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 *AMICUS CURIAE* FAIR LINES
AMERICA FOUNDATION, INC.
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae is Fair Lines America Foundation, Inc.[1] Fair Lines America Foundation is a nonprofit, nonpartisan organization that educates the public on fair and legal redistricting through comprehensive data gathering, processing, and deployment; dissemination of relevant news and information; and strategic investments in academic research and litigation.

Fair Lines America Foundation's interest in this case focuses on the importance of obtaining full and accurate data from the census. There are significant legal and compliance challenges when creating redistricting plans, and Fair Lines America Foundation helps educate the public about these important issues. Ensuring courts, legislatures, academics, and others have access to full and accurate data is critical to Fair Lines America Foundation's mission and to legislatures, academics, and courts around the country.

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[1] Fair Lines America Foundation affirms no counsel for a party to this case authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. On October 28, Counsel for Petitioners and Counsel for all Respondents filed letters with this Court granting blanket consent to the filing of all amicus briefs.

INTRODUCTION & SUMMARY OF THE ARGUMENT

This Court should not block the Census Bureau from providing information available to it and requested by the President. Nothing in the Constitution or law—or in the Presidential Memorandum[2]—should be allowed to prevent the President from requesting and making public multiple datasets of entirely lawful information obtained and processed by the Census Bureau.

In fact, the Presidential Memorandum requires the Census Bureau to "provide information permitting the President, to the extent practicable, to exercise the President's discretion to" exclude those persons residing in the United States without authorization from the Congressional apportionment base.[3] Importantly, the Memorandum instructs the Census Bureau to count people consistent with its methodology, which includes counting those residing in the United States at detention facilities operated by Immigration and Customs Enforcement. *See Final 2020 Census Residence Criteria and Residence*

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[2] *See Excluding Illegal Aliens From The Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44679 (July 23, 2020). Fair Lines America Foundation takes no position before this Court on what population should or should not be the baseline population in any particular apportionment (either the distribution of Congressional seats to the states or the drawing of various district lines within each state).

[3] *See id.* at 44680.

Situations, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018); *see also id.* at 5533 (stating that citizens of foreign countries living in the United States are counted at their residence where they sleep and live most of the time).

Accordingly, the "information" the Census Bureau must provide to the President includes the following three pieces of data:

First: the total population residing in the United States, including those persons who reside in the United States illegally;

Second: the total number of United States citizens of voting age;

Third: the total number of persons residing in the United States without legal authorization.

Amicus Curiae presents two arguments for this Court's consideration.

First, the Presidential Memorandum directs the Census Bureau to provide the President (and the public) with information. This Court should not interfere with the release of information requested by the President. The more information obtained from the census, the more the data can assist policymakers in crafting policies to address issues confronting federal, state, and local governments.

Second, obtaining information that concerns the number of U.S. citizens of voting age who reside in the United States, as well as the number of persons

residing in the United States without authorization, will be of paramount importance to Congress, state legislatures, and thousands of local government bodies that will soon draw representative districts for the next decade. This information will be instrumental in the drawing of districts that, in their judgment, best comply with the one-person, one-vote principle as well as the Voting Rights Act. This Court should permit the public dissemination of this information at the earliest moment possible.

ARGUMENT

I. THIS COURT'S PRECEDENTS FAVOR THE CENSUS BUREAU PROVIDING THE PRESIDENT AND THE PUBLIC WITH INFORMATION—NOT SUPPRESSING INFORMATION.

A. The Presidential Memorandum Requests The Census Bureau Provide Him With Information Available to the Bureau.

The Enumeration Clause of the Constitution "vests Congress with virtually unlimited discretion in conducting the decennial actual Enumeration…". *Dep't. of Comm. v. New York*, 139 S. Ct. 2551, 2566 (2019). Congress then "delegated its broad authority over the census to the Secretary." *Id*.

The Census Bureau is currently tabulating the total population of those persons residing in the United States. 13 U.S.C. § 141(a). Once this tabulation of total population is complete, the

Secretary of Commerce is then directed to report these numbers to the President of the United States. *Id*. § 141(b).

Congress then empowers the President to transmit the "whole number of persons in each State" to Congress, including a report detailing the number of congressional seats each State receives according the apportionment formula. *See* 2 U.S.C. § 2a(a).

The Presidential Memorandum, as this Court has recognized, separates these two distinct steps. *See Dep't. of Comm. v. U.S. House of Representatives,* 525 U.S. 316, 321 (1999) (stating that the Census Bureau conducts the census, then the Secretary reports the results of the tabulation to the President and "[u]sing this information, the President must then transmit to the Congress a statement showing the whole number of persons in each State.") (internal quotation marks omitted).

Prior to transmitting his report, the Presidential Memorandum indicates his intent to "exclud[e] Illegal Aliens from the Apportionment Base Following the 2020 Census."[4] To do this, he orders the Secretary of Commerce to provide the President with the "information" necessary to effectuate his policy.[5] This Memorandum does not require the Census Bureau to exclude illegal aliens from the tabulation of total population. On the contrary, the Memorandum explicitly orders the Census Bureau to

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[4] *See* 85 Fed. Reg. at 44680.

[5] *See id.*

include the total population in the United States.[6] *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018).

This means the Census Bureau will still provide the President with the total population of the United States. What the Memorandum requests is that the Census Bureau also provide information concerning how many persons reside in the United States without authorization. The Memorandum also requests the number of United States citizens residing in the United States.

Regardless of whether the President must use the total population number when apportioning congressional seats, this Court should continue to recognize the two steps—the Secretary reporting various pieces of information to the President and the President then apportioning the number of congressional seats—as separate and distinct processes. Thus, however this Court rules on which dataset is correct for the apportionment, this Court should permit the Secretary to publicly report this important information.

Accordingly, the district court's opinion went too far when it enjoined the Census Bureau from reporting "information" to the President that would allow the President to carry out the policy he outlined in his Presidential Memorandum. *See* JA 99a. The district court ordered that the Census Bureau withhold from the President (and the public)

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[6] *See* 85 Fed. Reg. at 44680.

the number of persons residing in the United States without authorization and only report to the President the total population. *See id.* This was erroneous: there is nothing unconstitutional or impermissible about providing the number of persons lawfully and unlawfully within the boundaries of the United States.

Regardless of the outcome of this case on the apportionment base debate, the district court's order committed legal error by barring the Secretary from providing the President with information he requested. It precluded the reporting of information to the President—step one—as a means to prevent the President from using that information to apportion congressional seats at step two. In preventing the dissemination of citizenship information and the number of those persons living in the United States without authorization, the district court exceeded its remedial scope and prohibited the release of otherwise permissible public information the President may lawfully request from the Census Bureau. This Court should permit the dissemination of this pertinent information.[7]

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[7] While not addressed in detail herein, Fair Lines America Foundation agrees with the Solicitor General that the Appellees here, Plaintiffs below, lack standing.

B.   Both Congress And This Court Favor Obtaining The Most Accurate Information.

From the very first census in 1790, Congress has demanded "a just and perfect enumeration of every person" living in the United States. *Dep't. of Comm.*, 525 U.S. at 335. Statistical sampling was prohibited. *Id*. This remained the practice in the United States from 1790 to 1957. *Id*. at 336. In 1957, some statistical sampling was permitted, but not for purposes of apportionment. *See id*. at 336-37. Congress's steadfast purpose in obtaining the most accurate count of population for apportionment purposes remains as true today as it did in 1790. *See id*. at 338.

This does not mean the census cannot use statistical sampling. In fact, the Secretary is required "to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census." *Id*. Congress was interested in both obtaining the most accurate count of the population for apportionment purposes as well as obtaining the most data it could assemble. Accordingly, citizenship has long been the subject of census questions, among other demographic data. *Dep't of Comm.*, 139 S. Ct. at 2567. In fact, nearly every census since 1790 has included a question about whether the census respondent was a U.S. citizen. *Id.* at 2561.[8]

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[8] The American Community Survey (ACS) is insufficient to determine the number of U.S. citizens because the ACS is sent to only 2.6% of households.

Accordingly, the purpose of the census is to both apportion Congress and for "information-gathering purposes." *Id*. The census is, therefore, the "linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." *Id*. Thus, using the census to collect data on the number of citizens is permissible under the Constitution. *Id*. In fact, this Court credited the Secretary's interest in including a citizenship question on the census because it was likely to obtain "more complete and accurate citizenship data" and was worth the risk of a potentially "lower response rate." *Id*. at 2571.

Another example of Congress's determination to ensure an accurate count is the 1970 Census. This census, conducted during the Vietnam War, accounted for the numerous Armed Forces members serving abroad. The Census Bureau used personnel records from the Department of Defense to allocate these persons to their "home[s] of record." *Franklin v. Massachusetts*, 505 U.S. 788, 793 (1992). After realizing that those "home[s] of record" in Defense Department records were prone to misuse, the Census Bureau declined to use these records in the 1980 Census. *Id*. Later, for the 1990 Census, the Census Bureau found these records were in fact accurate and invited 40 federal agencies with employees overseas to "submit counts of their employees as well." *Id*. at 795. This Court upheld this practice in part because these employees and

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Dep't. of Comm. v. New York, 139 S. Ct. 2551, 2562 (2019).

service members likely consider themselves to be "usual residents" of the United States, and counting them does not harm the "goal of equal representation" but "actually promotes equality." *Id*. at 806.

All this information is submitted to the President who this Court has ruled has the power to "reform" the census count before apportioning the number of congressional seats. *See id*. at 798. Additionally, the Secretary's report "carries no direct consequences for reapportionment." *Id* at 798. To ensure the integrity and accuracy of the census count, Congress empowered both the Secretary of Commerce and the President of the United States to tabulate the total population and make calculations to send the final report with the apportionment conclusions to Congress. *Id*. at 800. The President has an independent duty to consider the census data before making the apportionment.

II. **PERMITTING THE CENSUS BUREAU TO REPORT THIS INFORMATION IS IMPORTANT FOR REDISTRICTING PURPOSES.**

A. **OBTAINING THIS INFORMATION IS IMPORTANT FOR ONE PERSON, ONE VOTE PURPOSES.**

1. **This Information Is Instrumental For Policy Makers Deciding How to Conduct Redistricting.**

When state legislatures conduct their sovereign function of drawing districts, *see, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993), the Fourteenth Amendment's Equal Protection Clause does not command that the legislature use total population or citizen population as the basis for those districts. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1123, 1126 (2016) (holding a state *may* use total population as its base to draw legislative districts, and further holding that the Equal Protection Clause does not require a state to use the number of voters as its base); *Burns v. Richardson*, 384 U.S. 73, 91 (1966) ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.").

In fact, this Court has reviewed equal protection challenges to state legislative districts where the state used total population, *Reynolds v. Sims*, 377 U.S. 533 (1964) and where the state used citizen population, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 646-49 (1964) (analyzing under the Equal Protection Clause New York's redistricting plan drawn on the basis of citizen population).[9] This Court has therefore acknowledged that it has never held States "are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment

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[9] *See also Burns*, 384 U.S. at 91-92 (stating that in *Lomenzo* "we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure").

base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Burns*, 384 U.S. at 92. A State legislature's choice of its apportionment base "involves a choice about the nature of representation." *Id.*

Accordingly, the state legislatures need citizenship data in determining whether to apportion their districts based upon total population or citizen populations, or by using some combination of this data. States have the discretion to apportion their districts to "equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government." *Evenwel*, 136 S. Ct. at 1133 (Alito, J., concurring).

Some federal circuit courts are in agreement that the political branches of government are empowered to decide whether to use a total population or citizen population. *See Chen v. Houston*, 206 F.3d 502, 523 (5th Cir. 2000) ("[W]e find that the *choice* of population figures—[the use of CVAP or total population]—is a choice left to the political process.") (emphasis added); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). Accordingly, for States to make informed decisions about this "quintessentially" political decision of which apportionment base most accurately reflects their individual state, *Daly*, 93 F.3d at 1227, the legislatures need the most accurate citizenship data. This Court should permit the Secretary to report this data.

2. **This Data Implicates Serious Policy Decisions Regarding the One Person, One Vote Principle.**

This Court has previously expressed concern about the difference between districts drawn on the basis of total population with those districts drawn on the basis of registered voters in discussing electoral equality. *See Burns*, 384 U.S. at 90. In *Burns*, this Court analyzed Hawaii's state legislative redistricting plan. Hawaii chose to use registered voters as a basis "for Hawaiian apportionment…". *Id*. This decision produced "sizable differences in results produced by that distribution in contrast to that produced" by total population. *Id*. For example, if Hawaii drew districts on the basis of total population, Oahu constituted 79% of Hawaii's population and was entitled to 40 seats in its 51-seat House of Representatives. *Id*. By contrast, if districts were drawn on the basis of registered voters, Oahu would be entitled to 37 representatives. *Id*. The reason for this disparity was the "uneven distribution of military residents—largely unregistered…". *Id*. The difference between districts on the island of Oahu are even more striking. If districts were drawn on the basis of total population, Oahu's 9th and 10th districts would be entitled to eleven representatives. On the other hand, if they were drawn on the basis of registered voters, this number drops to six. *See id*. at 90-91.

The Court then highlighted the problem with the choice between total population and registered voters as the basis of apportionment. Each choice is

"susceptible to improper influences" by those with political power. *Id*. at 92. Those in political power could use the over-representation issue presented by non-voting populations like military bases to "perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment." *Id*. at 92-93. Due to the large presence of the military bases containing large population centers but only a small number of voters, "if total population were to be the only acceptable criterion upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow." *Id*. at 94. Accordingly, using total population figures may constitute a "substantially distorted reflection of the distribution of state citizenry." *Id*.

In a subsequent case, Justice Thomas highlighted how this choice between total population and citizen population implicated the one-person, one-vote principle. *See Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of cert.). There, the City of Houston's total population deviation had less than 10% of population variance. *Id*. at 1048. This Court has ruled that a population variance of less than 10% is *prima facie* constitutional. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016). *But see Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J., concurring) (declining to create a "safe harbor" for all "population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever"). Based on total population, the City of Houston's redistricting map appears to

survive a one person, one vote equal protection challenge. If, however, citizen population were used as the basis, the maximum deviation is anywhere from 20% to 32.5%. *Chen*, 532 U.S. at 1048 (Thomas, J., dissenting from denial of cert.). Thus, the decision to base apportionment on total population or citizen population can be the difference between a constitutional map with population deviations less than 10% or an unconstitutional map with deviations above 30%.

The problem is one of numerical, racial, and political vote dilution, as well as often intentional dilution. Non-citizen population is yet another subset of non-voting population, no different than the previously cited military bases in Hawaii. It is also similar to universities, prisons, and other non-voting populations—many of which have been "adjust[ed]" by various states over the years when determining the apportionment base. *See Evenwel*, 136 S. Ct. at 1124 n.3. However, non-citizen population is the largest non-voting block of voting age population by far. It is also the only non-voting block for which accurate geographic data is currently unattainable.[10]

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[10] "Geographic accuracy" refers to the ability to have accurate data at small levels of geography (i.e. the block level) that can be accurately aggregated into political districts. The Census Bureau often discusses the similar concept of "distributive accuracy," which is also concerned with the issue of small area accuracy, but does not always address the issue of maintaining accuracy when aggregating those areas into non-census geography, such as

As the Census Bureau ramped up for the 2010 Census, this Court decided *Bartlett v. Strickland*, which reinforced the importance of citizen voting age population as a key determinant for remedies of Section 2 cases. 556 U.S. 1 (2009). However, prior to the census following this Court's decision in *Bartlett*, the Census Bureau eliminated the long form (and therefore the citizenship question) from the decennial census.[11]

When the Bureau did that, it had to determine whether to continue including the citizenship question as part of the decennial census, what had previously been called the short form, or migrate the question to the American Community Survey (ACS). Because the ACS is a rolling survey done over multiple years with a different population base and with a smaller sample size, it cannot, as demonstrated in the *Evenwel* case, provide accurate geographic data with respect to the citizenship question, particularly at the block level as is needed for redistricting. *See* 136 S. Ct. 1120.

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political districts. This is another reason why the use of enumerated data, rather than statistically generated data, is critical.

[11] Until 2010, the long form was asked of every seventh person in the decennial census and contained a citizenship question. Because it was asked with the decennial census, used the same population base, and was asked of a large contemporaneous sample, it provided reasonably accurate characteristic data at the block level, which neither the ACS nor any other current census product does.

Having the enumerated data, which the Bureau is now preparing from administrative records, *see Dept. of Commerce v. House of Representatives*, 525 U.S. at 321-27, is critical to an apportionment process that protects the equal protection rights of all citizens. The district court's decision below will have the effect of denying any relief for any Fourteenth Amendment and Voting Rights Act violations because litigants will not have complete data with which to make their case, and courts will not have accurate data with which to fashion any required remedies. If a state uses total population as its apportionment base, and its "eligible voters are unevenly distributed, the result will necessarily devalue the votes of individuals in the area with a higher percentage of potentially eligible voters." *Chen*, 206 F.3d at 525. The problem arises because "the large populations in the other district will leverage the votes of the smaller number of eligible voters there." *Id.*

This problem persists now. For example, in California, using total population as the base for its apportionment, its 53 congressional districts have a population deviation of 0%.[12] Its state Senate districts and state House districts have total population deviations of 1.98% and 1.99% respectively.[13] Using actual voter turnout as the

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[12] *See* National Conference of State Legislatures, *2010 Redistricting Deviation Table*, *available at* https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 26, 2020).

apportionment basis (i.e., as a proxy for the number of eligible voters since geographically accurate citizen voting age population (CVAP) data isn't available),[14] it is possible to examine the population "deviation" in California's congressional districts in 2018. The "ideal" turnout in a California district in 2018 was 229,869 based on the votes cast that year. The highest turnout district had 340,654 votes cast. The lowest turnout district had 113,616 votes cast. The "deviation" from the ideal for the highest turnout district is +48%, and the deviation for the lowest turnout district is -51%, for a "range" of 99%.[15] In other words, in the 2018 election 340,654 citizens voted to elect one U.S. Representative in one California district, while in another California

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[13] *See id.*

[14] While data about the number of voters who turned out for elections is not detailed enough to address the possible equal protection issues created by large blocks of non-voting population, it is sufficient to illustrate the extent and nature of the issue. It also helps to illustrate the problems that come with the Census Bureau's sudden removal of geographically accurate non-citizen data ten years ago, which had been available previously for decades. If allowed to stand, the district court's decision may ensure this information never returns.

[15] U.S. Census Bureau, "Citizen Voting-Age Population and Voting Rates for Congressional Districts: 2018," *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/congressional-voting-tables.html (last visited Oct. 29, 2020).

district 113,616 citizens voted to elect one U.S. Representative.

Another metric that can be used to assess electoral equality (or inequality) is the vote weight, which is a comparison of the population base, here votes cast for all candidates in a statewide race, for the district with the most votes and the least. Looking again at the 2018 California congressional plan to illustrate, these numbers translated into a vote weight of 2.998 (340,654/113,616),[16] meaning the weight of a vote in the low turnout district was worth nearly three times a vote in the high turnout district in that election year.[17] This kind of vote weight imbalance between a State's districts seriously implicates the one-person, one-vote principle. As this Court has pertinently admonished: "It would be extraordinary to suggest . . . the votes of inhabitants of some parts of a State . . . could be weighted at two or three times the value of the votes of people living in [other] parts of the State." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

Comparable metrics from New York state also illustrate the disparity in electoral equality. For example, in the 2014 race for Governor of New York, the range of deviations from the average number of

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[16] *See id.*

[17] This demonstrates that because many persons identified by the census are not even eligible to vote, using total population as the basis for apportionment can result in significant vote weight inequality among actual eligible voters.

total votes for all candidates per district is as follows:

- For congressional districts: 106.10% (+48.50% to -57.59%) which translates into a vote weight of 3.50 for that plan. In the congressional district with the highest turnout, 209,714 voters voted to elect one U.S. Representative. In the congressional district with the lowest turnout, 59,890 voters voted to elect one U.S. Representative.

- For state senate districts: 118.38% (+55.75 to -62.93%) which translates into a vote weight of 4.20 for that plan. In the senate district with the highest turnout, 94,257 voters voted to elect one senator. In the senate district with the lowest turnout, 22,433 voters voted to elect one senator.

- For state assembly districts: 160.59% (+86.71 to -73.88%) which translates into a vote weight of 7.14 for that plan. In the legislative district with the highest turnout, 47,474 voters voted to elect one state assembly member. In the assembly district with the lowest turnout, 6,641 voters voted to elect one state assembly member.[18]

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[18]*See* https://www.polidata.org/census/law/20366dl.ht m (updated October 28, 2020).

For both California and New York, a comparison of the number of total votes for statewide office demonstrates a clear relationship: the higher the proportion of non-citizens based on ACS estimates, the lower the total votes for all candidates. To illustrate, the close correlation between CVAP on the one hand and total votes cast on the other is evident from examining these numbers from the 2018 election across the five most populous states' congressional districts, as reflected in the attached graphs. *See* App. 1-5.[19]

How electoral equality varies (at least for congressional districts) across other states is apparent in the results from a review of all 435 districts for each presidential election.[20] For

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[19] Four Florida congressional districts are excluded in the Florida graph in the attached appendices because the Census Bureau's 2018 data table did not include the votes cast in those congressional districts. This is because in Florida, candidates do not appear on the ballot in uncontested races. *See* Nate Cohn and Kevin Quealy, "A Mysterious 'Undervote' Could End Up Settling the Florida Senate Race," *N.Y. Times* (Nov. 9, 2018), *available at* https://www.nytimes.com/2018/11/09/upshot/florida-senate-race-broward-undercount.html (last visited Oct. 29, 2020). Accordingly, no votes were cast or counted in those four districts with uncontested races.

[20]*See* https://www.polidata.org/census/law/20366dl.htm (updated October 28, 2020). Examples listed here include states for which the listings on the website,

example, looking at the 2004 presidential race, Florida had a high district with 379,839 votes and a low district with 206,081 votes: this is a vote weight of 1.84. North Carolina had a high district with 349,702 votes and a low district with 223,421 votes: this is a vote weight of 1.56. Texas had a high district with 347,217 votes and a low district with 107,631 votes: this is a vote weight of 3.22.[21] And, once again, based on non-citizen data, the proportion of non-citizens was generally higher in the districts with the lowest number of votes cast.

Furthermore, an alternate population base is not the only way the discriminatory effect of non-voter population can be dealt with. For instance, several states have already chosen to take areas of readily identifiable non-voting population, such as universities, military installations, and correctional institutions, and reassign those persons amongst many districts to minimize the electoral inequality impact of the non-voting population.[22] However, without accurate geographic non-voting population data, this is impossible for the non-voting population that has the largest impact on electoral inequality. The data the President seeks in his memo is the

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which summarize only the top and bottom districts for the entire nation, include the high and low turnout districts.

[21] *See* https://www.polidata.org/census/law/20366dl.ht m (updated October 28, 2020).

[22] *See Redistricting Law 2020*, National Conference of State Legislatures (Denver, 2019), at 155; *see also Evenwel*, 136 S. Ct. at 1124 n.3.

necessary predicate for that geographically accurate data.

To determine how best to represent its population, whether to base apportionment on total population or citizen population, states need information on citizenship status. Accordingly, this Court should permit the Census Bureau to publish its information on the number of citizens residing in the United States.

B. OBTAINING THIS INFORMATION IS IMPORTANT FOR VOTING RIGHTS ACT PURPOSES.

Information on the number of citizens residing in a district, and information concerning the number of persons residing in a district illegally, is important for compliance with the Voting Rights Act. Section 2 of the Voting Rights Act prohibits the enactment of laws or procedures that results in "a denial or abridgment of the right of any *citizen* of the United States to vote on account of race or color…". 42 U.S.C. § 1973 (emphasis added). To violate this provision, a plaintiff must show that based on the totality of the circumstances, the ability to cast a ballot in a primary or general election "are not equally open to participation by members of a class of *citizens*…". *See id.* (emphasis added).

To prove a violation under Section 2 of the Voting Rights Act, a plaintiff must demonstrate the minority *citizen* population is sufficiently large to be considered a voting majority in a single-member district; the minority group is politically cohesive;

and there must be racially polarized voting such that the majority typically defeats the minority's candidate of choice. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The purpose of Section 2 is to extract from our body politic the corrosive wrong that occurs when a minority has "50% or more of the *voting population* and could constitute a compact voting majority, but, despite racially polarized bloc voting, that group is not put into a district." *Bartlett*, 556 U.S. at 19 (emphasis added).

In analyzing whether a plaintiff has shown the minority population is sufficiently large as to constitute a majority, the proper basis of the population is citizen voting age population. *See id.* at 27 (Souter, J., dissenting) ("In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity 'to elect representatives of their choice.'"); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 436 (2006) ("LULAC") ("We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are [minority] opportunity districts with the [minority] share of the citizen voting age population.").

As discussed above, just as this Court determined CVAP was the crucial piece of data for determining what is and is not a majority-minority district, the Bureau frustrated the decision of the Court by eliminating the very data and evidence it relied upon in *LULAC* and *Bartlett*. Because this

data which the Court had relied upon in those cases has been absent from the public record since the 2010 Census, the courts, legislatures, litigants, and the public have been forced to use inaccurate estimates and indirect data to estimate a data point which was quite specific when this Court made its decision in *Bartlett*.[23]

The current administration, through its administrative data program, has attempted to restore what was taken away in 2010, with perhaps

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[23] Recent disputes before federal courts over how to calculate or estimate CVAP in Voting Rights Act cases show just how imprecise and contested these estimates are. *See e.g.*, *Kumar v. Frisco Independent School District*, 2020 U.S. Dist. LEXIS 138141 (E.D. Tex., August 4, 2020) (utilizing CVAP data derived from a Spanish surname list in a Section 2 case and not using ACS data); *NAACP v. E. Ramapo Central School District*, 2020 U.S. Dist. LEXIS 91273 (S.D.N.Y., May 25, 2020) (approving use of the Bayesian Improved Surname Geocoding ("BISG") method for determining CVAP in a Section 2 case); *Flores v. Town of Islip*, 382 F. Supp. 3d 197 (E.D.N.Y. 2019) (utilizing ACS data estimates to determine CVAP in a Section 2 case); *Rios-Andino v. Orange County*, 51 F. Supp. 3d 1215 (M.D. Fla. 2014) (ruling against plaintiffs in a Section 2 case because of the uncertain nature of the dueling experts' citizenship calculations, where the experts used two different analyses of ACS data to determine citizenship). If the Census Bureau were to release enumerated data, these expert battles over CVAP before the lower courts would be minimized or even eliminated.

an increase in geographic accuracy. The decision below—if uncorrected by the Court—would ensure the enumerated citizenship data is never available for any purpose. This suppression of information by court order is unnecessary to provide relief to the plaintiffs in the case below.

Furthermore, in drafting districts, legislatures must have access to citizenship data for another reason. Without that data, in attempting to comply with the Voting Rights Act, legislatures must be wary of the "competing hazards of liability" by violating the Equal Protection Clause's prohibition against racial gerrymandering while balancing the requirements of Section 2. *See Abbott v. Perez*, 138 S. Ct. 2305, 2314-15 (2018) ("The Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning *citizens* to a district on the basis of race without sufficient justification.") (emphasis added).

For legislatures to determine whether the Voting Rights Act requires the creation of a majority-minority district, these legislatures must have access to data about the citizenship composition of the proposed district maps.[24] This data will also assist in preventing the legislature from violating the prohibition against racial gerrymanders.

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[24] As demonstrated above, *supra* note 22, ongoing disputes remain over what CVAP data or estimates legislatures and line drawers should use when assessing Section 2 compliance with adopted or proposed maps.

CONCLUSION

The district court committed an error at the very least in their commanded remedy. The district court was asked to prevent the President of the United States from using anything other than the total population of the United States to apportion congressional seats. The Congressional apportionment occurs at the second step of the census reporting statute, and the district court's order did not properly assess the first step of the process.

The district court improperly prevented the Secretary from even *reporting* information to the President at step one. Regardless of how this Court decides the merits of the case at step two, this Court should never prevent the Secretary of Commerce from reporting the number of U.S. citizens living in the United States and the number of those persons residing in the United States without authorization. This information is critically important, especially for legislatures as they embark on their sovereign function of drawing districts for the following decade.

Respectfully submitted,

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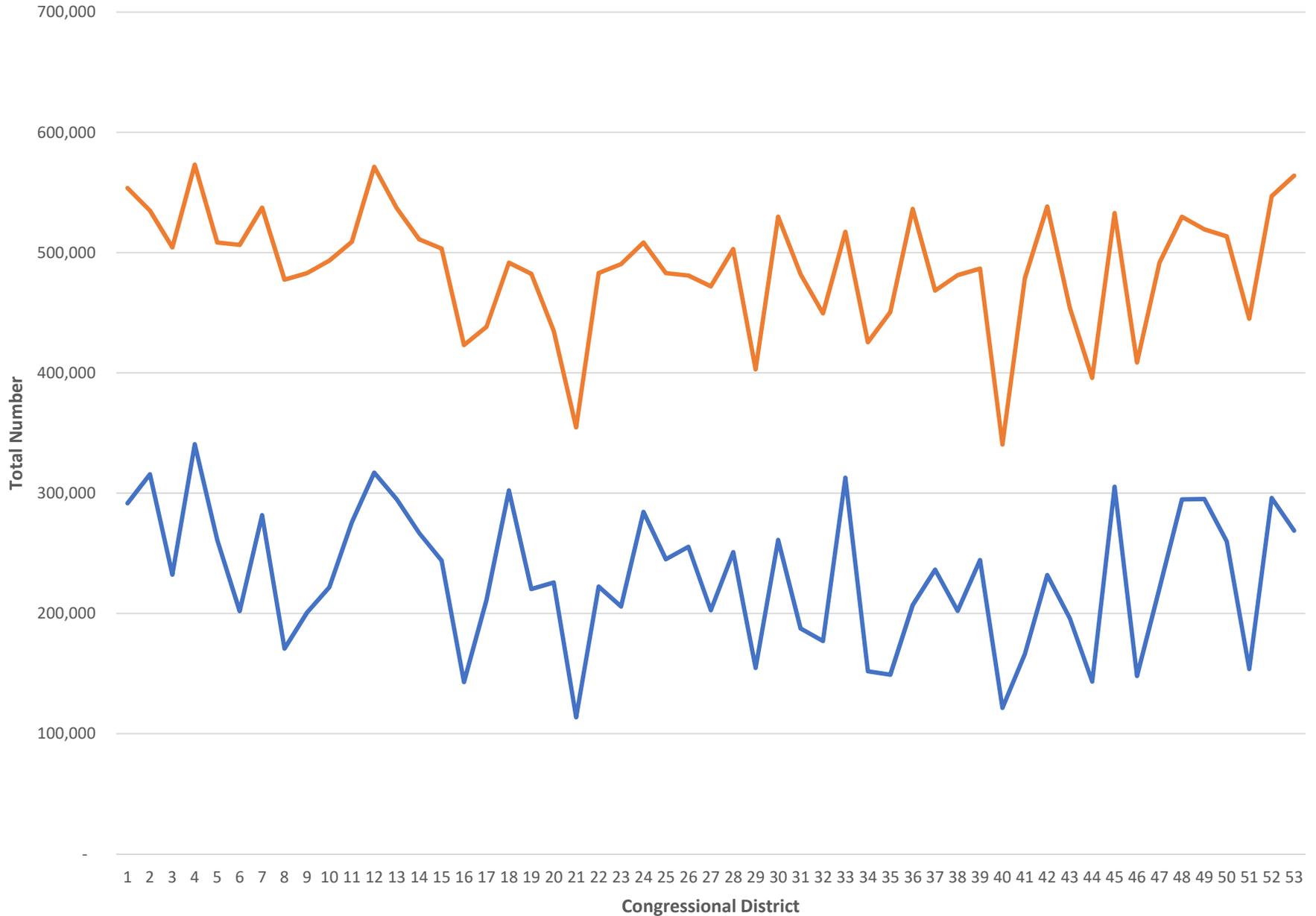KEN DAINES
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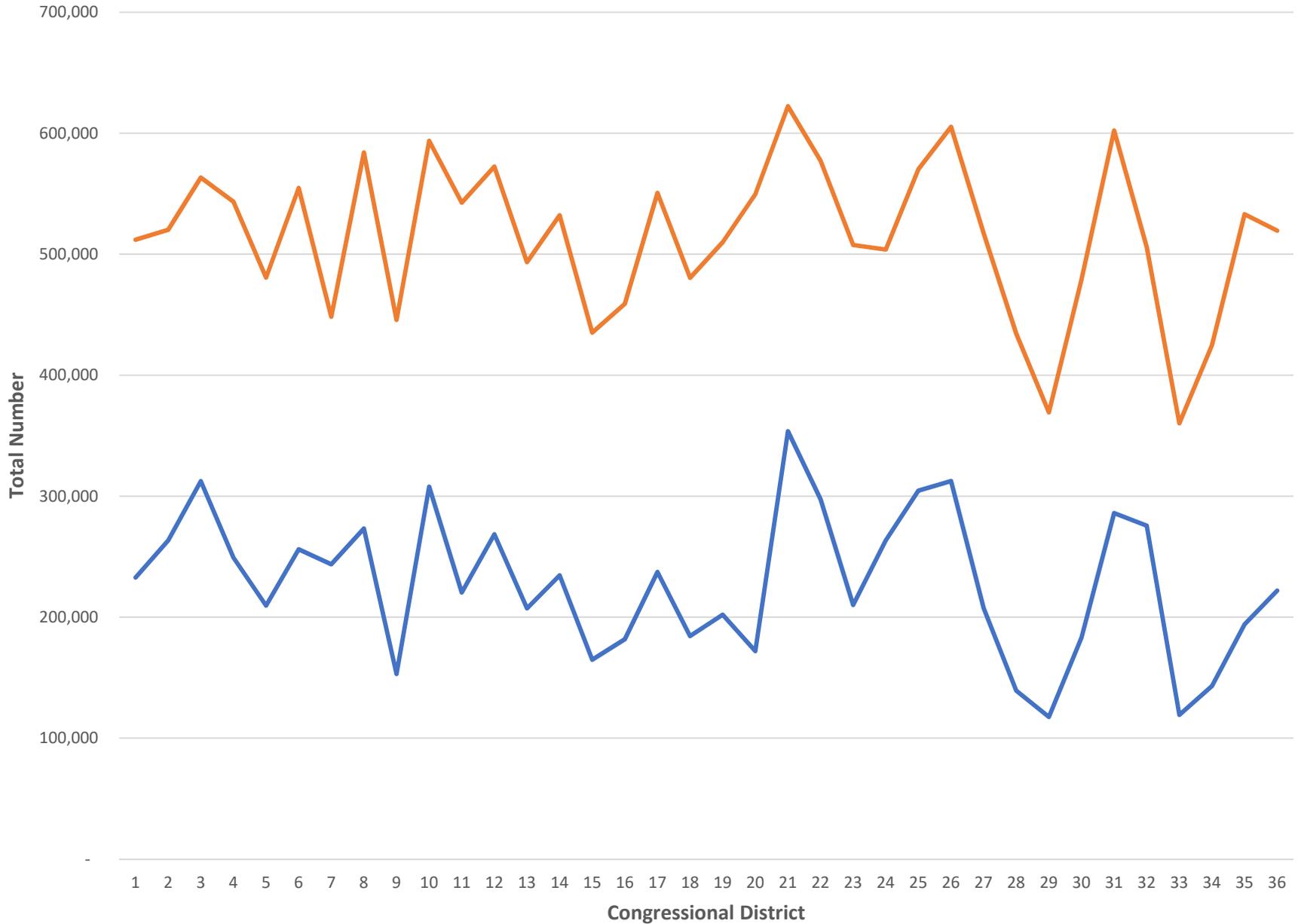(803) 772-7729

October 30, 2020

Appendix

California Congressional Districts: CVAP and Votes Cast (2018)

Source: U.S. Census Bureau, "Citizen Voting-Age Population and Voting Rates for Congressional Districts: 2018," *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/congressional-voting-tables.html
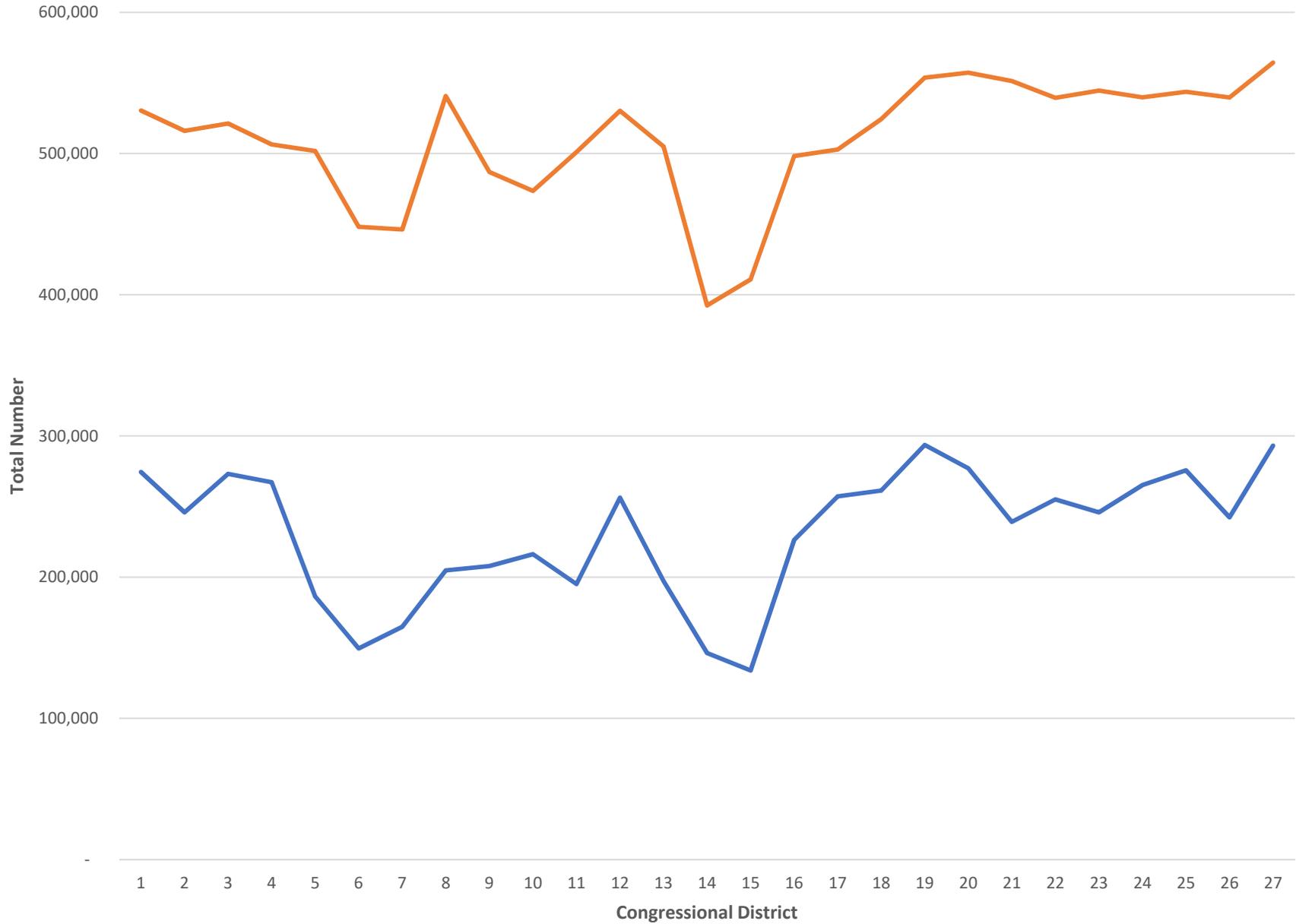
Texas Congressional Districts: CVAP and Votes Cast (2018)

Source: U.S. Census Bureau, "Citizen Voting-Age Population and Voting Rates for Congressional Districts: 2018," *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/congressional-voting-tables.html
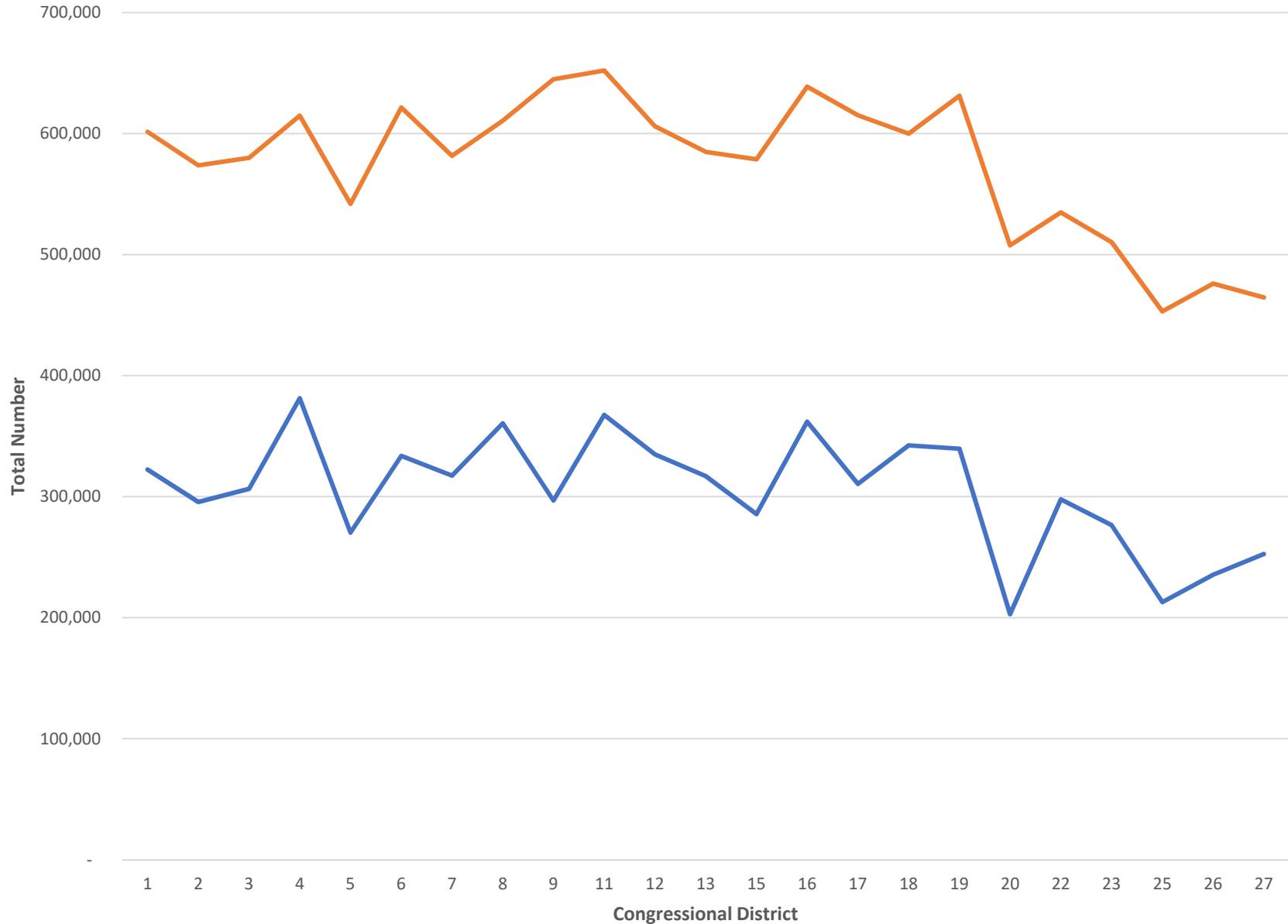
New York Congressional Districts: CVAP and Votes Cast (2018)
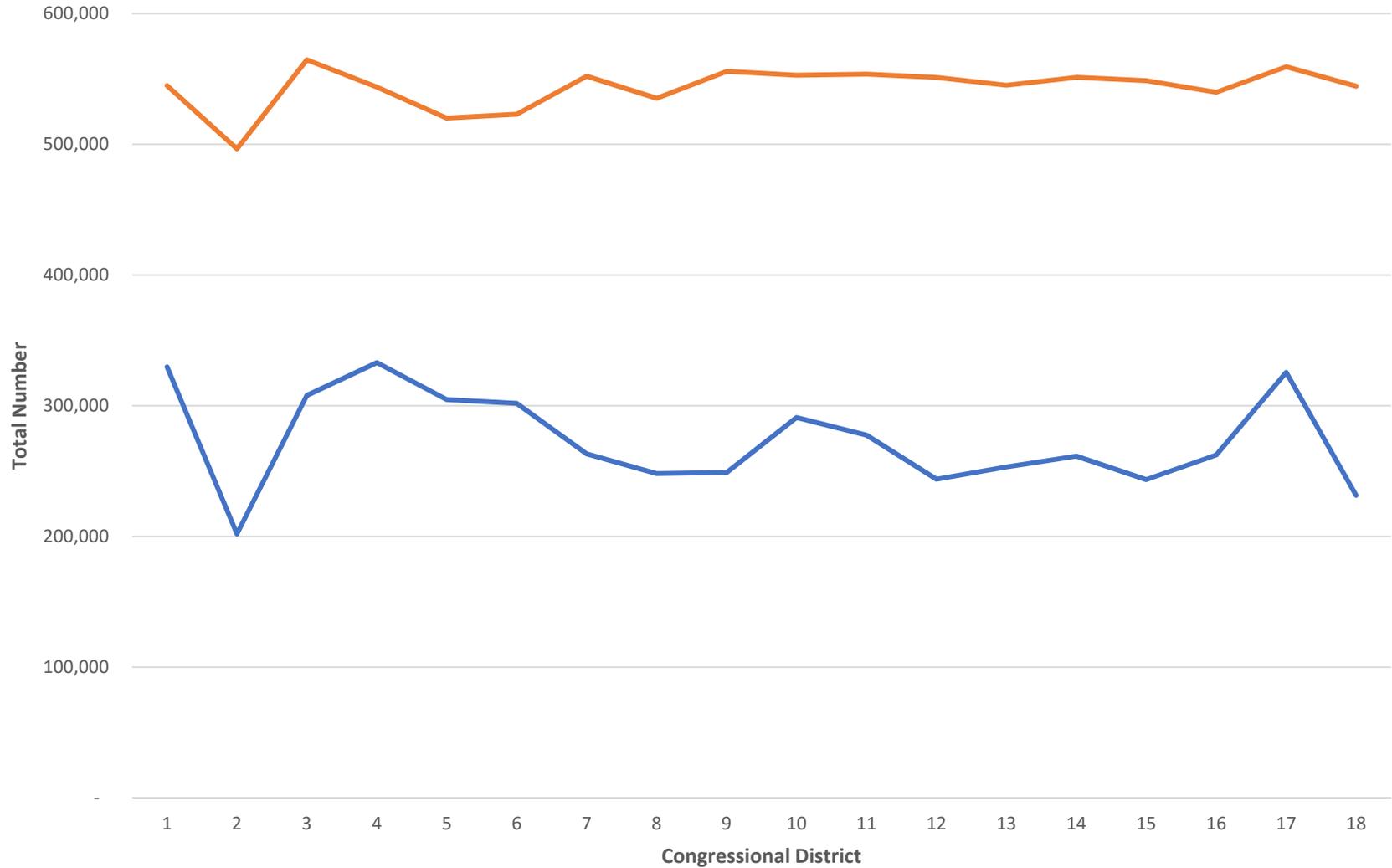
Votes Cast — CVAP

Source: U.S. Census Bureau, "Citizen Voting-Age Population and Voting Rates for Congressional Districts: 2018," *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/congressional-voting-tables.html

Florida Congressional Districts: CVAP and Votes Cast (2018)

Source: U.S. Census Bureau, "Citizen Voting-Age Population and Voting Rates for Congressional Districts: 2018," *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/congressional-voting-tables.html

App. 5

Pennsylvania Congressional Districts: CVAP and Votes Cast (2018)

Source: U.S. Census Bureau, "Citizen Voting-Age Population and Voting Rates for Congressional Districts: 2018," *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/congressional-voting-