory Committee, of the U.S. Department of Labor's Workforce Information Advisory Council and of the Statistics Committee of the National Association for Business Economics (NABE). The NABE Statistics Committee meets three times yearly with the directors of the U.S.

---

[1] All parties have provided blanket consent to the filing of amicus briefs. No party or counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Amicus's research and analysis has been supported by a monetary contribution from the Ford Foundation. Amicus submits this brief solely as an individual and not on behalf of the institutions with which he is affiliated.

Census Bureau, the U.S. Bureau of Labor Statistics (BLS), and BEA. Amicus serves as staff to the Committee on Economic Statistics of the American Economic Association. Amicus is also a former chair and member of the BLS Data Users Advisory Committee and a former member of the U.S. Department of Commerce National Advisory Council on Innovation and Entrepreneurship. He holds a Ph.D. in Economic Development and Public Policy and a Master of City Planning from the Massachusetts Institute of Technology as well as a Bachelor of Science in Economics from the Wharton School of the University of Pennsylvania.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the conclusion of the decennial census, the Secretary of Commerce has traditionally presented the President with a single "tabulation of total population by States." 13 U.S.C. § 141(b). That tabulation is "required for the apportionment of Representatives in Congress," *id.*, and is the only tabulation that the Secretary is statutorily required to report as part of the decennial census.

President Trump's July Memorandum directs the Secretary to exclude undocumented immigrants from that tabulation. *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the "July Memorandum"). If the Secretary follows through on that instruction, it may affect the allocation of federal funding to plaintiff States.

Several federal programs require funding to be allocated based upon the results "certified," 16 U.S.C. § 669c(c)(3), "stated," 49 U.S.C. § 47114(d), or

"reported," 52 U.S.C. § 20901(d), by the decennial census. Such phrases have always been understood to refer to the apportionment tabulation reported to the President, because it is the only tabulation that the Census Act requires to be made or reported as part of the decennial census. Changes to the apportionment tabulation, as directed by the July Memorandum, may therefore affect the allocation of federal funding under these statutes.

The States that would lose federal funding are those with a higher-than-average percentage of undocumented immigrants in their population. Eleven States that can be expected to lose funding are plaintiffs here.[2]

ARGUMENT

EXCLUSION OF UNDOCUMENTED IMMIGRANTS FROM THE CENSUS APPORTIONMENT TABULATION MAY CAUSE SEVERAL APPELLEES TO LOSE FEDERAL FUNDING

1. "The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States . . . ." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019). Hundreds of federal programs use census-derived data to allocate and distribute funds to state and local governments, households, businesses, and nonprofit organizations.[3]

---

[2] Because the District of Columbia is treated as a State for purposes of most federal funding formulas, this brief's references to "States" include the District.

[3] *See, e.g.*, 20 U.S.C. §§ 1411, 2321, 6611, 6333-37; 29 U.S.C. §§ 730, 2852; 34 U.S.C. § 20103; 42 U.S.C. §§ 300x-

The formulas for allocating such funds among the States vary by program. For the vast majority of such programs, however, Congress appropriates a fixed number of dollars, and then census-derived data determine the share of that funding that each State receives. In other words, Congress appropriates a finite pie of federal funds, and then federal agencies use data from the census to divide that pie among the States according to statutory and regulatory formulas.

2. At the conclusion of each decennial census, the Secretary of Commerce must "report[]" to the President a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress." 13 U.S.C. § 141(b). This tabulation is the only data that the Secretary is statutorily required to report as part of the decennial census. In colloquial shorthand, it is often referred to simply as "the census."

In a departure from past practice, President Trump's July Memorandum directs the Secretary of Commerce to report two tabulations. First, the Memorandum directs the Secretary 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," and to report that tabulation to the President. July Memorandum, 85 Fed. Reg. at 44,680. Then, the Memorandum directs that the Secretary "also include" in his "report information tabulated according to the methodology set forth in *Final*

33, 502, 1396d(b), 1397b, 1397ee(d)(2), 1397dd, 3024, 5306, 9835, 9858m; 49 U.S.C. § 5336; 7 C.F.R. § 246.16; 42 C.F.R. § 423.910; 45 C.F.R. §§ 98.55, 1356.60(a)(2).

2020 Census Residence Criteria and Residence Situations, 83 [Fed. Reg.] 5525 (Feb. 8, 2018)," *id.*—that is, a tabulation prepared according to the traditional methodology that would count individuals regardless of their immigration status. The Acting Solicitor General has since confirmed that "[t]he Memorandum directs the Secretary to submit to the President two tabulations." U.S. Br. 4.

Because the Secretary of Commerce has traditionally reported only one tabulation of statewide population counts, there is significant ambiguity as to how Appellants will—or even can—use the two tabulations that the Secretary has been directed to report. Though Appellants intend to use the tabulation excluding undocumented immigrants for purposes of apportioning Representatives, it is not clear that they can, or will, limit its use to only that purpose. Indeed, Appellants have themselves referred to that apportionment tabulation (i.e., the one excluding undocumented immigrants) as "the census." *E.g.*, J.S. 19; U.S. Br. 29. The census is used for more purposes than just congressional apportionment; thus, Appellants' statements underscore the possibility that the new apportionment tabulation may be used for some or all of these other purposes.

3. The new apportionment tabulation may affect the allocation of federal funding among the States.

Some federal programs must, by statute, geographically allocate funds based on the decennial census. The statutes for these programs provide that funds must be allocated, for example, on the basis of "the latest decennial census for which figures are available, as certified by the Secretary of Commerce," 16 U.S.C. § 669c(c)(3), "the population stated in the latest decennial census," 49 U.S.C. § 47114(d), or

calculations based on data "as reported in the most recent decennial census," 52 U.S.C. § 20901(d); 52 U.S.C. § 21002(b) (same). Other statutes use other, similar phrases that expressly refer to the figures or data reported by the "decennial census."[4]

The July Memorandum may affect the allocation of federal funds under these programs. The Census Act requires only one tabulation to be calculated and reported as part of the decennial census: the tabulation to be used for "the apportionment of Representatives in Congress." 13 U.S.C. § 141(b). Other tabulations—such as the second, more inclusive tabulation that the July Memorandum directs that the Secretary "also include"—do not have any official status under the Census Act.

Because the apportionment tabulation is the only official tabulation, statutes that require federal funds to be allocated on the basis of the decennial census may require that funds be allocated on the basis of the apportionment tabulation. In other words, when

---

[4] *See also* 34 U.S.C. § 21116(a)(2)(B)(ii)(I) (requiring funding formula to consider "[t]he population of each State, as determined by the most recent decennial census"); 7 U.S.C. § 361c(c)(2) (allocating funding based on rural and farm population of States "as determined by the last preceding decennial census"); 7 U.S.C. § 2663(b)(4) (same); 49 U.S.C. § 5305(d), (e) (same for urbanized areas); 49 U.S.C. § 5311(c)(3)(B)(iii) (same for rural population). A larger number of federal programs apportion federal funds based on population or other demographic variables, without expressly stating that the relevant variable must be the one reported by the decennial census. *E.g.*, 34 U.S.C. § 20103(a)(3)(B). The analysis in this brief does not pertain to those programs.

Congress refers to the population "certified," 16 U.S.C. § 669c(c)(3), "stated," 49 U.S.C. § 47114(d), or "reported," 52 U.S.C. § 20901(d), by the "decennial census," it is presumably referring to the only population tabulation that is officially "reported" as part of the decennial census, 13 U.S.C. § 141(b), that is, to the apportionment tabulation.

After all, when Congress allocates federal funds among the States on the basis of the decennial census, it is resolving fraught questions by reference to a specified, objective standard. It is quite improbable that, in selecting such a standard, Congress nonetheless intended to afford agencies unbounded discretion to pick and choose between official and unofficial census tabulations to use when allocating funds.

4. Simple arithmetic dictates which States would, as a general matter, lose federal funds if undocumented immigrants were excluded from the statewide population counts used to allocate federal funds. Because the overall amount of funding for any federal program is generally fixed by a congressional appropriation, whether a State would gain or lose funding as a result of the exclusion of undocumented immigrants depends on whether the State has more or fewer undocumented immigrants as a percentage of its population than the national average. States with more undocumented immigrants as a percentage of their population than the national average would lose funding if undocumented immigrants were excluded; by contrast, States that have a lower relative percentage of undocumented immigrants would gain funding.

In 2017, the most recent year for which the most widely used and reliable data are available, there were approximately 10.5 million undocumented immigrants in the United States, who made up

approximately 3.2 percent of the Nation's population. *See* Jeffrey S. Passel & D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, Pew Research Center (June 12, 2019), https://perma.cc/T27Z-MJ43; Amicus App. A.[5] But that population was not spread evenly among the States. *Id.*[6] Several States had, and can be presumed to have still, a population with a greater percentage of undocumented immigrants than the national average. Of the plaintiff States here, eleven have such a population: Nevada, New Jersey,

---

[5] The Pew Research Center's data on the undocumented immigrant population has been cited both by this Court and by the Government's briefs. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 397-98 (2012); Brief for the Petitioners Dep't of Homeland Security et al. at 36, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587 (Aug. 19, 2019); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1920 n.3 (2020) (Thomas, J., concurring in part). Pew's population estimates are also consistent with those of the Department of Homeland Security. *See*, *e.g.*, Dep't of Homeland Security Office of Immigration Statistics, Population Estimates: Illegal Alien Population Residing in the United States: January 2015 7 (2018), https://perma.cc/8NH9-MXV8 (noting the similarities between DHS's and Pew's methodologies and estimates).

[6] President Trump's July Memorandum shares the assumption that the undocumented population is not distributed proportionally among the States: It states that removing undocumented immigrants from the apportionment base will affect the allocation of congressional seats among the States. *See* 85 Fed. Reg. at 44,680. That would occur only if the undocumented population were not proportionally spread among the States.

Maryland, Massachusetts, Connecticut, the District of Columbia, Washington, Illinois, New York, Rhode Island, and Virginia.[7]

Each of these States would receive less federal funding if undocumented immigrants were removed from the statewide population bases used to allocate federal funding than they would receive if such persons were counted. Allocation formulas reflect a continuum of possible outcomes—and a place on that continuum is determined by specific statistics, often calculated to the one-hundredth or one-thousandth of a percentage point. For that reason, any change to statewide population or subpopulation tabulations is likely to affect the federal funding provided to States. Even one missed person can correlate to a reduction in federal funding.[8]

5. The foregoing description shows, at a high level of generality, why excluding the undocumented

---

[7] Nevada, New Jersey, Maryland, Massachusetts and Connecticut almost certainly have such a population. The District of Columbia, Washington, Illinois, New York, Rhode Island and Virginia likely have such a population. Methodology and calculations are described in the appendices to this brief. Appellants have not described which dataset they will use to exclude undocumented immigrants from the apportionment tabulation, but a reliable dataset should result in impacts to a substantially similar set of States, especially as to the first five States identified above.

[8] Federal funding is distinct from the apportionment of congressional seats in this regard: While very small changes in statewide population statistics can result in changed levels of federal funding, congressional apportionment is typically affected only by changes of much larger magnitudes.

population from statewide populations would affect the allocation of federal funding to the States. In this final section of the brief, Amicus describes three discrete federal programs under which plaintiff States can be expected to lose funding, if undocumented immigrants are excluded from the population counts used to allocate federal funds.

Airport Improvement Program Funds. The Federal Aviation Administration must distribute a significant portion of funding for airport capital improvements to States "in the proportion that the population of each of those States bears to the total population of all of those States." 49 U.S.C. § 47114(d)(3)(B). Congress has expressly tied the apportionment of such funds to the decennial census by specifying that "[t]he term 'population' means the population stated in the latest decennial census of the United States." *Id.* § 47114(d)(1)(B).[9]

Each of the eleven plaintiff States identified above can be expected to lose funding under this program if undocumented immigrants are excluded from the population counts used to allocate this funding.

The Help America Vote Act Election Security Funds. The Election Assistance Commission apportions election security funding among the States according to the proportion of "the voting age population of the State (as reported in the most recent decennial census)" to the "total voting age population of all

---

[9] *See* Federal Aviation Administration, Airport Improvement Program FY 2020 State Apportionment, https://perma.cc/6SAQ-E6DY (setting forth allocation for most recent fiscal year).

States (as reported in the most recent decennial census).” 52 U.S.C. § 20901(d)(4).[10]

Each of the eleven plaintiff States identified above can be expected to lose funding under this program if undocumented immigrants were excluded from the population counts used to allocate this funding.[11]

Pittman-Robertson Hunter Education and Safety Funds. The U.S. Fish and Wildlife Service is required to apportion funds for two hunter education and safety programs “among the States in proportion to the ratio that the population of each State bears to the population of all the States” as “determined on the basis of the latest decennial census for which figures are available, as certified by the Secretary of Commerce.” 16 U.S.C. § 669c(c)(1), (3); *id.* § 669h-1. That statutory language ties the apportionment of funds to the decennial census. *See, e.g.*, Cong. Research Serv., R45667, *Pittman-Robertson Wildlife Restoration Act: Understanding Apportionments for States and Territories* 12 (2019), https://perma.cc/D56M-VNL (“[A]pportionments are determined based on the

---

[10] *See* Election Assistance Commission, Election Security Grant Funding Chart, https://perma.cc/5SRW-9YWP (setting forth allocations for most recent fiscal year).

[11] Allocations under this program depend on States’ “total voting age population,” not their total *citizen* voting age population. *See* 52 U.S.C. § 20901(d)(4). It is possible that the age distribution of the undocumented population differs from that of the remainder of the population, but it is highly unlikely to differ significantly enough to affect which States would lose funding under this program, except at the margins.

decennial census, which only changes when a new decennial census is conducted . . . .").[12]

Because the amounts apportioned to each State under both these programs "shall be not greater than 3 percent and not less than 1 percent" of the tax revenues that fund the programs, 16 U.S.C. § 669c(c)(2); *id.* § 669h-1, the exclusion of undocumented immigrants from the population count would affect the funding allocated only to mid-sized States.[13] Of the plaintiff States, Connecticut, Maryland, Massachusetts, New Jersey, Virginia and Washington can be expected to receive reduced funding.

CONCLUSION

The apportionment tabulation directed by President Trump may cause several plaintiff States to receive less federal funding than they would otherwise receive.

---

[12] *See* U.S. Fish and Wildlife Service, Final Apportionment of Pittman-Robertson Wildlife Restoration Funds for Fiscal Year 2020, https://perma.cc/2SGM-FYHT (setting forth allocations for most recent fiscal year).

[13] Some larger and smaller States remain above or below the statutory threshold, whether or not their undocumented population is included. In addition, the District of Columbia is ineligible to receive funds under this program.

Respectfully submitted.

Lee T. Friedman
D. Hunter Smith
    Counsel of Record
Anna L. Deffebach
Courtney Millian
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER &
SAUBER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500
hsmith@robbinsrussell.com

Counsel for Amicus Curiae

November 16, 2020

APPENDIX A—
ESTIMATED UNDOCUMENTED IMMIGRANTS
BY PLAINTIFF STATE, 2017, RANKED BY
PERCENTAGE OF POPULATION

	Estimated undocumented immigrants	Total population	Undocumented immigrants as % of population
United States	10,500,000	324,985,539	3.23%
Nevada	210,000	2,969,905	7.07%
New Jersey	450,000	8,885,525	5.06%
Maryland	250,000	6,023,868	4.15%
Massachusetts	275,000	6,859,789	4.01%
Connecticut	140,000	3,573,297	3.92%
District of Columbia	25,000	694,906	3.60%
Washington State	250,000	7,423,362	3.37%
Illinois	425,000	12,778,828	3.33%
New York	650,000	19,589,572	3.32%
Rhode Island	35,000	1,055,673	3.32%
Virginia	275,000	8,463,587	3.25%

Colorado	180,000	5,611,885	3.21%
North Carolina	325,000	10,268,233	3.17%
Hawaii	45,000	1,424,393	3.16%
Delaware	30,000	956,823	3.14%
New Mexico	55,000	2,091,784	2.63%
Oregon	100,000	4,143,625	2.41%
Minne-sota	85,000	5,566,230	1.53%
Pennsyl-vania	190,000	12,787,641	1.49%
Wisconsin	75,000	5,790,186	1.30%
Michigan	110,000	9,973,114	1.10%
Vermont	<5,000	624,344	<0.80%
Maine	<5,000	1,334,612	<0.37%

Sources: Estimates of undocumented immigrant population are from the Pew Research Center estimates for 2017.[1] Estimates of total population are

---

[1] *See* Jeffrey S. Passel & D'Vera Cohn, Pew*, Mexicans decline to less than half the U.S. unauthorized immigrant* population *for the first time,* https://perma.cc/T27Z-MJ43.

from the 2017 U.S. Census Bureau Population Estimates.[2]

---

[2] *See* U.S. Census Bureau, *State Population Totals and Components of Change 2010-2019*, https://perma.cc/C4W5-QQ2G.

APPENDIX B—
PLAINTIFF STATES EXPECTED TO HAVE
ABOVE-AVERAGE UNDOCUMENTED IMMI-
GRANT POPULATION SHARE (BASED ON
2017 ESTIMATES)

	Estimated undocumented immigrants		Undocu-mented immi-grants as % population	
	Lower Bound	Upper Bound	Lower Bound	Upper Bound
United States	10,340,000	10,660,000	3.18%	3.28%
High Confidence Above Average (State lower bound > U.S. upper bound)				
Nevada	195,000	225,000	6.57%	7.58%
New Jersey	415,000	485,000	4.67%	5.46%
Maryland	230,000	270,000	3.82%	4.48%
Massa-chusetts	255,000	295,000	3.72%	4.30%
Connecti-cut	125,000	155,000	3.50%	4.34%
Probable Above Average (State lower bound < U.S. upper bound and State midpoint > U.S. midpoint)				
Washing-ton State	230,000	270,000	3.10%	3.64%
District of Columbia	20,000	30,000	2.88%	4.32%
Illinois	395,000	455,000	3.09%	3.56%

New York	600,000	700,000	3.06%	3.57%
Rhode Island	25,000	45,000	2.37%	4.26%
Virginia	255,000	295,000	3.01%	3.49%

Source: Data on undocumented population is from the Pew Research Center estimates for 2017, and data on total population is from the 2017 U.S. Census Bureau Population Estimates.

The Pew Research Center estimates that the true undocumented population is located between the upper and lower bounds indicated in the above table at a 90 percent confidence level. When a State's lower bound is above the U.S. upper bound, that State's undocumented population share can be said to be above the national average with a high degree of certainty. When a State's lower bound is below the U.S. upper bound and the midpoint of a State's range is above the midpoint of the national range, the State's undocumented population share can be said to be probably above the national average.