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

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA, THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION, THE COUNTY OF LOS ANGELES, THE CITIES OF LONG BEACH, LOS ANGELES, AND OAKLAND, AND THE LOS ANGELES UNIFIED SCHOOL DISTRICT

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INTEREST OF AMICI

The State of California is home to approximately two million undocumented residents. California's undocumented residents are integrated into the fabric of communities, provide essential goods and services to other Californians, and pay taxes that support the operations of state and local governments. They live throughout the State, including in the City of Los Angeles, the County of Los Angeles, the City of Long Beach, the City of Oakland, and within the boundaries of the Los Angeles Unified School District, all of which are amici here. Amicus California Citizens Redistricting Commission is an independent and bipartisan commission responsible for drawing the maps for congressional and state districts based on California's total population, without regard to immigration status.

The President's decision to exclude undocumented immigrants from the census apportionment count will cause California and other States with large populations of undocumented immigrants to lose representation in the House of Representatives and, as a result, in the Electoral College. Indeed, the President's Memorandum expressly singles out California for that purpose, predicting that the State will lose more than one congressional seat under the President's policy. *See* Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 21, 2020). A decision upholding the Memorandum would dilute California's political representation in the national government and harm its residents' ability to make their voices heard.

In addition, California and the local government amici are plaintiffs in a separate lawsuit challenging the President's Memorandum. *See California v.*

Trump, No. 20-5169 (N.D. Cal.). That suit was heard together with a similar action brought by the City of San Jose and other plaintiffs. *See City of San Jose v. Trump*, No. 20-5167 (N.D. Cal.). On October 22, 2020, a three-judge district court entered a partial final judgment under Rule 54(b) in favor of California, San Jose, and the other plaintiffs, holding that they had established standing and that the President's decision to exclude undocumented immigrants from the apportionment count violated the Census Act, the Reapportionment Act, and the Constitution. *See City of San Jose v. Trump*, ___ F. Supp. 3d ___, 2020 WL 6253433 (N.D. Cal. Oct. 22, 2020) (per curiam), reproduced at No. 20-561 J.S. App. 1a-127a.

The federal defendants have appealed that ruling; and on October 29, they filed a jurisdictional statement asking this Court to hold that appeal until it resolves the present case. No. 20-561, J.S. 10, 12. The present case involves a parallel challenge brought by New York and other plaintiffs, including two California counties and two organizations with members in California. N.Y. Mot. to Affirm 18; N.Y. Immigration Coal. Mot. to Affirm 32. Appellants contend that all of the claims and arguments framed in the California action are fairly presented and should be resolved here. No. 20-561 J.S. 11-12; *see also* Br. 19, 46. California and its fellow amici accordingly submit this brief pursuant to Rule 37.4 to explain why the plaintiffs in both proceedings have standing to challenge the President's Memorandum and why the Memorandum violates applicable federal statutes and the Constitution.

SUMMARY OF ARGUMENT

For 230 years, since the first national census in 1790, the United States has included immigrants regardless of their citizenship or legal immigration status in the apportionment count. The President's unprecedented decision to exclude undocumented immigrants from the apportionment base will deprive States like California and the California-based parties who are appellees in the present action of representation in the national government in violation of the Reapportionment Act, the Census Act, and the Constitution.

This Court has jurisdiction to address challenges to the Memorandum. The district court below did not decide whether the threatened loss of congressional representation was an adequate basis for Article III standing, but the decision in California's parallel action confirms that it is. An expert economist performed a comprehensive statistical analysis of population data and concluded that California and Texas were each highly likely—at a 90% confidence interval—to lose a seat in the House of Representatives if the President's Memorandum is implemented. That conclusion should not come as a surprise because the Memorandum itself predicts that California will see reduced representation in Congress under its directives.

The facts also demonstrate the required substantial risk that appellants will implement the Memorandum as directed. Since July of last year, appellants have been taking steps to tabulate the population of undocumented immigrants, consistent with the President's directive to achieve maximum exclusion of individuals lacking legal immigration status. Appellants

have since confirmed their intention to implement the Memorandum and have explained their plan to do so.

On the merits, the Memorandum violates two federal statutes. In the Reapportionment Act, Congress directed that the allocation of congressional seats must be based on the "whole number of persons in each State, excluding Indians not taxed." 2 U.S.C. § 2a(a). Undocumented immigrants are indisputably "persons" who are "in" the United States. When it adopted this provision, moreover, Congress expressly considered and rejected a proposal to omit undocumented immigrants. That history, along with the Census Bureau's own longstanding conclusion that undocumented individuals are to be counted, confirm that the President has no authority to eliminate individuals from the count based on their immigration status.

Any discretion the statute gives to the Executive to make technical judgments regarding discrete categories of persons, such as foreign tourists or business travelers whose transitory presence in the United States is *de minimis*, does not support the Memorandum's far-reaching assertion of authority to exclude individuals who actually reside in the United States on the ground that they lack permission to enter or remain in the country. Congress did not delegate to the Executive the authority to make that kind of highly consequential decision about the distribution of political power in the United States. Indeed, Congress expressly foreclosed that approach by requiring apportionment to be based on "the whole number of persons in each State."

The Memorandum also violates the requirement in the Reapportionment and Census Acts that the appor-

tionment count be based on the decennial census. Appellants do not dispute that undocumented immigrants are counted as part of the census; and it is clear that the separate calculations directed by the Memorandum stand wholly apart from the normal census tabulation. Whatever discretion appellants have to conduct the census itself does not authorize them to adjust the apportionment count based on non-census data.

Finally, although the decision below did not address the constitutionality of the Memorandum, if the Court addresses that issue here it should conclude that the Memorandum violates the Constitution. The constitutional text demands that apportionment be based on "the whole number of persons in each State, excluding Indians not taxed." Undocumented immigrants are persons, as confirmed by Founding-era dictionaries, this Court's precedents interpreting other provisions of the Fourteenth Amendment, history, and the longstanding practice of counting individuals without regard to their immigration status.

ARGUMENT

I. THE COURT HAS JURISDICTION TO ADDRESS CHALLENGES TO THE MEMORANDUM

The decision below held that appellees have Article III standing to challenge the President's Memorandum because of its chilling effect on census participation. J.S. App. 43a-44a. The court did not decide an additional basis for standing: that the Memorandum will cause at least some appellees to lose representation in the House of Representatives and the Electoral College. *Id.* In the California action, however, the district court reached that alternative ground and held that California and other plaintiffs

face a substantial risk of suffering such apportionment injury. No. 20-561 J.S. App. 35a-36a. That decision confirms that the requirements of Article III are satisfied here as well.

1. A party "does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Nor does a plaintiff need to "demonstrate that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). Rather, under Article III a future injury is sufficient to confer standing when it "is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted). The "expected" diminishment of political representation through the loss of a House seat and the threat of vote dilution from an improper apportionment are sufficient injuries for Article III purposes. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-332 (1999).

a. Here there is at least a substantial risk that the Memorandum will cause some appellees to suffer a diminution in political representation. As appellees explained in their motions to affirm, the evidence in this case demonstrates that the Memorandum will likely cost California and Texas—where a number of appellees or their members are located—representation in Congress. N.Y. Mot. to Affirm 18; N.Y. Immigration Coal. Mot. to Affirm 32; *see also* J.A. 344, 367 (Warshaw Decl. ¶¶ 11, 48).

The evidence in the California action confirms that showing. An expert economist performed a comprehensive statistical analysis of population data and calculated the effect of the Memorandum on the

allocation of congressional seats. No. 20-561 J.S. App. 36a; D. Ct. Dkts. 37-1, 39 (Gilgenbach Decl.).[1] Based on that analysis, the expert concluded that, under a wide range of assumptions, California and Texas are each "highly likely" to lose a seat in the House of Representatives if undocumented immigrants are excluded from the apportionment tabulation. D. Ct. Dkt. 37-1 (¶¶ 5, 22). That conclusion was with "90% confidence." *Id.* ¶ 22. Significantly, appellants did not question the validity of the expert's methodology or her conclusion that, if the Memorandum were implemented, California would almost certainly see a reduction in the size of its congressional delegation. No. 20-561 J.S. App. 36a (expert declaration "is not contested"); *id.* at 39a (appellants did not "contest[] the facts put forward by" California plaintiffs).[2]

b. Appellants argue that it is "unknown" whether any appellees will suffer apportionment injury because it purportedly "remains uncertain to what extent it will be 'feasible' to exclude" undocumented immigrants from the apportionment base. Br. 19

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[1] Citations to D. Ct. Dkt. are to the docket in *California v. Trump*, No. 20-5169 (N.D. Cal.) unless otherwise indicated.

[2] On its face, the Memorandum directs exclusion of undocumented immigrants only from the apportionment count and not from other census datasets used to allocate federal funding or to draw district maps. 85 Fed. Reg. at 44,680; *see also* Appellants Br. 19-20. If, however, the President's decision were read more broadly to direct exclusion of undocumented immigrants for other purposes, it would inflict additional concrete injuries and provide a further basis for Article III standing. States like California would be deprived of critical federal funds; and California's ability to draw district lines based on total population, without regard to immigration status as state law requires, would be impaired. No. 20-561 J.S. App. 50a-53a; Cal. Const. Art. 21, § 2.

(quoting 85 Fed. Reg. at 44,680). But they do not support their assertion of uncertainty, and it is belied by the facts.

To start, appellants themselves expect that California will lose congressional representation as a result of the President's decision. The Memorandum explains that "one State is home to more than 2.2 million" undocumented individuals. 85 Fed. Reg. at 44,680. And it predicts that including these individuals in that State's population for apportionment purposes "could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.* That State is California, as appellants have conceded. No. 20-561 J.S. App. 56a.

There is also nothing uncertain about the fact that the Memorandum directs maximal exclusion of undocumented immigrants from the apportionment tabulation. It declares that the President has "determined" that all undocumented immigrants should be omitted from the apportionment base, proclaims that this is the "policy of the United States," and promises to carry out the Memorandum "to the maximum extent of the President's discretion under the law." 85 Fed. Reg. at 44,680. It further orders the Commerce Secretary to "take all appropriate action" to implement its directives. *Id.* That the Memorandum purports to qualify the exclusion of undocumented immigrants in terms of "'feasib[ility],'" Appellants Br. 19, cannot "overrid[e the] clear and specific language" of the Memorandum, No. 20-561 J.S. App. 43a-44a (internal quotation marks omitted). The "determination of the President to accomplish the memorandum's explicit and singular goal of excluding undocumented immigrants from the census count is abundantly clear." *Id.* at 44a.

Appellants' other actions further confirm the substantial likelihood that they will implement the Memorandum as directed, thus resulting in the loss of congressional representation. More than a year ago, the President issued an Executive Order directing federal agencies to share with the Commerce Department information and administrative records about the citizenship status of the United States population. *See* Collecting Information About Citizenship Status in Connection With the Decennial Census, 84 Fed. Reg. 33,821 (July 11, 2019); *see also* No. 20-561 J.S. App. 22a-24a, 47a (discussing same). That order explained that the Census Bureau had already determined "that administrative records to which it had access would enable it to determine citizenship status for approximately 90 percent of the population." 84 Fed. Reg. at 33,821. It further directed various federal agencies to share additional sets of records to "ensure that the Department will have access to all available records in time for use in conjunction with the census." *Id.*

One year later, the President stated that this information sharing was underway. *See* Statement from the President Regarding Apportionment (July 21, 2020) ("Under an Executive Order I signed last year, Federal departments and agencies have been collecting the information needed to conduct an accurate census and inform responsible decisions about public policy, voting rights, and representation in Congress.").[3] In August 2020, appellants explained that the information-gathering process was "ongoing" and informed the district court in the California action

[3] *Available at* https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/ (last visited Nov. 14, 2020).

that the Census Bureau had entered into "a series of memoranda of understanding" with other federal agencies and States to obtain records that the Bureau would then seek to use to identify undocumented individuals for omission from the apportionment count. D. Ct. Dkt. 33 (Tr. 31:17-32:21); *see also* No. 20-561 J.S. App. 47a-48a.

Appellants have also confirmed their intent to fully implement the Memorandum in filings before this Court. They sought expedited treatment of this appeal precisely to ensure that they could carry out the President's policy of maximal exclusion of undocumented immigrants. *See* Mot. for Expedited Consideration (Sept. 22, 2020) at 2, 6.

Appellants have also set out their plan to accomplish that objective. They informed the Court that "by December 31, [the Census Bureau] will provide the President with information regarding any unlawful aliens in [Immigration and Customs Enforcement] Detention Centers whom the President could" then "exclude from the apportionment base, thereby partially implementing his Memorandum." Supp. Br. (Oct. 2, 2020) at 5 (internal quotation marks omitted). The additional "processing steps required *for fully implementing*" the Memorandum apparently would take place immediately thereafter. *Id.* at 3-4 (emphasis added). Specifically, the Bureau plans to provide "other Presidential Memorandum related outputs by Monday, January 11, 2021, and would continue to work on a quicker timetable to implement that aspect of the Memorandum sooner if feasible." *Id.* at 5 (alterations and internal quotation marks omitted). That timeline appears to be aimed at allowing the President

to submit an apportionment count to Congress that maximally excludes undocumented immigrants.[4]

2. Prudential considerations also favor the Court's exercise of jurisdiction. To the extent that appellants ask the Court "to deem [appellees'] claims nonjusticiable on grounds that are prudential rather than constitutional," any such request would be in "some tension" with the principle "that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony*, 573 U.S. at 167 (internal quotation marks omitted). And appellants' concerns about ripeness (Br. 21) are not persuasive in any event.

The prudential ripeness inquiry "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The issues here are fit for resolution because

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[4] The President must submit the apportionment count to Congress by January 10, 2021. *See* 2 U.S.C. § 2a(a) (requiring transmittal "[o]n the first day, or within one week thereafter, of" the start of Congress); U.S. Const. amend. XX, § 2 (first meeting of Congress is January 3 unless Congress sets a different day). It is possible, however, that the statutory deadline will be one or more days after January 10, because the start of the new Congress is frequently postponed. *See* Cong. Research Serv., The First Day of a New Congress: A Guide to Proceedings on the House Floor at 1 (Dec. 19, 2018). That may be particularly likely here because January 3, 2021 is a Sunday. Either way, appellants' stated timeframe for supplying information needed to carry out the President's policy corresponds closely to the statutory deadline for the President's submission of the apportionment count to Congress; and the Census Bureau intends to provide those outputs earlier than Monday, January 11 if feasible. *Supra* p. 10.

appellees' challenge to the Memorandum is "purely legal, and will not be clarified by further factual development." *Susan B. Anthony*, 573 U.S. at 167 (internal quotation marks omitted). Appellants claim that the "Memorandum's effects will be more concrete" after the President transmits his apportionment count to Congress. Br. 21. But they do not deny that the Memorandum's compliance with federal law is a question of law or offer any reason why consideration of that legal question would benefit from factual development. Accordingly, "[n]othing would be gained by postponing a decision" in this case. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582 (1985).

Delaying consideration of appellees' claims, in contrast, could lead to prolonged uncertainty and unnecessary disruption of state redistricting processes. In appellants' view, injured parties should wait to file suit until after the President transmits the apportionment count to Congress in January 2021. That would entail further proceedings before a three-judge court and this Court, which appellants have suggested could take a year or eighteen months to conclude. *See* D. Ct. Dkt. 78 (Tr. 12:2-10, 14:11-12). In that scenario, the States might not know how many congressional seats they will receive through 2021 and beyond. Such extended uncertainty could impair States' ability, including the ability of the California Citizens Redistricting Commission, to timely draw congressional maps consistent with the public-participation requirements and deadlines provided under state law. *See, e.g.*, Cal. Const. art. 21, § 2(b); Cal. Gov't Code § 8253(a)(7); *Legislature v. Padilla*, 9 Cal. 5th 867

(2020).[5] Notably, the federal defendants have themselves recognized this concern. *See* Reply in Support of Stay Application, *Ross v. Nat'l Urban League*, No. 20A62 at 11-12 (Oct. 10, 2020).

Even if the courts were to address new challenges on a shortened schedule, that would mean a second round of highly expedited litigation before three-judge district courts and again before this Court. That is not a sensible result when it is clear now that California and the California-based appellees in the present New York action face a substantial risk of losing representation in Congress. Moreover, appellants face no prospect of hardship from pre-apportionment resolution of challenges to the Memorandum, because the injunctive orders issued both here and in the California action allow appellants to continue preparing to implement the Memorandum if they prevail in overturning those injunctions. J.S. App. 99a-100a; No. 20-561 J.S. App. 124a. Under these circumstances, "the public interest would be well served by a prompt resolution" of appellees' claims. *See Thomas*, 473 U.S. at 582.

Finally, appellants are incorrect in contending that this Court's "normal approach" is to consider apportionment challenges only after the fact. Br. 16. In *Department of Commerce v. U.S. House of Representatives*, for example, the Court addressed the merits of a pre-apportionment lawsuit where plaintiffs showed "expected loss of a Representative to the United States Congress." 525 U.S. at 331. In other cases where the Court has adjudicated challenges

[5] *See generally* Nat'l Conf. of State Legislatures, State Redistricting Deadlines (Nov. 10, 2020), *available at* https://www.ncsl.org/research/redistricting/state-redistricting-deadlines637224581.aspx (last visited Nov. 14, 2020).

post-apportionment, "it was not clear which state would be harmed until after the census was completed and the apportionment was determined." No. 20-561 J.S. App. 54a-55a (discussing *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Utah v. Evans*, 536 U.S. 452 (2002)). Here, it is clear that California and the California-based appellees in the New York action would be harmed by the exclusion of undocumented immigrants from the apportionment base.

II. THE MEMORANDUM VIOLATES THE CENSUS AND REAPPORTIONMENT ACTS

A. The Apportionment Base Must Include the "Whole Number of Persons in Each State," Without Regard to Immigration Status

1. The Memorandum's exclusion of undocumented immigrants from the apportionment base cannot be reconciled with Congress's directive that, to effectuate reapportionment, "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed." 2 U.S.C. § 2a(a); *see also* 13 U.S.C. § 141(b) (requiring that the Secretary of Commerce report to the President, as the basis for apportionment, the "total population" of each State).

Like the constitutional provision from which it is adapted, *see infra* pp. 28-30, the statutory text forecloses any attempt to exclude a class of persons based on their immigration status. When Section 2a(a) was enacted in 1929, the term "person" referred to "human being," just as it does now. Webster's Practical Dictionary 518 (1931). And "in" meant "within" or "inside." *Id.* at 379. Undocumented immigrants indisputably are persons located within the physical boundaries of their respective States.

That interpretation is bolstered by the statute's exclusion of "Indians not taxed." 2 U.S.C. § 2a(a). Congress's express exclusion of one class of persons supports the inference that Congress did not contemplate the exclusion of any other class. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Had Congress intended the apportionment base to be limited to citizens or those with lawful immigration status, it would have used language along those lines, as it has done elsewhere. *See, e.g.*, 5 U.S.C. § 552a(a)(2) (defining "individual," for purposes of that statute, as "a citizen of the United States or an alien lawfully admitted for permanent residence").

Furthermore, since the first census, persons residing in the United States have been included in the apportionment base without regard to immigration status. J.S. App. 91a; No. 20-561 J.S. App. 81a. Appellants have acknowledged as much. J.S. App. 91a; No. 20-561 J.S. App. 81a. The Court may presume that Congress was aware of this "longstanding practice" when it enacted Section 2a(a). *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988).

The Census Bureau likewise has read the statute as including undocumented immigrants. Its Residence Rule provides that "[t]he state in which a person resides … is determined in accordance with the concept of 'usual residence,'" which is "the place where a person lives and sleeps most of the time." Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018). That principle, the agency has explained, is "consistent with the intent of the Census Act of 1790" and "guided by the constitutional and statutory mandates to count all residents of the several states." *Id.* Under this approach, "[c]itizens of foreign countries living in the

United States" are "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533.

The legislative history of the 1929 Act, which is unusually detailed on this point, confirms that "whole number of persons in each State" includes undocumented immigrants. When an amendment was introduced in the Senate to exclude noncitizens from the apportionment base, the Senate Legislative Counsel reasoned that there was "no constitutional authority for the enactment of legislation excluding aliens from enumeration for the purposes of apportionment." 71 Cong. Rec. 1821-1822 (1929). Apportionment must include "every single human being residing within the State." *Id.* at 1971 (Sen. Blaine).

Even staunch advocates of limiting immigration reached that conclusion. For example, Senator David Reed of Pennsylvania, who had co-sponsored the restrictionist Immigration Act of 1924, explained that he wished to support the amendment limiting the apportionment base to citizens: "I want to vote for it; everything in my experience and outlook would lead me to vote for this amendment if that possibly could be done." 71 Cong. Rec. 1958. But he could not support the legislation because he believed it to be unconstitutional: "I am forced to the conclusion that the word 'persons' must be taken in its literal sense; that it was not an accident that it occurred but was the deliberate choice, first, of the Constitutional Convention and next of the Congress in acting on the Fourteenth Amendment." *Id.* Other members expressed similar views. *See, e.g.*, *id.* at 1912 (Sen. Bratton), 2270 (Rep. Lea). The fact that Congress included noncitizens in the apportionment base, even though many members

would have preferred to exclude them as a policy matter, is a powerful indicator of congressional intent. *See Printz v. United States*, 521 U.S. 898, 905 (1997) (if Congress has "avoided use of [a] highly attractive power, we would have reason to believe that the power was thought not to exist").

That understanding extended not just to noncitizens generally, but also to those lacking lawful immigration status. As appellants acknowledge (Br. 35), Congress began to restrict immigration by 1875, and several high-profile laws restricting immigration had been enacted by 1929. *See* Immigration Act of 1924, 68 Cong. Ch. 190, 43 Stat. 153; Chinese Exclusion Act, 47 Cong. Ch. 126, § 14, 22 Stat. 58, 61 (1882). Members of Congress voting on the 1929 Act thus were well aware of the issue of immigrants who had arrived "illegally" being counted as "persons" for apportionment purposes. *E.g.*, 71 Cong. Rec. 1973 (Sen. Barkley); *id.* at 2283 (Rep. Robsion). One estimate cited by Senator Barkley was that there were "at least three or four million" undocumented immigrants in the country at the time. *Id.* at 1976; *see also* No. 20-561 J.S. App. 11a. Given that each congressional seat represented a population of about 282,000 people in 1929, a population of undocumented immigrants of that size would have affected the allocation of House seats.[6] Yet Congress chose to retain the statutory language requiring inclusion of the "whole number of persons," a strong indication that it did not intend to exclude undocumented immigrants.

Congress has rejected similar proposals in the years since 1929. It voted down a proposal in 1940 to

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[6] Cong. Research Serv., House of Representatives: Setting the Size at 435 at 2 (July 11, 1995).

exclude all noncitizens from the apportionment base, and in 1989 rejected legislation to exclude undocumented immigrants. *See* H.R. Rep. No. 76-1787, at 1 (1940); 135 Cong. Rec. 14539-14540 (1989). Each time, members explained that they believed the Constitution foreclosed any such statutory change. "I wish the Founding Fathers had said you will only enumerate 'citizens,' but they did not. They said 'persons,' and so that is what it has been for 200 years. We have absolutely no right or authority to change that peremptorily on a majority vote here." 135 Cong. Rec. 14551 (Sen. Bumpers); *see also* 86 Cong. Rec. 4372 (1940) (Rep. Celler).

2. Appellants' defense of the Memorandum's interpretation of Section 2a(a) is unpersuasive.

a. While appellants do not dispute that undocumented immigrants are "persons," they contend that the phrase "persons in each State" can be equated to the word "inhabitants," which in their view confers discretion on the President to exclude undocumented immigrants from the apportionment base. Br. 29-33. That argument suffers from numerous flaws. As an initial matter, the statutory text refers to "persons in each State," not "inhabitants." The starting place for this Court's analysis should be "the language actually used by Congress," *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973), which unambiguously encompasses undocumented immigrants, *see supra* p. 14.

Resisting this straightforward reading of the phrase "persons in each State," appellants note that foreign tourists or business travelers temporarily in the country may be excluded from the apportionment base, even if they are physically "in" a State at the time of the census. Br. 34. But the Census Bureau's longstanding practice is to exclude such individuals

because their "usual residence" is not the United States—not because of their immigration status. *See* 83 Fed. Reg. at 5526. The exclusion of these classes of noncitizens, whose transitory presence in the United States is *de minimis*, does not support appellants' far more sweeping theory that persons who actually reside in the United States are not "in" the country if their entry or continuing presence is unlawful. *See Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (describing background presumption that statutes contain a *de minimis* exception).

b. Even if the statutory phrase "persons in each State" were equivalent to "inhabitants," undocumented immigrants would be "inhabitants" for apportionment purposes. An inhabitant is a person who "live[s] or dwell[s] in (a place)." Random House Webster's Unabridged Dictionary 982 (2d ed. 1997). That definition has not changed since the founding. *See* 4 Judicial and Statutory Definitions of Words and Phrases (West 1st ed. 1904) ("As where one sleeps. In a case involving the settlement of a man, it was said that 'a man properly inhabits where he lies[.]'") (quoting *Parishes of St. Mary Colechurch and Radcliffe* [1760], 1 Strange, 61 Eng. Rep. 385). And it also aligns with the understanding reflected in the Census Bureau's "usual residence" standard. 83 Fed. Reg. at 5526.

Most undocumented immigrants meet that standard. In the California action, for example, an expert explained that "[r]esearch and statistical reports have repeatedly found that undocumented immigrants see themselves as part of American society and indeed have longstanding ties in the cities and towns in which they permanently live." D. Ct. Dkt. 63-3 (Barreto

Decl. ¶ 18). He noted that "a clear majority of undocumented immigrants have lived in the United States for over five years and have families, hold jobs, own houses, and are part of the community." *Id.* Appellants did not dispute that evidence. No. 20-561 J.S. App. 90a ("undisputed that most undocumented immigrants live and sleep most of the time at a residence in the United States").

Appellants concede that the term "inhabitant" "evidently covered at least *some*" noncitizens at the founding. Br. 34. They nevertheless argue that the term could require "the sovereign's permission to remain within the country." *Id.* at 35. The sources on which they rely, however, do not support their argument. The cited 1760 treatise by Emmerich de Vattel and a passage of Federalist 42 make passing references to individuals being "permitted" or "allowed" to remain in a place in other contexts, but they shed no light on whether undocumented immigrants may be excluded from the apportionment base simply because they lack lawful status. *See id.* at 35-36. As the court in the California action explained, Vattel's statement was "cursory," and neither source has "to do with the census or apportionment." No. 20-561 J.S. App. 95a-96a. And whatever the merits of these eighteenth century sources, when Congress enacted Section 2a(a) in 1929, there is no indication that anyone thought the phrase "persons in each State" was limited to persons with lawful immigration status.

Nor do the cases invoked by appellants (Br. 36-37) support their position. In *Kaplan v. Tod*, 267 U.S. 228, 229-230 (1925), the Court considered a noncitizen who was detained at Ellis Island and "ordered to be excluded," but temporarily released into the custody of an immigrant aid society because the outbreak of

World War I made deportation impractical. The Court held that she could not be deemed to be "dwelling in the United States" for purposes of naturalization because her presence was unlawful. *Id.* But naturalization and apportionment are different, and the fact that eligibility for naturalization depends in part on possessing lawful immigration status does not mean the same is true for apportionment purposes. No. 20-561 J.S. App. 99a. Indeed, the historical record shows that Kaplan was counted in the 1920 census. *Id.* Appellants also cite *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), but that case did not address apportionment either and is even further afield factually, involving a noncitizen who "attempted to enter the country illegally and was apprehended just 25 yards from the border." *Id.* at 1964. While the statutory text and history confirm that such individuals are included in the apportionment base if detained within a State, appellants cannot defend the Memorandum merely by raising questions about whether certain noncitizens in unique circumstances like these—accounting for a small fraction of the overall undocumented population—can be excluded on the basis that they lack residency in the United States. *Infra* pp. 24-25.

Appellants also err in contending that *Franklin v. Massachusetts*, 505 U.S. 788 (1992), supports their understanding of "inhabitants." Br. 37. In *Franklin*, the Court upheld the Secretary of Commerce's allocation of approximately 900,000 "overseas military personnel to the State designated in their personnel files as their 'home of record'" for apportionment purposes. 505 U.S. at 790-791. The Court explained that the term "usual residence" "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place."

Id. at 804. Thus, individuals temporarily absent from their home State, especially for reasons of national service, can be included in their State's apportionment base. *See id.* But it does not follow that an individual's extended, indefinite physical presence is insufficient on its own to establish "usual residence." *Franklin* provides no basis for excluding undocumented immigrants who are physically present in their State, usually for many years.

In any event, appellants offer no reason to believe that undocumented immigrants lack an "allegiance or enduring tie" to their States. *Franklin*, 505 U.S. at 804. The majority of undocumented immigrants have lived in this country for years, and have numerous and extensive ties to their home communities. *Supra* pp. 19-20. Appellants' reliance on the 1910 through 1940 censuses, moreover, is misplaced. *See* Br. 38. As appellants recognize, those censuses excluded "aliens who ha[d] left the country," not undocumented individuals who are physically present in the country at the time of the enumeration. *Id.* (internal quotation marks omitted). Appellants are unable to cite a single instance of any census that has excluded such individuals on the basis of their immigration status.

c. Appellants also contend that Congress intended to afford the Executive "discretion" to determine whether to exclude noncitizens, or at least those who are undocumented, from the apportionment base. Br. 30, 33; *see also id.* at 40 (asserting that appellees must establish that "the term 'inhabitants' … unambiguously" includes undocumented immigrants). That argument is mistaken. The statutory text on its face gives no indication of any such delegation to the Executive. Appellants do not cite *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), nor can they establish that the Memorandum qualifies for *Chevron* deference. Unlike the Census Bureau's Residence Rule, it was not the product of notice-and-comment rulemaking or any similar process, *see United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); and it is flatly inconsistent with prior agency practice that is reflected in the Residence Rule, 83 Fed. Reg. at 5526; *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016).

The decision whether to exclude undocumented immigrants from the apportionment base, moreover, is not the type of question Congress would delegate to the Executive by implication. In 1929, no less than today, the question whether to exclude noncitizens (including individuals who are undocumented) from the apportionment base was a question of substantial economic and political importance. *Supra* pp. 16-17. Had Congress wanted to assign that question to the Executive, "it surely would have done so expressly." *See King v. Burwell*, 576 U.S. 473, 485-486 (2015). Instead, Congress resolved that question itself by expressly rejecting attempts to eliminate undocumented immigrants from the apportionment base, in part because of concerns that doing so would run afoul of the Constitution. Neither the statutory phrase "persons in each State" nor the term "inhabitants" can plausibly be understood to confer on the President discretion to make the highly consequential decision to exclude individuals on the basis of their immigration status.

That the statutory scheme may allow the President to make a technical or interstitial policy judgment to count federal employees temporarily stationed overseas, *Franklin*, 505 U.S. at 806, or to prescribe the treatment of foreign diplomats, *see* Appellants Br. 42; 83 Fed. Reg. at 5533, does not mean that Congress has

afforded him the discretion to make the much more far-reaching decision to exclude from the apportionment base approximately 11 million undocumented immigrants. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007) (recognizing Congress may delegate "highly technical, specialized interstitial matter[s] that Congress often does not decide itself"). Indeed, Congress has expressly foreclosed the Executive from making any such judgment. *Supra* pp. 14-18.

d. Finally, appellants argue that appellees can obtain relief only if they establish that *all* undocumented individuals within the United States—including, for example, those detained while crossing the border—must be included in the apportionment base. Br. 39-41. That is not correct. Appellees bring a facial challenge to the President's decision to deprive them of representation by excluding from the apportionment base all undocumented immigrants on the sole ground that they are undocumented. There is "no set of circumstances" in which that policy is lawful, *Reno v. Flores*, 507 U.S. 292, 301 (1993), because Congress has determined that immigration status is not a proper basis for excluding persons from the apportionment count.

This Court has recognized that the "no set of circumstances" rule does not preclude facial challenges to government actions even though a subset of the affected entities might permissibly be subject to the same treatment on other grounds. In *Shelby County v. Holder*, 570 U.S. 529 (2013), for example, the Court entertained a facial challenge to the coverage formula of the Voting Rights Act. The Court explained that the plaintiff county could proceed on the theory that the formula was "unconstitutional in all its applications[]

because of how it selects the jurisdictions subjected to pre-clearance," rejecting the dissent's argument that a facial challenge was improper because the plaintiff county would still have been subject to pre-clearance under a narrower coverage formula. *Id.* at 554-555; *cf. id.* at 581-587 (Ginsburg, J., dissenting). The same principle applies here. Even if some undocumented immigrants may properly be excluded from the apportionment base because they do not satisfy the criteria of the Residence Rule, that would not defeat appellees' challenge to the President's decision to exclude individuals on the basis of their immigration status. *See id.* at 554-555 (majority opinion).

B. The Memorandum Impermissibly Seeks to Base Reapportionment on Non-Census Data Sources

Apart from unlawfully excluding undocumented immigrants from the apportionment base, the President's Memorandum separately violates the statutory requirement that reapportionment must be based on census data. Section 2a(a) provides that "the President shall transmit to the Congress a statement showing the whole number of persons in each State … *as ascertained under the … decennial census of the population*." 2 U.S.C. § 2a(a) (emphasis added). The President must also spell out "the number of Representatives to which each State would be entitled under an apportionment … by the method known as the method of equal proportions[.]" *Id.*; *see also* 13 U.S.C. § 141(a)-(b) (mandating that "[t]he tabulation of total population by States" under the census is "required for the apportionment of Representatives in Congress among the several States").

The Memorandum proposes to base apportionment in part on data regarding citizenship and legal status.

But the census itself does not include that information. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). Appellants do not dispute that undocumented immigrants will be counted as part of the census enumeration, notwithstanding the Memorandum. *See* Br. 4. And appellants acknowledge that the Memorandum directs that information regarding citizenship and legal status be obtained from non-census data sources. *Id.* at 4-5; *see also* D. Ct. Dkt. 33 (Tr. 31:21-32:21). The Memorandum refers to a separate executive order, described above, that directs federal agencies to share non-census data regarding "the number of citizens, non-citizens, and illegal aliens in the country." 85 Fed. Reg. at 44,680; *see* 84 Fed. Reg. 33,821.

That approach cannot be squared with statutory requirements. Under 13 U.S.C. § 141, the Secretary of Commerce must provide to the President "the tabulation of total population by States under subsection (a)"—*i.e.*, the decennial census—"as required for the apportionment of Representatives." 13 U.S.C. § 141(a)-(b). Section 2a, in turn, "require[s] the President to use … the data from the 'decennial census.'" *Franklin*, 505 U.S. at 797. "The decennial census is the only census that is used for apportionment purposes." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. at 341 (internal quotation marks omitted). Once the census data are complete for apportionment purposes, "the President exercises no discretion in calculating the numbers of Representatives"; rather, his role is of a "ministerial nature." *Franklin*, 505 U.S. at 799; *see also id.* at 809 (Stevens, J., concurring in part) ("The automatic connection between the census and the reapportionment was the key innovation of the [1929] Act."). In con-

trast, the Memorandum requires the Commerce Secretary to provide the President with a separate tabulation that excludes undocumented immigrants—despite their inclusion in the regular census tabulation. "That is not a normal understanding of the decennial census tabulation." No. 20-516 J.S. App. 113a-114a.

Similarly, the Memorandum violates Section 2a(a) because it envisions an apportionment that is not based on "the method of equal proportions." That method, selected by Congress in 1941 and used for apportioning seats ever since, "minimize[s] the relative difference both between the size of congressional districts and between the number of Representatives per person." *Dep't of Commerce v. Montana*, 503 U.S. at 455. Its starting point is "the population of each State." *Id.* at 452 n.26; *see also* Appellants Br. *9-11, *Montana*, 503 U.S. 442 (No. 91-860) ("[T]he formula … has as its numerator the population of the State."). Because the Memorandum seeks to use something other than "the population" of each State as the apportionment base, it departs from the method of equal proportions.

Appellants' response to these arguments relies primarily on *Franklin*, which they assert establishes that "the President is the ultimate decisionmaker concerning the contents of the decennial census" and "retains discretion to make policy judgments" regarding the apportionment base. Br. 23-24. But *Franklin* says something quite different: The President has "authority to direct the Secretary in making policy judgments that *result in* 'the decennial Census,'" though that discretion is cabined by the Constitution and by statute. 505 U.S. at 799 (emphasis added). Unlike in *Franklin*,

the question in this case is not what sources of information—such as personnel data or other administrative records—will be used to complete the census enumeration. It is undisputed that the information the Memorandum seeks to use to exclude undocumented immigrants does not come from the census and will not be used to complete census enumeration. *Supra* p. 26. *Franklin* does not hold, much less suggest, that the President may adjust the apportionment base using non-census data.

Finally, even if the Executive may use administrative records to supplement the census enumeration, it does not follow that such records may be used after the fact to remove persons already counted. *Supra* pp. 26-27. Appellants suggest that approach is permissible, Br. 29, but nothing in *Franklin* supports that theory, and appellants do not cite any historical precedent for it.

III. THE MEMORANDUM IS UNCONSTITUTIONAL

The district court below did not address appellees' claim that the President's decision violates the Constitution. If the Court accepts appellants' invitation to resolve that claim here, the Court should hold that the Memorandum's exclusion of undocumented immigrants from the apportionment base is also unconstitutional, as the court in the California action concluded.

1. The analysis of any constitutional provision "start[s] with the text." *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). Prior to 1868, representatives were "apportioned among the several States … according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons … and excluding Indians not taxed, three

fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3. After the adoption of the Fourteenth Amendment, representatives must be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2.

Undocumented immigrants are "persons" within the meaning of those provisions. Founding-era dictionaries defined "person" as an "[i]ndividual or particular man or woman," and also a "human being." Samuel Johnson, A Dictionary of the English Language (3d ed. 1766). The same is true at the time the Fourteenth Amendment was ratified. Noah Webster, A Dictionary of the English Language 314 (1867); *see also* No. 20-561 J.S. App. 69a-70a. Other sources confirm this understanding. *See, e.g.*, 1 Blackstone Commentaries on the Laws of England, ch. 10 (1765) (discussing the rights of "People, Whether Aliens, Denizens, or Natives"). Indeed, appellants have conceded that undocumented immigrants are "persons" under the ordinary meaning of that term. No. 20-561 J.S. App. 70a.

That interpretation is consistent with how this Court has interpreted the word "person" in other sections of the Fourteenth Amendment. In *Yick Wo v. Hopkins*, 118 U.S. 356, 368-369 (1886), the Court held that the term "person" as used in the Due Process Clause includes noncitizens barred from naturalization. And in *Plyler v. Doe*, 457 U.S. 206, 210 (1982), the Court concluded that "person" encompasses undocumented immigrants in particular. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Id.* This Court ordinarily assumes that the same terminology conveys the same meaning, particularly when used in

the same section of the Constitution. *See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting).

Moreover, the text demonstrates that "[w]hen the Founders chose to exclude specific subsets of persons … they did so." No. 20-561 J.S. App. 68a-69a. The Apportionment Clause of the original Constitution excluded "Indians not taxed" and specified that slaves would be counted as only three-fifths of a person. U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment, of course, eliminated the latter provision but retained the exclusion of "Indians not taxed." Under the *expressio unius* canon, which applies to the interpretation of the Constitution as well as statutes, that is powerful evidence that the drafters did not intend for there to be other exceptions. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995).

2. The history of both the original Constitution and the Fourteenth Amendment confirms that noncitizens must be included in the apportionment base. As Alexander Hamilton explained during the drafting process, "apportionment was to be based on the number of persons residing in each state because 'every individual of the community at large has an equal right to the protection of government.'" No. 20-561 J.S. App. 76a (quoting 1 Records of the Federal Convention of 1787, at 472-473 (M. Farrand ed. 1911); *see also id.* at 74a-77a.

The drafters of the Fourteenth Amendment made a conscious decision to retain that basis for apportionment. One of the debates during the drafting was over what to use as the apportionment base. *See* No. 20-561 J.S. App. 78a (discussing historical materials); Zuckerman, A Consideration of the History and Pre-

sent Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93, 94-107 (1961). The drafters considered and rejected several proposals that would have based apportionment on a subset of persons that did not include immigrants, such as the number of citizens, voters, or male voters over 21. Zuckerman, *supra*, at 95 (legal voters), 96 (citizens), 101-102 (male citizens over 21). Ultimately, they settled on "the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers … not voters.'" Cong. Globe, 39th Cong., 1st Sess. 2766-2767 (1866) (Sen. Howard).

In doing so, the drafters acknowledged that including noncitizens and immigrants could have a dramatic impact on the apportionment totals. Senator Wilson of Massachusetts, for instance, noted that in 1860 "there were 3,856,628 unnaturalized persons of foreign birth" in the northern states and excluding them from apportionment "would cause Massachusetts to lose one or perhaps two Representatives, Pennsylvania two, and New York as many as four." Zuckerman, *supra*, at 100; *see also id.* at 95, 105 (discussing similar predictions). As the district court in the California action observed, the drafters ultimately "found it important to include noncitizens and other non-voters … because even nonvoters' interests would be represented by the elected government." No. 20-561 J.S. App. 79a.

3. Consistent practice since the founding confirms that the Constitution requires undocumented immigrants to be counted for apportionment purposes. Although the constitutional text is clear, *supra* pp. 28-30, were that not so, this Court's interpretation would

be "informed by long and consistent historical practice." *Dep't of Commerce v. New York*, 139 S. Ct. at 2567; *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (looking to "settled practice" to resolve constitutional dispute regarding apportionment); *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014). Since the time of the founding, Congress and the Executive Branch have uniformly agreed that immigrants, including undocumented immigrants, are included in the apportionment base. *See* No. 20-561 J.S. App. 81a-82a. Indeed, appellants have "conceded that historical practice does not support their argument" and were unable to identify any historical precedent for excluding undocumented immigrants. *Id.* at 81a.

Ever since the first census in 1790, the enumeration has counted individuals without regard to citizenship or legal status. In the 1850s, for example, escaped slaves in the northern states were not citizens, and their very presence was unlawful. *See, e.g.*, Fugitive Slave Act of 1850, 31 Cong. Ch. 60, 9 Stat. 462. Yet they were counted in the 1860 census as part of the apportionment base. *See* U.S. Census Bureau, 1860 Census: Population of the United States at vi-vii, xv-xvi (1864); *see also* No. 20-561 J.S. App. 82a.

In more recent years, the Executive Branch has continued to adhere to this approach. For instance, the Department of Justice under Presidents Carter, Reagan, and George H.W. Bush told Congress that the Constitution would not permit the exclusion of immigrants—including undocumented immigrants—from the apportionment base. No. 20-561 J.S. App. 17a-19a, 87a-88a (compiling examples). The Census Bureau also successfully defended a lawsuit seeking to exclude undocumented immigrants from the 1980 ap-

portionment count, explaining that it was "constitutionally required to include all persons, including illegal aliens, in the apportionment base." *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980). This unbroken history confirms that appellants' novel reading of the Constitution is unsustainable.

CONCLUSION

The judgment of the district court should be affirmed.

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