

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 OF LATINOJUSTICE PRLDEF AND
TWELVE *AMICI CURIAE*
IN SUPPORT OF APPELLEES**

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STATEMENT OF INTEREST¹

Amicus curiae LatinoJustice PRLDEF (“LJP”) champions an equitable society by using the power of the law together with advocacy and education. Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, LJP has advocated for the constitutional rights of all Latinos,² including their right to equal protection under the law. LJP has engaged in and supported legal reforms and civil rights litigation, combatting discriminatory policies, in state and federal courts across the country. That advocacy includes work to secure the rights and political participation of Latinos in multiple cases.³

The additional twelve *amici* are listed in the attached Appendix. *Amici* include some of the nation’s most prominent Latino and other community nonprofit organizations. Individually and collectively, *amici*

¹ Under Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties’ blanket consent to the filing of this brief are on file with the Clerk of the Court.

² In this brief, the term “Latino” will refer to the group that the Census Bureau designates as “Hispanic or Latino.” Specifically, the Census Bureau defines “Hispanic or Latino” as “a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.” U.S. Census Bureau, About Hispanic Origin, <https://www.census.gov/topics/population/hispanic-origin/about.html> (last visited Nov. 12, 2020).

³ See, e.g., *Arcia v. Florida Sec’y of State*, 772 F.3d 1335 (11th Cir. 2014); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285 (S.D.N.Y. 2020); *Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018); *Favors v. Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974).

advocate for civil rights and equal protection of Latinos through a combination of public policy analysis, civic engagement, professional development initiatives, and legal advocacy.

Amici agree with the District Court that the Presidential Memorandum would illegally exclude undocumented immigrants from the apportionment base used to apportion representatives among the states. This exclusion would significantly harm Latino communities throughout the United States by reducing the number of representatives and Electoral College votes apportioned to regions where Latinos reside, resulting in reduced political power and federal funding in connection with a wide array of social, political, and economic programs.

SUMMARY OF ARGUMENT

By attempting to exclude undocumented immigrants for purposes of the decennial census, the Administration fails to recognize the significant contribution and participation of the undocumented community in the United States. Nearly 11 million undocumented immigrants currently live in the United States and have long-established ties to the country. Their family ties, their jobs, their education and their social connections make them part of the fabric of American life. Undocumented immigrants contribute billions of dollars in annual tax revenues and are recognized as U.S. residents by the federal government for military purposes.

The Presidential Memorandum continues the Administration's practice of pursuing policies that harm the Latino community. Through a series of disparaging statements and policies motivated by racial animus, the Administration has significantly

harmed the Latino community. As a result, Latinos live in an environment of fear and distrust, reluctant to report crimes, seek necessary medical care, or participate in government programs.

The Presidential Memorandum compounds these harms. By refusing to count undocumented immigrants in the apportionment process, the Presidential Memorandum dilutes Latino political power and harms the U.S. democratic process. Unless the Presidential Memorandum is enjoined, states with significant populations of Latino and other undocumented immigrants will lose Congressional representatives and electoral votes. This dilution of Congressional representation will unfairly deprive Latino communities and their states of political influence, and in turn, of federal funding. Overall, the loss of political representation resulting from the Presidential Memorandum threatens the well-being of communities across the United States.

ARGUMENT

Article I, Section 2 of the United States Constitution states: “Representatives and direct taxes shall be apportioned among the several states which may be included within this union, *according to their respective numbers.*”⁴ The Fourteenth Amendment to the U.S. Constitution provides that the apportionment count shall include “*the whole number of persons in each state, excluding Indians not taxed.*”⁵ In direct contradiction of the plain language of the Constitution,

⁴ U.S. Const. art. I § 2 (emphasis added).

⁵ U.S. Const. amend. XIV, § 2 (emphasis added).

the “Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census” (the “Presidential Memorandum”) states that the President will exclude from the apportionment count all “aliens who are not in a lawful immigration status under the Immigration and Nationality Act.”⁶

The Presidential Memorandum goes against more than 200 years of American history, during which every President has fulfilled his duty to report to Congress the “whole number of persons”—including those who may not be in “lawful immigration status”—for the congressional apportionment. The Presidential Memorandum also flouts precedent from this Court affirming 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*.”⁷

By seeking to exclude undocumented immigrants from the census count, the Presidential Memorandum ignores that undocumented immigrants are part of the political, economic, and social fabric of American life. Indeed, unlike the “Indians not taxed” that the Fourteenth Amendment’s framers excluded, undocumented immigrants pay billions of dollars in taxes. And undocumented immigrants are gainfully employed in every type of job imaginable, run countless businesses, serve in the military, and attend schools. In short, far from being fleeting visitors to

⁶ 85 Fed. Reg. 44,679 (July 21, 2020).

⁷ *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) (emphasis added); see also *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (“[T]he basis of *representation* in the House was to include *all inhabitants*.” (first emphasis in original; second added)).

America with no stake in our country, undocumented immigrants are residents and inhabitants of the United States just as citizens are. Erasing these residents from the census count will have a profoundly negative impact on these members of our society, the vast majority of whom are Latino, depriving them of civil rights, political power and economic and social resources. LJP and *amici* respectfully submit that this Court should uphold the District Court’s opinion and reaffirm the Constitutional requirement that congressional apportionment include “all inhabitants.”⁸

I. THE PRESIDENTIAL MEMORANDUM IGNORES THAT UNDOCUMENTED IMMIGRANTS ARE ACTIVE MEMBERS OF AMERICAN SOCIETY.

To bolster their argument that undocumented immigrants should not be considered “inhabitants” or “residents” of the United States for apportionment purposes, Appellants treat undocumented immigrants like transient visitors, minimizing their ties and contributions to the country. For example, Appellants compare undocumented immigrants to foreign business persons or tourists who are only temporarily present in the United States.⁹ Appellants thus insist that undocumented immigrants lack an “enduring tie to” and a “usual residence” in the United States,¹⁰ but

⁸ *Evenwel*, 136 S. Ct. at 1127.

⁹ Mem. of Law in Supp. of Defs.’ Mot. to Dismiss and in Opp’n to Pls.’ Mot. for Partial Summ. J. or Preliminary Inj. at 24, *State of New York v. Donald J. Trump*, No. 1:20-cv-05770-JMF (S.D.N.Y. 2020).

¹⁰ Defs.’ Reply in Supp. of Mot. to Dismiss, at 8, *State of New York v. Donald J. Trump*, No. 1:20-cv-05770-JMF, 2020 WL 6471230 (S.D.N.Y.).

their characterizations ignore the long-lasting and substantial contributions of millions of undocumented immigrants to communities throughout the United States. An examination of the reality of undocumented immigrant life in the United States puts the lie to Appellants' position.

A. Undocumented immigrants have a significant and established presence in the United States.

It is estimated that nearly 11 million undocumented persons currently reside in the United States.¹¹ Based on 2016 data, researchers estimate that 21 states have a population of 100,000 or more undocumented immigrants.¹² A significant portion of the community has maintained a long and established residence in America. According to a study by the Migration Policy Institute, an estimated nine million undocumented persons have resided in the United States for more than five years; seven million for more than a decade; and four million for more than twenty years.¹³

Not surprisingly, then, a sizeable portion of the undocumented population has established deep and lasting ties to local communities. The Migration Policy Institute estimates that nearly 3.8 million undocumented

¹¹ *Immigrants and the Economy in: United States of America*, NEW AMERICAN ECONOMY, <https://www.newamericaneconomy.org/locations/national/> (last visited Nov. 12, 2020).

¹² *U.S. Unauthorized Immigrant Population Estimates by State, 2016*, PEW RESEARCH CTR. (Feb. 5, 2019) <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/>.

¹³ *Profile of the Unauthorized Population: United States*, Migration Policy Institute, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> (last visited Nov. 12, 2020).

immigrants are homeowners.¹⁴ While undocumented immigrants do reside in the United States under the threat of possible deportation, the mere fact that a person may be subject to deportation does not mean that the person is not considered a resident of the United States, as this Court recognized in *Plyler v. Doe*.¹⁵ The enduring nature of the residence in the United States of a vast majority of undocumented immigrants directly undercuts Appellants' arguments.

B. Undocumented immigrants are connected to the fabric of American society.

The ties of undocumented immigrants to the United States extend far beyond their presence in the country. Like the American community as a whole, undocumented people are connected to the fabric of American society through family, community engagement, work, and education.

Many U.S. citizens are cared for and supported by undocumented immigrants. More than 16 million U.S. residents live in mixed status households—households with both U.S. citizens and undocumented immigrants.¹⁶ It is estimated that one out of every twelve children in the United States—a total of nearly 6.1 million children—lives with at least one undocumented family member.¹⁷

¹⁴ *Id.*

¹⁵ 457 U.S. 202, 226 (1982).

¹⁶ *Fact Sheet: Mixed Status Families and COVID-19 Economic Relief*, National Immigration Forum (Aug. 12, 2020), <https://immigrationforum.org/article/mixed-status-families-and-covid-19-economic-relief/>.

¹⁷ *Id.*; see also *Fact Sheet: Immigrants in the United States*, American Immigration Council (Aug. 6, 2020), <https://www>

In addition, undocumented immigrants have demonstrated their lasting investment in this country via sustained economic activity and new business growth. According to a report prepared by the UCLA North American Integration and Development Center and the Mexican Instituto Nacional de Estadística y Geografía (“NAID Report”), undocumented people are responsible for more than \$1 trillion of the U.S. gross domestic product.¹⁸ The aggregate spending power of the undocumented community in 2018 was estimated at \$217.7 billion dollars—including a combined \$24.1 billion in annual spending power of Deferred Action for Childhood Arrivals (“DACA”) recipients and their households.¹⁹ This money sustains businesses throughout the country, stimulating the economy and supporting the American workforce.

The vital connection of undocumented persons to this country is also evident from their critical participation in the workforce, spanning multiple sectors of the U.S. economy. According to New American Economy, a bipartisan research and advocacy organization, in more than twenty states, undocumented immigrants “boast higher rates of entrepreneurship than either legal permanent residents or citizens of the same age

americanimmigrationcouncil.org/research/immigrants-in-the-united-states.

¹⁸ Raul Hinojosa-Ojeda et al., *Essential but Disposable: Undocumented Workers and Their Mixed-Status Families* 6 (2020), available at <https://irle.ucla.edu/wp-content/uploads/2020/08/Essential-Undocumented-Workers-Final-w-Cover.pdf>.

¹⁹ NEW AMERICAN ECONOMY, *supra* note 11; Nicole Prchal Svajlenka, *What We Know About DACA Recipients in the United States*, CTR. FOR AMERICAN PROGRESS (Sept. 5, 2019), <https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states>.

group.”²⁰ It is estimated that, in 2018, more than 808,000 undocumented immigrant entrepreneurs generated \$15.2 billion in business income.²¹

Amidst the ongoing COVID-19 pandemic, it is estimated that over 78 percent of undocumented workers are considered “essential.”²² According to the NAID Report, “undocumented workers are most concentrated in essential and critical industries that are mandated to supply goods and services during the COVID-19 shutdown.”²³ Furthermore, “undocumented and mixed-status families” will remain “critical for reactivating essential supply-and-demand chains” as part of the nation’s economic recovery from the current public health crisis.²⁴ In the agricultural sector, “undocumented immigrants account for nearly 50 percent of all hired crop workers,” and are similarly vital to the meat and dairy industries.²⁵ While undocumented persons make up 4.6 percent of the total U.S. workforce, the community makes up a larger share of the workforce in certain industries, including agriculture (14%), construction (12%), leisure and hospitality (7%), and manufacturing (5%).²⁶

²⁰ NEW AMERICAN ECONOMY, *supra* note 11.

²¹ *Id.*

²² Raul Hinojosa-Ojeda et al., *supra* note 18, at 10.

²³ *Id.*

²⁴ *Id.*

²⁵ See U.S.D.A, Farm Labor, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> (last visited Nov. 12, 2020); Mary Jo Dudley, *These U.S. industries can't work without illegal immigrants*, CBS NEWS (Jan. 10, 2019) <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/>.

²⁶ Jens Manuel Krogstad, Mark Hugo Lopez, and Jeffrey S. Passel, *A majority of Americans say immigrants mostly fill jobs*

Undocumented immigrants are also a vital part of the American educational system. As this Court made clear in *Plyler v. Doe*, undocumented students have an equal right to public education.²⁷ Nearly 1.5 million undocumented students are enrolled in K-12 and higher education programs in the United States.²⁸ Moreover, as of 2016, more than 4.1 million K-12 students in public and private schools are children of undocumented immigrants.²⁹ In addition to pursuing undergraduate degrees, “a sizable portion” of undocumented students “are pursuing advanced degrees” and are “actively ready[ing] themselves to fill critical skills shortages, including in healthcare, STEM fields, teaching, and business” which will in turn allow them “to support their families, communities, and regional and national economies.”³⁰ Notably, nineteen states, from both ends of the political spectrum, currently

U.S. citizens do not want, PEW RESEARCH CTR. (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/a-majority-of-americans-say-immigrants-mostly-fill-jobs-u-s-citizens-do-not-want/>.

²⁷ 457 U.S. 202 (1982).

²⁸ See, e.g., Migration Policy Institute, *supra* note 13.

²⁹ See Jeffrey S. Passel and D’Vera Cohn, *Most Unauthorized Immigrants Live with Family Members*, PEW RESEARCH CTR. (Nov. 27, 2018), <https://www.pewresearch.org/hispanic/2018/11/27/most-unauthorized-immigrants-live-with-family-members/>.

³⁰ See *Undocumented Students in Higher Education: How Many Students are in U.S. Colleges and Universities, and Who Are They?* at 6, NEW AMERICAN ECONOMY (Apr. 2020), available at <https://www.presidentsimmigrationalliance.org/wp-content/uploads/2020/04/2020-04-16-NAE-PA-Report-Undocumented-Students-in-Higher-Education.pdf>.

allow undocumented students to qualify for in-state tuition rates at public colleges and universities.³¹

Simply put, undocumented people make essential and lasting contributions in all walks of American life.

C. Undocumented immigrants residing in the United States contribute billions of dollars in tax revenues annually.

The undocumented population is not just woven into the social and economic fabric of the United States, but also contributes substantially to the tax base. Appellants' failure to acknowledge this contribution further exposes the disconnect between Appellants' view of the undocumented community and the reality of American life. On an annual basis, undocumented immigrants contribute tens of billions of dollars in tax revenues within the United States. In 2018 alone, according to New American Economy estimates, the undocumented community paid \$20.1 billion in federal taxes.³²

These contributions to tax revenues have not gone unnoticed by the U.S. government. In 1996, to enable a growing community of established residents to file taxes, the IRS introduced the Individual Taxpayer Identification Number ("ITIN").³³ By obtain-

³¹ *Undocumented Student Tuition: Overview*, Nat'l Conference of State Legislatures, (Sept. 19, 2019), <https://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

³² New American Economy, *supra* note 11.

³³ I.R.S., *Understanding Your IRS Individual Taxpayer Identification Number 5*, available at <https://www.irs.gov/pub/irs-pdf/p1915.pdf> (last visited Nov. 12, 2020).

ing an ITIN, non-citizen residents who do not have a social security number can file taxes and comply with U.S. tax laws. While ITINs can be used by any non-citizen, including authorized immigrants, “[m]ost experts believe that the vast majority of tax returns filed with ITINs today are filed by undocumented immigrants.”³⁴ Using ITINs, millions of undocumented immigrants consistently and faithfully enforce their connection to the United States community by filing tax returns. The U.S. Internal Revenue Service itself has acknowledged the magnitude of this process and confirmed that, in 2015, 4,400,000 ITIN filers paid over \$23.6 billion in total taxes.³⁵

These tax contributions are critical to the federal government’s ability to fund essential programs for the American community and to help reduce the national debt. The Office of the Chief Actuary of the Social Security Administration (“SSA”) reported in 2010 that tax payments from undocumented immigrants accounted for about \$12 billion in revenue for the Social Security program.³⁶ The same report concluded that “the presence of unauthorized workers in

³⁴ Hunter Hallman, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer*, Bipartisan Policy Center (Mar. 28, 2018), <https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/>.

³⁵ *Individual Taxpayer Identification Number (ITINs): IRS Processes Create Barriers to Filing and Paying for Taxpayers Who Cannot Obtain Social Security Numbers* at 199, National Taxpayer Advocate Most Serious Problems #18 (2015), available at https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015_ARC/ARC15_Volume1_MSP_18_ITIN.pdf.

³⁶ Stephen Goss et al., *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds 2*, SOCIAL SECURITY ADMIN. ACTUARIAL NOTE 151 (Apr. 2013), available at https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf.

the United States has, on average, a positive effect on the financial status of the Social Security Program.”³⁷ In fact, some reports maintain that tax revenue generated from undocumented immigrants has been essential in “keeping Social Security and Medicare solvent.”³⁸ In 2014, the Chief Actuary of the SSA estimated that, over the prior decade, undocumented immigrants contributed \$100 billion to the Social Security program.³⁹ In addition, New American Economy estimates that undocumented immigrants generated a \$35.1 billion surplus to the Medicare Trust Fund between 2000-2011.⁴⁰ Undocumented immigrants are not eligible to participate in these federal programs, making their contributions all the more remarkable.

These contributions are equally visible at the state and local community level. Numerous bipartisan organizations have reported that undocumented immigrants contribute more than \$11 billion in state and local taxes annually.⁴¹ According to an April 2019 report by

³⁷ *Id.*

³⁸ Alexia Fernández Campbell, *Undocumented immigrants pay millions of dollars in state taxes — even in the reddest states*, VOX (Mar. 1, 2019), <https://www.vox.com/2019/3/1/18241692/undocumented-immigrants-pay-state-local-taxes>.

³⁹ Roy Germano, *Unauthorized Immigrants Paid \$100 Billion Into Social Security Over Last Decade*, VICE (Aug. 4, 2014), <https://www.vice.com/en/article/zm5k8j/unauthorized-immigrants-paid-100-billion-into-social-security-over-last-decade>.

⁴⁰ *Undocumented Immigrants*, New American Economy, <https://www.newamericaneconomy.org/issues/undocumented-immigrants> (last visited Nov. 12, 2020).

⁴¹ *See, e.g., id.*; Lisa Christensen Gee et al., *Undocumented Immigrants’ State & Local Tax Contributions 2*, INSTITUTE ON TAXATION & ECONOMIC POLICY (Mar. 2017), *available at* <https://itep.sfo2.digitaloceanspaces.com/immigration2017.pdf>.

the California Budget & Policy Center, a non-partisan organization, undocumented immigrants in California contributed \$3.2 billion in state and local taxes, including \$2 billion in sales and excise taxes, \$1.1 billion in property taxes, and \$157.9 million in personal income taxes.⁴² The contributions are not limited to states typically associated with large undocumented immigrant populations; for example, the Institute on Taxation and Economic Policy estimated that, in 2014, undocumented immigrants contributed state and local taxes of more than \$60 million in Alabama and more than \$80 million in Oklahoma.⁴³

As reported in 2019 by the Center for American Progress, DACA recipients have also made substantial contributions at both the federal and state levels.⁴⁴ DACA recipients and their households annually pay \$5.7 billion in federal taxes, \$3.1 billion in state and local taxes, and boost Social Security and Medicaid through payroll taxes.⁴⁵

The extensive contributions that undocumented immigrants make to the federal, state and local tax base simply cannot be squared with Appellants' characterization of undocumented immigrants as fleeting visitors to the United States with no real community ties, and decisively distinguish undocumented people

⁴² Kayla Kitson, *California's Undocumented Immigrants Make Significant Contributions to State and Local Revenues*, CALIFORNIA BUDGET & POLICY CENTER (Apr. 2019), <https://calbudgetcenter.org/resources/californias-undocumented-immigrants-make-significant-contributions-to-state-and-local-revenues/>.

⁴³ Christensen Gee, *supra* note 41, at 9-10.

⁴⁴ Svajlenka, *supra* note 19.

⁴⁵ *Id.*

from the “Indians not taxed” that the Fourteenth Amendment’s framers excluded from the count.

D. Undocumented immigrants are considered residents of the United States for military purposes and have served in or support family members in the United States military.

The notion that undocumented immigrants are like visiting tourists also shows no respect for undocumented immigrants’ contributions to the U.S. military. For decades, pursuant to the Military Selective Service Act (“MSSA”),⁴⁶ all male citizens and “all other males *residing* in the United States” between the ages of 18 and 26 have been required to register with the Selective Service System. Based on these registrations, the Selective Service System establishes a database of eligible men that can be called for military service in case of a national emergency mobilization. The Selective Service System considers all immigrants, “documented or undocumented,” residents of the United States for purposes of the MSSA.⁴⁷

Moreover, the United States has a long practice of recruiting and relying on foreign-born individuals to serve in the United State military. As part of this practice, in 2014, the Department of Defense extended eligibility for military recruitment and enlistment under the Military Accessions Vital to the National Interest (“MAVNI”) program to undocumented immigrants granted deferred action under the DACA

⁴⁶ 50 U.S.C. § 451 *et seq.* (as amended).

⁴⁷ Selective Service System, <https://www.sss.gov/> (last visited Nov. 12, 2020).

process.⁴⁸ As recently as September 2017, more than 800 DACA recipients who possessed skills “vital to the national interest” were serving in the U.S. military through the MAVNI program.⁴⁹

The United States has also recognized the significant contributions of undocumented immigrants who are military family members. In consideration for these contributions and sacrifices, in 2007, President George W. Bush created the “Parole in Place” program to protect undocumented immediate family members of U.S. veterans and active duty military service members from deportation.⁵⁰ A 2016 U.S. Citizenship and Immigration Services (“USCIS”) policy memorandum on the program explicitly recognized the resident status of undocumented immigrant military family members within the United States, confirming USCIS “authority to grant parole to noncitizen applicants for admission, including those *residing* in the United States.”⁵¹ Moreover, undocumented immigrants continue

⁴⁸ See, e.g., Andrew Tilhman, *Military to allow undocumented immigrants to serve*, USA TODAY (Sept. 25, 2014), available at <https://www.usatoday.com/story/news/nation/2014/09/25/policy-to-allow-undocumented-immigrants-in-military/16225135/>.

⁴⁹ See, e.g., *Brief Profile: Eager To Serve His Country, Dreamer Worries He May Be Thrown Out Instead*, NEW AMERICAN ECONOMY (Jan. 26, 2018), <https://www.newamericaneconomy.org/feature/brief-profile-eager-to-serve-his-country-dreamer-worries-he-may-be-thrown-out-instead/>.

⁵⁰ U.S.C.I.S., Policy Memorandum PM-602-0091 (Nov. 15, 2013), available at https://www.uscis.gov/sites/default/files/document/memos/2013-1115_Parole_in_Place_Memo_.pdf.

⁵¹ U.S.C.I.S., Policy Memorandum PM-602-0114 (Nov. 23, 2016), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/PIP-DA_Military_Final_112316.pdf.

to be considered residents of the United States even after the death of their military family member.⁵²

To consider undocumented immigrants as U.S. residents for functions important to the U.S. military but not for purposes of the decennial census is wholly inconsistent and disrespects the vital contributions of these immigrants to the United States.

II. THE PRESIDENTIAL MEMORANDUM CONTINUES THE ADMINISTRATION'S PURSUIT OF POLICIES THAT HARM THE LATINO COMMUNITY.

Appellants' claim that the Presidential Memorandum is not motivated by discriminatory animus is not credible, given the Administration's pattern and practice of spouting anti-immigrant rhetoric and pursuing policies that harm the Latino community. Moreover, the consequences to the Latino community have been devastating.

A. The Administration has a history of engaging in anti-immigrant rhetoric and policies.

President Trump's animus toward the Latino community was on full display in the early stages of his first presidential campaign, and the President has continued in the same vein throughout his presidency, as he and members of his Administration have portrayed immigrants as imminent threats to the health, safety, and well-being of the United States.

First, in his now infamous 2015 presidential announcement speech, then-candidate Trump said: "When Mexico sends its people, they're not sending

⁵² *Id.*

their best They're sending people that have lots of problems, and they're bringing those problems with [them]. They're bringing drugs. They're bringing crime. They're rapists."⁵³ Three days later, President Trump tweeted, "Druggies, drug dealers, rapists and killers are coming across the southern border," and asked, "When will the U.S. get smart and stop this travesty?"⁵⁴ The President has repeated such comments on numerous occasions during his presidency.⁵⁵

Upset that he lost the popular vote in the 2016 election, President Trump concocted a theory, without evidence, that millions of undocumented immigrants illegally voted in the election.⁵⁶ To pursue this fabrication, he signed an Executive Order establishing a commission on "election integrity" to examine supposed improper or fraudulent voter registration and voting.⁵⁷ The commission was abruptly disbanded in

⁵³ Amber Phillips, *'They're rapists.' President Trump's campaign launch speech two years later, annotated*, WASH. POST (June 16, 2017), available at <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/>.

⁵⁴ Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2015, 10:22 PM), <https://twitter.com/realdonaldtrump/status/612083064945180672>.

⁵⁵ Jesse Ferreras, *Donald Trump: Calling Mexicans 'Rapists' was 'Peanuts' Next to the 'Truth'*, GLOBAL NEWS (Aug. 2, 2018), <https://globalnews.ca/news/4368981/donald-trump-mexicans-rapists-peanuts/>.

⁵⁶ Tom LoBianco, *Trump Falsely Claims 'Millions of People Who Voted Illegally' Cost Him Popular Vote*, CNN (Nov. 28, 2016) <https://www.cnn.com/2016/11/27/politics/donald-trump-voter-fraud-popular-vote/index.html>.

⁵⁷ Exec. Order No. 13799, 82 Fed. Reg. 22389 (May 11, 2017).

2018 after holding only two meetings⁵⁸ and admitted to finding no evidence of voter fraud.⁵⁹

Within a week of his inauguration, President Trump issued two immigration-related executive orders. The first order called for the immediate construction of a border wall between the United States and Mexico and also directed federal government agencies to “repatriate illegal aliens swiftly. . . .”⁶⁰ The second order called for the withholding of federal funds from sanctuary cities and directed the DHS to publicize, on a weekly basis, crimes committed by undocumented immigrants.⁶¹

In May 2018, the Administration announced a “zero tolerance” policy whereby all persons attempting to enter the country without documents would be prosecuted and children would be separated from their parents at the border.⁶² In fact, as Administration officials later admitted, the separation policy started a year before the Administration’s formal announcement.⁶³

⁵⁸ Jessica Taylor, *Trump Dissolves Controversial Election Commission*, NPR (Jan. 3, 2018), <https://www.npr.org/2018/01/03/575524512/trump-dissolves-controversial-election-commission>.

⁵⁹ Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), available at <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html>.

⁶⁰ Exec. Order. No. 13767 §§ 1–2, 82 Fed. Reg. 8793 (Jan. 25, 2017).

⁶¹ *Id.*

⁶² William A. Kandel, Cong. Research Serv., R45266, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy 1* (2019).

⁶³ Alan Gomez, *Democrats grill Trump administration officials over family separation policy on the border*, USA TODAY (Feb. 7, 2019), available at <https://usatoday.com/story/news/politics/2019/02/>

The policy resulted in thousands of undocumented children and adults being separated and held in detention centers that former First Lady Laura Bush found to be “eerily reminiscent” of internment camps used for Japanese-Americans during World War Two.⁶⁴ Even young children under the age of two were separated from their families.⁶⁵ Although the highly controversial policy was scheduled to end on June 20, 2018, there are reports as recent as May 2020 of continued family separations.⁶⁶ It was recently reported that the Administration has been unable to reunite 666 children who were separated from their parents.⁶⁷

Two other major policy initiatives likewise demonstrate the Administration’s anti-immigrant and anti-Latino

07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/.

⁶⁴ Laura Bush, *Separating Children from Their Parents at the Border ‘Breaks My Heart’*, WASH. POST (June 17, 2018), available at https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html.

⁶⁵ Staff Report, House Comm. on Oversight and Reform, *Child Separations by the Trump Administration*, U.S. House of Representative 1 (July 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf>.

⁶⁶ Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), available at <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html>.

⁶⁷ Jacob Soboroff & Julia Ainsley, *Lawyers can’t find the parents of 666 migrant kids, a higher number than previously reported*, NBC NEWS (Nov. 9, 2020), <https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144>.

animus: the effort to end the DACA program in 2017; and the effort to add a citizenship question to the census in 2018. The attempt to rescind DACA threatened to upend the lives of approximately 800,000 young undocumented immigrants who have received work permits and have been protected from deportation under the program. While DACA recipients hail from countries all over the world, “more than nine-in-ten were born in Latin America.”⁶⁸ If the Administration’s move to end DACA had been successful, this group of predominantly Latino young adults would have seen their lives drastically altered,⁶⁹ with far-reaching, ruinous consequences for “students, patients, clients, community members, family, and friends who have come to rely on [them] for essential services and emotional and financial support.”⁷⁰ Ultimately, this Court rejected the Administration’s misguided attempt to rescind the DACA program in part because DHS “failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients.”⁷¹

⁶⁸ Gustavo López & Jens Manuel Krogstad, *Key facts about unauthorized immigrants enrolled in DACA*, PEW RESEARCH CTR. (Sept. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

⁶⁹ Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N. Y. TIMES (Sept. 5, 2017), available at <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

⁷⁰ Complaint at 15, *Garcia v. United States of America*, No. 3:17-cv-05380 (N.D. Cal. Sept. 18, 2017).

⁷¹ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020). See also Mem. and Order, *Batalla Vidal v. Wolf*, No. 1:16-cv-04756 (E.D.N.Y. Nov. 14, 2020) (invalidating Administration’s suspension of DACA).

Similarly distressing to the Latino community, and likewise indicative of animus toward the immigrant community, was the March 26, 2018 announcement by the Secretary of Commerce of the Administration's plan to include a citizenship question to the 2020 decennial census questionnaire.⁷² While the Secretary of Commerce claimed the question was being added at the request of the Department of Justice (“DOJ”) in order to provide the DOJ with citizenship data to use in enforcing the Voting Rights Act, this Court found that “the evidence tells a story that does not match the explanation the Secretary gave for his decision.”⁷³ In fact, reports surfaced of a 2015 study prepared by a senior Republican official “which concluded that a citizenship question would decrease the political power of Latinos and ‘be advantageous to Republicans and Non-Hispanic Whites’ in the redistricting process.”⁷⁴ The predictable result, of course, would have been that “states where [undocumented immigrants] are concentrated [would] be undercounted.”⁷⁵

⁷² Press Release, Wilbur Ross, Sec’y of Commerce, Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), *available at* https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf.

⁷³ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2556 (2019).

⁷⁴ Cristian Farias, *Is There Racist Intent Behind the Census Citizenship Question?*, NEW YORKER (June 26, 2019), *available at* <https://www.newyorker.com/news/news-desk/is-there-racist-intent-behind-the-census-citizenship-question-wilbur-ross>.

⁷⁵ Andrew Prokop, *Trump’s census citizenship question fiasco, explained*, VOX (Jul. 11, 2019), <https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order>.

The Trump Administration's shameless animus has even been directed at men and women serving in the U.S. military. In 2017, the Administration adopted a policy that barred lawful permanent residents from serving in the military until they could pass unspecified and vague background investigations.⁷⁶ In 2018, reports emerged that the Administration had been abruptly discharging immigrants who had enlisted in the U.S. Army with a promised path to citizenship through the MAVNI program.⁷⁷ And in 2019, it was reported that the Administration was looking to "scale back" the Parole in Place program by ending deportation protection for U.S. military families.⁷⁸

Given the devastating impact of all of these policies on the Latino community, it is difficult to escape the conclusion that these actions were designed to harm the immigrant Latino population and prevent the growth of Hispanic political power.⁷⁹

⁷⁶ Sameer Ahmed & Imaan Patel, *Federal Judge Blocks Trump's Anti-Immigrant Military Enlistment Policy*, AM. CIV. LIBERTIES UNION (Nov. 21, 2018), <https://www.aclu.org/blog/immigrants-rights/federal-judge-blocks-trumps-anti-immigrant-military-enlistment-policy>.

⁷⁷ Martha Mendoza & Garance Burke, *US Army quietly discharging immigrant recruits*, ARMYTIMES (July 5, 2018), available at <https://www.armytimes.com/news/your-army/2018/07/05/us-army-quietly-discharging-immigrant-recruits/>.

⁷⁸ Franco Ordoñez, *Trump Wants To Withdraw Deportation Protections For Families Of Active Troops*, NPR (June 27, 2019), <https://www.npr.org/2019/06/27/736362986/trump-wants-to-withdraw-deportation-protections-for-families-of-active-troops>.

⁷⁹ Salvador Rizzo, *Wilbur Ross's false claim to Congress that the census citizenship question was DOJ's idea*, WASH. POST (July 30, 2018), available at <https://www.washingtonpost.com/>

B. The Administration’s discriminatory policies and practices have caused significant harm to Latino communities.

The Administration’s anti-Latino policies have had a devastating impact. For example, since the beginning of the Trump Presidency, Latino immigrants have consistently underreported violent crimes in their neighborhoods, despite the fact that they are more likely to be victims of certain crimes than nonimmigrants.⁸⁰ Studies from The Urban Institute show that fear of apprehension or removal deters undocumented immigrants from reporting crimes and seeking assistance.⁸¹ Law enforcement officials are therefore concerned that the Latino population is “going further into the shadows,” a consequence that is not “good for the safety of all people.”⁸²

This troubling trend is not confined to any particular geographic region of the country, but rather affects all areas with the large immigrant populations. For example, Denver, Philadelphia, Houston, and Dallas have all reported data consistent with immi-

news/fact-checker/wp/2018/07/30/wilbur-ross-false-claim-to-congress-that-the-census-citizenship-question-was-doj-idea/.

⁸⁰ Alexandra Ricks, *Latinx immigrant crime victims fear seeking help*, Urban Institute: Urban Wire (Sept. 25, 2017), <https://www.urban.org/urban-wire/latinx-immigrant-crime-victims-fear-seeking-help>.

⁸¹ *Id.*

⁸² Lindsey Bever, *Hispanics ‘are going further into the shadows’ amid chilling immigration debate, police say*, WASH. POST (May 12, 2017), available at <https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/>.

grants becoming less likely to report crimes.⁸³ During the first three months of 2017, Houston reported a 13 percent decrease in violent crime reporting by Hispanics compared to the first three months of 2016. Houston also saw a 43 percent drop in the number of Hispanics reporting rape and sexual assault, while there was an 8 percent rise in the number of non-Hispanics reporting such crimes.⁸⁴ The lower reporting is even more disturbing considering that, according to the FBI, the number of victims in anti-Latino hate crimes rose more than twenty percent in 2018.⁸⁵

The Administration's policies have also had a cognizable psychological impact on the Latino community. Research conducted in 2018 showed that fifty percent of Latinos thought their situation in the United States had worsened during the Trump Presidency.⁸⁶ Two thirds of Latinos also specifically noted that the Administration's policies have been harmful to Hispanics. A separate study released in 2019 concluded that fear and worry about rhetoric around U.S. immigration policy correlated with "higher anxiety

⁸³ Rob Arthur, *Latinos In Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight (May 18, 2017), <https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/>.

⁸⁴ Bever, *supra* note 82.

⁸⁵ Brad Brooks, *Victims of anti-Latino hate crimes soar in U.S.: FBI report*, Reuters (Nov. 12, 2019), <https://www.reuters.com/article/us-hatecrimes-report/victims-of-anti-latino-hate-crimes-soar-in-u-s-fbi-report-idUSKBN1XM2OQ>.

⁸⁶ Mark Hugo Lopez, Ana Gonzalez-Barrera & Jens Manuel Krogstad, *More Latinos Have Serious Concerns About Their Place in America Under Trump*, PEW RESEARCH CTR. (Oct. 25, 2018), <https://www.pewresearch.org/hispanic/2018/10/25/more-latinos-have-serious-concerns-about-their-place-in-america-under-trump/>.

levels, sleep problems, and blood pressure changes among US-born Latino adolescents” and that anxiety levels of this group “significantly increased after the 2016 presidential election.”⁸⁷ Reports indicate that, during the Trump Presidency, “immigrants and their children are also becoming targets of heightened racism and discrimination” and that “teachers have reported cases of children adopting Trump’s rhetoric to bully their peers in school.”⁸⁸

Similar issues were noted in yet another study about the impact of immigration policy and rhetoric on Latino parents in America.⁸⁹ The study noted higher levels of psychological distress among Latino parents, including odds of “high psychological distress” being “118 percent greater for parents who frequently avoided contact with authorities such as the police.”⁹⁰ The harmful impact around immigration rhetoric was “manifest across a range of parent concerns and behaviors.”⁹¹

In the face of these increased mental health effects and other medical issues, undocumented Latino immi-

⁸⁷ Brenda Eskenazi, et al., *Association of Perceived Immigration Policy Vulnerability With Mental and Physical Health Among US-Born Latino Adolescents in California*, 173 JAMA Pediatrics 744 (2019).

⁸⁸ Leila Schochet, *Trump’s Immigration Policies Are Harming American Children*, Center for American Progress (July 31, 2017), <https://www.americanprogress.org/issues/early-childhood/reports/2017/07/31/436377/trumps-immigration-policies-harming-american-children/>.

⁸⁹ Kathleen M. Roche, et al., *Impacts of immigration actions and news and the psychological distress of US Latino parents raising adolescents*, 62 J. Adolescent Health 525 (2018).

⁹⁰ *Id.* at 528.

⁹¹ *Id.* at 525.

grants have been less likely to show up to hospital and clinic appointments.⁹² As one Latino immigrant remarked, “[i]mmigration officers are more terrifying than an illness.”⁹³ Certain undocumented communities have seen a fifty percent decrease in the number of prenatal-care patients seeking regular care and assessments at hospitals and clinics.⁹⁴

The Administration’s policies have also chilled Latino participation in public and civic programs. A study by the Kaiser Family Foundation on Latino families in the United States detailed evidence of a decrease in participation in Medicaid and the Children’s Health Insurance Program (“CHIP”).⁹⁵ A study conducted by the Urban Institute found that, in response to the Administration’s efforts to expand the public charge rule, nearly one-third of low-income immigrant families with children avoided using public benefits for fear of losing green card eligibility.⁹⁶ The same study reported that in 2019, 10.2 percent of adults in immigrant families with children reported that they or someone in their family avoided the Supplemental Nutrition

⁹² Ileana Najarro & Jenny Deam, *Fearing deportation, undocumented immigrants in Houston are avoiding hospitals and clinics*, HOUS. CHRONICLE (Dec. 27, 2017), available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Fearing-deportation-undocumented-immigrants-are-12450772.php>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Jennifer M. Haley, et al., *One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019*, Urban Institute (June 2020), https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019_1.pdf.

Assistance Program (“SNAP”), 9.6 percent avoided Medicaid/CHIP, and 7.0 percent avoided housing subsidies.

There has been a significant decrease across the nation in the number of immigrant students attending public schools; at minimum, the anti-immigrant rhetoric has caused Latino parents to avoid attending public school events and open houses.⁹⁷ The environment of fear and distrust has so permeated the Latino community that, even during Hurricane Harvey, some Latino families were afraid to call for help, refused refuge in shelters and assistance at food banks, and even hid from rescue teams.⁹⁸

As these real-world impacts demonstrate, the Administration’s anti-immigrant and anti-Latino animus has had real world consequences, and those consequences have been highly damaging to the Latino community.

III. THE PRESIDENTIAL MEMORANDUM HAS HARMED AND WILL CONTINUE TO HARM LATINO AND BROADER U.S. COMMUNITIES.

The Presidential Memorandum continues these devastating impacts and does so by design. Indeed, legal experts have suggested the Administration used the Presidential Memorandum to sow uncertainty and confusion among immigrants already wary of respond-

⁹⁷ Monica Rhor, Trump’s immigrant crackdown brings ‘blanket of fear’ to Houston schools, HOUS. CHRONICLE (Dec. 21, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-s-immigrant-crackdown-brings-blanket-of-12442229.php>

⁹⁸ Ileana Najarro & Monica Rhor, *Deeper Underground: Fear drives mistrust between police, immigrant communities*, HOUS. CHRONICLE (Sept. 22, 2017), <https://www.houstonchronicle.com/deeperunderground/1>.

ing to the census,⁹⁹ and Latinos have been less likely to participate in the 2020 census as a result.¹⁰⁰

The Presidential Memorandum thus represents the latest attempt by the current Administration to diminish political representation for and the rights of Latino communities, as well as the states where they reside. Unless enjoined by this Court, the Memorandum will harm the U.S. democratic process and divert critical funding away from states with large Latino communities and undocumented immigrant populations.

A. The Presidential Memorandum dilutes Latino political power and harms the U.S. democratic process.

Refusing to count undocumented immigrants in the apportionment process would illegally diminish political representation for Latino communities.

Latinos are estimated to account for more than 65 percent of undocumented immigrants residing in the United States.¹⁰¹ Undocumented Latino immigrants

⁹⁹ Sam Levine, *Trump Orders Undocumented Immigrants Excluded From Key Census Count*, THE GUARDIAN (July 21, 2020), available at <https://www.theguardian.com/us-news/2020/jul/21/trump-executive-order-census-undocumented-immigrants>.

¹⁰⁰ See, e.g., Joint Appendix, *Trump v. State of New York*, (Oct. 16, 2020), Exhibit 57 (John Thompson Expert Decl.) at 333 (opining that “the effects of the Memorandum on the current macro environment are likely to be as great if not greater than the addition of a citizenship question. . . . The issuance of the Memorandum has significantly increased the risk of larger total and differential undercounts”).

¹⁰¹ Migration Policy Institute, *supra* note 13.

often reside in communities with significant Latino populations.¹⁰² Thus, states with significant Latino populations stand to lose Congressional representatives and electoral votes. As the District Court noted, “the [Presidential] Memorandum itself anticipates that excluding illegal aliens from the apportionment count could reduce the number of representatives in States with large immigrant populations.”¹⁰³ And as Appellees’ expert explained, as a result of the proposed reallocation, Texas would “almost certainly” lose a Congressional representative, while California, New Jersey, Arizona, Florida, New York, or Illinois also each may lose a representative.¹⁰⁴

Affected states represent the entire political spectrum. As the District Court explained, the Presidential Memorandum apparently notes that California, traditionally a majority Democratic state, would receive additional congressional seats if the apportionment count includes undocumented immigrants.¹⁰⁵ On the other side of the aisle is Florida, also a state potentially affected by the Memorandum, which voted Republican in recent presidential elections.

¹⁰² Passel, *supra* note 29.

¹⁰³ *New York v. Trump*, No. 20-CV-5770, 2020 U.S. Dist. LEXIS 165827, at *42 (S.D.N.Y. Sep. 10, 2020).

¹⁰⁴ *Id.* at 43; *see also* Jeffrey S. Passel and D’Vera Cohn, *How Removing Unauthorized Immigrants from Census Statistics Could Affect House Reapportionment*, PEW RESEARCH CRE. (July 24, 2020), <https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment/>.

¹⁰⁵ *New York v. Trump*, No. 20-CV-5770, 2020 U.S. Dist. LEXIS 165827, at *30 (S.D.N.Y. Sep. 10, 2020) (quoting Presidential Memorandum).

The Memorandum would also prevent Latinos from achieving the level of proportionate representation that their growing numbers merit. As of 2019, the Latino population represents nearly 20 percent of the U.S. population and is the fastest growing segment—accounting for more than half of U.S. population growth since 2010.¹⁰⁶ Furthermore, Latinos accounted for approximately 32 million of all eligible voters in the 2020 election, or a projected 13.3 percent.¹⁰⁷ As of 2019, three states were home to Latino communities with over five million Latino residents: California (15.6 million), Texas (11.5 million), and Florida (5.7 million). The population of five states is more than 25 percent Latino: New Mexico (48%), California (39%), Texas (39%), Arizona (31%), and Nevada (28%).¹⁰⁸

These figures confirm that the Latino community—including undocumented members—constitutes an integral part of American society. And, as Section I details, millions of undocumented immigrants participate in the U.S. workforce, pay taxes, and serve in the

¹⁰⁶ Jens Manuel Krogstad, *Hispanics Have Accounted for More Than Half of Total U.S. Population Growth Since 2010*, PEW RESEARCH CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/#:~:text=Some%20of%20the%20nation's%20largest,of%20the%20nation's%20Hispanic%20population.>

¹⁰⁷ Luis Noe-Bustamante, et al., *Where Latinos Have the Most Eligible Voters in the 2020 Election*, PEW RESEARCH CTR. (Jan. 31, 2020), <https://www.pewresearch.org/fact-tank/2020/01/31/where-latinos-have-the-most-eligible-voters-in-the-2020-election/>.

¹⁰⁸ Renee Stepler & Mark Hugo Lopez, *Ranking the Latino Population in the States*, PEW RESEARCH CTR. (Sept. 8, 2018), [https://www.pewresearch.org/hispanic/2016/09/08/4-ranking-the-latino-population-in-the-states/#:~:text=Nearly%20half%20\(48%25\)%20of,%25\)%20and%20Florida's%20\(24%25\).](https://www.pewresearch.org/hispanic/2016/09/08/4-ranking-the-latino-population-in-the-states/#:~:text=Nearly%20half%20(48%25)%20of,%25)%20and%20Florida's%20(24%25).)

U.S. military. Undocumented workers are responsible for more than \$1 trillion of the U.S. gross domestic product,¹⁰⁹ and nearly 80 percent of them are considered essential workers.¹¹⁰ Undocumented workers are estimated to have paid \$20.1 billion in federal taxes alone as of 2018, and close to four million undocumented immigrants own homes and pay property taxes in the United States.¹¹¹ Yet the Presidential Memorandum seeks to exclude each and every one of these people from the apportionment count, thereby depriving them and their communities of political representation.

Moreover, the majority of undocumented immigrants live in mixed households alongside U.S. citizens. As of 2017, nearly 17 million Americans shared a home with an undocumented person.¹¹² More than five million minor U.S. citizens are being raised by an undocumented parent.¹¹³ As of 2016, children of undocumented immigrants represent nearly 10 percent of the total U.S. school-age population, but their distribution amongst the states is uneven. The states with the highest shares include Nevada (20.2% of students); Texas (13.3% of students); and California (13.3% of students). Thus, the Presidential Memorandum will cause a loss of political representation for millions of

¹⁰⁹ Raul Hinojosa-Ojeda et al., *supra* note 18.

¹¹⁰ *Id.*

¹¹¹ Migration Policy Institute, *supra* note 13.

¹¹² *U.S. Citizen Children Impacted by Immigration Enforcement*, American Immigration Council (Nov. 22, 2019), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

¹¹³ *Id.*

households and communities raising the next generation of American voters.

The Presidential Memorandum's harms are not limited to the Latino community. Rather, the Presidential Memorandum will harm the democratic process itself. Every person living in affected states will lose congressional and Electoral College representation. As a result, all residents of these states will suffer from the loss of political influence and the resultant loss of federal funding, as described in greater detail in Section III.B below. In addition, reductions in apportionment will necessitate changes in how intrastate congressional districts are drawn, which could result in further dilution of political representation for certain districts. The Court should reject this attempt to damage the American political process.

B. The Presidential Memorandum deprives states with large Latino communities of funding for vital programs.

By refusing to recognize the reality that undocumented immigrants reside in the United States, the Presidential Memorandum has reduced Latino participation in the census¹¹⁴ and will reduce Latino congressional representation. These effects will deprive Latino communities and their states of political influence and, in turn, federal funding.¹¹⁵

¹¹⁴ *New York v. Trump*, No. 20-CV-5770, 2020 U.S. Dist. LEXIS 165827, at *43-*48 (S.D.N.Y. Sep. 10, 2020).

¹¹⁵ *See, e.g., City of San Jose v. Trump*, No. 20-cv-05167, 2020 WL 6253433, at *15 (N.D. Cal. Oct. 22, 2020) (noting that “state and local governments’ share of federal funding, and state and local governments’ ability to perform critical governmental functions” are “dependent on and affected by the accuracy and completeness of census data”).

A 2019 overview of federal spending programs calculated that, in Fiscal Year 2017, there were over three hundred such programs disbursing more than \$1.5 trillion. Political representation often determines how these funds are allocated among the states. In addition, many of these programs rely on data derived from the census.¹¹⁶ Consequently, a state’s and locality’s “receipt of its fair share of federal funds depends on the accuracy of its census population count.”¹¹⁷

These federal programs include:

- \$796.2 billion in Medicare funding,¹¹⁸
- \$73.5 billion in grants for SNAP, which “supplement[s] the food budget of needy families so they can purchase healthy food and move towards self-sufficiency,” through the Department of Agriculture;¹¹⁹

¹¹⁶ Andrew Reamer, *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds – Brief 7: Comprehensive Accounting of Census-Guided Federal Spending (FY2017)*, Geo. Was. Inst. Pub. Policy (Nov. 2019), available at <https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%202020%20Brief%207A%20-%20Comprehensive%20Accounting.pdf>.

¹¹⁷ *Id.*

¹¹⁸ Bd. of Tr., Fed. Hosp. Ins. & Fed. Supplementary Medical Ins. Tr. Funds, *The 2020 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds*, Centers for Medicare & Medicaid Services 10 (Apr. 22, 2020).

¹¹⁹ Randy Alison Aussenberg & Kara Clifford Billings, Cong. Research Serv., R45743, *USDA Domestic Food Assistance Programs: FY2019 Appropriations 2* (2019).

- \$29.9 billion in loans, assistance, and guarantees through the Small Business Administration;¹²⁰
- \$28.2 billion in Title I Grants to Local Education Agencies and Special Education Grants through the Department of Education;¹²¹
- \$9.8 billion for child welfare programs through the Department of Health and Human Services;¹²² and
- Various other programs, accounting for more than a trillion dollars in federal funding, through twenty-one different federal departments and agencies, including the Department of Housing and Urban Development, DOJ and DHS.¹²³

This loss of federal funding will harm Latinos and the states in which they reside. As the District Court found, the Presidential Memorandum will “result in the loss of federal funding, ‘which, in turn, will add extra financial burden on local governments, resulting in even fewer available resources to assist families with food, housing, health, and other support and

¹²⁰ Reamer, *supra* note 115.

¹²¹ U.S. Dep’t of Educ., *Fiscal Years 2019-2021 State Tables for the U.S. Dept. of Education*, <https://www2.ed.gov/about/overview/budget/statetables/index.html>. (last visited Nov. 12, 2020).

¹²² Emilie Stoltzfus, Cong. Research Serv., IF10590, *Child Welfare: Purposes, Federal Programs, and Funding 2* (2019).

¹²³ Reamer, *supra* note 115.

safety net services.”¹²⁴ Another adverse impact is the loss of funding for local educational endeavors. It is estimated that more than four million K-12 students in the United States are children of undocumented immigrants.¹²⁵ As this Court has recognized, a funding loss would disproportionately affect students and their families in communities where significant percentages of undocumented immigrants are residents.¹²⁶ This Court has similarly recognized that states could lose federal funds that are distributed based on state population if noncitizen households are undercounted by as little as two percent.¹²⁷

Loss of political representation will reduce access to federal programs. Thus, the Presidential Memorandum threatens the well-being of American communities in numerous areas with significant numbers of undocumented immigrants. The need for essential services such as education, health care, access to shelter, and public safety do not disappear simply because the Administration has decided to ignore the millions of undocumented immigrants that reside in the United States.

¹²⁴ *New York v. Trump*, No. 20-CV-5770, 2020 U.S. Dist. LEXIS 165827, at *55 (S.D.N.Y. Sep. 10, 2020) (internal citations omitted).

¹²⁵ Passel, *supra* note 29.

¹²⁶ *Dept. of Commerce v. New York*, 139 S. Ct. at 2565.

¹²⁷ *Id.*

CONCLUSION

For the reasons stated herein, *amici* respectfully urge the Court to reject the Presidential Memorandum’s unlawful attempt to exclude undocumented immigrants from the Congressional apportionment count and instead require the Administration to include “all inhabitants.”¹²⁸

Respectfully submitted,

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November 16, 2020

¹²⁸ *Evenwel*, 136 S. Ct. at 1127.

APPENDIX

APPENDIX

LIST OF ADDITIONAL *AMICI CURIAE*

Alianza Americas

American GI Forum

ASPIRA

Hispanic Association of Colleges and Universities (HACU)

Hispanic Federation

Hispanic National Bar Association (HNBA)

Mi Familia Vota (MFV)

National Association of Latino Elected and Appointed
Officials (NALEO)

NALEO Educational Fund

National Hispanic Caucus of State Legislators (NHCSL)

National Hispanic Media Coalition (NHMC)

Presente