No. 20-366

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Appellants,

v.

STATE OF NEW YORK, ET AL.,

Appellees.

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

BRIEF FOR AMICUS CURIAE THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

This case arises from the Administration's unlawful and unprecedented efforts to exclude undocumented residents from the apportionment count resulting from the decennial census. The Fourteenth Amendment requires the enumeration of "the whole number of persons in each State," U.S. Const. Amend. XIV, § 2, and commands that "Representatives shall be apportioned among the several States according to their respective numbers." *Id.*; *see also* U.S. Const. Art. I, § 2, cl. 3.

Congress has codified these constitutional commands in a detailed statutory scheme that governs both the census and the resulting apportionment. *See* 13 U.S.C. § 141; 2 U.S.C. § 2a. The Census Act requires that, by January 1, the Secretary of Commerce tabulate the "total population" of each State and "report[]" that tabulation "to the President of the United States." 13 U.S.C. § 141(b). The Reapportionment Act provides next for a statement by the President to Congress by January 10, showing—in language echoing the Fourteenth Amendment—the "whole number of persons in each State." 2 U.S.C. § 2a(a). That number is to be "ascertained under the . . . decennial census of the population," and the President is also directed to provide "the number of Representatives to which each State would be entitled" under a specified

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, made a monetary contribution to this brief. The parties have filed blanket letters of consent to amicus briefs.

mathematical formula. *Id.* The Clerk of the House is then required to send to each State "a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

Amicus curiae, the United States House of Representatives,[2] has a compelling institutional interest in preserving the lawfulness and integrity of the apportionment process and, thus, in the affirmance of the district court's ruling.

The House has a paramount institutional interest in the integrity of its own composition, *see Powell v. McCormack*, 395 U.S. 486, 548 (1969), which depends on an accurate apportionment of Representatives among the States. The Apportionment and Enumeration Clauses of Article I of the Constitution grant Congress responsibility for the census and apportionment. U.S. Const. Art. I, § 2, cl. 3 (the enumeration shall be conducted "in such Manner as [Congress] shall by Law direct"). The House therefore has a compelling interest in ensuring that the Administration observes constitutional and statutory commands in administering the census and certifying

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[2] The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives, which "speaks for, and articulates the institutional position of, the House in all litigation matters," has authorized the filing of an amicus brief in this matter. Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip. Representative McCarthy and Representative Scalise dissented.

the resulting apportionment to Congress. And, in exercising its appropriations and other legislative powers, the House has an institutional interest in ensuring that all of the Nation's communities—which contribute to the public fisc and are subject to its laws—receive the representation in the House mandated by federal law.

SUMMARY OF ARGUMENT

This Court should affirm the district court's holding that the President's Memorandum of July 23, 2020, violates federal law by ordering the exclusion of undocumented residents from the apportionment count. *See* Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020); Op. & Order, *New York v. Trump*, No. 20-CV-05770-RCW-PWH-JMF, 2020 WL 5422959 (S.D.N.Y. Sept. 10, 2020).

The Constitution prohibits the exclusion of undocumented residents from the apportionment count. The Fourteenth Amendment requires the enumeration of "the *whole number of persons* in each State," U.S. Const. Amend. XIV, § 2 (emphasis added), and commands that "Representatives shall be apportioned among the several States according to their respective numbers," *id.*; *see also* U.S. Const. Art. I, § 2, cl. 3. The Census and Reapportionment Acts implement this constitutional mandate, requiring "[t]he tabulation of total population by States," 13 U.S.C. § 141(b), and the counting of the "whole number of persons in each State," 2 U.S.C. § 2a(a).

All three branches of the Federal Government have long understood that both the enumeration and the Congressional apportionment base ascertained through the census must include all persons residing in each State—regardless of citizenship or immigration status. Therefore, as the district court held, the President cannot lawfully transmit an apportionment calculation to Congress based on

anything other than "the whole number of persons in each State." U.S. Const. Amend. XIV, § 2.

ARGUMENT

I. The President's Memorandum Violates The Constitutional And Statutory Requirements That Apportionment Be Based On Total Population.

The text of Article I of the Constitution, as amended by the Fourteenth Amendment—and as confirmed by the Constitution's history and purpose—establishes that apportionment must be based on a count of *the whole number of persons* residing in each State. Accordingly, Congress, the courts, and the Executive Branch have consistently interpreted the Constitution to require an all-persons enumeration. Indeed, Congress has not only enacted statutes that implement this constitutional command and thereby prohibit what the President is attempting, but also has refused to enact legislation that would accomplish what the Memorandum purports to achieve by Executive fiat.

A. The Constitution requires apportionment based on total resident population.

1. As originally framed, the Constitution required a regular enumeration of the population that counted the "whole [n]umber" of "[p]ersons" in the United States for purposes of apportioning seats in the House, *see* U.S. Const. Art. I, § 2, cl. 3, subject to only two exceptions: Enslaved people were notoriously counted

as only three-fifths of a person, and "Indians not taxed" were excluded from the total population. *Id.*

The Framers understood this language to require that *every* individual residing in the United States be included in the census and apportionment count. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (explaining that the Framers deliberately chose a method of apportionment based on total population rather than eligible voters, for example). As Alexander Hamilton stated, arguing in support of apportionment based on total population: "There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government." 1 Records of the Federal Convention of 1787, at 473 (M. Farrand ed., 1911) (quoted in *Evenwel*, 136 S. Ct. at 1127).

The Fourteenth Amendment, ratified after the Civil War to establish political representation for all, amended Article I's Enumeration Clause. It removed the Three-Fifths Clause but retained total population as the apportionment base, requiring that Representatives be apportioned "according to their respective numbers, *counting the whole number of persons in each State*." U.S. Const. Amend. XIV, § 2 (emphasis added).[3]

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[3] The exception for "Indians not taxed" also no longer applies. *See* An Act to Provide for Taking the Tenth and Subsequent Censuses, Pub. L. No. 45-195, § 7, 20 Stat. 473, 475 (1879) (authorizing enumeration of all Native Americans); *Exclusion of "Indians Not Taxed" When Apportioning Representatives*, 39 Op. Att'y Gen. 518, 519–20 (1940) (recommending that enumeration of Native Americans continue).

The meaning of this provision is clear. The term "person" includes any "human being," Black's Law Dictionary (11th ed. 2019), without regard to legal status. That the Fourteenth Amendment elsewhere uses the word "citizens" when referring to certain individual rights underscores that the broader reference to "persons" for purposes of the apportionment count is not tied to citizenship status. *Compare* U.S. Const. Amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]"), *with id.*, § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property without the due process of law[.]").

In addition, when interpreting the Fourteenth Amendment's Due Process Clause, this Court has consistently held that "[a]liens, even aliens whose presence in this country is unlawful," are encompassed within the broad term "persons." *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (references to "persons" in the Fourteenth Amendment are "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

The Fourteenth Amendment's drafting history confirms that provision's reference to "persons" as encompassing all constituents, not just citizens or voters. Like the Framers, the Amendment's drafters debated this point extensively and deliberately chose a total-population basis for the apportionment of Representatives in the House. *See Evenwel*, 136 S. Ct. at 1127–29 (describing "fierce" debates between advocates of allocation based on voter population and those favoring an all-persons count, who grounded

their arguments "in the principle of representational equality"); *see also, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (remarks of Sen. Jacob Howard of Michigan) ("Numbers, not voters . . . [or] property; this is the theory of the Constitution."). The selected approach reflected a continued understanding that *all* residents "have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess. 141 (remarks of Rep. James Blaine of Maine)).

Moreover, in making this choice, the drafters recognized that elected officials represent and act in the name of *all* their constituents, including non-voting individuals like women (at the time), children, incarcerated persons, and noncitizens. *See* Cong. Globe, 39th Cong., 1st Sess. 705 (statement of Sen. William Fessenden of Maine) ("The principle of the Constitution, with regard to representation, is that it shall be founded on population . . . . [W]e are attached to that idea, that the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution."); *id.* at 434 (statement of Rep. Hamilton Ward of New York) (contending that "the large class of non-voting tax-payers" "should be enumerated in making up the whole number of those entitled to a representative").

The Administration too invokes the history of this text, including statements by the Framers and drafters of the Fourteenth Amendment, in an effort to prove that the Constitution's reference to "persons" "cover[s] only a State's '*inhabitants*.'" Appellants' Br. 29–32 (emphasis added). Setting aside that the term "inhabitant" does not appear in the relevant

constitutional text, the proposition that the drafters intended the Amendment to encompass all "inhabitants" is not in dispute. Indeed, as this Court has emphasized, the Constitutional Convention debates make "abundantly clear" that "when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's *inhabitants*." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) (emphasis added); *see also Evenwel*, 136 S. Ct. at 1127 (the "basis of representation in the House was to include all *inhabitants*" (emphasis added)).

The Administration errs, however, in its insistence on limiting the term "inhabitants" in a manner that contravenes the constitutional text and history. The term, the Administration contends, is sufficiently "indeterminate" that the President may construe it to exclude an entire class of residents from the apportionment based solely on their legal status. Appellants' Br. 32–29. But however the term "inhabitants" may be used in other contexts, where it is used as a way to define the constitutional requirement to count the "whole number of persons" for apportionment, it obviously must be understood in light of the Constitution's text and drafting history—neither of which leaves room for the Administration's arguments.

Indeed, the drafters of the Fourteenth Amendment specified that the provision's reference to "whole number of persons" encompassed *all* persons living in each State, *including* the "entire immigrant population not naturalized." Cong. Globe, 39th Cong., 1st Sess. 432 (statement of Rep. John Bingham of

Ohio); *id.* at 1256 (statement of Rep. Henry Wilson of Massachusetts) (recognizing that "unnaturalized foreign-born" individuals and other non-voters were included in the census).

And when alternatives were proposed that would have limited the apportionment base—including by excluding "the immigrant population not naturalized"—Representative Bingham, the Amendment's primary drafter, argued vehemently against those approaches, asserting that, "[u]nder the Constitution as it now is and as it always has been, *the entire immigrant population* of this country is included in the basis of representation." *Id.* at 432 (emphasis added).

Many others agreed. *See, e.g.*, *id.* at 411 (statement of Rep. Burton Cook of Ohio) (expressing concern that representation based on voters would inappropriately "take[] from the basis of representation all unnaturalized foreigners"); *see also id.* at 2944 (statement of Sen. George Henry Williams of Oregon) ("Representation is now based upon population," including "foreigners not naturalized."); *id.* at 2987 (statement of Sen. Henry Wilson of Massachusetts) (declaring that an apportionment based only on voters would constitute "a blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis"); *id.* at 353 (statement of Rep. Andrew Jackson Rogers of New Jersey) ("Every man in this House knows perfectly well in the several States . . . unnaturalized citizens cannot vote . . . yet for these persons the States are entitled to representation."); *id.* at 359 (statement of Rep. Roscoe Conkling of New York) ("'Persons' and not

'citizens,' have always constituted the basis" for representation and apportionment, and a proposal to use voters instead "would narrow the basis of taxation and cause considerable inequalities in this respect, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year."); *id.* at 961 (statement of Sen. Charles Buckalew of Pennsylvania) ("[F]oreigners are counted.").

2. The Administration ignores this history, instead suggesting that its narrower reading of "inhabitant" has an equivalent historical pedigree. That is wrong. The Administration's argument largely hinges on a statement by an eighteenth-century Swiss international law scholar, Emmerich de Vattel. Appellants' Br. 35–38. In a treatise later quoted by Chief Justice John Marshall in a concurrence, Vattel described "inhabitants" as "strangers who are permitted to settle and stay in the country." *The Venus*, 12 U.S. (8 Cranch) 253, 289 (1814) (Marshall, C.J., concurring). But, as a federal court recently recognized, "neither Vattel's statement nor *The Venus* has any relation to apportionment or the census." *City of San Jose v. Trump*, Nos. 20-CV-05167-RRC-LHK-EMC, 20-CV-05169-RRC-LHK-EMC, 2020 WL 6253433, at *39 (N.D. Cal. Oct. 22, 2020) (three-judge court), *jur. statement filed*, No. 20-561 (Oct. 29, 2020).

Chief Justice Marshall's reference to Vattel had nothing to do with the census and apportionment. Marshall made clear that Vattel (a scholar of international law) was not discussing U.S. domestic law but rather "the law of nations." *The Venus*, 12 U.S. (8 Cranch) at 289 (Marshall, C.J., concurring).

The Chief Justice, moreover, did not even fully embrace in this different context Vattel's view, which Chief Justice Marshall described as "not very full to this point." *Id.* There is therefore no basis to conclude from Chief Justice Marshall's concurrence—or from anything that came before or after it—that the U.S. Constitution enshrined Vattel's international-law conception of "inhabitants" into American domestic law as the proper understanding of the constitutional term "persons" for purposes of the census and apportionment.

Further, the Administration suggests (Appellants' Br. 35–36) that the Constitution's Framers may have had Vattel's definition in mind when drafting the Apportionment Clause. But that idea too is belied by the historical record. The Act of March 1, 1790, passed just three years after the Constitution's ratification, specified that persons should be enumerated at their "usual place of abode" or where they "usually reside[]." Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103. The Act also specified that persons "without a settled place of residence" should be enumerated "where he or she shall be on" a specified date, *id.*, confirming that a strict requirement of permanent habitancy was *not* a prerequisite for counting "persons" or "inhabitants" at the Founding.

In short, permanent or legal habitancy has never been a constitutional prerequisite for counting "persons" for purposes of the enumeration and apportionment. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525-1, 5,526 (Feb. 8, 2018). Accordingly, the apportionment "always has included those persons who have established a residence in the United

States," regardless of their legal status. *Historical Perspective*, U.S. Census Bureau (2020), https://perma.cc/Y6LW-XKF8.

3. The Administration makes several additional arguments in support of the notion that the President has extensive discretion to redefine the term "inhabitant" and exclude undocumented immigrants from the apportionment. Those arguments all disregard the Constitution's text, historical understanding, or both.

The Administration notes, for example, that some undocumented immigrants, such as inadmissible noncitizens paroled within the United States, are subject to a legal fiction that they have not "entered" the country even when they are physically present within its borders. Appellants' Br. 36–37 (citing *Kaplan v. Tod*, 267 U.S. 228 (1925)). But that legal fiction applies only to the notion of "entry," distinguishing between those "on the threshold" of entering and those who are already "within the United States after an entry, irrespective of its legality." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

That distinction is irrelevant here, because individuals in either category—those who are excludable because they have not "entered," and those who have entered but are removable because their presence here is unlawful—still may be deemed "inhabitants" (or "persons") and included in the enumeration and apportionment. Surely, in common speech people would use the term "inhabitant" to include a person who lived in a community for years, regardless of whether such a person did or did not

possess appropriate immigration papers. That is because only *residency*—not "entry"—is the relevant criterion for these purposes. *See, e.g.*, Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. at 5,526 (explaining that the Census Bureau counts inhabitants based on their "usual residence" or "usual place of abode," citing the Act of March 1, 1790); *accord Franklin v. Massachusetts*, 505 U.S. 788, 804–06 (1992); *see also* 1 Noah Webster, *American Dictionary of the English Language* (1828) (reprinted 1989) (unpaginated) (defining "usual" as "[c]ustomary; common; frequent; such as occurs in ordinary practice, or in the ordinary course of events"; and defining "residence" as "[t]he act of abiding or dwelling in a place for some continuance of time").

Kaplan, on which the Administration relies (at Appellants' Br. 36–37, 41), itself proves this point. There, this Court held that Esther Kaplan, as a parolee, was not "dwelling in the United States" for the purposes of determining the effect of her father's naturalization on her citizenship status. 267 U.S. at 230. But, as the district court recognized in *City of San Jose*, Kaplan, who had resided in the United States since 1914, *was counted* as part of the 1920 census, despite her legal status as a parolee. 2020 WL 6253433, at *40. Likewise, under Census Bureau practice, an immigrant who entered the country unlawfully, but resided here would be counted as an "inhabitant" of the State in which she lives. *See Frequently Asked Questions (FAQs) on congressional apportionment*, U.S. Census Bureau (2020), https://perma.cc/2HCH-NYVZ (confirming that undocumented residents are counted).

The Administration also argues that this Court's decision in *Franklin* justifies adding to the residency inquiry a second question—whether the individual has developed "an enduring tie to a place" (which, they suggest, noncitizens are unlikely to establish). Appellants' Br. 37–38 (citing *Franklin*, 505 U.S. at 804). That is a serious misreading of *Franklin*. There, the Court permitted the Census Bureau to count federal employees stationed abroad among the "total population" of the State that was their "usual residence." 505 U.S. at 806. The Court was satisfied that "usual residence" could be assessed by looking *either* to a resident's physical presence *or* to whether, when stationed overseas, the individual retained "an enduring tie" to her home state. *Id.* at 804, 806. But the goal, as always, was to ensure that the enumeration reflected all of the individuals who called a State home. *Franklin* thus in no way sanctions requiring all noncitizens to prove some degree of allegiance to a place in order to be counted in the census at their "usual residence." *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. at 5,526.

Finally, the Administration's approach conflicts with other longstanding legal regimes that treat undocumented immigrants as "inhabitants" or "residents." For tax purposes, for example, noncitizens residing in the United States are considered "resident aliens," regardless of their status, and they are required to "file a tax return following the same rules that apply to U.S. citizens." *Publication 17, Your Federal Income Tax*, Internal Revenue Serv. (2019), https://perma.cc/56R3-TM2Z; *see also Publication 519, U.S. Tax Guide for Aliens*,

Internal Revenue Serv. (2019), https://perma.cc/BN23-ACMK (establishing a "substantial presence test" for resident-alien status that applies regardless of legal status). The Administration has offered no principled basis to treat undocumented immigrants as "inhabitants" for purposes of federal taxation, but not Congressional apportionment.

The Administration thus falls short in its effort to refocus the debate on who qualifies as an "inhabitant"—and then imbue that term with a new, and far more limited, meaning. The relevant constitutional and (as discussed below) statutory text and history establish that the responsibility of Congress to carry out an enumeration and apportionment must include all "persons," regardless of immigration status.

B. The Census and Reapportionment Acts implement the constitutional mandate.

1. Congress has enacted a comprehensive statutory framework to implement the Constitution's mandate that the enumeration and apportionment be based on total resident population in the United States. The Census Act requires the "tabulation of *total population* by States" for apportionment purposes. 13 U.S.C. § 141(b) (emphasis added). The Reapportionment Act in turn provides that the statement transmitted by the President to Congress must "show[] *the whole number of persons* in each State . . . as ascertained . . . [by the] decennial census" and an apportionment of Representatives calculated based on that full count. 2 U.S.C. § 2a(a) (emphasis

added); *Utah v. Evans*, 536 U.S. 452, 461 (2002) (explaining the statutory scheme and noting that "the President must transmit to Congress by January 12, 2001" the required decennial census statement).

As the district court held, these statutes "took their current form in 1929, after a decade-long stalemate over the method for calculating the reapportionment following the 1920 census." Appellants' Jur. Statement 75a. The statutes resolved this impasse by creating "an 'automatic reapportionment' scheme that would be 'virtually self-executing,'" based on the total figures from the census. *Id.* (quoting *Franklin*, 505 U.S. at 792). Under Section 2a(a), once the census was taken, "with these figures in hand, the President would report the census figures, together with a table showing how, under these figures, the House would be apportioned . . . pursuant to a purely ministerial and mathematical formula." *Id.* at 75a–76a (quoting S. Rep. No. 71-2, at 4 (1929)) (emphasis omitted).[4]

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[4] The Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66 (codified at 31 U.S.C. § 1113 note), does not bear on the disposition of this case, but it warrants an explanation to avoid potential confusion. That Act provided that laws requiring submission to Congress of "any annual, semiannual, or other regular periodic report" included among a separate (and far broader) list of documents prepared by the Clerk of the House "shall cease to be effective, with respect to that requirement, 4 years after the date of the enactment of this Act." *Id.* § 3003(a), (c); *see also* Act of Nov. 29, 1999, Pub. L. No. 106-113, § 236, 113 Stat. 1501 (extending sunset date to May 15, 2000). The decennial census statement required under 2 U.S.C. § 2a(a) was one of approximately two thousand documents included in the Clerk's list. *See* H. Doc. No. 103-7, at 17 (1993), https://perma.cc/SF3Q-4LY4. But that statement was not among *(cont'd)*

2. The statutes governing the enumeration and apportionment reflect Congress's consistent understanding that the Constitution requires apportionment based on total population. Every census has, accordingly, included undocumented immigrants in the apportionment count. *Fed'n of Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980) (explaining that "the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders"); *see also Frequently Asked Questions (FAQs) on congressional*

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the requirements eliminated by the 1995 Act. That is because Section 2a(a) requires a "statement" of apportionment figures calculated based on the decennial census and not a "regular periodic report." Moreover, the purpose of the Act was to eliminate needless paperwork that Congress would discard, not to repeal the mechanism through which Congress implements the constitutionally mandated reapportionment of Representatives. *See* H. Rep. No. 104-327 at 23 (1995); 141 Cong. Rec. 10167-01 (1995). The Clerk's list included numerous other documents that were not "regular periodic reports" and thus were similarly unaffected. *See, e.g.*, H. Doc. No. 103-7 at 2, 3, 4, 5, 7, 8, 9, 10, 12, 14, 37, 44, 47.

Accordingly, in both 2001 and 2011, Presidents transmitted the decennial census statement to Congress "pursuant to" Section 2a(a), and the House Clerk subsequently certified the apportionment information to the States under Section 2a(b). *See* H. Doc. No. 107-12 (2001), https://perma.cc/HK76-ND69; H. Doc. No. 112-5 (2011), https://perma.cc/CW5C-NUSX. In the President's Memorandum, the Administration also expressed that the Section 2a(a) requirement remains operative, *see* 85 Fed. Reg. at 44,679, and the Department of Justice reiterated in its briefing to this Court that "the President *must* transmit to the Congress" the decennial census statement, *see* Appellants' Br. 2 (emphasis added and quotation marks omitted).

apportionment, U.S. Census Bureau (confirming that the Bureau has always relied on "total resident population," including both "citizens and non-citizens," in making apportionment determinations); *Computing Apportionment*, U.S. Census Bureau (2020), https://perma.cc/29ZD-9V76 (explaining that the "Equal Proportions Method" of calculating apportionment, used since 1941, relies on "a state's total population").

Tellingly, failed legislative efforts to amend the statutory census scheme to exclude noncitizens confirm that the Constitution prohibits drawing the lines the Administration now seeks to draw between aliens with legal status and those without, and confirms that all residents should be counted regardless of immigration status.

Immediately after adoption of the Fourteenth Amendment, for example, a proposal to exclude "foreigners" from apportionment was defeated in the House. *See* Cong. Globe, 39th Cong., 1st Sess. 535, 537; *see also id.* at 2767 (remarks of Sen. Jacob Howard of Michigan) (the "true basis of representation" is the "whole population," "the principle upon which the Constitution itself was originally framed").

Subsequent attempts to exclude either all aliens generally or undocumented immigrants specifically from the apportionment base similarly failed due to a broad recognition that the "statutory exclusion of aliens from the apportionment base would be

unconstitutional."[5] *FAIR*, 486 F. Supp. at 576 (citing 71 Cong. Rec. 1821 (1929)); *see also* 86 Cong. Rec. 4372 (1940) (remarks of Rep. Emanuel Celler of New York) ("The Constitution says that all persons shall be counted," including "those aliens here illegally."); *1980 Census: Counting Illegal Aliens: Hearing Before the S. Subcomm. on Energy, Nuclear Proliferation, & Fed. Services of the Comm. on Gov't Affairs*, 96th Cong. Rec. 10 (1980) (remarks of Sen. Jacob Javits of New York) (maintaining that the Constitution means what is "described in [the] Federalist papers": "the aggregate number of inhabitants, which includes aliens, legal and illegal"); 135 Cong. Rec. 14551 (1989) (remarks of Sen. Dale Bumpers of Arkansas) (stating that he did "not want to go home and explain [his] vote on this" legislation to defund inclusion of illegal aliens in the census "any more than anyone else," but explaining that he voted against the legislation because he thought it was unconstitutional: "I wish the Founding Fathers had said you will only enumerate 'citizens,' but they did not. They said 'persons,' and so that is what it has been for 200 years. We have absolutely no right or authority to change that peremptorily on a majority vote here.").[6]

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[5] *See* Margaret Mikyung Lee & Erika K. Lunder, *Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes*, Cong. Research Serv. at 6, n.38 (Apr. 13, 2012) (citing examples from the 86th and 96th Congresses).

[6] Although the Senate passed two bills in 1989 that would have "prohibit[ed] the use of funds to include illegal aliens in the census for apportionment," neither was enacted. Lee & Lunder, at 13 (referencing S. 358, § 601, 101st Cong. (1989), and Senate-passed version of H.R. 2991, 101st Cong. (1989)).

That Members of Congress who would have preferred to exclude aliens from the apportionment base declined to support such legislation because—in their words, it would be "unconstitutional"—confirms that all persons must be counted. *See, e.g.*, 71 Cong. Rec. 1958 (remarks of Sen. David Reed of Pennsylvania) (emphasizing that the Constitution deliberately used the word "persons" instead of the word "citizens," and "the word 'persons' must be taken in its literal sense"; and noting that "the oath which we take to support the Constitution includes the obligation to support it when we dislike its provisions as well as when we are in sympathy with them").

C. The Executive Branch has consistently recognized that apportionment must be based on total population.

Historical practice in the Executive Branch further confirms that apportionment must be based on total population. Until now, and throughout administrations of both parties, the Executive Branch has read the Constitution to require the enumeration of the whole number of persons, including undocumented immigrants, and the inclusion of all those enumerated in the apportionment count. Both the Census Bureau and the Department of Justice (DOJ) have long acknowledged this constitutional mandate.

Since its inception, "[t]he Census Bureau has always attempted to count every person residing in a state on Census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully

within our borders." *FAIR*, 486 F. Supp. at 576.[7] Notably, enslaved persons who escaped to a free State were counted as inhabitants of that State, even though they were considered by law to be fugitives illegally residing there. Joseph C. G. Kennedy, *Population of the United States in 1860; Compiled from the Original Returns of the Eighth Census Under the Direction of the Secretary of the Interior* ix–xii (1864), https://perma.cc/MBR8-AKDU (assessing fluctuations in the fugitive slave population).

In 1985, then-Census Bureau Director John Keane told Congress that the "[t]raditional understanding of the Constitution and the legal direction provided by the Congress has meant that for every census since the first one in 1790, [the Bureau] ha[s] tried to count residents of the country*, regardless of their status*." *Enumeration of Undocumented Aliens in the Decennial Census: Hearing on S. 99-314 Before the Subcomm. on Energy, Nuclear Proliferation, & Gov't Processes of the S. Comm. on Governmental Affairs*, 99th Cong. 19 (1985) (emphasis added).

For the current census, the Census Bureau issued a rule expressly recognizing that foreign citizens are "'living' in the United States"—and therefore count toward the total population—"if, at the time of the census, they are living and sleeping most of the time at a residence in the United States." Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. at 5,530. Earlier this year, the Census Bureau Director also told Congress that the Bureau's

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[7] *See also, e.g.*, *Frequently Asked Questions (FAQs) on congressional apportionment*, U.S. Census Bureau; *Computing Apportionment*, U.S. Census Bureau.

directive and mission is to "count everyone, wherever they are living." *With Census Bureau Director, Dr. Steven Dillingham: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 12 (2020). And in a subsequent hearing before a House committee, four former Census Bureau Directors testified that the Administration's effort to exclude undocumented immigrants from the apportionment count was unconstitutional. *See* Press Release, H. Comm. on Oversight & Reform, *Oversight Committee Held Emergency Hearing on Trump Administration's Unconstitutional Politicization of 2020 Census* (July 29, 2020), https://perma.cc/9YWA-PRGJ. Indeed, no census has ever systematically excluded undocumented immigrants or separated the apportionment count from the population count, as the President's Memorandum would do here. *See Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks: Hearing Before the H. Comm. on Oversight & Government Reform* (July 29, 2020), https://perma.cc/2TFF-DBZ8 (testimony of Kenneth Prewitt and Robert M. Groves).

DOJ, too, has long understood that enumeration and apportionment must encompass the entire population, including undocumented immigrants. For years, in both litigation and communications to Congress, DOJ has maintained that the government is "constitutionally mandated . . . to count all persons in the [census], including illegal aliens, for purposes of apportionment." *Ridge v. Verity*, 715 F. Supp. 1308, 1311 (W.D. Pa. 1989) ("[I]n accordance with" the Constitution, the government had, "in each decennial census conducted for the past two hundred years,

counted all persons residing in the United States, except those persons expressly excluded by the Constitution.").[8] More than forty years ago, DOJ correctly observed that removing undocumented immigrants from the census and apportionment counts would constitute "a radical revision of the constitutionally mandated system for" apportionment "and an equally radical revision of the historic mission of the decennial census." Federal Defs.' Post-Trial Proposed Findings, 15 Arg. Mem. at 1, *FAIR*, No. 79-3269 (D.D.C. Feb. 15, 1980).

The Executive Branch's position was longstanding for a reason: it was clearly correct. The Memorandum betrays the accurate legal understandings that the Executive Branch, like Congress, has long embraced—which confirms its invalidity.

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[8] *Accord* Letter from Thomas M. Boyd, Acting Assistant Attorney General, to Rep. William D. Ford, House of Representatives (June 29, 1988) (reprinted in *1990 Census Procedures and Demographic Impact on the State of Michigan*, U.S. Gov't Printing Off., 240–44 (1988)) (describing a "clear" constitutional mandate to count "all persons, including aliens residing in this country" in the census and "insist[ing] upon their inclusion" in the apportionment base); Letter from Carol T. Crawford, Assistant Attorney General, to Senator Jeff Bingaman (Sept. 22, 1989) (reprinted in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989)) ("[T]he Constitution require[s] that inhabitants of States who are illegal aliens be included in the census count."); Defs. Reply Mem., *FAIR*, No. 79-3269, 1980 WL 683642 (D.D.C. Jan. 3, 1980) (DOJ arguing in litigation that the Fourteenth Amendment "requir[es] that all the inhabitants of the states, including illegal aliens, be counted for the apportionment").

II. The President's Memorandum Will Produce An Inaccurate Apportionment And Undermine The Integrity Of The House's Composition.

The enumeration and the apportionment that follows have direct and substantial stakes for the distribution of electoral power across the country. For that reason, an objective and impartial process, resulting in accurate data, is critical to implementing a constitutionally sound census. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348–49 (1999) (Scalia, J., concurring in part) (discussing the need for the census process to pursue "the most accurate way of determining population with minimal possibility of partisan manipulation").

Disregarding these principles, the Administration has attempted to manipulate the census in novel and troubling ways, and the Memorandum only deepens serious concerns that the Administration's goal throughout has been to use the enumeration as a means of achieving partisan political ends. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (rejecting the 2018 attempt to add a citizenship question to the 2020 census questionnaire, finding the Administration's proffered rationale "contrived"). Indeed, when issuing the Memorandum, the President abandoned any pretense of lawful motivations, specifically tying the Memorandum to his illegal efforts to target States with higher immigrant populations, and confirming his intent to enhance the voting power of certain favored constituencies at the expense of others. *See* 85 Fed. Reg. at 44,680 ("States adopting policies that

encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives."). Allowing this unlawful effort to continue will further undermine the public's faith in the impartiality, objectivity, and integrity of the enumeration.

Moreover, even if the Memorandum were lawful—which it is not—it is extremely unlikely that the Administration could implement its directive in a fair and reliable way. Despite the passage of more than three months since the Memorandum issued, the Census Bureau has yet to explain how it will identify the number and location of undocumented immigrants to be subtracted from the enumeration count. Appellants' Br. 4–5 (stating that the Census Bureau is still "'examining methodologies and options'" for the exclusion of undocumented immigrants (quoting Press Release, U.S. Dep't of Commerce, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), https://go.usa.gov/xGR2C)).

Of course, that predicament is to be expected. The 2020 census ultimately did not include any question about citizenship status, let alone ask the more complex question whether each person counted is lawfully present in the United States. And as the Census Bureau has explained, at present, it lacks "accurate estimates of the resident undocumented

population."[9] Moreover, the Executive Branch has long acknowledged the difficulty of accurately capturing the kinds of data that would be necessary to implement the Memorandum. *See, e.g.*, *FAIR*, 486 F. Supp. at 568 (noting the Census Bureau's position that "as a practical matter" methods for counting illegal aliens "would take months to develop, *if it could be done at all*" (emphasis added)).

* * *

At its core, the President's Memorandum threatens the public's faith in the concept of representative government and the constitutional promise that all residents in a district—including non-voters—will be equally represented in Congress. *See Evenwel*, 136 S. Ct. at 1127–29. The unlawful directive thus poses a direct institutional threat to the House, which draws its legitimacy from both the accuracy and integrity of the enumeration and apportionment, and the public's confidence that those processes are conducted lawfully. Foundational democratic principles therefore demand what federal law requires: Congressional representation must reflect the country's total population.

CONCLUSION

The House respectfully urges this Court to affirm the district court's ruling.

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[9] Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772-RDP (N.D. Ala. Mar. 13, 2020).

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November 16, 2020