No. 20-366

IN THE
Supreme Court of the United States

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

v.

NEW YORK, *ET AL.*, *Appellees*.

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

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Appellants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). The Presidential Coalition, LLC is an IRC section 527 political organization. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

These same *amici* filed an *amicus* brief in support of the Jurisdictional Statement in this case on October 2, 2020. Citizens United and Citizens United Foundation also filed an *amicus* brief in this Court on March 6, 2019 in Department of Commerce, *et al.* v. New York, *et al.*, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019). A component of Citizens United, National Citizens Legal Network, filed an *amicus* brief in this Court on November 3, 1998, in Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999).

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[1] It is hereby certified that counsel for Petitioners and Respondents have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

COURSE OF PROCEEDING

On September 22, 2020, the United States filed its Jurisdictional Statement, seeking this Court's review of the decision of a three-judge district court in the Southern District of New York. There followed motions practice concerning Appellant's request for expedited consideration. The Government Appellees filed a Motion to Affirm, and the Non-Governmental Appellees filed a Motion to Dismiss or Affirm, in opposition to the Jurisdictional Statement on October 7. On October 13, the United States filed its Reply Brief. On October 16, this Court postponed consideration of the question of jurisdiction to consideration on the merits, establishing a briefing schedule and setting the case for argument on November 30, 2020.

The three-judge district court order, entered on September 10, 2020, now under review, granted summary judgment to an assemblage of Democrat-controlled state and local governmental units and pro-immigration nongovernmental Plaintiffs, as well as granting declaratory relief on their statutory claims. New York v. Trump, 2020 U.S. Dist. LEXIS 165827 at *130 (Sept. 10, 2020) (hereinafter New York). Additionally, the court granted a permanent injunction prohibiting all federal government Defendants, except the President of the United States, from implementing President Trump's Memorandum of July 21, 2020, which directed he would be provided the data necessary to ensure the nation's Decennial Census could be employed to exclude illegal aliens in the

reapportionment of the House of Representatives. *Id.* at *129.

In his July 21, 2020 Memorandum, President Trump declared:

> For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act ... to the maximum extent feasible and consistent with the discretion delegated to the executive branch. [Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, Section 2 (July 21, 2020).]

In that Memorandum, President Trump then explained the reasons for that policy:

> Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional

> representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. [*Id.*]

Lastly, President Trump directed the Secretary of Commerce to provide him with information permitting him to exercise his discretion to implement that policy. *See* Memorandum, Section 3.

SUMMARY OF ARGUMENT

The Motion to Affirm filed by the State of New York and the other Government Appellees reveals the weakness of their position. Their Motion to Affirm raised several arguments which now will be considered on the merits, but none of which are as helpful to their case as they view them. For example, Government Appellees heavy reliance on the language "whole number of persons" ignores the obvious contextual meaning of that phrase. *See* Section I, *infra*.

Neither the Constitution nor the Census Act prevent the President from implementing the policy declared in his July 21, 2020 Memorandum. The executive has been given sufficient discretion by Congress to exclude illegal aliens from the

apportionment base from the 2020 Census data. *See* Section II, *infra*.

The Government Appellees' obvious purpose is to increase their political power. The policy set out in the Presidential Memorandum is fully consistent with several constitutional and statutory provisions which are designed to protect our republic's political institutions from improper foreign influence. *See* Section III, *infra*.

If the *per curiam* opinion of the three-judge district court were left to stand, the federal judiciary not only would have usurped the President's role in conducting the nation's Decennial Census, but also directed that the composition of the House of Representatives be determined in a manner which violates Article I, Section 2, Clause 3, as modified by Section 2 of the Fourteenth Amendment. *See* Section IV, *infra*.

Accordingly, these *amici* urge this Court to reverse the decision of the district court, with instructions to dismiss the case.

ARGUMENT

I. THE MOTION TO AFFIRM FILED BY THE GOVERNMENT APPELLEES EXPOSES THE WEAKNESS OF THE DISTRICT COURT DECISION.

In opposing the Federal Government's Jurisdictional Statement, the Government Appellees described Appellants' challenge to their standing and

request for reversal as "baseless" and "meritless." They claim the Federal Government's defenses are a ruse to "avoid judicial review" of "an unprecedented and blatantly unlawful exclusion of undocumented immigrants." Motion to Affirm for Government Appellees ("Gov't Appellees Br.") at 11. As "baseless" appeals do not generally come before this Court, a claim that the other side has no argument whatsoever often signals a desire to divert attention from the weakness of that side's own legal arguments. Although following sections *infra* expand on most of these issues, this initial section focuses on exposing five flawed arguments made by the Government Appellees in their filing at the Jurisdictional Statement level that were offered in an effort to shore up the district court decision.

A. The "Whole Number" of Persons Argument.

The Government Appellees described the district court decision as determining that the exclusion of illegal aliens from the representation base violated "the statutory command to include 'the **whole number** of persons in each State' — *i.e.,* everyone who lives here — in calculating and transmitting apportionment figures to Congress. 2 U.S.C. § 2a(a)." Gov't Appellees Br. at 21 (emphasis added). The Government Appellees further contended that the Fourteenth Amendment contains a "requirement to apportion based on 'the **whole number** of persons in each State' ... to encompass all individuals who usually reside here for both the decennial enumeration of total population and the corresponding apportionment

base." *Id*. at 22 (citations omitted) (emphasis added). In truth, the use of the phrase the "**whole number** of persons in each state" in the Census Act and the Fourteenth Amendment provides no textual support for their position. The phrase "whole number" had its first use in Article I, Section 2, Clause 3, and understood in context, has an entirely different meaning from that which Government Appellees urge.

Article I, Section 2, Clause 3 (prior to ratification of the Fourteenth Amendment) included the following provision:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the **whole Number of free Persons**, including those bound to Service for a Term of Years, and excluding Indians not taxed, **three fifths of all other Persons**. [Emphasis added.]

When placed in proper context, it becomes clear that the phrase "whole Number" of free Persons had but one purpose — to establish the full weight given to "free Persons" (100 percent) as distinguished from the fractional weight given to "all other Persons" (60 percent or three-fifths). That phrase has nothing whatsoever to do with the proposition asserted by the Government Appellees — that the phrase means that the apportionment base must include "everyone who lives here," including persons who have no legal right to be here.

The Fourteenth Amendment, Section 2, also employed that same phrase, to amend and undo the provision in Article I giving different weight to different classes of persons:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the **whole number of persons in each State**, excluding Indians not taxed. [Emphasis added.]

Insofar as Section 2 of the Fourteenth Amendment was designed to modify Article I, Section 2, Clause 3, it is clear that the identical phrase in the Amendment is, again, wholly unrelated to the proposition for which it is asserted by Government Appellees.

Lastly, the Census Act also employs that phrase:

> On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, 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) (emphasis added).]

Essentially tracking the provisions in Article I and the Fourteenth Amendment, the Census Act provides no support for the proposition for which it is cited by the Government Appellees.

B. Legislative History.

Among the legal authorities on which the Government Appellees ask this Court to base its decision was a speech by a Senator in 1940 that "'every man, woman, and child within the confines of this Republic' was entitled to representation." Gov't Appellees Br. at 24. The Government Appellees assert that the Trump Memorandum "violates the plain text and purpose of both the Census Act and the Constitution," and their brief addresses "both sources of law together." *Id.* at 21-22. The Government Appellees speak of President Trump "improperly strip[ping] representation from ... undocumented immigrants" (*id.* at 28), when, under the Constitution, the persons who are represented in the People's House are the People of the United States — a term which does not include foreign nationals who have snuck across the border or overstayed their visas, generally not by some accident, but in flagrant violation of our nation's laws. *See* Section IV.D.

The Government Appellees also cite as authority a statement by Representative John Bingham that the "'*whole immigrant population* should be numbered with the people....'" *Id.* However, they do not state whether they also agree with Mr. Bingham's view that "every human being born within the jurisdiction of the United States of parents **not owing allegiance to any foreign sovereignty** is ... a natural born citizen." *The Congressional Globe* 1291 (1866) (emphasis added). Of course, if the Government Appellees embrace that view, they now would be required to remove Kamala Harris as a candidate for Vice

President of the United States from their state ballots, as both her parents were foreign nationals at the time of her birth. *See also* the Twelfth Amendment.

C. Department of Commerce v. New York (2019) — Standing.

The Government Appellees assert that the alleged harm to plaintiffs is not "'speculative,'" but rather can readily be seen by using "common sense." *Id*. at 12. The Government Appellees believe that they have shown harm because of what the district court termed the "predictable effect" of Appellants' actions. Although the Government Appellees do not provide a citation to that phrase in the decision below, it appears once on page 40 and twice on page 86, where, in all three instances, the district court relied on this Court's decision in Department of Commerce v. New York, 139 S.Ct. 2551, 2566 (2019). However, in the earlier case, this Court was addressing the plaintiff's contention that asking a question about citizenship status on the census form itself would decrease participation due to "fears that the Federal Government will itself break the law by using noncitizens' answers against them **for law enforcement purposes**." *Id*. (emphasis added). The Court then ruled:

> we are satisfied that, **in these circumstances**, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government

> keep individual answers confidential. [*Id.* (emphasis added).]

Thus, in that 2019 case, the threat postulated was deemed personal to the census responder — possible prosecution or deportation. Here, however, the Government Appellees can make no such argument. *See* Reply Brief for the Appellants at 2. In the current challenge, the Government Appellees have argued that an illegal alien who somehow learns about President Trump's Memorandum, and realizes that his response to the census might not be counted in allocating House seats — and possibly distributing money to the state in which he lived — would be more likely to refuse to participate. The effort by the Government Appellees to equate an illegal alien's concrete, personal, and individualized fear of being prosecuted, convicted, jailed, or deported, with an illegal alien's generalized concern about how the House is apportioned, a policy concern which he would share with many other persons, is absurd. Chief Justice John Roberts found standing in 2019 "in these circumstances." The circumstances in 2020 are completely inapposite, and the effort by the Government Appellees to rely on Chief Justice Roberts' language relating to an entirely different matter is completely unavailing.

D. **Department of Commerce v. U.S. House of Representatives (1999) — Ripeness.**

The Government Appellees reject out of hand the Federal Government's argument that a challenge to the allocation of seats in the House of Representatives should be brought only if and when any harm that the

Appellee states may suffer will be manifest rather than speculative. Gov't Appellees Br. at 18. In opposition to that argument, the Government Appellees assert that "[t]his Court and others have regularly considered challenges to census- or apportionment-related policies *before* the actual loss of political representation." *Id.* The only decision of this Court cited as authority for its assertion was Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999). However, as Justice Sandra Day O'Connor explained there, the plaintiffs based their challenge on a provision in the Census Act by which:

> any person aggrieved by the use of any statistical method in violation of the Constitution, or any provision of law ... in connection with the 2000 census ... to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action, obtain ... relief. [*Id.* at 328-29.]

Justice O'Connor explained that, by adding this provision to the Census Act to facilitate a court challenge, "Congress has eliminated any prudential concerns..." and also made clear that ripeness "is not challenged here." Thus, the only case from this Court cited by the Government Appellees to support judicial review at this time is not only readily distinguishable, but the proposition for which it is now cited was also never actually considered and ruled upon by this Court in 1999.

E. Franklin v. Massachusetts (1992).

The Government Appellees devoted an entire section of their brief in an effort to demonstrate that both "The Census Act and the Constitution Require Appellants to Produce Apportionment Figures Based Solely on the Census's Enumeration." Gov't Appellees Br. at 32. That section appears only three pages after the Government Appellees had just explained that in Franklin v. Massachusetts, 505 U.S. 788 (1992), this Court determined that the Census enumeration was insufficient and would need to be supplemented to **include** "overseas federal personnel" because they were "'usual residents of the United States.'" Gov't Appellees Br. at 29. If the approach urged here by the Government Appellees — which it claims requires that apportionment figures be "Based Solely on the Census's Enumeration" — had been followed by this Court in 1992, the Franklin decision would have required the Executive Branch to **exclude** "overseas federal personnel."

II. THE CONSTITUTION PROVIDES BROAD DISCRETION TO CONGRESS IN THE CONDUCT OF THE CENSUS, AND THE CENSUS ACT VESTS THAT DISCRETION IN THE EXECUTIVE.

The district court never reached the constitutional issues urged by appellees, ruling only that the President's Memorandum violated the Census Act. The court ruled: "The Presidential Memorandum deviates from, and thus violates ... statutory requirements [2 U.S.C. § 2a and 13 U.S.C. § 141]."

New York at *104. Purporting to base its decision on "the plain language of the statute" (*id*. at *110), the district court denied to President Trump the discretion which Congress has entrusted to all Presidents.

The Constitution requires that a decennial census be taken for the purpose of "apportion[ing] among the several States ... according to their respective Numbers," and vested in Congress the power to direct an "actual Enumeration" — counting "the whole number of persons in each State, excluding Indians not taxed." Art. I, Sec. 2, cl. 3 and Fourteenth Amendment, Sec. 2. The Constitution does not set out the details of that requirement, but rather provides that the census shall be conducted "in such Manner as they shall by Law direct." Art. I, Sec. 2, cl. 3. In turn, Congress set the policies and procedures for the conduct of each decennial census by statute in the Census Act.

The Government Appellees would have this court believe that in employing the phrase "whole number of persons in each State," the Constitution requires that the census and apportionment base must include every usual resident. The basic flaw in the Government Appellees' argument is their failure to address the context of the phrase "whole number," as discussed in Section I.A., *supra*. However, the constitutional text affords even more reasons to discard that interpretation. The constitutional text itself establishes two exceptions to the "whole persons" rule argued by Government Appellees. Both Article I and the Fourteenth Amendment exclude "Indians not taxed" from the supposed "whole number."

Additionally, the Fourteenth Amendment requires that representation for States which deny voting rights to eligible citizens be reduced from the supposed "whole number." *See* Fourteenth Amendment, Sec. 2.

Further, the Census Act authorizes the Secretary of Commerce to "'take a decennial census of population as of the first day of April of such year,' [requiring] 'the tabulation of total population by States.'" Department of Commerce v. U.S. House of Representatives at 321. Section 141 of Title 13 requires the Secretary of Commerce to take the decennial census "in such form and content as he may determine.... In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."

The Census Act, codified in Title 13, provides a few basic rules by which the Bureau of the Census operates, such as protection of confidentiality (§ 9), but otherwise vests great latitude in the executive, directing the Secretary to "prepare questionnaires, and [to] determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." 13 U.S.C. § 5.

After the Secretary conducts the census, the Secretary is required to report the "tabulation of total population by States" to the President of the United States within nine months of the April 1st census day, but the Act does not specify details for that report. 13 U.S.C. § 141(b).

The Reapportionment Act of 1929 directs the President to "transmit to the Congress a statement

showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under ... each subsequent decennial census of the population," as well as the apportionment of seats in the House of Representatives for the 50 States. 2 U.S.C. § 2a(a). Beyond the instruction to transmit a statement and the minimum contents required to be in that statement, this provision does not specify details or policies about the conduct of the census.

Under this broad grant of authority, the executive properly decided to count federal employees serving overseas. *See* Franklin v. Massachusetts, 505 U.S. 788 (1992). In Franklin, this Court explained that "§ 2a does not curtail the President's authority to direct the Secretary in **making policy judgments** that result in 'the decennial census.'" *Id.* at 799 (emphasis added).

The Census Bureau has developed the "usual residence" standard to determine who to count. *See* 83 *Fed. Reg.* 5525, 5533 (Feb. 8, 2018). Thus, certain foreign citizens who happen to be vacationing in the United States on census day are not counted. Similarly, other foreign diplomatic personnel are not included in the census. *See* Jurisdictional Statement at 27. Neither the Constitution nor the Census Act expressly establish the residence criteria — it was a discretionary decision about who should be counted as part of the census and who should not. However, these criteria by their very nature exclude from the census count those individuals who would otherwise be included by the district court's simplistic view.

Likewise, Congress in the past has looked into the feasibility of counting all overseas American citizens (beyond the overseas federal employees included in the 1990 census), and the Government Accountability Office ("GAO") concluded that "[t]he Constitution and federal statutes give the Bureau discretion over whether to count Americans overseas." *See* GAO Report GAO-04-1077T, "2010 Census: Counting Americans Overseas as Part of the Census Would Not Be Feasible" at 3.

Indeed, over 70 years ago, the Attorney General recognized the broad discretion provided to the executive to conduct the decennial census:

> The statutes governing the decennial censuses have uniformly left the actual administration of a great number of necessary details to the judgment and discretion of the Director of the Census. They charge the Director "to superintend and direct the taking of censuses of the United States."... They have vested in him broad discretion, with the approval of the Secretary of Commerce, as to the "number, form, and subdivision of the inquiries in the schedules used to take the census."... Innumerable problems not unlike the one here in question, which have not been dealt with in the statutes, obviously arise frequently in the taking of censuses. Decisions on such matters have, historically, been made by the Director of the Census, and the Congress has through the years acquiesced in this practice. [U.S. Attorney General Opinion, "Seventeenth

Decennial Census," 41 Op. Att'y Gen. 31 (Aug. 26, 1949).]

The district court recognized executive discretion for "policy judgments *that result in the 'decennial census*'" — but rejected any discretion to the President once he receives the Secretary's report. New York at *108-09. However, neither the census clauses nor any statute supports such a dichotomy. Congress could enact more detailed rules for the executive's duties regarding the census, but until it does so, the judiciary cannot impose such non-textual restrictions.

III. THE DECENNIAL CENSUS SHOULD NOT BE USED TO ALLOW FOREIGN NATIONALS TO INFLUENCE OUR NATIONAL GOVERNANCE.

The President's Memorandum now challenged had established that it is "the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status" under the INA. 85 *Fed. Reg.* at 44680. Accordingly, the President stated: "Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.*

Unlike this Court's holding last year in Department of Commerce v. New York, this policy is clear and direct, and not subject to a claim that there is any pretext about the purpose of the Presidential Memorandum. Nor is there any pretext about the Government Appellees' goals in this litigation. By

including illegal aliens in the apportionment base, the Appellees — which are primarily states and cities dominated by Democrat Party officeholders — seek to increase their representation in the House of Representatives and increase the number of electoral votes those states will have in future presidential elections.

Let's face it: their goal is partisan. That is the same goal that states such as New York, Illinois, and California are pursuing in adopting policies which encourage illegal immigration, thwart immigration enforcement, and establish sanctuary states and cities: to maintain, and then increase, political power.

The Presidential Memorandum explains the ultimate purpose of its directive: "Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines ... the principles of representative democracy." 85 *Fed. Reg.* 44680. "States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." *Id.* President Trump's Memorandum establishing the policy of the United States is not subject to judicial review and Article III judges may not substitute their own policy preferences for his.

Despite the effort by the Government Appellees to make this policy seem new and strange, the Trump Policy is not an outlier — it is fully consistent with federal government policies that have been expressed repeatedly, to protect our nation's decision making from foreign influence. It is part of a longstanding, distinctly "America First" agenda, which the People reaffirmed when they elected President Trump. That policy gives primacy to the interests of the American people over the interests of foreign nationals.

Moreover, it is fully consistent with two provisions in the U.S. Constitution which are specifically designed to protect the nation against foreign influence. First, the foreign emoluments clause prohibits any "Person holding any Office of Profit or Trust" in the United States from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" without congressional consent. Art. I, Sec. 9, cl. 8. Second, the Constitution requires that the President and Vice President be "a natural born Citizen" in order to reduce the ability of "foreign powers to gain an improper ascendant in our councils." Federalist No. 68.

And it is fully consistent with steps taken by Congress in the Federal Election Campaign Act of 1971 to reduce foreign influence, such as by prohibiting foreign nationals from participating in elections in the United States. Section 30121 of Title 52 prohibits foreign nationals from directly or indirectly making a contribution or donation to a federal, state, or local election or to a political party or

from making any expenditure, independent expenditure, or electioneering communication. *See* 52 U.S.C. § 30121(a).

Additionally, the Foreign Agents Registration Act of 1938 requires an agent of a foreign principal who engages in political activities in the United States or who represents foreign interests before any federal agency or official to register and report to the Department of Justice. *See* 22 U.S.C. §§ 611, *et seq*. The obvious purpose of this law is to provide transparency to the American electorate of which foreign actors are engaging in activities within the United States that can affect the United States.

Federal law also prohibits any alien from voting in federal elections except under limited circumstances. *See* 18 U.S.C. § 611(a). Even lead Appellee State of New York makes voter registration open only to those who are citizens of the United States (*see* N.Y. Elec. Law § 5-102(1)) and makes it crime for someone ineligible to vote (*see* N.Y. Elec. Law § 17-132).

Alexander Hamilton, noting the deficiencies of the Articles of Confederation, explained, "[o]ne of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption." Federalist No. 22. Foreign nationals — which illegal aliens by definition are — do not deserve additional representation in Congress. And States which provide havens for illegal aliens and adopt "policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws" should be thwarted in their efforts

to use foreign nationals to increase their political power in the federal system.

The Reapportionment Act established a fixed number of seats in the House of Representatives. So if a state retains or gains congressional seats due to the presence of illegal aliens in that state, others lose seats. It is a zero-sum game. A state that does not have policies which encourage illegal immigration could lose one or more seats to the pro-illegal immigration states, thus depriving lawful residents of political power to which they are entitled. The Government Appellees are not acting to defend seats in the House that are rightly theirs; they are demanding to be given House seats that belong to other states.

IV. THE THREE-JUDGE DISTRICT COURT ERRONEOUSLY ASSUMED THAT THE DECENNIAL CENSUS IS REQUIRED TO COUNT ILLEGAL ALIENS.

A. The Three-Judge Court Supported Its Decision Not from the Constitution, but on a Practice that Developed under Different Circumstances and by Different Administrations.

The district court opened its decision first by reciting, without analysis, the text of Article I, Section 2, Clause 3, and 2 U.S.C. § 2a(a) — and then by assuming that both the constitutional provision and the statute require counting illegal aliens, because that is how it has been done in the past:

> Throughout the Nation's history, the figures used to determine the apportionment of Congress — in the language of the current statutes, the "total population" and the "whole number of persons" in each State — have included every person residing in the United States at the time of the census, whether citizen or non-citizen and **whether living here with legal status or without**. [New York at *10 (emphasis added).]

The record does not appear sufficient for the district court to make such findings, but even if true, the court, focusing on practice, diverted attention away from the central legal issues: What does the Constitution require, and what authority does the Census Act[2] confer upon the President? The court erroneously believed that the role of the President was ministerial only, giving him no discretion to provide a definition as to which persons should be considered "inhabitants." New York at *100-01. Note should be taken of the very different circumstances that existed when the "long-standing practice" relied on by the district court developed. New York at *10.

The Pew Research Center, whose statistics are often relied on by pro-immigrant groups, reports that the number of what they term "unauthorized immigrants" was quite small compared to the population, and thus not consequential in apportioning the House, until quite recently. For example, Pew

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[2] The Census Act was most recently amended in 90 *Stat*. 2459 (Oct. 17, 1976) and is codified in Title 13 of the U.S. Code.

reports there were a relatively modest 3.5 million "unauthorized immigrants" in 1990. That number exploded to 8.6 million in 2000, and grew even further to 11.4 million in 2010.[3] (Another immigration source estimated that as of last year, there were 14.3 million illegal aliens residing in the United States — more than four times the number estimated in 1990.[4]) Thus, the existence of a "long-standing practice" of Presidents not addressing a problem that then was *de minimis* provides no support for continuing that same practice when the problem has become serious. As the population of illegal aliens increased dramatically, and because that population is not spread evenly over the nation, its inclusion in the base population for the 2020 apportionment presents a significant threat of distorting legislative power as reflected in the distribution of House seats among the states.

A political factor is also at work. When the number of illegal aliens first swelled in 2000, that census was conducted by the Clinton Administration, and the 2010 census was conducted by the Obama Administration. It is not speculation to conclude that neither of these Democrat Administrations had the motivation to exclude illegal aliens from the House apportionment as a strategic matter, as that would grant additional House seats to states controlled by Democrats, because the illegal alien population is

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[3] *See* A. Budiman, *et al.*, "Facts on U.S. immigrants, 2018," Pew Research Center (Aug. 20, 2020).

[4] *See* M. O'Brien, *et al.*, "How Many Illegal Aliens Live in the United States?," FAIR (Sept. 2019).

concentrated in a handful of states such as New York and Illinois — both plaintiffs in this litigation, and both dominated by Democrats.

Lastly, the district court selectively focused on only one aspect of past practice, ignoring other aspects of that practice. President Trump's Memorandum described the treatment of other categories of aliens in the United States: "[A]liens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are 'persons' [but they] have been excluded from the apportionment base in past censuses." Memorandum of July 21, 2020, Section 1. As to this practice, the district court never even tried to explain why under its decision foreign nationals in the United States **illegally** should be counted, while foreign nationals **lawfully** in the United States are not.

B. The Purpose of the Decennial Census.

Constrained both by (i) the purpose that representation of the States in the House of Representatives be proportionate to the populations of each State, and (ii) the requirement to determine the numbers of persons State by State, the decennial census was not designed to count willy-nilly "every person residing in the United States at the time of the census" as the district court assumes to be the practice. New York at *10. Rather, the constitutional text contemplates a count of the number of persons who constitute the "population" of each State. The district court's position disregards the central purpose of the decennial census, namely, to ensure that

membership in the House of Representatives is based upon the principle of popular sovereignty that its members from each State would truly be "chosen every second Year by the **People** of the several States." *See* Art. I, Sec. 2, cl. 1 (emphasis added).

James Madison aptly concluded in Federalist 52:

> As it is essential to liberty, that the government in general should have a **common interest** with the **people**; so it is particularly essential, that the branch ... should have an immediate dependence on, and an intimate sympathy with, the **people**. [The Federalist, No. 52, p. 273 (G. Carey & J. McClellan, eds.: Liberty Press 2001) (emphasis added).]

Madison's "common interest" test would not include those foreign nationals unlawfully in the country.

C. The "Persons" of the Decennial Census.

The use of the word "persons" in the Fourteenth Amendment does not support opening the floodgates to illegal aliens. Employed in the context of the constitutionally prescribed decennial census, "person" should be understood contextually — not abstractly as denoting just any human being, but relationally, with respect to the government as an "inhabitant" or "constituent." "Inhabitant" connotes a person who "dwells or resides permanently in a place,"[5] in contrast

[5] Webster's Dictionary of 1828.

with one who is an occasional lodger or visitor. Surely the decennial census should not be counting a foreigner who is on a tourist visa who just happened to be on American soil on April 1, 2020. Likewise, an illegal alien who could be deported at any time should not be counted. *See* discussion of the more than 3.2 million aliens either in custody or likely in the process of being deported as identified by the government, Jurisdictional Statement at 29 n.4. The decennial census is designed to number "constituents," denoting that those persons who are an essential part of the political community. The district court envisions a census counting the lawful permanent resident and the trespasser alike — each to be counted as one of the population of his respective State and therefore, each to be counted in the apportionment of members of the House of Representatives for the next 10 years. This is not the kind of decennial census contemplated by the nation's founders. *See* J. Madison, Census Bill, House of Representatives, Jan. 25-26, Feb. 2, 1790, reprinted in 2 The Founder's Constitution; item 19, p. 139, P. Kurland & R. Lerner (Univ. Chi. 1987).

D. The "People" in the Decennial Census.

Indeed, the language in the Fourteenth Amendment cannot be viewed in isolation, but must be viewed in the context of the original constitutional text to determine if a substantive change was intended by that Amendment's use of the word "persons." Immediately after vesting "[a]ll legislative Powers ... in a Congress," the Constitution of 1789 establishes that:

> The House of Representatives shall be composed of Members **chosen** every second Year **by the People** of the several States.... [Art. I, Sec. 2, cl. 1 (emphasis added).]

As Chief Justice William Rehnquist explained in 1990:

> **"[T]he people"** seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "**the People** of the United States." The Second Amendment protects "the right of **the People** to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "**the people**." See also U.S. Const., Amdt. 1 ("Congress shall make no law ... abridging ... *the right of* ***the people*** peaceably to assemble") (emphasis added).... [United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (bold emphasis added).]

Then, turning to the composition of the House, the Chief Justice addressed Article I, Section 2, clause 1, again italicizing the key words: "'The House of Representatives shall be composed of Members chosen every second year *by* ***the People*** *of the several States*' (emphasis added)." *Id.* (bold emphasis added). Based on all this, Chief Justice Rehnquist concluded:

> While this textual exegesis is by no means conclusive, it suggests that "**the people**" ...

> refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. [*Id*. (emphasis added).]

And to clarify who would not be part of that community, the Chief Justice cited United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 292 (1904), for the proposition that:

> (Excludable alien is not entitled to First Amendment rights, because "he does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of [the First, Second, Ninth, and Tenth] Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments.... [Verdugo-Urquidez at 265-266.]

The Fourteenth Amendment did not denigrate the concept of citizenship, but rather was designed to clarify entitlement to national and state citizenship of the former slave class. It would be a serious mistake to assume that, solely based on the single use of the word "persons," Congress and the ratifying states intended to apportion House seats by a count of all persons, rather than a count of "the People." Indeed, even following the ratification of the Fourteenth Amendment, the 1870 census asked about the citizenship of each respondent, as well as whether the respondent's parents were foreign born, and also

inquired whether the respondent was a male citizen of the United States 21 years old and older "whose right to vote is denied or abridged on other grounds than rebellion or other crime." The Census of 1870, Question 20.

CONCLUSION

For the reasons set out above, these *amici* urge this Court to reverse the September 10, 2020 decision of the three-judge court, ordering the district court to dismiss the case.

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