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 A*MICI CURIAE* COMMON CAUSE *ET AL.* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are plaintiffs in *Common Cause et al. v. Trump et al.*, No. 20-cv-2023 (D.D.C.), another lawsuit challenging the President's memorandum titled *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44679 (July 23, 2020) (the "Memorandum"). In that case, *amici*'s motion for summary judgment and the Government's cross-motion to dismiss remain *sub judice*. *Amici* include Common Cause; individual voters in states likely to lose representation as a result of the Memorandum; several cities; one city school board; and nonprofit organizations that work with immigrant, minority, and undocumented communities. The claims asserted by *amici* overlap with those brought by Appellees in this matter, though (as discussed below) certain claims are unique to the *Common Cause* litigation. Due to their parallel challenge to the Memorandum, *amici* have a compelling interest in the outcome of this case.

Amicus curiae Common Cause was founded by John Gardner in 1970 as a nonpartisan "citizens' lobby" whose mission is to create open, honest, and accountable government that serves the public interest; to promote equal rights, opportunity, and representation for all; and to empower all people to make

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[1] *Amici* and their counsel have authored the entirety of this brief, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. On October 28, 2020, the parties filed statements providing blanket consent for *amicus* briefs in this matter.

their voices heard in the political process. Common Cause is one of the nation's leading democracy organizations and currently has over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members who are voters or who are eligible to vote in all 50 states and in every congressional district.

Amici curiae Roberto Aguirre, Sheila Aguirre, Paula Aguirre, Andrea M. Alexander, Angelo Ancheta, Cynthia Ming-hui Dai, Simon Fischer-Baum, Stan Forbes, Connie Galambos Malloy, Raquel Morsy, Norma (Robin) Mote, Debra de Oliveira, Lilbert (Gil) Roy Ontai, Sara Pavon, Coleen P. Stevens Porcher, Jeanne Ellen Raya, Jonathan Allan Reiss, Josanna Smith, Thad (Bo) Smith, Inge Spungen, Irene Sterling, Dennis Vroegindewey, Susan N. Wilson, and Myrna Young are individuals who reside in California, Florida, New Jersey, New York, and Texas. All are registered to vote and regularly exercise their right to vote.

Amici curiae City of Atlanta, City of Clarkston, City of Dayton, City of El Paso, City of Paterson, City of Portland, and City of South Pasadena are municipalities with diverse populations that include noncitizen and immigrant communities.

Amicus curiae El Monte Union High School District is a large school district in Los Angeles County, California. Its student population includes undocumented immigrants.

Amicus curiae Center for Civic Policy is a 501(c)(3) nonprofit in Albuquerque, New Mexico, that

works to empower and amplify the voices of everyday New Mexicans, for a more inclusive, responsive, and accountable democracy.

Amicus curiae Masa is a community organization in the Bronx, New York, that partners with Mexican and Latino youth and families. Masa was founded by undocumented students and has been actively engaged in outreach regarding the 2020 census.

Amicus curiae New Jersey Citizen Action is a non-partisan 501(c)(3) organization based in Newark, New Jersey that fights for social, racial, and economic justice.

Amicus curiae New Mexico Asian Family Center is a 501(c)(3) nonprofit based in Albuquerque, New Mexico, that helps Asian families become more self-sufficient, empowered, and aware of their rights by using multilingual and multicultural staff members, licensed counselors, and interpreters.

Amicus curiae New Mexico Comunidades en Acción y de Fé is a 501(c)(3) nonprofit based in Dona Ana County, New Mexico, that works to empower New Mexicans to act on their own behalf towards a better quality of life.

Amicus curiae Partnership for the Advancement of New Americans is a 501(c)(3) nonprofit based in San Diego, California with over 400 members, that is dedicated to advancing the full economic, social, and civic inclusion of refugees.

SUMMARY OF ARGUMENT

Three separate three-judge panels have now ruled that the Memorandum is unlawful and have enjoined its implementation. *See New York v. Trump*, No. 20-cv-5770, 2020 WL 5422959 (S.D.N.Y. Sept. 10, 2020); *City of San Jose, California v. Trump*, No. 20-cv-05167, 2020 WL 6253433 (N.D. Cal. Oct. 22, 2020); *Useche v. Trump*, No. 20-cv-02225, 2020 WL 6545886 (D. Md. Nov. 6, 2020).

Across all challenges to the Memorandum—in New York, California, Maryland, and in *amici*'s suit in the District of Columbia—the Government's defense has focused primarily on justiciability questions related to standing and ripeness. All three courts that have issued decisions in these cases have correctly rejected these arguments and found the plaintiffs' claims justiciable. This Court, in considering the instant appeal, should be informed not just by the reasoning of the New York panel, but also by the analyses of the panels in California and Maryland, which properly found that the plaintiffs had standing on the basis of impending "apportionment injury"—*i.e.*, because implementation of the Memorandum will likely cause at least one plaintiff to lose a Congressional representative—and that plaintiffs' claims are ripe for review.

As to standing, it is uncontested that the loss of representation in Congress is a cognizable Article III injury-in-fact. The Memorandum expressly seeks to reduce the congressional representation of states with large populations of undocumented immigrants, and specifically identifies one state—California—as

likely to lose "two or three" seats once the Memorandum is implemented. In addition, *amici* have adduced uncontested expert evidence showing that it is a statistical certainty that, among California, Texas, New Jersey, New York, and Florida, at least one state will lose at least one representative if the Memorandum is implemented. The Government's sole response to these showings, both below and in this Court, has been speculation that the Memorandum might not actually be implemented (or might be implemented only partially). But the existence of some metaphysical doubt about the Government's plans does not defeat standing, because the record evidence establishes that full implementation of the Memorandum is, at minimum, *substantially likely*. Nothing more is needed to satisfy Article III's imminence requirement.

Prudential ripeness considerations also support adjudicating this challenge now. Delaying resolution of the claims presented in this appeal—and in the California and Maryland cases, as well as *amici*'s litigation—would cause serious disruption to the next election cycle in many states by preventing timely redistricting. In addition, the Government has argued that courts may not enjoin the President. Though *amici* disagree, the implications of the Government's argument make clear that judicial intervention is urgently needed *before* the Secretary of Commerce transmits his final census report to the President. If the Court were to wait to resolve this case until the Secretary finalized and transmitted that report, and the Court were then to find that the President cannot be enjoined, it would raise the possibility that no meaningful relief would be available

entirely due to the Court's decision to delay. To avoid such a scenario, expeditious review is the most prudent path.

The New York panel's decision is also correct on the merits (as are the decisions from California and Maryland): the Memorandum exceeds the limited authority delegated by Congress to the Executive with respect to reapportionment. The governing statutes expressly require the President to base apportionment on the "whole number of persons in each State" and provide no discretion to omit persons who actually reside in a state on the basis of their noncompliance with federal immigration laws. Those statutes also expressly require the President to base apportionment calculations exclusively on the actual enumeration generated through the decennial census, not another number of his choosing. For similar reasons, as the California panel found, the Memorandum also violates the Constitution.

For these reasons, the judgment below should be affirmed.

BACKGROUND

1. Under the Constitution and applicable statutes, representation in the U.S. House of Representatives must be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const., amend. XIV, § 2, cl. 1; *see also* 2 U.S.C. § 2a(a); 13 U.S.C. § 141. Consistent with that command, from the ratification of the Constitution in 1788 to the present day, all human beings residing in

each state have been counted by the census and included in the congressional apportionment base, regardless of their citizenship status or compliance with immigration laws. Only two exceptions to this practice of counting all resident persons have ever been made, both based in the Constitution's plain text: notoriously, slaves were counted as three-fifths of a person (though that clause was stricken in 1868), and "Indians not taxed" were excluded altogether (though such persons no longer exist). No President has ever maintained that other, implicit exceptions have been lurking in the Constitution for the last 232 years.

Until now. On July 21, 2020, President Trump issued the Memorandum. Breaking with the plain text of the Constitution and governing statutes, as well as centuries of universally accepted practice, the Memorandum declared that it was now "the policy of the United States to exclude from the [congressional] apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch."

The Memorandum also announced that, upon completion of the 2020 census, the President will "exclude" such persons when preparing apportionment tables for transmission to Congress. The Memorandum noted specifically that "one State"—which the Government later confirmed to be California—"is home to more than 2.2 million illegal aliens," and that excluding this population could result in the state losing "two or three . . . congressional seats." To

accomplish its expressly stated objective of diminishing the representation of states like California, the Memorandum ordered the Department of Commerce to provide the President with two sets of numbers: the whole number of persons in each state as determined by the 2020 census, and a *second set* of figures that would "permit[] the President" to subtract undocumented immigrants from the population totals as determined by the census.

2. Two days later, on July 23, 2020, *amici* filed the first of several suits challenging the Memorandum. *See* Compl., *Common Cause*, No. 20-cv-2023, ECF No. 1. Relevant here, *amici* assert claims for violation of (1) the constitutional command that apportionment be performed according to the "whole number of persons in each State," *see* U.S. Const., Art. I, § 2, cl. 3; *id.*, amend. XIV, § 2, cl. 1; (2) the statutory requirement that apportionment be performed according to the "whole number of persons" in each state as determined by the "decennial census," *see* 13 U.S.C. § 141; 2 U.S.C. § 2a; and (3) the constitutional and statutory commands that apportionment be performed on the basis of an "actual Enumeration" of each state's population, without resort to statistical sampling, *see* U.S. Const., Art. I, § 2, cl. 3; 13 U.S.C. § 195.[2]

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[2] Plaintiffs also brought additional claims not relevant here: (1) vote dilution and representational injury, in violation of the Equal Protection Clause, U.S. Const., amend. XIV, § 1, cl. 2; and (2) invidious discrimination based on race, ethnicity, and national origin, in violation of the Equal Protection Clause, U.S. Const., amend. XIV, § 1, cl. 2.

On August 19, 2020, *amici* moved for summary judgment, or in the alternative, expedited trial on the merits, with respect to these three claims. *See* Mot., *Common Cause*, No. 20-cv-2023, ECF No. 31. In support of their motion, *amici* submitted uncontested declarations from several plaintiffs attesting to the concrete harms they would suffer as a result of losing a congressional representative and reduced federal funding due to the Memorandum. Pl. Decls., *Common Cause*, No. 20-cv-2023, ECF Nos. 31.3-31.22.

In addition, *amici* submitted an expert declaration from Dr. Christopher Warshaw, a professor of Political Science at George Washington University. Warshaw Decl. ¶ 1, *Common Cause*, No. 20-cv-2023, ECF No. 31.23. Dr. Warshaw conducted an analysis showing that, if all undocumented immigrants are removed from the apportionment base, as dictated by the Memorandum, several states are likely to lose House seats. *Id.* at ¶¶ 11-66. He found that Texas has the highest likelihood of losing a seat, at 98%, followed by California at 72.1% and New Jersey at 69.8%. *Id.* at ¶ 44. Each of these states is the home of multiple individual-voter *amici*, as well as many Common Cause members. Pl. Stat. of Undisputed Material Facts ¶¶ 27, 32-51, *Common Cause*, No. 20-cv-2023, ECF No. 31.26. Dr. Warshaw also determined that the probability that *at least one* of the five states where the individual-voter *amici* live (Texas, California, New Jersey, New York, and Florida) would lose a House seat if the Memorandum is implemented is 100%. Warshaw Decl. ¶ 12, *Common Cause*, No. 20-cv-2023, ECF No. 31.23.

Finally, *amici* also submitted a declaration from Dr. Sunshine Hillygus, a professor of Political Science and Public Policy at Duke University and member of the Census Scientific Advisory Committee, which advises the U.S. Census Bureau on statistical data collection. Hillygus Decl. ¶¶ 1-3, *Common Cause*, No. 20-cv-2023, ECF No. 31.24. Dr. Hillygus demonstrated through exhaustive analysis that the only methodologies by which the Memorandum could be implemented, whether in whole or in part, would necessarily involve prohibited statistical sampling. *Id.* ¶ 6.

The Government opposed and cross moved to dismiss. *See* Gov't Mot. & Br., *Common Cause*, No. 20-cv-2023, ECF Nos. 59, 60. Its response focused exclusively on the alleged uncertainty about whether, and to what extent, the Census Bureau and Commerce Department would actually implement the Memorandum. Per the Government's argument, it is simply "unknown what numbers the Secretary may report to the President," and thus, whether those reported numbers will result in any state's loss of congressional representation. *See* Gov't Br., *Common Cause*, No. 20-cv-2023, ECF No. 60 at 7. However, the Government did not submit any evidence that it would *not* be feasible to implement the Memorandum in full, or that the Census Bureau or Commerce Department *lacked* the intent to do so. Moreover, the Government did not challenge Dr. Warshaw's methodology or dispute his conclusion that *if* the Memorandum is implemented in full, it is a virtual certainty that at least one of the individual-voter *amici* will lose congressional representation. Finally, the Government did not address Dr. Hillygus's analysis at

all, save for a conclusory statement that implementation of the Memorandum "will not involve the use of statistical sampling for apportionment purposes." *Id.* at 48.

In their reply, *amici* supplemented the record with additional analysis from Dr. Warshaw, demonstrating that even if the Government were to exclude *only* the 3.2 million persons the Government claims to be on the non-detained docket of Immigration and Customs Enforcement ("ICE"), such a partial implementation of the Memorandum *by itself* poses a 93% chance of causing apportionment injury to at least one of the individual-voter *amici*. Suppl. Warshaw Decl. ¶ 11, *Common Cause*, No. 20-cv-2023, ECF No. 67.3. Dr. Warshaw also showed that even if the Government excluded *only* the 2.2 million undocumented immigrants resident in California, who are explicitly singled out in the Memorandum's text, that alone would pose a 72% probability that California would lose a seat, causing apportionment injury to at least the individual-voter *amici* who live there. *Id.* ¶ 9.

Oral argument was held on both motions on September 29, 2020. No decision has yet issued.

3. Shortly after *amici* filed suit, several other actions were filed across the country, challenging the Memorandum on overlapping (though not identical) grounds. Three separate three-judge panels have now issued decisions holding unanimously that the plaintiffs' claims are justiciable and that the Memorandum is unlawful. *See New York*, 2020 WL 5422959; *San Jose*, 2020 WL 625343; *Useche*, 2020 WL 6545886.

As to standing, both the California and Maryland panels unanimously held that the plaintiffs in those cases had demonstrated a sufficient likelihood of impending apportionment injury. *See San Jose*, 2020 WL 6253433, at *20; *Useche*, 2020 WL 6545886, at *4. By contrast, the New York panel initially found that it "need not . . . decide" whether Appellees had shown sufficient risk of apportionment harm, because harm flowing from the Memorandum's deterrence effect on census participation sufficed. *New York*, 2020 WL 5422959, at *15. In a subsequent decision, however, the New York panel noted that, with the passage of time and advancement of the Government's implementation plans, the plaintiffs' apportionment harm "could well" establish standing. *New York v. Trump*, 2020 WL 5796815, at *5 & n.8 (S.D.N.Y. Sept. 29, 2020).

4. Nearly four months have passed since the Memorandum was published. The statutory deadline for the Secretary's census report to the President is December 31, 2020, a mere month and a half away. *See* Gov't Br., *Trump et al. v. New York et al.*, No. 20-366 ("Gov't Br.") at 2 (U.S. filed Oct. 30, 2020); *see also* 13 U.S.C. § 141(b). Yet the Government's line has not changed: before this Court, it simply repeats that it does not yet know "to what extent it will be 'feasible' to exclude illegal aliens from the apportionment population base." Gov't Br. at 19. But the record now plainly demonstrates that the Government has proceeded with its plans to fully implement the Memorandum, and thereby deprive Appellees and other plaintiffs in their position—including *amici*—of the congressional representation to which they are entitled.

As the Maryland panel recently summarized, the record is now "replete with evidence of concrete plans to provide the President with . . . the total number of undocumented immigrants in each state." *Useche*, 2020 WL 6545886, at *6. For example, on September 29, 2020, in connection with *National Urban League v. Ross*, No. 20-cv-5799 (N.D. Cal.), the Government produced an email dated September 28, 2020, from Census Bureau Deputy Director Ron Jarmin. *See* Supp. Authority, *Common Cause*, No. 20-cv-2023, ECF No. 80, Ex. A. In that email, Jarmin informed Commerce Secretary Wilbur Ross that, assuming census "field work" was complete on October 5, the Bureau could produce a count of "unlawful aliens in ICE Detention Centers by 12/31," and that the "[o]ther PM [*i.e.*, Presidential Memorandum] related outputs would be pushed to 1/11/2021." *Id.* This e-mail confirms that, even as of late September, the Bureau had plans regarding implementation of the Memorandum that were concrete enough that the Bureau knew precisely how many days it would take to carry them out—and that those plans plainly go beyond mere subtraction of "aliens in ICE Detention Centers." *Id.*; *see also Useche*, 2020 WL 6545886, at *6.

Next, on September 30, 2020, the Census Bureau's Associate Director, Albert E. Fontenot, Jr.—also a declarant in *amici*'s case—submitted a sworn declaration in *National Urban League*. *See* Supp. Authority, *Common Cause*, No. 20-cv-2023, ECF No. 76, Ex. A. The stated purpose of Mr. Fontenot's declaration was to explain the Census Bureau's timeline for "submit[ting] apportionment counts" to the President. *Id.* at ¶ 2. In the final paragraph, Mr. Fontenot

states that, while the Bureau intends to "submit the required [13 U.S.C. § 141(b)] report" to the President by December 31, 2020, "certain processing steps necessary *to fully implement* the Presidential Memorandum dated July 21, 2020 will not be completed until after December 31, 2020." *Id.* at ¶ 26 (emphasis added).

ARGUMENT

I. Appellees Have Standing Based on Impending Apportionment Injury.

As this Court has held, voters who live in a state that is "expected [to] los[e] . . . a Representative" due to a challenged apportionment practice "undoubtedly satisf[y] the injury in-fact requirement of Article III standing," because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999) (citation omitted) (finding that "[w]ith one fewer Representative, Indiana residents' votes will be diluted").

Such apportionment injury confers standing on Appellees in this case—as it does on *amici* and the plaintiffs in the California and Maryland litigations. It does not make any difference that the apportionment injury has not yet occurred; "[a]n allegation of future injury" is sufficient to satisfy Article III as long as "the threatened injury is certainly impending, *or there is a substantial risk* that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (emphasis added; cleaned up). As the

courts in California and Maryland correctly held—and as *amici* have argued in their pending case—there is, at minimum, a "substantial risk" that the apportionment injuries alleged in these cases will come to pass. *San Jose*, 2020 WL 6253433, at *16-*25; *Useche*, 2020 WL 6545886, at *4-*9. In particular, notwithstanding the Government's professed ignorance of its own course of action just weeks from now, there is *at least* a "substantial risk" that the Memorandum will be implemented in a manner sufficient to cause at least one relevant state to lose at least one representative.

A. It Is Undisputed That, If the Memorandum Is Implemented, At Least One Relevant State Will Lose Representation.

The Government has never disputed—in this case or in any other litigation concerning the Memorandum—that *if* the Memorandum is implemented in full, the plaintiffs bringing these suits will lose representation in Congress. Nor *could* the Government dispute that fact.

Amici's expert, Dr. Christopher Warshaw, conducted a rigorous analysis showing that, if all undocumented immigrants residing in the country are removed from the apportionment base, as the Memorandum commands, several states are likely to lose seats in Congress. Warshaw Decl. ¶¶ 11-12, *Common Cause*, No. 20-cv-2023, ECF No. 31.23.

As Dr. Warshaw showed, Texas has the highest likelihood of losing a seat, at 98%. *Id.* at ¶¶ 12, 44. The next-most-likely states to lose a seat are Califor-

nia (72.1% probability) and New Jersey (69.8% probability). *Id.* Appellees in the case now before the Court include counties and municipalities in Texas and California, as well as the State of New Jersey. Meanwhile, in *amici*'s pending suit, individual-voter plaintiffs reside in each of these states as well.

In addition, as Dr. Warshaw showed, there is a 100% probability that *at least one* of Texas, California, New Jersey, New York, and Florida will lose a seat if all undocumented immigrants are excluded from the apportionment base, as the Memorandum commands. *Id.* at ¶¶ 12, 45. Appellees in the case now before the Court include government actors or membership organizations with members in each of these states. And again, individual-voter plaintiffs in *amici*'s pending suit reside in each of these states.

Again, the Government has never disputed these findings. Instead, it argues that it may ultimately implement the Memorandum *only partially—i.e.*, that it may exclude fewer than all undocumented immigrants residing in the country from the apportionment base. As discussed below, this argument is unsupported by any record evidence and must be rejected. However, even if the Government ultimately chooses to exclude fewer than all undocumented immigrants from the apportionment base, there would still be not just a "substantial risk," but a high likelihood, of apportionment injury.

For example, the Government has speculated that, rather than excluding all of the approximately 10.8 million undocumented immigrants residing in the country, Appellants may exclude only the 3.2

million persons on the non-detained docket of ICE—a population equal to four congressional seats. *See* Gov't Br., *Common Cause*, No. 20-cv-2023, ECF No. 60 at 32 & n.5. As Dr. Warshaw has shown, and as the Government has not disputed, such a partial implementation of the Memorandum *by itself* poses a 93% chance of causing at least one state among California, Florida, New York, and Texas to lose one representative. Suppl. Warshaw Decl. ¶ 11, *Common Cause*, No. 20-cv-2023, ECF No. 67.3. Dr. Warshaw also showed that even if the Government excluded *only* the 2.2 million undocumented immigrants resident in California, who are explicitly singled out in the Memorandum's text, that alone would pose a 72% probability that California would lose a seat, causing apportionment injury to at least some of the Appellees and individual-voter *amici*.

As a result, implementation—even partial implementation—of the Memorandum is highly likely to cause apportionment injury to Appellees in this suit and to *amici*. *A fortiori*, there is a "substantial risk" that such injury will occur.

B. Appellants Are Likely to Implement the Memorandum.

Again, the Government does not dispute that, *if* the Memorandum is implemented in full (or in any substantial part), apportionment injury will occur to Appellees and *amici*. Rather, the Government speculates that the Memorandum may not be implemented at all, or may be implemented only to a trivial extent. This argument is illogical and unsupported by the record.

To begin, "[o]n its face, the Memorandum makes abundantly clear its intent to exclude not some but all undocumented immigrants from the apportionment base, and unambiguously commands action to achieve that goal." *Useche*, 2020 WL 6545886, at *6 (cleaned up) (quoting *San Jose*, 2020 WL 6253433, at *18). The Memorandum declares it is "the policy of the United States to exclude" undocumented immigrants from the apportionment base and proclaims the President's intent "to carry out [that] policy." As multiple courts have now recognized, this is an "unambiguous directive." *New York*, 2020 WL 5422959, at *25; *San Jose*, 2020 WL 6253433, at *18; *Useche*, 2020 WL 6545886, at *6. Moreover, in the Memorandum, the President proclaims—without reservation—that he is "directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." Thus, on its face, the Memorandum plainly seeks to exclude *all* undocumented immigrants from the apportionment base—not some lesser subset.

Further, "if there were any doubt that what is contemplated is to exclude *all* undocumented immigrants from the apportionment count," rather than some unspecified subset, "the Memorandum dispels it by explicitly referencing" the *total* population of undocumented immigrants living in California. *Useche*, 2020 WL 6545886, at *6; *San Jose*, 2020 WL 6253433, at *12 & n.5. The Memorandum declares that "one State is home to more than 2.2 million illegal aliens" and that implementing the Memorandum's policy will "result in [its loss] of two or three . . . congressional seats." Appellants have subsequently confirmed this state to be California. *Useche*, 2020

WL 6545886, at *5. This figure—2.2 million—is "an estimate of the *total* number of undocumented immigrants in that state," not some fractional part, such as those in ICE detention or on ICE's non-detained docket. *Id.* at *6.

Moreover, the Memorandum makes clear throughout that impacting congressional apportionment is its *raison d' être*. It declares that "[a]ffording congressional representation . . . to States on account of" their undocumented populations "undermines" principles of "representative democracy." It insists that "[i]ncreasing congressional representation based on the presence of" undocumented immigrants "encourag[es] violations of Federal law." It asserts that states that welcome undocumented immigrants "should not be rewarded with greater representation in the House of Representatives." In sum, the only rational reading of the Memorandum is that it commands the exclusion from the apportionment base of *all* undocumented persons—or, at minimum, enough of them to make a difference in congressional apportionment. No reasonable reader could conclude that the Census Bureau and Commerce Department would be faithfully implementing the Memorandum's policy by removing from the apportionment base only a negligible fraction of the undocumented population, insufficient to affect congressional representation.

"Given the Memorandum's plain text and stated purpose, the 'presumption of regularity' that attaches to agency action means that [courts] presume, in the absence of contrary evidence, that the Secretary and Census Bureau will take the steps necessary to exclude not some but *all* undocumented immigrants

from the apportionment base." *Useche*, 2020 WL 6545886, at *6 (emphasis added) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001)); *see also New York*, 2020 WL 5422959, at *25. And the Government has introduced no "contrary evidence"—in this case, or in any other—to support its speculation that a departure from regular procedure will take place. For example, it has not pointed to "any evidence that there are any significant impediments to fulfilling the Presidential Memorandum" in its entirety (or to an extent sufficient to impact congressional representation). *San Jose*, 2020 WL 6253433, at *20; *see also Useche*, 2020 WL 6545886, at *7 (Appellants have "provided no reason why it would *not* be feasible for the Bureau and the Secretary to tabulate the total number of undocumented immigrants in each state").

To the contrary, the record is "replete with evidence of concrete plans to provide the President with . . . the total number of undocumented immigrants in each state." *Useche*, 2020 WL 6545886, at *6. Since the Memorandum was issued, the President has repeatedly underscored his intention to exclude *all* undocumented immigrants from the apportionment base. *See San Jose*, 2020 WL 6253433, at *18-*19 (collecting examples). And the Director of the Census Bureau testified under oath before Congress that the Secretary of Commerce has "giv[en] [the Bureau] the directive . . . to proceed with the requirements of the Presidential Memorandum," that implementation "is

underway," and that the Bureau "ha[d] received most of the data" necessary for implementation.[3]

For example, as of July 2019, the Census Bureau had access to "administrative records" that "would enable it to determine citizenship status for approximately 90 percent of the population." *See* Exec. Order No. 13,880, *Collecting Information About Citizenship Status in Connection with the Decennial Census*, 84 Fed. Reg. 33,821, 33,821 (July 11, 2019). And in July 2019, the President issued an executive order in which he instructed agencies to share with the Department of Commerce any additional records that would identify citizenship status so as to "generate a more reliable count of the unauthorized alien population in the country." *Id.* at 33,823. Since that executive order was promulgated, Appellants have made "significant progress" towards collecting additional information regarding citizenship, *Useche*, 2020 WL 6545886, at *7, and "the Census Bureau has entered into memoranda of understanding with agencies and states to obtain administrative records such as driver's license information," *San Jose*, 2020 WL 6253433, at *19.

Further, in declarations submitted in parallel litigation concerning the census timeline, the Government has laid out specific plans to "fully implement

[3] Counting Every Person: Hearing on Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks Before the House Comm. on Oversight & Reform, 116th Cong. (2020), *available at* https://www.youtube.com/watch?v=SKXS8e1Ew7c (last accessed November 10, 2020) (relevant exchanges at 2:53:36-3:02:07).

the Presidential Memorandum." *Useche*, 2020 WL 6545886, at *6 (quoting Fontenot Decl. ¶ 26, *Nat'l Urb. League*, No. 20-cv-5799, ECF No. 284.1); *supra* at 12-14. Those plans include providing the Secretary of Commerce "with the number of all 'unlawful aliens in ICE Detention Centers'" by December 31, 2020, and providing the Secretary with "other Presidential Memorandum-related outputs" by January 11, 2021. *Id.* (quoting Fontenot Decl. ¶ 8, *La Unión Del Pueblo Entero v. Trump*, No. 19-cv-2710 (D. Md. Oct. 2, 2020), ECF No. 126.1). Remarkably, while the Government has refused to state publicly what those "other . . . outputs" are, "the Bureau is certain enough of exactly what will be entailed in the collection of that information that it can quantify . . . how long such collection will take": to wit, "precisely five days." *Id.* (quoting Fontenot Decl. ¶ 8, *La Unión Del Pueblo Entero*, No. 19-cv-2710, ECF No. 126.1).

As the Maryland panel correctly observed, "[t]he meticulousness of the [Census Bureau]'s calculations" regarding this timeline for providing Memorandum-related outputs "belies any suggestion that the Bureau has yet to determine whether and how it will transmit to the Secretary the data necessary to 'fully implement' the Presidential Memorandum." *Id.* At an absolute minimum, this record establishes that there is at least a "substantial risk" of full (or substantially full) implementation of the Memorandum in just a few short weeks—and, again, that is all that Article III requires. *See Susan B. Anthony List*, 573 U.S. at 158.

Notably, in their brief to this Court, the Government provides no update on the status of its efforts

to comply with the Memorandum, even though the statutory deadline for the Secretary to provide his report to the President is now just six weeks away. Instead, it vaguely asserts that the Government's imminent course of action "remains unknown." Gov't Br. at 11, 19. Yet the further this case progresses, and the closer the statutory deadline looms, the less credible such vague and unsupported assertions become—and the time for crediting them is long past. As this Court recently noted in a similar context, it is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). Indeed, the Government's continuing insistence that it knows nothing is not just implausible; it smacks of gamesmanship. The Government should not be permitted to defeat standing by intentionally hiding the ball as to its own imminent plans—especially when it is clear from the record evidence that such plans do exist.

In sum, as the panels in California and Maryland correctly found, and as the undisputed evidence adduced by *amici* below demonstrates, there is at least a "substantial risk" that the Memorandum will inflict apportionment injury on several relevant states and their voters. That is sufficient to establish Article III standing in this case.

II. Appellees' Claims Are Ripe.

Traditionally, courts have recognized two kinds of ripeness: constitutional and prudential. Constitutional ripeness has been "subsumed into the Article III requirement of standing." *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012). For the

same reasons Appellees satisfy Article III's standing requirements, their claims are also constitutionally ripe.

Appellants argue that *prudential* ripeness principles "support deferring judicial review of the Memorandum until it is implemented." Gov't Br. at 21. Not so: as all three lower courts that have ruled on the matter agree, Appellees "easily satisf[y]" the traditional standard for prudential ripeness. *New York*, 2020 WL 5422959, at *24; *see also San Jose*, 2020 WL 6253433, at *22-*25; *Useche*, 2020 WL 6545886, at *7-*8.

For starters, Appellees' challenge to the Memorandum "presents an issue that is purely legal, and will not be clarified by further factual development." *Susan B. Anthony List*, 573 U.S. at 167 (cleaned up). In addition, "denying prompt judicial review would impose a substantial hardship" on Appellees, *id.* at 167-68, since "[d]elaying judicial review until after the Secretary presents numbers to the President impacts the states' ability to do redistricting for upcoming elections in 2021 and 2022—which affects not only the states themselves but also local governments and individuals who reside in the states," *San Jose*, 2020 WL 6253433, at *24.

Furthermore, because it is not clear whether and in what circumstances the President himself may be enjoined, it is important that the Court rule *before* the relevant information is transmitted to the President. The Government has consistently argued that a federal court can never issue an injunction that runs against the President himself. *See* Gov't Br.,

Common Cause, No. 20-cv-2023, ECF No. 60 at 49; Gov't Reply Br. in Support of Mot. To Dismiss, *New York v. Trump*, No. 20-cv-5781, 2020 WL 6471230 (S.D.N.Y. Aug. 28, 2020). While *amici* disagree with this categorical position,[4] the very fact that the Government presses this argument militates strongly in favor of adjudicating Appellees' claims now.

If the Court were to stay its hand until the Census Bureau and the Secretary of Commerce had fully performed their part in implementing the Memorandum—which it appears will be no later than early January 2021—and the Court were thereafter to find that the President cannot be enjoined, then there is a serious question whether the Court could provide relief. *Cf. Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143-45 (1974) (finding prudential ripeness satisfied because, *inter alia*, "delay in decision w[ould] create the serious risk" that judicial review would come "too late" to "prevent" the harm). Meanwhile, should the Court then rule that the President *may* be enjoined, and should the President refuse to accede, a genuine constitutional crisis may arise. The doctrine of prudential ripeness—which, after all, is grounded in *prudence*—therefore counsels strongly in favor of a prompt decision, which would avoid these untoward results. *See Useche*, 2020 WL 6545886, at *8.

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[4] As this Court recently reminded us, although the King of England's "'dignity' was seen as 'incompatible'" with being subjected to judicial process, "[t]he President, by contrast, is 'of the people' and subject to the law." *Trump v. Vance*, 140 S. Ct. 2412, 2422 (2020) (quoting *United States v. Burr*, 25 F. Cas. 30, 33-34 (CC Va. 1807) (Marshall, J.)).

The Government has argued that apportionment-related challenges are typically brought *after* apportionment is performed. Gov't Br. at 16. But, while several apportionment challenges have been decided after the President certified apportionment numbers to Congress, *see Franklin v. Massachusetts*, 505 U.S. 788, 790-91 (1992); *Dep't of Commerce v. Montana*, 503 U.S. 442, 445-46 (1992); *Utah v. Evans*, 536 U.S. 452, 458-59 (2002); *Wisconsin v. City of New York*, 517 U.S. 1, 4 (1996), no case suggests, much less holds, that apportionment cases *must* be decided after-the-fact. *Cf. House of Representatives*, 525 U.S. at 327-29 (addressing challenge to use of statistical sampling in apportionment in pre-apportionment posture). What is more, in none of these post-apportionment challenges did this Court actually rule for the plaintiffs and order reapportionment. There is, therefore, no historical precedent for how a post-certification apportionment "do-over" would occur. Again, prudence counsels against plunging the country into such a situation for the first time when pre-apportionment review is available.

III. The Memorandum Is Unlawful in Multiple Respects.

The Constitution compels the inclusion of undocumented immigrants in the apportionment base on the same terms as citizens and documented immigrants. The plain text of both Article I, § 2 and the Fourteenth Amendment states that the apportionment base shall consist of "the whole number of persons in each state." Whatever their status under federal immigration statutes, undocumented immigrants are "persons in each state." As the panel in

California correctly held, the Memorandum is simply not "consonant with the text and history of the Constitution." *San Jose*, 2020 WL 6253433, at *41.

Similarly, the Memorandum violates the statutory requirement that apportionment calculations be based on "the whole number of persons in each state." 2 U.S.C. §2a(a). The "statutory scheme governing who must be included in the apportionment base" is "straightforward." *Useche*, 2020 WL 6545886, at *9. Ever since this statutory language was enacted in 1929, "the ordinary public meaning of 'persons in each state' has included and still includes undocumented immigrants living in each state." *San Jose*, 2020 WL 6253433, at *43.

In addition, the Memorandum violates the statutory command that apportionment be based on the results of the decennial census alone. Statutory law "calls for the Secretary to report a single set of numbers—'the tabulation of total population by States' under the 'decennial census'—to the President," *New York*, 2020 WL 5422959, at *25 (quoting 13 U.S.C. § 141) (cleaned up), and "expressly requires the President to use the data from the 'decennial census' in determining apportionment," *id.* (quoting *Franklin*, 505 U.S. at 797) (cleaned up). This "statutory command is clear." *Useche*, 2020 WL 6545886, at *12. Yet the Memorandum "flouts this statutory requirement," *id.*, by announcing that the apportionment calculation will be based on "information" regarding undocumented immigrants, which must be provided *separate from* and *in addition to* the "information tabulated" in the 2020 decennial census, which the

Government concedes *will* include undocumented persons, *see San Jose*, 2020 WL 6253433, at *46.

IV. If the Court Does Not Affirm Here, It Should Avoid Foreclosing Other Challenges to the Memorandum.

As noted, *amici* have brought suit in the District of Columbia asserting that the Memorandum violates constitutional and statutory provisions beyond those at issue in this appeal. *See* Second Am. Compl., *Common Cause*, No. 20-cv-2023, ECF No. 70.

For example, in addition to the grounds presently before the Court, *amici* moved for summary judgment on the ground that the Memorandum violates the Constitution's Enumeration Clause, which provides that all data used in congressional apportionment "shall be determined" via an "actual Enumeration." U.S. Const., art. I, § 2, cl. 3. Interpreting this requirement, this Court has explained that "the Framers expected census enumerators to seek to reach each individual household" one by one when collecting information that bears on apportionment. *Utah v. Evans*, 536 U.S. 452, 477 (2002); *see also House of Representatives*, 525 U.S. at 346-47 (Scalia, J., concurring) (noting that, in the Framers' day, "an 'enumeration' require[d] an actual counting, and not just an estimation"). Thus, to the extent other "methods substitute for any such effort, . . . the Framers did not believe that the Constitution authorized their use." *Evans*, 536 U.S. at 477.

It bears emphasizing why the Framers were insistent on an "actual Enumeration." Besides select-

ing a method that was simple and unambiguous, they sought to guard against political "manipulation" of the census and the resulting apportionment. Br. of National Republican Legislators Ass'n as *Amici Curiae*, No. 98-404, *Dep't of Commerce v. House of Representatives*, 1998 WL 767644, at *6 (U.S. filed Nov. 3, 1998). The Constitution's "actual Enumeration" requirement served those ends: a literal headcount constituted a "permanent and precise standard" that would "t[ie] the hands" of future Congresses so that they "could not sacrifice their trust to momentary considerations." 1 Records of the Federal Convention of 1787 at 578, 580 (Max Farrand ed., 1911). This method also "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less open to fraud and evasion, than any other, which could be devised." 2 Joseph Story, Commentaries on the Constitution of the United States § 633 (1833); *see also* 3 Joseph Story, Commentaries on the Constitution of the United States § 676, at 143 (1833) ("[T]he rule" of actual Enumeration was intended "always [to] work the same way . . . and be as little open to cavil, or controversy, or abuse, as possible.").

In addition, *amici* moved for summary judgment on the ground that the Memorandum's implementation will violate 13 U.S.C. § 195, which "directly prohibits the use of [statistical] sampling in the determination of population for purposes of apportionment"—whether "as a 'supplement' [to] or as a 'substitute'" for actual enumeration. *House of Representatives*, 525 U.S. at 338, 342.

The reason why Congress prohibited statistical sampling in apportionment is the same reason why the Framers insisted on an "actual Enumeration": the danger that "the census could become just a tool to further the political ends of [the methodology's] designers, the political party that controls the executive branch." Br. of National Republican Legislators Ass'n as *Amici Curiae*, No. 98-404, *Dep't of Commerce*, 1998 WL 767644, at *8. President George H. W. Bush's Secretary of Commerce, Robert Mosbacher, explained that sampling would "open the door to political tampering with the census" and "subject the Census Bureau to partisan pressures," because such methods "depend[] heavily on assumptions," and their results change "in important ways" when those assumptions change. Dep't of Commerce, *Adjustment of the 1990 Census for Overcounts and Undercounts of Population and Housing, Notice of Final Decision*, 56 Fed. Reg. 33582, 33583, 33605 (July 22, 1991); *see also Wisconsin v. City of New York*, 517 U.S. 1, 11-12 (1996) (summarizing these concerns).

As *amici* showed below, the Memorandum runs headlong into these provisions. The Census Bureau did not inquire household by household about respondents' compliance with immigration laws in connection with the 2020 census. The Bureau therefore lacks anything constituting an "actual Enumeration" of who in each state is, and is not, in compliance with those laws. Any estimate of the undocumented immigrant population that the Bureau might be able to make through the administrative records that it has collected will be just that: an estimate, not an "actual Enumeration." U.S. Const., art. I, § 2, cl. 3. Moreo-

ver, according to the undisputed declaration of *amici*'s expert, Dr. Hillygus, any such method would necessarily "rely on statistical sampling" prohibited by statute. Hillygus Decl. ¶ 6, *Common Cause*, No. 20-cv-2023, ECF No. 31.24.

These constitutional and statutory provisions, however, are not presently before the Court in this appeal. Accordingly, should this Court reverse the judgment below for whatever reason, *amici* respectfully request that the Court take care to avoid prematurely foreclosing or opining on these independent challenges to the Memorandum.

CONCLUSION

The judgment below should be affirmed.

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Respectfully submitted,

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