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 CITY OF SAN JOSE, CALIFORNIA; KING COUNTY, WASHINGTON; ARLINGTON COUNTY, VIRGINIA; HARRIS COUNTY, TEXAS; BLACK ALLIANCE FOR JUST IMMIGRATION; SAM LICCARDO; RODNEY ELLIS; ZERIHOUN YILMA; LOVETTE KARGBO-THOMPSON; AND SANTCHA ETIENNE AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are the plaintiffs in *City of San Jose v. Trump*, No. 5:20-cv-05167 (N.D. Cal.),[2] a parallel suit challenging the Presidential Memorandum of July 21, 2020 ("Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census"), 85 Fed. Reg. 44,679 (the "Presidential Memorandum" or "Memorandum"). Amici include a California city; counties in Texas, Virginia, and Washington; individual voters in California, Florida, Georgia, and Texas; and a civic organization dedicated to advancing the rights of immigrants and refugees. Amici brought claims similar to those advanced by Appellees here, asserting that the Executive Branch policy to exclude undocumented immigrants from the apportionment base violates the Constitution and statutes governing the decennial census and apportionment. On October 22, 2020, the three-judge district court agreed and granted partial summary judgment in Amici's favor. *San Jose* Joint Statement ("J.S.") App. 1a-131a (Order (per curiam)).[3] In a

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[1] The parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Citations to "*San Jose*, Doc. xx" refer to district court filings in *City of San Jose v. Trump*, No. 5:20-cv-05167 (N.D. Cal.); "*San Jose* [ ]" refer to filings in *Trump v. San Jose*, No. 20-561; and "*New York* [ ]" refer to filings in *Trump v. New York*, No. 20-366.

[3] The *San Jose* opinion addressed two cases that were argued together: one brought by Amici, and the other by the State of California and local jurisdictions.

thorough opinion spanning over a hundred pages, the district court ruled that the exclusion policy violates Article I, Section 2 of the Constitution, Section 2 of the Fourteenth Amendment, the Reapportionment Act (2 U.S.C. § 2a), and the Census Act (13 U.S.C. § 141).

The *San Jose* court first determined that Amici had Article III standing and that their challenge was ripe. It found that Amici established two types of injury in fact from the Memorandum's impending enforcement: (1) apportionment injuries based on the likely loss of seats in Congress, and (2) injuries based on the exclusion's negative impact on state and local governments' share of federal funding and intrastate redistricting. *Id.* at 32a-39a. The court also rejected the Government's contention that adjudication was premature because it was unclear which immigrants it would be "feasible" to exclude. *Id.* at 39a-53a.

On the merits, the *San Jose* court meticulously examined the historical record illuminating the original public meaning of the constitutional text (*id.* at 4a-10a, 65a-79a, 94a-95a), subsequent congressional action (*id.* at 10a-16a, 82a, 86a), and centuries of Executive Branch practice (*id.* at 17a-19a, 80a-83a, 87a-90a). Finding that all of this evidence pointed in the same direction, the court held the exclusion policy unconstitutional. *Id.* at 64a. Like the district court in *Trump v. New York*, *see New York* J.S. App. 74a, the *San Jose* court held that the Memorandum additionally violates the Reapportionment Act and Census Act, *San Jose* J.S. App. 102a-20a.

The district court therefore enjoined the Government Defendants from providing the President with "any information concerning the

number of aliens in each State 'who are not in a lawful immigration status under the Immigration and Nationality Act'" in the Secretary's report under 13 U.S.C. § 141(b) "or otherwise as part of the decennial census." *San Jose* J.S. App. 130a-31a (quoting Presidential Memorandum, 85 Fed. Reg. at 44,680). It also entered a declaratory judgment. *Id.* at 130a.

On October 29, 2020, the Government filed a jurisdictional statement in this Court and requested that the appeal be held pending the outcome of the present case. *San Jose* J.S. 12. And in its opening brief in this case, the Government explicitly asked this Court to issue a ruling rejecting the grounds on which *San Jose* found standing and the merits of Amici's constitutional claims, to "clear[] the path" for the Government to implement the President's directive. Appellants' Br. 10-11, 14, 19, 46.[4]

Amici thus have a particularly acute stake in the outcome of this parallel case. If the current injunctions are lifted, the implementation of the Presidential Memorandum will cause direct and profound harm to the governmental Amici who count hundreds of thousands of immigrants among their residents, to the individual Amici who reside and vote in such communities, and to the Amici organization

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[4] Amici strongly believe that Appellees have established standing. Amici note, however, that there are differences between Appellees' record and the record before the *San Jose* district court that potentially could impact the analysis. Given the extraordinarily expedited timeline for the Court's adjudication of this appeal, setting Amici's case for briefing and argument alongside *New York* was not practicable. Amici will therefore seek an opportunity to address the decision's ramifications on the *San Jose* case if the Court does not affirm the judgment in *New York*.

and its members advocating on behalf of immigrant rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

On July 21, 2020, the President of the United States issued a binding directive to the Secretary of Commerce establishing a "policy" to "exclude from the apportionment base aliens who are not in a lawful immigration status . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch." Presidential Memorandum, 85 Fed. Reg. at 44,680. With the stroke of a pen, the President cast aside centuries of adherence to the constitutional imperative to count "the whole number of persons in each State" and apportion seats in the House of Representatives according to that number. U.S. Const. amend. XIV, § 2; *see also* art. I, § 2, cl. 3. And the President did so based on a faulty premise: that he has expansive discretion to exclude individuals from the decennial census based on a consideration (legal immigration status) that has no bearing on whether those individuals maintain their usual residence in a State.

Appellees have standing to challenge the Memorandum and obtain relief before the President's unlawful directive is carried out. The Government does not dispute that, if the Memorandum is fully implemented, Appellees (and Amici) are likely to suffer cognizable harms in the form of lost congressional seats. But the Government argues that review must await the actual unlawful apportionment because it is theoretically possible that the Commerce Secretary will be unable to fulfill that mandate.

Two three-judge courts have unanimously rejected that argument. *See San Jose* J.S. App. 43a; *Useche v. Trump*, No. 8:20-cv-02225, 2020 WL 6545886, at *4 (D. Md. Nov. 6, 2020). They were right. Appellees have made an overwhelming showing—based on the Memorandum's text, the Administration's year-long effort to gather the necessary information, and its statements to the public and the courts—that the Administration is "substantially likely" to fully implement the President's directive less than two months from now. Indeed, the Government has never presented any evidence to the contrary.

The Government also maintains that, even if Appellees have standing, review should be deferred for prudential reasons. But such factors argue strongly *against* postponing review. Restarting this challenge in January would not only put the House apportionment in limbo, but also unnecessarily stymie state and local redistricting processes, including mandatory state deadlines—the very considerations the Government itself previously invoked in urging extraordinary action from this Court.

Once this Court reaches the merits, the analysis is straightforward: The Presidential Memorandum is unlawful. For the past 230 years, all three branches of government have recognized and respected the fundamental rule that, except where a class of persons is expressly excluded by the Constitution itself, the apportionment of seats in the House of Representatives must be based on the whole number of persons residing in each State. And the Government's emphasis on the Founders' synonymous term "inhabitants" does not alter the analysis in the slightest. According to the

Government, "inhabitants" can be understood to include only those who reside somewhere with permission. But there is no evidence that the drafters understood it that way. The Government's idiosyncratic understanding cannot override the word's ordinary meaning, and none of the historical evidence the Government cites withstands scrutiny.

The Government also argues that to succeed in their facial challenge, Appellees must show that *no* undocumented immigrant may *ever* be excluded from the apportionment base. Not so. Appellees need only show that a person cannot be excluded *based solely on immigration status*—because that is the policy the Memorandum establishes.

Nor can the Government argue that legal status is a reasonable proxy for some other characteristic that might legitimately render a person a non-inhabitant. Each subcategory of undocumented immigrants the Government identifies as potentially excludable—individuals in detention facilities, individuals who are paroled into the country, and individuals facing a final order of removal—would be counted in the State where they live on Census Day according to the longstanding principles embodied in the Census Bureau's own Residence Criteria. For that reason, the Government must defend the broader proposition that it can exclude persons who it otherwise admits are "inhabitants" or "usual residents" of a place, simply because of their immigration status. This the Constitution forecloses.

ARGUMENT

I. APPELLEES HAVE STANDING

To establish a "case or controversy" under Article III, a plaintiff must establish that the plaintiff

"(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (citation omitted). Threatened future injuries are cognizable if "there is a '"substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). Such injuries exist here.

First, as both the *San Jose* and *Useche* district courts have now squarely held, those in Appellees' positions face a substantial risk of future apportionment injuries. Appellees presented an uncontested expert declaration establishing that, if the Presidential Memorandum is implemented, Texas will "almost certainly" lose a seat; California and New Jersey would likely lose a seat; and other States (Arizona, Florida, Illinois, and New York) are at risk as well. *New York* J.S. App. 30a (citation omitted). And when a State "anticipate[s] losing a seat in Congress," that "diminishment of political representation" unquestionably inflicts an injury on both the State itself, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019), and its voters, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999).[5]

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[5] Each of the sets of plaintiffs in the decided cases—*New York, San Jose*, and *Useche*—includes either a State that is likely to lose a seat or a voter in that State, among others. *See* N.Y. Mot. to Affirm 18 (State of New Jersey); ACLU Mot. to Dismiss or Affirm 32 (organizations with members who are California and Texas voters); *San Jose* J.S. App. 33a-34a (State of California and California and Texas voters); *Useche v. Trump*, No. 8:20-cv-02225, 2020 WL 6545886, at *5 (D. Md. Nov. 6, 2020) (California and Texas voters).

Second—and as the *San Jose* court also held—Appellees and Amici are threatened with the potential loss of federal funding.[6] The decennial census "impacts federal funding received by state and local governments." *San Jose* J.S. App. 50a; *see also id.* at 50a-51a (noting examples of federal funding programs that depend on the census count); *Department of Commerce v. New York*, 139 S. Ct. at 2561 (recognizing that "[t]he population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States"). The *San Jose* court relied on the unrebutted expert declaration of Andrew Reamer—whose testimony the Government itself invokes, *see* Appellants' Br. 20 (citing *San Jose*, Doc. 86-1)—to find it substantially likely that, if undocumented immigrants are excluded from the census, at least one government plaintiff could experience a funding shortfall. *San Jose* J.S. App. 50a-52a.

The Government does not contest that losses of representation and funding would be concrete harms giving rise to Article III standing. *See* Appellants' Br. 19. It also does not question the likelihood that some of the relevant States will lose a congressional seat if undocumented immigrants are categorically excluded. *See id.* Instead, the Government argues that "[i]t remains uncertain to what extent it will be '*feasible*' to exclude illegal aliens from the

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[6] The *New York* Appellees and *San Jose* Amici include States, cities, and counties that rely on sources of census-based funding. *See* N.Y. Mot. to Affirm 1 (States and local jurisdictions); *see also id.* at 19-20; ACLU Mot. to Dismiss or Affirm 34-35 (organizations with members who rely on census-based appropriations); *San Jose* J.S. App. 34a-35a (city and counties in California, Texas, Virginia, and Washington).

apportionment base." *Id.* (emphasis added) (quoting Presidential Memorandum, 85 Fed. Reg. at 44,690). In other words, the Government asks this Court to find that there is no "substantial risk" that the Secretary will carry out the President's directive "to exclude from the apportionment base aliens who are not in a lawful immigration status . . . to the maximum extent." 85 Fed. Reg. at 44,680.

Two courts have already rejected this transparent attempt to manipulate the timing of judicial review. *See San Jose* J.S. App. 41a; *Useche v. Trump*, No. 8:20-cv-02225, 2020 WL 6545886, at *4 (D. Md. Nov. 6, 2020). This Court should do the same.

The Memorandum—a presidential directive binding on executive agencies—states that the President has "determined" that all undocumented immigrants should be excluded from the apportionment base; declares "it is the policy of the United States to exclude from the apportionment base *aliens who are not in a lawful immigration status under the Immigration and Nationality Act . . . to the maximum extent feasible*"; and orders the Secretary to take "all appropriate action" to carry out that policy. 85 Fed. Reg. at 44,680 (emphasis added). "[I]f there were any doubt that what is contemplated is to exclude *all* undocumented immigrants from the apportionment count, the Memorandum dispels it by explicitly referencing the 'more than 2.2 million illegal aliens' living in California, . . . an estimate of the *total* number of undocumented immigrants in that state." *Useche*, 2020 WL 6545886, at *6 (quoting 85 Fed. Reg. at 44,680).

President Trump's statement announcing the Memorandum was equally unequivocal: he told the American people that he had "direct[ed] the Secretary

of Commerce *to exclude illegal aliens from the apportionment base following the 2020 census*." The White House, Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/ (emphasis added). Consistent with this understanding of the Memorandum's categorical mandate, the Government has described the theoretical possibility that the Secretary might exclude just those immigrants in ICE detention centers as only a "partial[] implement[ation]" of the Memorandum. Appellants' Suppl. Br. 5 (Oct. 2, 2020).

Every indication, moreover, is that the Secretary has been working to implement the Memorandum's categorical policy as stated. Well over a year ago, President Trump issued Executive Order 13,880 ("Collecting Information About Citizenship Status in Connection With the Decennial Census"), directing executive departments and agencies to obtain administrative records to "determin[e] the number of citizens and non-citizens in the country." 84 Fed. Reg. 33,821, 33,821 (July 11, 2019). In marked contrast to the Government's litigating position here, the President's "Collecting Information" order expressed confidence that "[t]he executive action I am taking today . . . will ensure that the [Commerce] Department will have access to all available records in time for use in conjunction with the census." *Id.* at 33,822. It appears that effort has succeeded: as of last summer, the Government had entered into memoranda of understanding with agencies and States to obtain administrative records that "would allow the Census Bureau potentially to identify the illegal alien population." *San Jose* J.S. App. 47a-48a

(quoting Government statement during August 18, 2020 hearing).

And whatever the merit of the *New York* district court's observation that the apportionment injury might have been "'speculative'" "as of" September 10, *New York* J.S. App. 43a (citation omitted), the case stands at a different juncture now. *See Useche*, 2020 WL 6545886, at *4 & n.4. On September 18, the Administration announced its renewed intent "to vindicate [the Memorandum's] policy determination." The White House, Statement from the Press Secretary (Sept. 18, 2020), https://www.whitehouse.gov/briefings-statements/statement-press-secretary-091820/. And on October 6, the Government represented that the Bureau "anticipates that, by December 31, it will provide the President with information regarding any 'unlawful aliens in ICE Detention Centers,'" and then "provide the President with '[o]ther [Presidential Memorandum] related outputs' by Monday, January 11." Appellants' Suppl. Br. 5 (alterations in original) (citation omitted). The Government explained that it would need the period between December 31 and January 11 "to *fully implement* the Presidential Memorandum." *Id. at* 3-4 (emphasis added) (quoting Bureau official). These representations confirm that there is, at minimum, a substantial "likelihood" that the President's directive to exclude undocumented immigrants will be "fully implement[ed]." *San Jose* J.S. 46a-47a; *see also Useche*, 2020 WL 6545886, at *6 (observing that "the Bureau is certain enough of exactly what will be entailed in the collection of that information that it can quantify—to the day—how long such collection will take").

The Government also tries to cast the funding injuries as mere speculation. Appellants' Br. 19. But the uncontested Reamer declaration in Amici's case explained that if immigrants are excluded from the decennial census to some extent, jurisdictions with above-average numbers of immigrant residents may lose some amount of funding even if not *all* immigrants are excluded; in that event, "a change in the degree of the differential undercount *would only affect the magnitude of the losses*." *San Jose*, Doc. 86-1 ¶¶ 17-21 (emphasis added). Indeed, the Government acknowledged during argument in *San Jose* that funding could be affected even if the number of excluded undocumented immigrants is too few to affect apportionment. *See San Jose* J.S. App. 52a.[7]

To the extent there is any substance behind the Government's continued expressions of self-doubt, Appellees—and this Court—should not have to guess at the Government's plans. If the Government truly believes that logistical or other hurdles will prevent the Secretary from carrying out the President's directive in full, only it has access to the information needed to substantiate that belief. But in litigating these lawsuits across several courts for months, the Government has provided no such evidence at all. *See*

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[7] The Government also argues that it is "speculative" to assume that the same census numbers it uses for apportionment will be used to distribute funding. Appellants' Br. 19-20. But the Government itself notes that the Memorandum directs the Secretary "to *remove* people [undocumented immigrants] from 'the census' who were improperly included in questionnaire responses." *Id.* at 29. If those immigrants are "removed" from "the census," there is at least a substantial risk that the wrongful exclusion will carry over to funding schemes that are required to be based on "the census."

Useche, 2020 WL 6545886, at *7 (emphasizing that the Government "has offered no counterweight" to plaintiffs' evidence it is likely to implement the mandate in full). In its opening brief to this Court, the Government proffers only a statement from a September 10 filing that the "Bureau does not know exactly what numbers the Secretary may report to the President." Appellants' Br. 5 (quoting *San Jose*, Doc. 84-1 ¶ 15). But that is not responsive. The question for standing purposes is not "exactly what numbers the Secretary may report to the President." It is whether the Secretary is substantially likely to provide the President the information he needs to exclude all or most undocumented immigrants from the apportionment base. On *that* issue, the Government remains absolutely silent.

That silence should be dispositive. Now that the challengers "have established a prima facie case of feasibility," the Government should "have the burden of production to establish otherwise—particularly because [the Government], rather than [Appellees and Amici], have access to evidence on feasibility." *San Jose* J.S. App. 48a n.11. This is a straightforward application of Federal Rule of Civil Procedure 56. *See* 10A Mary Kay Kane, *Federal Practice and Procedure* § 2727.2 (4th ed. 2020, Westlaw) ("If the summary-judgment movant makes out a prima facie case that would entitle him to a judgment as a matter of law if uncontroverted at trial, summary judgment will be granted unless the opposing party offers some competent evidence . . . showing that there is a genuine dispute as to a material fact."); *Department of Commerce v. House*, 525 U.S. at 330-34. Because "it is never easy to prove a negative," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721,

745 (2011) (citation omitted), the burden should generally fall "upon the party claiming the affirmative of the issue," *Maxwell Land-Grant Co. v. Dawson*, 151 U.S. 586, 604 (1894).

Here—by pointing to the categorical nature of the Memorandum, the prior "Collecting Information" Order, and the Executive Branch's statements and actions since—Appellees and Amici have amply established a substantial likelihood that the categorical policy will be carried out as directed. They are not required to prove that there is *no* chance that implementation will prove infeasible. In turn, the Government must do more than offer only a "speculative and theoretical possibility that the agency may fall short in its efforts." *Useche*, 2020 WL 6545886, at *7. This it has not done.

When an attorney from the Office of the Solicitor General appears before this Court on November 30, there will be only 31 days remaining before the statutory deadline for the Secretary's report, and 42 days before the Secretary's announced deadline for giving the President the remaining "inputs." For the Government to represent to this Court, at that *very* late date, that it still has no idea which undocumented immigrants it plans to exclude—let alone whether a significant proportion will be excluded—would border on the preposterous.

Because there is more than a "substantial likelihood" that the Government will carry out the Presidential Memorandum as directed, causing undeniable harm to Appellees, this Court has jurisdiction.

II. PRUDENTIAL CONSIDERATIONS WEIGH HEAVILY IN FAVOR OF RESOLVING THIS CONTROVERSY NOW

Despite the courts' "virtually unflagging" obligation to exercise their rightful jurisdiction, *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)), the Government argues that prudence requires deferring any review of the Presidential Memorandum until after it is carried out. Appellants' Br. 21. To the contrary, prudential considerations weigh strongly against postponing review. *See San Jose* J.S. App. 57a.

First, Appellees' claims "present[] an issue that is 'purely legal, and [that] will not be clarified by further factual development.'" *Susan B. Anthony List*, 573 U.S. at 167 (citation omitted)). The "questions presented by Plaintiffs' constitutional and statutory claims are pure legal questions of constitutional and statutory construction." *San Jose* J.S. App. 58a. The Memorandum directs and the Government defends the exclusion of undocumented immigrants from the apportionment base with no exceptions or carveouts. And as discussed below, the legality of the policy would not change even if the Government ended up excluding only certain subcategories. *See infra* pages 26-30.

Second, there would be substantial harm in delaying review until after the President submits his report to the House in January 2021. *See* 2 U.S.C. § 2a(a). That would put the House apportionment in legal limbo, as well as impair redistricting processes in jurisdictions throughout the country that depend on decennial census figures. *See San Jose* J.S. App.

34-37a. Redistricting deadlines vary from State to State, and some States require the process to be completed swiftly. *See, e.g.*, Tex. Const. art. III, § 28; Legislative Reference Library of Texas, *Texas legislative sessions and years*, https://lrl.texas.gov/sessions/sessionYears.cfm (last visited Nov. 14, 2020) (Texas legislature must approve State redistricting plan by May 31, 2021).[8] Delaying review would thus create "a significant risk that more than one state would not be able to meet their redistricting deadlines." *San Jose* J.S. App. 61a.

The Government is in no position to minimize these concerns. In *Ross v. National Urban League*—the challenge to the Commerce Secretary's decision to curtail census field operations—the Government emphasized that unless this Court stayed the district court's preliminary injunction, "in a number of States, 'the delays [caused by extending the enumeration and data-processing periods by three months] would mean [redistricting] deadlines that are established in state constitutions or statutes *will be impossible to meet*.'" Reply to Stay Appl. 11, *Ross v. National Urban League*, No. 20A62 (Oct. 10, 2020) (citation omitted); *see also id.* (invoking "24 state deadlines that the [*National Urban League*] injunction puts at risk").

Indeed, the Government has stressed the importance of avoiding disruptions to the apportionment and redistricting schedule *in this very case*. In urging this Court to either stay the *New York*

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[8] For an overview of State redistricting deadlines, *see* Yurij Rudensky et al., *How Changes to the 2020 Census Timeline Will Impact Redistricting* 5-18 (May 4, 2020), https://www.brennancenter.org/sites/default/files/2020-05/2020_04_RedistrictingMemo.pdf.

court's judgment or expedite this appeal, the Government represented that absent those extraordinary steps, "it may be necessary to alter the apportionment" after this Court's review—and that "a post-apportionment remedy, while available, *would undermine the point of the deadlines established by Congress*." Mot. to Expedite 6 (emphasis added). Of course, the same would be true if this Court were to defer review of Appellees' challenge until after the apportionment has gone forward, resulting in the need for an even later reapportionment. What's sauce for the goose should be sauce for the gander.

As for the Government's contention that this Court's "normal approach" is to decide apportionment challenges after the fact, Appellants' Br. 16, the cases reveal no such norm. In *Department of Commerce v. House*, this Court reviewed (and invalidated) the Census Bureau's planned use of sampling to determine the population for congressional apportionment a year before the apportionment was to be completed. 525 U.S. at 320-21. And in *Department of Commerce v. New York*, the Court reviewed the decision to add a citizenship question to the census and found standing based on the "predictable effect" that this would have on the apportionment two years down the road. 139 S. Ct. at 2566. In neither case did the Court suggest that it was departing from any established norm.[9]

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[9] Looking beyond this Court, other census challenges have been brought pre-apportionment and found justiciable. *See Carey v. Klutznick*, 508 F. Supp. 404, 407, 411-12 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 666, 670-71 (E.D. Pa. 1980).

The Government points to *Utah v. Evans*, 536 U.S. 452 (2002), *Wisconsin v. City of New York*, 517 U.S. 1 (1996), and *Franklin v. Massachusetts*, 505 U.S. 788 (1992). But in *Utah v. Evans*, this Court's analysis implicitly recognized that pre-apportionment challenges were an option—the contested issue was whether a post-apportionment case could even be redressable. 536 U.S. at 462-64. And the *Wisconsin* challenge was brought *pre*-apportionment; adjudication was delayed only because the Secretary agreed to potentially reconsider the challenged decision. *See* 517 U.S. at 10. In any event, Appellees are hardly bucking a uniform trend.

Ripeness principles, precedent, and good sense counsel against requiring Appellees or others to come back before this Court in 2021 to relitigate this dispute.

III. THE PRESIDENTIAL MEMORANDUM IS UNLAWFUL

On the merits, this case is not a close call. Two hundred and thirty years of unbroken historical practice reinforce what the constitutional and statutory text makes plain: immigrants residing in the United States may not be excluded from the apportionment base based on their lack of legal status.[10]

The Constitution establishes a baseline rule of *inclusion*, requiring the enumeration of the "whole

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[10] The Presidential Memorandum additionally violates the census statutes by "basing an apportionment on something other than the 'decennial census of the population,'" *San Jose* J.S. App. 112a-15a (quoting 2 U.S.C. § 2a(a)). Amici focus here on the constitutional violation and the attendant violation of 2 U.S.C. § 2a(a).

number of persons in each State." U.S. Const. amend. XIV, § 2; *see also* U.S. Const. art. I, § 2, cl. 3. When the drafters wanted to exempt a specific category of persons, they did so explicitly. *See id.* ("excluding Indians not taxed" and counting only "three fifths" of all enslaved persons); *id.* amend. XIV, § 2 ("excluding Indians not taxed"). This is strong evidence that they intended "'persons' [to] be all-inclusive unless an express exception was provided." *San Jose* J.S. App. 67a-69a. And the drafting history of Article I and the Fourteenth Amendment reveals that other proposed exceptions were fiercely debated. *See id.* at 75a-79a. In fact, "[t]he apportionment issue consumed more time in the Fourteenth Amendment debates than did any other topic." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016) (citation omitted). Yet the drafters ultimately rejected additional exclusions.

The Government cannot dispute any of this. The Government agrees, moreover, that when the Founders directed that apportionment be based on the "whole number of free Persons," they meant "the number of each State's 'inhabitants,'" Appellants' Br. 30-32 (quoting *The Federalist No. 54* (James Madison)), counted at their "'usual place of abode'" or where they "'usually reside[],'" *id.* at 32 (quoting Act of Mar. 1, 1790, ch. 2, §§ 1, 5, 1 Stat. 101, 103). The Government further acknowledges that the ordinary meaning of "inhabitant" or "usual resident" is a person who habitually resides in a place, and that the Census Bureau has *never* excluded persons based solely on their immigration status. Appellants' Br. 30-32, 37, 45 (citation omitted).

The Government nonetheless defends the President's new determination to exclude persons based on their immigration status, on two grounds.

First, the Government argues that "inhabitant" and "usual residence" can be understood in a narrow, technical way that would exclude persons residing in a State without permission. Second, the Government argues that, even if "inhabitants" includes many undocumented immigrants, Appellees cannot prevail in their facial challenge because *some* undocumented immigrants can be lawfully excluded. Neither argument is persuasive.

A. Categorically Excluding Persons Without Legal Status Contravenes The Ordinary Meaning of "Inhabitant"

The Constitution and the Reapportionment Act require the enumeration of and apportionment by "the whole number of persons in each State." U.S. Const. amend. XIV, § 2; 2 U.S.C. § 2a(a). Subject to express textual exclusions, that language has always been understood to encompass *all* of a State's "inhabitants" or "usual residents." *Franklin*, 505 U.S. at 797, 803-05.

Both at the Founding and today, the ordinary meaning of "inhabitant" is one who lives or resides in a place. *See* 1 Samuel Johnson, *A Dictionary of the English Language* 658 (6th ed. 1785) ("[d]weller; one that lives or resides in a place"); *Merriam-Webster's Collegiate Dictionary* 543 (11th ed. 2014) (one who "occupies a particular place regularly, routinely, or for a period of time").[11] Nothing in that definition turns

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[11] The Government also cites a definition suggesting that a person must remain in a place *permanently* to qualify as an "inhabitant." Appellants' Br. 37. But the term has *never* been understood that way. Such a requirement would exclude innumerable citizens, since Americans frequently relocate within the country for any number of reasons.

on the lawfulness of a person's residency. Consider a family that moves into an abandoned house and resides there for several years. Ask the neighbors if the house has any inhabitants, and the answer will surely be yes. The fact that the family has no legal right to live there is irrelevant.

The same is true for the term "usual resident." Under the Census Bureau's Residence Criteria, a person's "usual residence" is "the place where [the] person lives and sleeps most of the time." Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018) ("Residence Criteria"); *see also* Act of Mar. 1, 1790, § 5, 1 Stat. at 103 (describing a person's "usual place of abode" as her "settled residence"); *Oxford English Dictionary* 1594, 1223 (12th ed. 2011) (defining "usual" as "habitually or typically occurring or done" and "resident" as "a person who lives somewhere on a long-term basis"). To be sure, "usual residence" may connote "some element of allegiance or enduring tie to a place." *Franklin*, 505 U.S. at 804. But undocumented immigrants who live, work, and sleep in a State plainly "have the requisite 'enduring tie to a place' to make them usual residents under *Franklin*." *San Jose* J.S. App. 72a (citation omitted).[12] That these persons are citizens of another

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[12] Eighty-seven percent of Latino undocumented immigrants have lived in the U.S. for at least five years, *San Jose* J.S. App. 72a, and the median length of residence is fifteen years, *see* Pew Research Center, *The typical unauthorized immigrant adult has lived in the U.S. for 15 years* (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/ft_19-06-12_unauthorizedimmigration_typical-unauthorized-immigrant-adult-lived-us-15-years_3.

country does not matter: *Franklin* speaks of ties "*to a place*," not a sovereign. 505 U.S. at 804 (emphasis added).[13]

The Government's attempts to sidestep these terms' ordinary meaning fall flat. First, the Government argues that "inhabitant" had a technical legal meaning at the time of the Founding, which it draws from an international-law treatise by Emmerich de Vattel. Appellants' Br. 35-36. Defining "inhabitants" in opposition to "citizens" for the purpose of identifying the rights of each under international law, Vattel described "inhabitants" as noncitizens who had been "permitted to settle and stay in the country." 1 Emmerich de Vattel, *The Law of Nations* § 213 (1760).

But Vattel provides weak support for the Government. Vattel did not explain what he meant by staying in a State "with permission." He might well have considered the millions of undocumented immigrants who live, work, and raise their families in this country to be "inhabitants" entitled to international-law protection. Regardless, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (alteration in original) (citation

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[13] The Government notes that foreign diplomats have been excluded from prior censuses. Appellants' Br. 34. But that was likely due to the *sui generis* considerations governing diplomatic personnel under international law. *See San Jose*, Doc. 78, at 11 (amici historians explaining that foreign diplomatic personnel living on embassy grounds were understood to live "on 'foreign soil and thus not in a state'" (citation omitted)).

omitted). Vattel was a respected authority in his field, but there is no evidence the Founders intended the phrase "whole number of persons" to be confined to a narrow, idiosyncratic definition of "inhabitant" plucked from an international-law treatise written by a Swiss scholar in French. To the contrary, the draft constitutional text that went to the Committee of Style spoke of "inhabitants of *every age, sex, and condition*." 2 *Records of the Federal Convention of 1787* at 571 (M. Farrand ed. 1911) (emphasis added).

The Government cites other references to Vattel's definition and uses of "inhabitant" in various Founding Era sources. Appellants' Br. 34, 36. None of those stray references addressed the meaning of "inhabitant" for apportionment purposes, however. *The Venus* addressed the effect of a "declaration of war" on international commercial relationships. 12 U.S. (8 Cranch) 253, 289, 292 (1814). Federalist No. 42 criticized a provision of the Articles of Confederation that gave inhabitants of one State the right to be treated as citizens by other States. *The Federalist No. 42*, at 286 (James Madison) (Jacob E. Cooke ed., 1961). And John Adams' discussion of "citizens" and "inhabitants" actually supports Appellees: he wrote that while "inhabitant" does not include "every Stranger who has been in the United States," it does include those who show an "animus habitandi," or "will to dwell," in the nation. *See* Letter from John Adams to the President of Congress (Nov. 3, 1784) *in* 16 *Papers of John Adams* 362 (Gregg L. Lint et al. eds., 2012).

The Government's second textual argument fares no better. Addressing the phrase "usual resident," the Government observes that "usual" can "connote regularity"—and from there argues that there is

nothing "regular" about "aliens living in the country in continuous violation of federal law." Appellants' Br. 42. But that is just word games. Yes, "usual" and "regular" are synonyms when "regular" is used to mean "[s]teady or uniform in course, practice, or occurrence." *Webster's New International Dictionary* 2099 (2d ed. 1943). But the words are not synonymous in all respects; that "regular" can carry other meanings obviously does not mean that "usual" carries those meanings as well. In any event, context makes crystal clear that the Founders did not have the Government's concept of "regularity" in mind. Whether described as a person's "inhabitance," "usual residence," or "usual place of abode"—all phrases the Founders and First Congress used, *see Franklin*, 505 U.S. at 804-05—*habitual* residence is the Constitution's touchstone for apportionment. *Cf.* Residence Criteria, 83 Fed. Reg. at 5526 (distinguishing "usual residence" from "legal residence").

The Government's "strained definitions of a phrase that is clear as a matter of ordinary English hardly commend themselves." *United States v. Standard Oil Co.*, 384 U.S. 224, 234 (1966). Even worse, the Government's reading is conclusively refuted by 230 years of historical practice. From the Founding until today, all three branches of government understood the Constitution to require the enumeration of all who reside in the United States, rejecting every suggestion that the text could be construed more narrowly. *See San Jose* J.S. App. 77a, 83a-93a. This "early, longstanding, and consistent interpretation" provides "powerful evidence of [the text's] original public meaning." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch,

J., concurring in the judgment) (emphasis omitted); *see also Evenwel*, 136 S. Ct. at 1132 (relying on historical gloss in an apportionment case).

As noted above, in the very first Census Act of 1790, Congress directed enumerators to count "*every* person" at his or her "usual place of abode." Act of Mar. 1, 1790, § 5, 1 Stat. at 103 (emphasis added). This "usual residence rule" applied irrespective of lawful status: the 1860 Census counted escaped slaves residing "illegally" in the North. *San Jose* J.S. App. 17a, 82a-83a. The Government discounts this early precedent because it assumes the constitutional drafters and early Congresses were unfamiliar with the concept of illegal immigration. Appellants' Br. 35. But it seems unlikely that the Founders, who gave Congress the power to "establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, failed to envision the potential that those rules could be violated. It is even less plausible that the drafters of the Fourteenth Amendment failed to consider that possibility. By 1868, States had been restricting immigration for at least two decades. *See, e.g.*, *Henderson v. Mayor of City of New York*, 92 U.S. 259, 261 (1875); Act of May 5, 1847, ch. 195, § 3, 1847 N.Y. Laws 182, 184. And the first federal restrictions were passed shortly thereafter, in 1875. *See Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).

Of course, throughout the ensuing twentieth century, the concept of unlawful immigration was well known, and often the focus of legislative and executive action. Yet Congress and the Executive Branch repeatedly rejected invitations to read the Constitution's text more narrowly. *See San Jose* J.S. App. 10a-19a, 80a-90a (detailing this history). A "lack of historical precedent" is "the most telling indication

of [a] severe constitutional problem." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (alteration in original) (citation omitted). Here, not only is there *zero* historical precedent for the Memorandum's exclusion policy, but every time a similar policy was proposed, the political branches readily recognized the constitutional problem.

B. The Government's Assertion That It Can Lawfully Exclude Some Undocumented Immigrants Cannot Save The Presidential Memorandum

As a fallback, the Government argues that Appellees' facial challenge cannot succeed because at least *some* undocumented immigrants might be properly excludable from the apportionment base. *See* Appellants' Br. 39-40. That argument cannot sustain the Presidential Memorandum.

The Government claims that "under any relevant definition of 'inhabitants,' there are at least some aliens whose lack of lawful status is a proper basis for exclusion." *Id.* at 40. These are: (1) "aliens living in a detention facility after being arrested while crossing the border"; (2) "aliens who have been detained for illegal entry and paroled into the country pending removal proceedings"; and (3) "aliens who are subject to final orders of removal." *Id.* The Government argues that these immigrants lack an "enduring tie to" the State where they are located on Census Day. *Id.* (citation omitted). But that assertion is belied by the Government's own established understanding of residence, as reflected in the Census Bureau's rules for enumeration.

The Census Bureau counts people based on their "usual residence" as of Census Day (April 1, 2020).

Residence Criteria, 83 Fed. Reg. at 5526. "[T]his is not always the same as a person's legal residence, voting residence, or where they prefer to be counted." *Id.* Instead—in keeping with the precedent set by the First Congress—a person's usual residence is their current "abode," or "the place where a person lives and sleeps most of the time." *Id.* This is why foreign visitors are excluded: although they may be present in a State on April 1, that is not where they live. *See id.* at 5533.

Crucially, the focus is on where a person lives *on Census Day*. It does not matter where she resided previously or where she may live in the future—even if those plans are certain. *See San Jose* J.S. App. 110a. Thus, the Census Bureau counts those who move to a different State on April 2, 2020 as residents of the State where they lived on April 1. *See* Residence Criteria, 83 Fed. Reg. at 5533. Consistent with this principle, the Census Bureau recently rejected a suggestion that it count individuals in nursing facilities and adult group homes who are "actively preparing to transition" to a new home at their *future* address. *Id.* at 5530. The Bureau explained that "people *must* be counted at their current usual residence, rather than a future usual residence." *Id.* (emphasis added).

That principle illustrates why the Government cannot categorically exclude any of the three classes of undocumented immigrants it identifies. Start with immigrants living in an ICE detention facility after crossing the border. But for the Presidential Memorandum, they would be counted in the State where they are detained—consistent with the rule for all other prisoners and detainees. *See id.* at 5535. And this is the rule for prisoners regardless of their

prior connections to their State of detention, the length of their confinement, or where they intend to live when released.[14] For example, a person from Albuquerque who is incarcerated in FCI Phoenix would be counted in Arizona, even if he intends to return to New Mexico following his sentence. An undocumented immigrant who was detained at the border and subsequently resides at a detention facility in Arizona should likewise be counted in Arizona, even if he may eventually return to a different place.

Second, take undocumented immigrants who are subject to final orders of deportation. They are analogous (for residency purposes) to convicted defendants whom the government plans to imprison in a different State. In both situations, the fact "the government may control the relocation of a given individual" does not demonstrate that the individual does not "live" in his current State. *San Jose* J.S. App. 110a. "People in prison can be transferred to a prison in a different state," but "[t]hey are still residents of their current state for census purposes." *Id.*; *see also* Residence Criteria, 83 Fed. Reg. at 5527 (explaining that "incarcerated people are typically transferred multiple times . . . during the time between when they are arrested and when they are released"). To take another analogy, the Residence Criteria count foreign college students as residents of the States in which

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[14] Notably, the Census Bureau has adhered to this rule in the face of criticism from commenters because "[t]he practice of counting prisoners at the correctional facility is consistent with the concept of usual residence," given that "the majority of people in prisons live and sleep most of the time at the prison." Residence Criteria, 83 Fed. Reg. at 5527-28.

they attend college on April 1, even if their visa requires them to leave the United States when their course of study is complete. *See id.* at 5534. The Government offers no basis for treating undocumented immigrants who are subject to final orders of removal differently.

Third, consider immigrants who have been detained for unlawful entry and paroled into a State pending removal proceedings. It is even less certain that such individuals—not in detention and not subject to final removal orders—will leave the country. *See New York* J.S. App. 86a (citing data that 57% of aliens in immigration proceedings are ultimately allowed to remain in the United States). These individuals—who live, work, and raise children here—certainly have no fewer "enduring ties" to their places of residence, and no less expectation of continued residence, than foreign students who plan to leave when their studies end.

Contrary to the Government's claim, then, there is nothing about these three classes of immigrants that would render them categorically excludable under ordinary residency principles. All three have direct analogues under the Residence Criteria. The only salient difference is a lack of lawful immigration status. And that alone is not a legitimate basis on which to exclude persons who live in a State, as the Constitution's text, drafting history, and longstanding congressional and executive practice make plain.

Finally, the Government's assertion that, in order to prevail, Appellees must show "the term 'inhabitants' . . . covers all illegal aliens," Appellants' Br. 40, fundamentally misunderstands the standard for facial challenges. A facial challenge is "a claim

that the law or policy at issue"—here, the policy of excluding persons from apportionment *based on their legal status*—"is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). In "assessing whether a [policy] meets this standard," the Court has traditionally "considered *only* applications of the [policy] in which it *actually authorizes or prohibits conduct*." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (emphasis added). In other words, the "proper focus" of the inquiry is "the group for whom the [challenged policy] is a restriction, not the group for whom the [policy] is irrelevant." *Id.* (citation omitted). Here, "[t]he Presidential Memorandum is 'irrelevant'" to those "like foreign tourists, who are already excluded from the count based on the Residence Rule." *San Jose* J.S. App. 97a.

The Government's contrary understanding would produce absurd results. There could be no facial challenge to an executive order directing the exclusion from the apportionment base of all Catholics, all persons of Latino heritage, and all persons under the age of eighteen. After all, *some* subset of those populations would always be excludable as business travelers or vacationers. Under the Government's rule, therefore, no legal challenge to the policy itself could ever prevail. That cannot be right.

For that reason, it does not matter whether the Government can conceivably identify immigrants who were present in the United States unlawfully on April 1, 2020 and who should not be counted based on ordinary residence principles. If an immigrant was located on Census Day in a State that was not her "usual residence"—that is, not the place where she

lived and slept most of the time—then she may be excluded. But such hypotheticals are irrelevant to the facial legality of the Memorandum's policy, which is to exclude those who have their "usual residence" in this country based on a characteristic that has no bearing on that determination.

* * *

CONCLUSION

Amici respectfully submit that the judgment of the district court should be affirmed.

Respectfully submitted,

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