No. 24-1102

IN THE

Supreme Court of the United States

CITIZENS FOR CONSTITUTIONAL INTEGRITY,
Petitioner,

v.

CENSUS BUREAU, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MICHAEL L. ROSIN IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF AMICUS

Amicus curiae **Michael L. Rosin** is an independent scholar whose work focuses on the Electoral College and everything on which it is built.[1] Mr. Rosin has conducted extensive historical research and analysis about the interstate apportionment of the United States House of Representatives and its impact on the Electoral College. *See, e.g., Who Is Excluded From the Basis of Representation? The Trump Apportionment Memorandum and Section 2 of the Fourteenth Amendment*, 34(1) S. CAL. REV. OF L. AND SOC. JUST. JUSTICE 45 (2025); *The Three-Fifths Rule and the Presidential Elections of 1800 and 1824*, 15(1) UNIV. OF ST. THOMAS L. J. 159 (2018). His scholarship also includes an explanation of why Woodrow Wilson owed his 1916 election defeat of Charles Evans Hughes to Congress's failure to enforce Section 2 of the Fourteenth Amendment following the 1910 census. *See The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46(2) HIST. Methods 57 (2013). He is at work on a comprehensive history of the interstate apportionment of the U.S. House of Representatives. For a complete listing of his published scholarship, see https://orcid.org/0000-0001-5029-3073.

Mr. Rosin's research on interstate apportionment—in particular his careful review of the deliberations of the Thirty-Ninth Congress—formed the basis of a merits-stage amicus brief in *Trump v. New*

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[1] Undersigned counsel notified counsel for all parties of Mr. Rosin's intention to file this brief on May 17, 2025. No party nor party's counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than amicus or his counsel made a monetary contribution to its preparation or submission.

York. *See* Brief of *Amicus Curiae* Michael L. Rosin, *Trump v. New York*, No. 20-366 (Nov. 13, 2020).

Based on his research on the Electoral College, Mr. Rosin submitted petition-stage and merits-stage amicus briefs in *Chiafalo et al. v. Washington* and *Colorado Department of State v. Baca et al. See* Brief of *Amici Curiae* Michael L. Rosin et al., *Chiafalo,* No. 19-465 & *Baca*, No. 19-518 (Mar. 6, 2020); Brief of *Amici Curiae* Michael L. Rosin & David G. Post in Support of Petition for Certiorari, *Chiafalo,* No. 19-465 & *Baca*, No. 19-518 (Nov. 6, 2019). He also submitted amicus briefs in *Chiafalo* and *Baca* to the Washington Supreme Court and Tenth Circuit Court of Appeals, respectively.

Finally, drawing once again on his detailed historical research, Mr. Rosin submitted a merits-stage amicus brief in *Moore v. Harper*. *See* Brief of *Amicus Curiae* Michael L. Rosin in Support of Respondents, No. 21-1272 (Oct. 24, 2022).

SUMMARY OF ARGUMENT

Section Two of the Fourteenth Amendment states:

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

U.S. CONST., amend. XIV, § 2.

Section 2's Penalty Clause[2] states a mandatory rule: If a state denies or abridges the right to vote of any

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[2] The courts and parties in this case generally refer to this provision as the "Reduction Clause." This brief will use the term "Penalty Clause." *See, e.g.*, Ethan Herenstein and Yurij Rudensky, *The Penalty Clause & the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y.U. L. REV. 1021 (2021); Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 George Washington L. REV. 774, 777, 785-87 (2018); Michael T. Morley, *Remedial Equilibration and the Right to Vote under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279 (2015). This term reflects the fact that the clause functions to reduce a state's basis of apportionment for representation but not its basis of direct taxation. It therefore "penalizes" a state that has denied or abridged its citizens' voting rights by potentially reducing that state's representation in Congress while leaving it on the hook for its full, existing direct taxation basis. *See* Cong. Globe, 39th Cong., 1st Sess. 1257 ("I support it for the reason that it settles the basis of representation and imposes a penalty on States that exclude any class

of its voting-age citizenry, the numerical basis for determining that state's representation in the House "shall be reduced in the proportion which the number of such [denied/abridged] citizens shall bear to the whole number of [voting-age] citizens . . . in such state." *Id.*

Section Two also states an exception to that rule: If the state in question denies or abridges the right to vote of some of its voting-age citizens "for participation in rebellion, or other crime," then the number of those disenfranchised participants "in rebellion, or other crime" has no impact on the state's "basis of representation." This Court has already addressed the exception. *Richardson v. Ramirez* upheld the states' authority to deny or abridge the right to vote of its adult citizens who participate in rebellion or are convicted of felonies. 418 U.S. 24, 49–55 (1974).

It is now time for the Court to invigorate the rule itself. As Judge Wilkins observed in his concurrence,

> When pressed further about which government actor is responsible for enforcing the Reduction Clause, if not the [Census] Bureau, the Bureau took no position, abdicating any responsibility for congressional action. The Bureau's response, put colloquially, was, "Not it."

Citizens for Constitutional Integrity v. Census Bureau, et al., 115 F.4th 618, 631 (D.C. Cir. 2024) (Wilkins, J., concurring) (cleaned up).

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of men on account of race or color. It is in the nature of a penalty." (Sen. H. Wilson (R-MA) commenting on predecessor version of Section 2)).

As explained in Point I, the government's "unacceptable position," *id.*, cannot be squared with the indispensable role the Penalty Clause plays in fulfilling the Constitution's "guarantee to every State in this Union a Republican Form of Government," U.S. CONST., art. IV, § 4, elected by the entirety of its adult citizenry (other than participants "in rebellion, or other crime"). The Penalty Clause forces a state to ask itself, when considering a change in the law or other action that might reduce access to the ballot, "is this change in the law worth risking losing one or more House seats?".[3] And if the Clause goes unenforced, "[o]ne State's representation in Congress" can be unconstitutionally "reduced while another's is fortified" by means of unconstitutional denial or abridgment of voting rights. *Utah v. Evans*, 536 U.S. 452, 509 (2002) (Thomas, J., concurring in part and dissenting in part) (discussing the use of statistical methods to estimate the Census count).

Point II then explains how the Penalty Clause operates and how it affects the interstate apportionment of the House of Representatives. Finally, Point III applies the Clause's mathematics to recent Census figures. That analysis shows that it is plausible (if not probable) that if the Census Bureau had collected the information needed

[3] Commenting on an early version of the Penalty Clause, James Blaine (R-ME) was perhaps the first member of Congress to make clear the intent to condition a state's share of its political power in the federal union on its fully sharing political power among its voting-eligible citizenry. *See* Cong. Globe, 39th Cong., 1st Sess. 141 (1866) ("The proposed constitutional amendment would simply say to those States, while you refuse to enfranchise your black population you shall have no representation based on their numbers; but admit them to civil and political rights and they shall at once be counted to your advantage in the apportionment of Representatives.").

to apply the Penalty Clause, at a minimum New York would have received another House seat. By showing how sensitive the process is to very small changes in states' apportionment bases, it underscores the need for the courts to intervene, now, and ensure that the executive branch fulfills its constitutional obligation under the Penalty Clause. "[T]he government has a duty to enforce all of the Constitution, not just some of it, and it is time that the government stop treating the Reduction Clause as an afterthought." *Citizens for Constitutional Integrity*, 115 F.4th at 636 (Wilkins, J., concurring). For these reasons, the Court should grant the petition.

ARGUMENT

I. A Constitutionally Compliant Apportionment of the House is the First Constitutional Obligation of the Government of the Union

The Constitution established a compact of rights, powers, and obligations among the people of the United States, the states they compose, and the Government of the Union created by the Constitution. For example, the Constitution obligates the federal government to "*guarantee to every State in this Union a Republican Form of Government*, and […] protect each of them against Invasion; and … against domestic Violence." U.S. CONST., art. IV, § 4 (emphasis added).

However, the first obligation imposed on the Government of the Union in the text of the Constitution is the obligation to make an "actual Enumeration … within every subsequent Term of ten Years," U.S. CONST., art. I, § 2, cl. 3, in support of the most fundamental political issue confronting a confederated republic: the allocation of political power among its confederated members. In our

constitutional system, this issue plays out in the interstate apportionment of the House of Representatives (and consequently the Electoral College).

To fulfill that mandate, the Census Bureau currently "take[s] a decennial census of population" of each state every ten years. *See* 13 U.S.C. § 141(a). As Congress noted in 1997, "the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." Appropriations Act of 1998, Pub. L. 105-119, § 209(a)(2), 111 Stat. 2440, 2481.

In the wake of the Civil War and Reconstruction, the framers of the Fourteenth Amendment realized that more than a simple headcount of the population was needed to achieve the goal of universal adult male citizen suffrage so that each state's government (and its Representatives and presidential electors) were chosen by the entirety of its adult male citizenry (except for participants "in rebellion, or other crime"). Motivated by the specter of the disenfranchisement of black voters, they fashioned the Penalty Clause to make sure that the basis of representation would be adjusted downward to the extent that any state denied or abridged its adult male citizens' rights to vote. The Penalty Clause's plain language operates to prevent states from getting apportionment "credit" for the number of adult citizens whose rights they deny or abridge.

The 2020 census did not do that. It simply counted the total number of persons in each state. Full implementation of the Penalty Clause requires the federal government to collect two additional sets of data: (1) the number of voting age citizens in each state; and (2) the number of voting age citizens in each state whose "right to vote [in certain elections] is denied … or in any way

abridged, except for participation in rebellion, or other crime." U.S. CONST., amend. XIV, § 2.

The federal government is fully capable of collecting that data. As Judge Wilkins's concurrence explains, "the Bureau demonstrates that it has the authority to provide the President with an apportionment count based on census data. It is thus the Bureau's responsibility to ensure that the apportionment count it is providing accords with the Reduction Clause as well as the Clause's statutory codification at 2 U.S.C. § 6." *Citizens for Constitutional Integrity*, 115 F.4th at 636 (Wilkins, J. concurring). Indeed, the decennial census provides the exact infrastructure needed for this task. And even if doing so would significantly complicate the census process, "that is no excuse for the Executive Branch to abdicate its responsibility to give effect to this important part of the Constitution." *Id.*

More importantly, the government has the constitutional responsibility to collect the data needed to effectuate the Penalty Clause. As Judge Wilkins's concurrence describes, it is a historically accurate statement that "neither the [Census] Bureau nor any other member of the Executive Branch appears to have meaningfully attempted to figure out how to implement this constitutional provision. It is as if the Reduction Clause were written in invisible, rather than indelible, ink." *Id.* at 635. But that fact does not alter the bedrock principle that "the government has a duty to enforce all of the Constitution, not just some of it." *Id.* at 636. Therefore, "it is time that the government stop treating the Reduction Clause as an afterthought." *Id.* (cleaned up).

In sum, it is "unacceptable," *id.* at 631, for the federal government to continue avoiding its obligation to

enforce the Penalty Clause. In the discussion that follows, *amicus* provides a brief explanation of how the Clause operates and shows that it is plausible (if not likely) that, had the Census Bureau collected the required data, the 2020 census would have resulted in New York receiving an additional House seat.

II. The Penalty Clause's operation and impact on House apportionment

A. How the Penalty Clause operates

Before providing an illustration of how the Penalty Clause operates, for ease of reference, here is a version of the Clause's text, annotated (with strike-through for deletions and bold type for insertions) to reflect the impact of the Nineteenth and Twenty-Sixth Amendments[4]:

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the ~~male~~ inhabitants of such state, being ~~twenty-one~~ **eighteen** years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such ~~male~~ citizens shall bear to the whole number of ~~male~~ citizens ~~twenty-one~~ **eighteen** years of age in such state.

[4] *See Evenwel v. Abbot*, 578 U.S. 54, 103 n.7 (2016) (Alito, J. concurring).

The following numerical example demonstrates how the Clause works, with annotations to show how each hypothetical figure correlates to the text of the Clause.

Suppose a state has

- A total population of 10,000,000 ("the basis of representation therein" initially, without penalty)
- 7,000,000 of whom are citizens over the age of eighteen ("the whole number of ~~male~~ citizens ~~twenty-one~~ **eighteen** years of age")
- 350,000 of the adult citizenry have had their voting rights denied or abridged for a reason other than "participation in rebellion, or other crime" ("the number of such ~~male~~ citizens" where "such" denotes voting-age citizens for whom "the right to vote . . . is denied . . . or in any way abridged")

In this hypothetical, "the proportion which the number of such ~~male~~ citizens shall bear to the whole number of ~~male~~ citizens ~~twenty-one~~ **eighteen** years of age in such state," or the penalty rate, is:

5.00% = 350,000 / 7,000,000

To determine the absolute number by which the "basis of representation therein" for apportionment must be reduced, multiply the penalty rate and the state's total population:

500,000 = 5.00% * 10,000,000

Therefore, the reduced "basis of representation therein" for apportionment purposes is:

9,500,000 = 10,000,000 – 500,000

Table 1 summarizes this calculation:

Population	10,000,000
Adult citizenry	7,000,000
Adult citizens disenfranchised for reasons other than "rebellion, or other crime"	350,000
Penalty rate	5.00%
Penalty number	500,000
Reduced apportionment basis	9,500,000

Table 1

B. How the Method of Equal Proportions works

In June 1929, more than a year in advance of receiving the 1930 census data, Congress fixed the size of the House at its current membership of 435 and prescribed the mathematical apportionment method by

statute. 46 Stat. 21, 26–27 § 22(a)(1), (b).[5] In 1941, it changed the apportionment method from the Method of Major Fractions to the Method of Equal Proportions, *see* 55 Stat. 761-762,[6] which remains in effect today. *See* 2 U.S.C. § 2a(a). Here is how that method works.[7]

The Constitution guarantees each state at least one seat in the House. U.S. CONST., art. I, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative"). The states compete for seats 51 through 435, so as to minimize the total variation of representatives per person among the states as measured by percentage at each step in the apportionment.[8]

The Method of Equal Proportions begins by determining each state's priority factor, and then awards the next seat to the state with the highest priority factor. Suppose State X has already been apportioned N seats in a hypothetical apportionment process. State X's priority

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[5] Section 22(a) (codified at 2 U.S.C. § 2a(a)) instructs the Census Bureau to deliver "an apportionment of the then existing number of Representatives." Congress, of course, has the power to revise the size of the House as it did in the Alaska and Hawaii Admission Acts that each added one seat to the size of the House and then called for the size to be reset to 435 in the apportionment based on the 1960 census. *See* § 9, 72 Stat. 339, 345; § 8, 73 Stat. 4, 8.

[6] This change switched the last seat in the House from Republican leaning Michigan to reliably Democratic Arkansas. *See* H. Doc. 77-45, at 2.

[7] *See* MICHEL L. BALINSKI and H. PEYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 48–55 (2nd ed. 2001); LAURENCE F. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 22–27 (1941). Nothing in this case depends on the method employed for interstate apportionment.

[8] BALINSKI and YOUNG, *supra* note 7, at 48; SCHMECKEBIER, *supra* note 7, at 21-24; 24-27 n.9.

factor is equal to its apportionment basis, A, divided by √(N*(N+1)), or

$$A / \sqrt{(N*(N+1))}$$

At each step in the apportionment process (i.e., the allocation of each House seat from number 51 to number 435), every state's priority factor is calculated, and the state with the highest priority factor gets the next seat. Suppose State X is awarded the next seat, increasing its apportionment to N+1. As a result, State X's priority factor for its (N+2)th seat is decreased from

$$A / \sqrt{(N*(N+1))}$$

to

$$A / \sqrt{((N+1)*(N+2))}.$$

The addition of a seat always decreases a state's priority factor, because it increases the denominator of that state's priority factor. For example, every state's initial priority factor (when each has only the single seat assigned by Article I, § 2, cl. 3) is its apportionment basis divided by √(1 * (1+1)), or ~1.4142. Following assignment of the 51st seat, the recipient state's priority factor for its next seat is its apportionment basis divided by √(2 * (2+1)), or ~2.4495.

The impact of the Penalty Clause on this process could be significant. Because the Method of Equal Proportions uses each state's apportionment basis as the unchanging numerator of each state's priority factor, a Penalty Clause reduction to State X's apportionment basis means that State X will have a lower priority factor at every step of the apportionment process than it would have, had it not denied or abridged the voting rights of any of its adult citizenry (for reasons other than "participation in rebellion, or other crime").

III. Recent census and other data demonstrate that the Government of the Union must be required to enforce the Penalty Clause

The results of the 2020 census and apportionment process show that extremely small changes to one state's apportionment basis (including via a Penalty Clause reduction) would have shifted seats among states, underscoring the paramount need for enforcement of the Clause. For example, in the 2020 apportionment New York barely lost out to Minnesota for the 435th House seat. The 2020 apportionment allocated 26 seats to New York, and its census count was 20,215,751.[9] Because the government did not collect the data needed to apply the Penalty Clause, each state's census count functioned as its apportionment basis. Therefore, New York's priority factor (rounded to two places to the right of the decimal point) for an additional, 27th seat in 2020 was:

$$762{,}994.35 = 20{,}215{,}751 / \sqrt{(26*27)}.$$

Meanwhile, the 2020 apportionment process awarded the final House seat to Minnesota, giving it a total of eight. With a 2020 census count (and therefore also an apportionment basis) of 5,709,752, Minnesota's priority factor for its eighth and final seat was:

$$762{,}997.71 = 5{,}709{,}752 / \sqrt{(7*8)}.$$

If Minnesota's apportionment basis had been decreased by a mere 26, or 0.0004%, *for whatever reason*, its priority factor would also have been decreased to be

[9] U.S. Census Bureau, 2020 Census Apportionment, at 11, available at https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/presentation-2020-census-apportionment-results.pdf.

just smaller than New York's priority factor for its 27th seat.

$$762{,}994.23 = (5{,}709{,}752 - 26) / \sqrt{(7*8)}.$$

The point of this example is not to suggest that Minnesota's eighth seat should be taken away and given to New York or any other state. Instead, it shows just how sensitive the apportionment math is to very tiny changes in states' apportionment bases. That, in turn, shows just how significant an impact application of the Penalty Clause plausibly would have, and therefore how imperative it is, now, for the courts to ensure that the executive branch fulfills its constitutional obligation to enforce it. As Judge Wilkins put it, "it is time that the government stop treating the Reduction Clause as an afterthought." *Citizens for Constitutional Integrity*, 115 F.4th at 636 (Wilkins, J., concurring). Minnesota was not an outlier in the 2020 process.

The crossover points (in percentages and absolute numbers) that would have reduced each state's priority factor to be lower than New York's, for the states that received the in ascending crossover percentage order appear in Table 2 below:

State	2020 Census Count	Penalty-Free Apportionment			NY Crossover		Revised Priority Factor
		Last Seat Priority	State Seat	House Seat	Percent	Absolute	
MN	5,709,752	762,997.71	8	435	0.00%	26	762,994.23
MT	1,085,407	767,498.65	2	434	0.59%	6,371	762,993.67
CA	39,576,757	768,516.94	52	433	0.72%	284,400	762,994.35
CO	5,782,171	772,675.10	8	432	1.25%	72,445	762,994.23
OR	4,241,500	774,388.41	6	431	1.47%	62,408	762,994.32
NC	10,453,948	774,898.18	14	430	1.54%	160,592	762,994.31
AL	5,030,053	776,154.03	7	429	1.70%	85,285	762,994.27
RI	1,098,163	776,518.50	2	428	1.74%	19,127	762,993.67
IL	12,822,739	777,492.75	17	427	1.86%	239,114	762,994.34
TX	29,183,290	778,290.25	38	426	1.97%	573,546	762,994.33

Table 2

Litigation concerning Texas's voter identification laws also sheds additional light on the real-world impact of enforcement of the Penalty Clause. Before a Fifth Circuit panel in 2015, Texas attempted to rebut a claim that SB 14, a Texas law requiring voters to present certain types of photo identification in order to vote, was racially discriminatory by arguing "that there is no disparate impact where, as here, the gross number of Anglos without SB 14 ID — 296,156 people — almost totals the number of African-American, Hispanic, and 'other' voters without SB 14 ID — 312,314 people." *Veasey v. Abbott*, 796 F.3d 487, 499, 509 n.25 (5th Cir. 2015). The panel

affirmed the district court's conclusion that SB 14 "violates Section 2 of the Voting Rights Act through its discriminatory effects" and remanded for consideration of an appropriate remedy. *Id.* at 520. The en banc Fifth Circuit then affirmed that finding and directed the district court to enter an interim remedy. *Veasey v. Abbott*, 13 F.4th 362, 366 (5th Cir. 2021) (citing *Veasey v. Abbott*, 830 F.3d 216, 264, 272 (5th Cir. 2016) (en banc)). In 2017, the Texas legislature essentially turned the interim remedy the district court had fashioned following the 2016 en banc ruling into law. *Veasey,* 13 F.4th at 366-67.

Assume that the figures Texas argued to the Fifth Circuit in 2015 were a reasonable count of the voters who had been disenfranchised by SB 14. Under that assumption, SB 14 denied or abridged the right to vote of 608,470 (296,156 + 312,314) adult citizens. Below, that hypothetical figure is incorporated into the 2020 apportionment mathematics to show the impact of such a change in Texas's apportionment basis.

In the context of the 2020 apportionment process, reducing Texas's apportionment basis by 608,470 would have reduced its priority factor for its 38th and final seat to be lower than New York's priority factor for its would-be 27th seat, shifting a seat from Texas to New York. As shown in Table 2 above, a reduction of at least 573,546 would have given Texas a lower priority factor than New York. Using the denial/abridgment figure Texas argued in *Veasey*, Texas's 2020 apportionment basis would have been 28,574,802—its 2020 census count of 29,183,290[10] less 608,470. It priority factor for its 38th seat would have been

[10] U.S. Census Bureau, 2020 Census Apportionment, at 11,

762,062.94 = 28,574,820 / √(37*38)

As explained above, New York's 2020 priority factor for a would-be 27th seat was 762,994.35. Therefore, New York would have received a 27th seat and Texas would not have received its 38th.

Again, this discussion is not intended to suggest that a seat should shift from Texas to New York. The examples discussed above show that collecting and processing that data—as the Penalty Clause's plain language commands—plausibly (if not probably) would have resulted in a different apportionment of House seats than the current one. None of this can be known, however, unless and until the Census Bureau gathers information on the number of adult citizens whose right to vote has been denied or abridged in the several states. Given the government's position in this litigation—which Judge Wilkins accurately described as "not it"—the judiciary must step in to ensure the government fulfills its constitutional obligation to enforce the Penalty Clause. "Equal treatment must be afforded not just to people but to the laws in place to protect their rights; it is high time, after 150 years, that the Reduction Clause receive the respect it deserves." *Citizens for Constitutional Integrity*, 115 F.4th at 631 (Wilkins, J., concurring).

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available at https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/presentation-2020-census-apportionment-results.pdf.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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