

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 BUSINESSES AND  
BUSINESS ORGANIZATIONS AS *AMICI CURIAE*  
IN SUPPORT OF APPELLEES**

---

ALEXANDER H. SOUTHWELL

LEE R. CRAIN

RANDI KIRA BROWN

GIBSON, DUNN & CRUTCHER LLP

200 Park Avenue

New York, NY 10166

STUART F. DELERY

*Counsel of Record*

JOSHUA M. WESNESKI

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 887-3650

sdelery@gibsondunn.com

*Counsel for Amici Curiae*

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
I. Apportionment Based On Less Than The Full Population Adversely Affects <i>Amici</i> And Their Communities .....	5
II. The Census Is An Important National Institution Whose Accuracy And Reliability Have Far-Reaching Effects On <i>Amici</i> .....	10
CONCLUSION .....	19

## TABLE OF AUTHORITIES

### Cases

<i>Bode v. Nat’l Democratic Party</i> , 452 F.2d 1302 (D.C. Cir. 1971) .....	6
<i>City of Detroit v. Murray Corp. of Am.</i> , 355 U.S. 489 (1958) .....	8
<i>City of San Jose v. Trump</i> , — F. Supp. 3d, — 2020 WL 6253433 (N.D. Cal. Oct. 22, 2020), <i>appeal</i> <i>filed</i> , No. 20-561 (U.S.) .....	6, 7
<i>Dawson Chem. Co. v. Rohm &amp; Haas Co.</i> , 448 U.S. 176 (1980) .....	8
<i>Dep’t of Commerce v. New York</i> , 139 S. Ct. 2551 (2019) .....	5, 12
<i>Evenwel v. Abbott</i> , 136 S. Ct. 1120 (2016) .....	7
<i>Fed’n for Am. Immigration Reform v.</i> <i>Klutznick</i> , 486 F. Supp. 564 (D.D.C. 1980) .....	3, 7
<i>Franklin v. Massachusetts</i> , 505 U.S. 788 (1992) .....	9
<i>New York v. Trump</i> , — F. Supp. 3d —, 2020 WL 5422959 (S.D.N.Y. Sept. 10, 2020) .....	7

<i>New York v. U.S. Dep’t of Commerce</i> , 351 F. Supp. 3d 502 (S.D.N.Y.) (Furman, J.), <i>aff’d in part</i> , 139 S. Ct. 2551 (2019) .....	12
<i>Utah v. Evans</i> , 536 U.S. 452 (2002) .....	6
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964) .....	6
<i>Wisconsin v. City of New York</i> , 517 U.S. 1 (1996) .....	6, 16
<b>Constitutional Provisions</b>	
U.S. Const. art. I, § 2, cl. 3 .....	3
<b>Statutes</b>	
13 U.S.C. § 9(a) .....	4
15 U.S.C. § 1512 .....	12
26 U.S.C. § 45D(e) .....	16
Permanent Census Act, Pub. L. No. 57-27, 32 Stat. 51 (1902) .....	12

## Regulations

- Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*,  
85 Fed. Reg. 44,679 (July 21, 2020) .....6

## Other Authorities

- 154 Cong. Rec. H4890 (June 4, 2008)  
(statement of Rep. Johnson) ..... 11
- AJ Agrawal, *Why Data Is Important for Companies and Why Innovation Is on the Way*, Inc. (Mar. 24, 2016),  
<https://bit.ly/2qY77iM> ..... 18
- Syed Riaz Ahmed, *Applications of Data Mining in Retail Business*,  
*Proceedings of the Int’l Conference on Info. Tech.: Coding and Computing*  
(2004) ..... 17
- Kimberly Amadeo, *Government Subsidies (Farm, Oil, Export, Etc)*,  
the balance (Jan. 16, 2020),  
<https://perma.cc/A8D4-HU3Q>..... 8
- Rhett Buttle & Katie Vlietstra  
Wonnenberg, *Why All Businesses Should Care About the 2020 Census*,  
The Hill (Mar. 4, 2020) ..... 13
- Jordain Carney, *McConnell Pushing for ‘Highly Targeted’ COVID-19 Relief Deal*,  
The Hill (Nov. 10, 2020) .....9

Cmty. Dev. Fin. Insts. Fund, <i>New Markets Tax Credit Program</i> , <a href="https://bit.ly/1H54VZx">https://bit.ly/1H54VZx</a> .....	16
Consortium of Soc. Sci. Ass'ns, <i>COSSA Statement on the Impact of a Citizenship Question in the 2020 Decennial Census</i> (Mar. 27, 2018), <a href="https://bit.ly/3fWyMWa">https://bit.ly/3fWyMWa</a> .....	4
<i>The Federalist</i> No. 54 .....	7
Tom Foster, <i>Warby Parker Grew to \$250 Million in Sales Through Disciplined Growth. Now It's Time to Get Aggressive</i> , Inc. (June 2017), <a href="https://bit.ly/2rZ2HEX">https://bit.ly/2rZ2HEX</a> .....	14
John H. Heinrichs & Jeen-Su Lim, <i>Integrating Web-Based Data Mining Tools with Business Models for Knowledge Management</i> , 35 <i>Decision Support Sys.</i> 103 (2003).....	18
Marisa Hotchkiss & Jessica Phelan, <i>Uses of Census Bureau Data in Federal Funds Distribution: A New Design for the 21st Century</i> , U.S. Census Bureau (Sept. 2017), <a href="https://bit.ly/3fX2gmJ">https://bit.ly/3fX2gmJ</a> ; .....	16, 17
Douglas A. Kysar, <i>Kids &amp; Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture</i> , 87 <i>Cornell L. Rev.</i> 853 (2002).....	11, 12, 13

- Melissa Martin, *Costs of Starting a Business: Bricks & Mortar Retail Startup*, StartupNation (June 8, 2006), <https://bit.ly/2Cf4vRr> ..... 14
- Amy Merrick, *New Population Data Will Help Marketers Pitch Their Products*, Wall St. J. (Feb. 14, 2001), <https://on.wsj.com/2V0hFck> ..... 14
- Nat'l Advertisers, *ANA Members Oppose Addition of Citizenship Question for 2020 Census* (June 12, 2018), <https://perma.cc/N9NR-9LED> ..... 15
- National Research Council, *Modernizing the U.S. Census* (1995) ..... 16
- Kenneth Prewitt, *The American People Census 2000: Politics and Science in Census Taking* (Russell Sage Foundation 2003), <https://wapo.st/2NWwjyp> ..... 11
- Records of the Federal Convention of 1787* (M. Farrand ed. 1911) ..... 7
- Report, Council of Econ. Advisers, *The Uses of Census Data: An Analytical Review* (Apr. 1, 2000), <https://bit.ly/2Tv1PJP> ..... 4
- Giovanni Russonello, *Why An Accurate Census Is So Important*, N.Y. Times (Aug. 7, 2020), <https://nyti.ms/3nqU8yK> ..... 10

Chris Rygielski et al., <i>Data Mining Techniques for Customer Relationship Management</i> , 24 <i>Tech. in Soc'y</i> 483 (2002) .....	17
SBA, <i>Market Research and Competitive Analysis</i> , <a href="https://perma.cc/9CAA-9T85">https://perma.cc/9CAA-9T85</a> .....	14
Diane W. Schanzenbach & Michael R. Strain, <i>Act Now to Save the 2020 Census</i> , Bloomberg Opinion (Aug. 11, 2017), <a href="https://bloom.bg/2vUz64R">https://bloom.bg/2vUz64R</a> .....	15
Robert Shapiro, <i>The 2020 Census May Be Wildly Inaccurate—And It Matters More than You Think</i> , Brookings Inst. (Aug. 31, 2017), <a href="https://perma.cc/6T77-KJFU">https://perma.cc/6T77-KJFU</a> .....	16
U.S. Census Bureau, <i>Census Business Builder</i> (Dec. 13, 2018), <a href="https://perma.cc/8HRY-88TH">https://perma.cc/8HRY-88TH</a> .....	14
U.S. Census Bureau, <i>Directors 1790 – 1810</i> (last revised Dec. 17, 2019), <a href="https://bit.ly/2VKtnrs">https://bit.ly/2VKtnrs</a> .....	11
Hansi Lo Wang, <i>Census Cuts All Counting Efforts Short by a Month</i> , NPR (Aug. 3, 2020), <a href="https://n.pr/2DSGB1A">https://n.pr/2DSGB1A</a> .....	13



Jonathan Weber, *Census Data Assists  
Business Where It Counts: Accurate  
Demographics*, L.A. Times (Jan. 2,  
1990), <https://lat.ms/2NYuuRF> ..... 15

**INTEREST OF *AMICI CURIAE*\***

*Amici* submit this brief to provide important context regarding the potential damage to *amici* and others if congressional representation is not fairly apportioned, and concerning the importance of the Census more generally. *Amici* include the following companies and business organizations from a variety of sectors:

Ben & Jerry's Homemade, Inc.  
Casper Sleep, Inc.  
Cummins Inc.  
General Assembly Space, Inc.  
Knotel, Inc.  
Levi Strauss & Co.  
LivHOME, Inc.  
Lush Cosmetics LLC  
Lyft, Inc.  
Mara Hoffman Inc.  
Minneapolis Regional Chamber of Commerce  
Postmates Inc.  
Shutterstock, Inc.  
Univision Communications Inc.

---

\* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

Warby Parker

Workplace Options, LLC

*Amici's* interests in this case are strong. *First*, *amici*, their employees, and their customers will be harmed if congressional representation is not apportioned in accordance with the Constitution and federal law. Businesses depend on Congress to provide federal programs and reasonably tailored regulation to help spur economic innovation and advancement. Reapportioning congressional representation based on fewer than all residents—contrary to consistent historical practice—threatens to impair businesses' access to those important channels of economic development by reducing congressional representation in areas in which *amici* do business or their employees and customers reside. Apportionment that does not follow the Constitution risks undermining public confidence in Congress as an institution and, as a result, the policy decisions it makes.

*Second*, the Census is an important national institution on which many businesses, including *amici*, rely to provide accurate and useful information about the U.S. population. Defendants' repeated attempts to politicize the Census and depart from established constitutional and statutory requirements threaten to undermine the integrity of the Census and confidence in the data it produces—to the detriment of *amici*, their employees, their stakeholders, and their customers. The value of Census data ranges from determining the allocation of federal funds to providing valuable insight into the demographics and behaviors of customers. Government actions that impede the collection of complete and accurate Census data or that undermine public confidence in the Census process going forward are contrary to *amici's* interests. This

Court should once again act, as it did last year, to protect the Census and ensure that businesses can continue to rely on Census data and the apportionment it supports.

For all of these reasons, *amici* have a substantial interest in this litigation.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Census is an important national institution. Its principal function is the apportionment of seats in the House of Representatives, which also affects the number of presidential electors each State selects. The Census also has implications for redistricting, and collects important information about the U.S. population that businesses and scientists use to predict or explain societal patterns and behaviors. Its roots trace back to the founding of the nation, when the Framers devised a mechanism to, for the first time, determine the total population of the United States.

To that end, the United States Constitution requires an “actual Enumeration” of the people to allow the “Representatives” to “be apportioned among the several States which may be included within this Union, according to their respective Numbers.” U.S. Const. art. I, § 2, cl. 3. Throughout history, that enumeration—and subsequent apportionment—has included undocumented immigrants. *See Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980).

The inclusion of all people, including undocumented immigrants, in the apportionment count has important implications for businesses and the community more broadly. Congressional apportionment

is a threshold determination that affects the weight that the interests of each State and community will be given in Congress and in the presidential election. A geographic region with less representation in Congress naturally has less of an opportunity to advocate for its interests. That disparity—itsself an ordinary function of democracy—is amplified and exacerbated, however, when representation among various communities is not proportional. The exclusion from the apportionment count of an entire group of residents—here, undocumented immigrants—who both contribute to communities and use their resources can thus have profound and harmful consequences for underrepresented areas. And businesses, no less than ordinary residents, depend on balanced representation in Congress to ensure their interests are forcefully and fairly reflected.

Even beyond its role in determining congressional apportionment, the Census has long been a vital national institution. It is traditionally a largely nonpartisan effort to obtain a common goal—the complete and accurate count of all residents in the United States. The data the Census produces has implications for a wide variety of sectors. Census data is made public, *see* 13 U.S.C. § 9(a), and social scientists have called Census responses “an irreplaceable source of data for researchers,” Consortium of Soc. Sci. Ass’ns, *COSSA Statement on the Impact of a Citizenship Question in the 2020 Decennial Census* (Mar. 27, 2018), <https://bit.ly/3fWyMWa>. “Today, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state.” Report, Council of Econ. Advisers, *The Uses of Census Data: An Analytical Review*

(Apr. 1, 2000), <https://bit.ly/2Tv1PJP>. Yet Defendants have for several years taken steps that undermine the accuracy and reliability of the important data the Census produces. Actions that politicize the Census are dangerous. They threaten to impair the reliability and accuracy of the important data the Census produces and to undermine public confidence in the institution.

For all of these reasons, *amici* urge the Court to affirm the judgment below and ensure that the Census is conducted consistent with constitutional and statutory requirements. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

## ARGUMENT

### I. APPORTIONMENT BASED ON LESS THAN THE FULL POPULATION ADVERSELY AFFECTS *AMICI* AND THEIR COMMUNITIES

The importance of the Census to *amici*, their employees, their stakeholders, and their customers is difficult to overstate: The Census is the means by which congressional seats in the House of Representatives—and by extension, presidential electors in the Electoral College—are allocated to the various States. *Amici* have a vested interest in ensuring that they and their communities have the representation in Congress and the Electoral College to which they are entitled. But Defendants' actions in this case threaten to disrupt the fair and balanced apportionment of representation in our Republic's most important organs of government.

The Census is enshrined in the Constitution because the Framers knew that the “calculation of populations could be and often were skewed for political or financial purposes,” and so they “chose to make an

‘actual Enumeration’ part of our constitutional structure” in order “to preclude the availability of methods that permit political manipulation.” *Utah v. Evans*, 536 U.S. 452, 500, 507, 510 (2002) (Thomas, J., concurring in part and dissenting in part); *see also Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996) (“[E]ach [decennial Census] was designed with the goal of accomplishing an ‘actual Enumeration’ of the population.”). The Census was an integral part of the design of the new government at the Founding—an attempt to ensure that the House of Representatives would be based on proportional representation of the people (not just the voters or even the citizens). This decision was essential to the “Great Compromise” that yielded our bicameral legislature. *See Wesberry v. Sanders*, 376 U.S. 1, 12–14 (1964); *Bode v. Nat’l Democratic Party*, 452 F.2d 1302, 1307–08 (D.C. Cir. 1971).

There is little question that the Presidential Memorandum requiring exclusion of undocumented immigrants from the apportionment base will have a significant impact on the allocation of congressional and presidential representation. The Presidential Memorandum expressly contemplates that excluding undocumented immigrants from the 2020 Census, if successful, will result in the reduction of “two or three” congressional seats in at least one State (California). 85 Fed. Reg. 44,679, 44,680 (July 21, 2020). Other States’ congressional representation also is in jeopardy. *See City of San Jose v. Trump*, — F. Supp. 3d — 2020 WL 6253433, at \*15 (N.D. Cal. Oct. 22, 2020), *appeal filed*, No. 20-561 (U.S.) (citing evidence that excluding undocumented immigrants from apportionment “is highly likely to cause California and Texas to each lose a congressional seat,” as well as potentially New Jersey (quotation marks omitted)).

The Presidential Memorandum mandates this result even though there is no serious question that undocumented immigrants have for centuries been included in the apportionment count. *See Fed'n for Am. Immigration Reform*, 486 F. Supp. at 576. Indeed, both Alexander Hamilton and James Madison contemplated that representation in Congress would be based “on the aggregate number of inhabitants.” *The Federalist* No. 54; *see also* 1 *Records of the Federal Convention of 1787*, at 473 (M. Farrand ed. 1911) (notes of Representative Robert Yates of New York on Constitutional Convention proceedings on Friday, June 29, 1787). And Congress has over time considered *constitutional* amendments to exclude noncitizens from the apportionment, all of which failed. *See City of San Jose*, 2020 WL 6253433, at \*5; *New York v. Trump*, — F. Supp. 3d —, 2020 WL 5422959, at \*31 (S.D.N.Y. Sept. 10, 2020). Thus, for the nation’s entire history, residents of a State have had the expectation that *every* resident will be counted and included for apportionment purposes, and that their interests and needs will be fully and fairly considered by Congress and the President based on a community’s full population. That “settled practice” is good evidence of what the Constitution requires. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

The Presidential Memorandum threatens to undermine that long tradition. The Presidential Memorandum’s deviation from established practice affects *amici* because businesses and their stakeholders depend on fairly apportioned congressional representation to ensure their interests are appropriately considered. Indeed, the federal government invests billions of dollars into the nation’s economy each year through direct subsidies—investments that directly impact businesses like *amici* nationwide. *See* Kimberly



Amadeo, *Government Subsidies (Farm, Oil, Export, Etc)*, the balance (Jan. 16, 2020), <https://perma.cc/A8D4-HU3Q>. And Congress passes dozens of laws each year that regulate—either directly or indirectly—scores of industries that contribute to the American economy.

These initiatives are the product of extensive analysis and negotiation, with high stakes on all sides of the debate. Congress is tasked with making “difficult policy decisions” about a host of nuanced issues, *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 495 (1958), often requiring “compromise between competing policy interests,” *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 221 (1980). Congress is at center stage, assessing and balancing interests while considering policy goals, options, and preferences. But this essential democratic function operates effectively only when the U.S. population is fairly represented in the House of Representatives. Otherwise, some interests and constituencies will be given outsized weight, to the detriment of those communities whose voices may not receive their due consideration. The House of Representatives made this precise point in an *amicus* brief filed in the district court. *See* Br. of the U.S. House of Representatives 23, Dist. Ct. Dkt. 107 (Aug. 14, 2020) (“Basing apportionment on anything other than the actual total population of each State would . . . undermine [the House’s] members’ ability to represent fairly and fully all of their constituents.”). Disrupting the balance of representation in Congress thus means that communities—including their businesses—will lose their voice at the table, and may lose an opportunity to meaningfully contribute to the ongoing discussion about how best to structure and regulate the American economy.

More generally, as Congress makes difficult policy choices with which many will disagree, it is important that Congress both accurately reflect the full population across the country and be *perceived* to fairly represent that population. If the public believes that representation of their communities has been undermined or skewed, that could undermine faith in the institution of Congress itself. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in the judgment) (noting that reviewability of census decisions “bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy”).

The ongoing pandemic demonstrates the importance of balanced representation. Congress is now considering the critical question of what additional steps are necessary to address the public health and economic crises triggered by the coronavirus—including potential additional relief for businesses adversely affected by the pandemic. *See* Jordain Carney, *McConnell Pushing for ‘Highly Targeted’ COVID-19 Relief Deal*, The Hill (Nov. 10, 2020), <https://perma.cc/QSN5-WVRT>. The structure of any such relief is important to *amici* and other businesses that may rely on new programs to provide important support as the nation’s economy continues to recover. But without fairly apportioned representation in Congress, businesses can have no assurance that the particular needs of their communities will be understood and addressed by further relief packages. Every State and community is suffering today, but the problems are not the same everywhere, and balanced representation in Congress is critical to ensure that all of *amici*’s communities are able to receive the assistance they so desperately need. Not only would a poorly or inadequately tailored relief package injure businesses

who may need to rely on that support, but it also would injure the employees and customers who depend on those businesses to provide jobs and important services. And a legislative process that fails to reflect the distribution of the full population and appears to be skewed will undermine public confidence in and acceptance of the difficult choices Congress makes.

*Amici* are thus concerned about the consequences of the Administration’s departure from the longstanding practice of including *all* residents in the apportionment count. Divesting communities of congressional representation based on an administration’s particular policy preferences is unlawful and unconstitutional, and does not accord with fundamental principles of our democracy. The Presidential Memorandum threatens to inhibit the ability of businesses and their employees across the country to effectively voice their opinions through the channels of democracy.

## **II. THE CENSUS IS AN IMPORTANT NATIONAL INSTITUTION WHOSE ACCURACY AND RELIABILITY HAVE FAR-REACHING EFFECTS ON *AMICI***

The Census is a nonpartisan exercise in democracy. The counting of the country’s population serves as the backdrop for much government decisionmaking each decade. *Amici* in particular rely on Census data—they depend on its accuracy, and any attempts to manipulate the Census have a direct effect on *amici* and businesses like them. Indeed, a former director of the Census itself noted that “[e]very demographic survey I’m aware of, they use the census.” Giovanni Russonello, *Why An Accurate Census Is So Important*, N.Y. Times (Aug. 7, 2020), <https://nyti.ms/3nqU8yK>. It is the “gold standard” and must be protected. *Id.*

This Court should reject Defendants' latest effort to manipulate the Census.

Our nation's earliest leaders recognized the importance of conducting an accurate Census. For instance, when Thomas Jefferson supervised the nation's first Census as Secretary of State in 1790, he expected a population count of at least 4 million people. Yet the Census ultimately revealed a nation of just 3.9 million people, much to the surprise and concern of Jefferson and President George Washington. Jefferson thought that the Census had significantly undercounted the population, perhaps by several hundred thousand residents. U.S. Census Bureau, *Directors 1790 – 1810* (last revised Dec. 17, 2019), <https://bit.ly/2VKtnrs>. And Washington, who had expected a population count about five percent higher, was similarly chagrined, blaming the “inaccuracy’ on avoidance by some residents as well as on negligence by those responsible for taking the census.” Kenneth Prewitt, *The American People Census 2000: Politics and Science in Census Taking* 6 (Russell Sage Foundation 2003), <https://wapo.st/2NWwjyp>. By making these concerns about the Census public, then-Secretary Jefferson “helped alert the Nation to the importance of accuracy in the numbers used to describe the society.” 154 Cong. Rec. H4890 (June 4, 2008) (statement of Rep. Johnson).

As the nation has evolved, so too has the scope and purpose of the Census. In the 1850s, Congress expanded the Census's traditional role and included a number of questions on the Census aimed at learning more about the characteristics of the U.S. population. See Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 Cornell L. Rev. 853, 862 (2002). At the turn of the

twentieth century, as the Census grew more complex, Congress created the Census Bureau, which opened its doors in 1902. *See* Permanent Census Act, Pub. L. No. 57-27, 32 Stat. 51 (1902). By that time, the Census’s mission to “foster, promote, and develop the foreign and domestic commerce” was codified, 15 U.S.C. § 1512, and the Census Bureau’s energies “were directed toward the improvement of business statistics, . . . and toward the collection of data that might foster improvements in the national economy without the heavy hand of government ‘planning,’” Kysar, *supra*, at 862–63 (some quotation marks omitted).

In the face of this long tradition of the arms of the government working collaboratively toward a common goal, Defendants have on multiple occasions taken actions that threaten to undermine the reliability and accuracy of Census data. In 2018, the Department of Commerce announced its intent to add a question to the Census asking about citizenship, despite longstanding recommendations by the Census Bureau itself that such a question would reduce response rates and impair Census data. *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 530 (S.D.N.Y.) (Furman, J.), *aff’d in part*, 139 S. Ct. 2551 (2019). Last year, this Court held that that effort was based on a “contrived” and pretextual rationale. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

This year, in the midst of the COVID-19 pandemic, the Department of Commerce announced that it would be extending the deadline for completion of the Census to October 31, 2020, owing to the delayed start of the Department’s outreach to individuals who did not respond to mail-in Census forms. In early August, though, the Department reversed course, imposing a September 30 deadline for completion of the

Census, potentially resulting in vast undercounting. See Hansi Lo Wang, *Census Cuts All Counting Efforts Short by a Month*, NPR (Aug. 3, 2020), <https://n.pr/2DSGB1A>. Because of other litigation, counting in fact continued until October 15, 2020.

This case represents Defendants' latest effort to use the Census to send a political message, rather than to operate the Census in a manner designed to achieve its constitutional purpose. As the plaintiffs argued in the citizenship question case and as Plaintiffs in this case argued below, Defendants' actions risked suppressing response rates to the Census, particularly with respect to responses from naturalized citizens and immigrants. That in turn risked serious impairment of the accuracy of the Census, which will harm businesses like *amici* that depend on reliable Census data to make a variety of business decisions. Although the Census has now closed, the full effects of Defendants' conduct on the response rate remain unknown. And if permitted to skew the apportionment by reflecting less than the full population, the Presidential Memorandum may very well discourage participation in *future* Censuses too by undermining public confidence in the fairness and impartiality of the process.

The effects of the Presidential Memorandum are concerning to *amici*, because businesses have long used Census data in a variety of strategic ways to plan their operations, enhance their understanding of their customer base, and develop products that meet consumer needs. See Kysar, *supra*, at 854–56; see also Rhett Buttle & Katie Vlietstra Wonnemberg, *Why All Businesses Should Care About the 2020 Census*, The Hill (Mar. 4, 2020), <https://bit.ly/3fN2BYZ> (“Census

data have been invaluable in guiding business decisions for more than 200 years.”). The Census Bureau itself recognizes the value businesses derive from the types of data the Census produces; it even provides companies with a “Census Business Builder,” which is “a suite of services that provide selected demographic and economic data from the Census Bureau tailored to specific types of users in a simple to access and use format.” U.S. Census Bureau, *Census Business Builder* (Dec. 13, 2018), <https://perma.cc/8HRY-88TH>. The Bureau notes that this data can “help you start or grow a business or understand the business landscape for a region.” *Id.*; see also SBA, *Market Research and Competitive Analysis*, <https://perma.cc/9CAA-9T85>.

By way of example, businesses frequently rely on Census data when they plan the placement and construction of new locations or markets. That data lets businesses maximize the effectiveness of a location and capitalize on a particular region’s needs or preferences. See Melissa Martin, *Costs of Starting a Business: Bricks & Mortar Retail Startup*, StartupNation (June 8, 2006), <https://bit.ly/2Cf4vRr>. Many retail merchants use Census data to strategically place their stores and other facilities. See Amy Merrick, *New Population Data Will Help Marketers Pitch Their Products*, Wall St. J. (Feb. 14, 2001), <https://on.wsj.com/2V0hFck>. And some businesses rely on Census data to evaluate what makes a market desirable and where to place stores within a market. See Tom Foster, *Warby Parker Grew to \$250 Million in Sales Through Disciplined Growth. Now It’s Time to Get Aggressive*, Inc. (June 2017), <https://bit.ly/2rZ2HEX>. Others look at the Census profile for a new area to see how it compares with an ex-

isting market and to determine whether a new location is likely to generate more, less, or the same business. See Jonathan Weber, *Census Data Assists Business Where It Counts: Accurate Demographics*, L.A. Times (Jan. 2, 1990), <https://lat.ms/2NYuuRF>.

Census data also affects the development and marketing of numerous products around the country. Businesses use Census data to inform decisions about product development and placement. A retail business may, for instance, rely on demographic data to determine which products are going to sell best in which regions, and calibrate each store's stock accordingly. See Diane W. Schanzenbach & Michael R. Strain, *Act Now to Save the 2020 Census*, Bloomberg Opinion (Aug. 11, 2017), <https://bloom.bg/2vUz64R> (“If you walk into a Target store in suburban Florida, the items on the shelves are different from what is in a Target store in downtown Washington D.C. Target makes these decisions in large part using government data.”). As the Association of National Advertisers has explained, “[m]arketing decisions/investments are often made based on population counts,” and inaccurate data would affect the data that businesses “rely on to quantify the marketplace, and thereby undersize the business opportunity.” Ass’n of Nat’l Advertisers, *ANA Members Oppose Addition of Citizenship Question for 2020 Census 2* (June 12, 2018), <https://perma.cc/N9NR-9LED> (quotation marks omitted).

Accurate Census data is also important to the way the federal government allocates federal funding. For example, under the New Market Tax Credit (“NMTC”)—a federal program designed to stimulate



investment in distressed communities—a business investment may qualify for special tax treatment if it occurs in an area with certain concentrations of low- or moderate-income households. See Cmty. Dev. Fin. Insts. Fund, *New Markets Tax Credit Program*, <https://bit.ly/1H54VZx>; Robert Shapiro, *The 2020 Census May Be Wildly Inaccurate—And It Matters More than You Think*, Brookings Inst. (Aug. 31, 2017), <https://perma.cc/6T77-KJFU>. An NMTC-eligible investment must be located in a designated “low-income community,” defined by U.S. Census data as a Census tract with a poverty rate of at least 20 percent or with a median family income that does not exceed 80 percent of the statewide median family income. 26 U.S.C. § 45D(e). Or a nonprofit organization, such as a rural health clinic, may use Census data for a special federal designation based on location and population served. See National Research Council, *Modernizing the U.S. Census* 298 (1995). Businesses rely on Census data to know whether they will be entitled to federal support, and inaccurate Census data risks depriving businesses of that needed support.

More broadly, the federal government relies on Census data to allocate and distribute federal funding—to the tune of about \$700 billion each year. For example, in 2015, the federal government used Census data to distribute over \$675 billion in federal funding to a variety of programs. See Marisa Hotchkiss & Jessica Phelan, *Uses of Census Bureau Data in Federal Funds Distribution: A New Design for the 21st Century*, U.S. Census Bureau 3 (Sept. 2017), <https://bit.ly/3fX2gmJ>; see also *Wisconsin*, 517 U.S. at 5–6 (“Today, census data also have important conse-

quences not delineated in the Constitution: The Federal Government considers census data in dispensing funds through federal programs to the States . . . .”). Those billions of dollars were funneled through 132 different programs, ranging from subsidies for school lunches to historic preservation. *See* Hotchkiss & Phelan, *supra*, at 16–20. Other than potentially rendering the broader Census data inaccurate, it is unclear whether the Presidential Memorandum contemplates excluding undocumented immigrants from Census tabulations used for federal funding purposes. *See* Br. for the Appellants 29 (indicating the Presidential Memorandum will “*remove* people from ‘the census’ who were improperly included in questionnaire responses”).

The importance of conducting an accurate Census will only increase as companies continue to rely on data-driven analytics to provide products and services that meet customers’ specific needs and wants. While businesses in the past adopted a more product-oriented approach—focusing on designing products they believed customers would want—businesses now operate on a more customer-oriented basis, seeking to understand customers’ needs before they invest resources into design and implementation. *See* Chris Rygielski et al., *Data Mining Techniques for Customer Relationship Management*, 24 *Tech. in Soc’y* 483, 484 (2002). The value of accurate and complete data is heightened by the need for businesses to respond quickly to changing market conditions and preferences. *See* Syed Riaz Ahmed, *Applications of Data Mining in Retail Business, Proceedings of the Int’l Conference on Info. Tech.: Coding and Computing 2* (2004). Companies seeking to gain a competitive edge over their competitors therefore rely on their ability

“to better manage the knowledge regarding the critical elements of their environment.” John H. Heinrichs & Jeen-Su Lim, *Integrating Web-Based Data Mining Tools with Business Models for Knowledge Management*, 35 *Decision Support Sys.* 103, 105 (2003). Census data has been, and will continue to be, integral to this modern focus, rendering an accurate Census imperative to business growth and innovation. See AJ Agrawal, *Why Data Is Important for Companies and Why Innovation Is on the Way*, Inc. (Mar. 24, 2016), <https://bit.ly/2qY77iM>.

In short, the Census is an important part of how businesses conduct their operations. Actions that sacrifice the accuracy, reliability, or efficiency of the Census in favor of political goals undermine businesses’ confidence in the important data the Census provides. And such actions, like the Presidential Memorandum at issue in this case, have spillover effects into numerous other areas. The Census is a national institution of crucial importance, and should be carried out as the Constitution requires with the primary intent of obtaining full and accurate information about the population and demographics of the United States.

**CONCLUSION**

For the foregoing reasons, *amici curiae* respectfully request the Court affirm the district court's judgment.

Respectfully submitted.

ALEXANDER H. SOUTHWELL

LEE R. CRAIN

RANDI KIRA BROWN

GIBSON, DUNN & CRUTCHER LLP

200 Park Avenue

New York, NY 10166

STUART F. DELERY

*Counsel of Record*

JOSHUA M. WESNESKI

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 887-3650

sdelery@gibsondunn.com

*Counsel for Amici Curiae*

November 16, 2020