

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 LOCAL GOVERNMENTS AS
AMICI CURIAE IN SUPPORT OF APPELLEES**

—◆—
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INTEREST OF AMICI CURIAE

Amici are diverse local jurisdictions that collectively represent several million residents.¹ For at least a decade, amici’s communities will be profoundly affected if the President’s Memorandum directing the categorical exclusion of all undocumented immigrants² from the apportionment base is implemented. Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020) (hereinafter the “Memorandum”).

The Memorandum is purportedly premised on the President’s determination that undocumented immigrants are not “inhabitants” of a state entitled to be counted for purposes of determining representation. *See, e.g.*, Appellants’ Br. at 12. Not only is this inconsistent with constitutional and statutory language and history, but as amici’s experience demonstrates, undocumented immigrants are inhabitants of amici’s jurisdictions under any definition of the word.

¹ The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

² Throughout the brief, amici use the term “undocumented immigrants” or “undocumented individuals” to refer to immigrants who are not in a lawful immigration status. This includes individuals who entered the United States without authorization as well as those who legally immigrated to the United States but have since lost their lawful immigration status.

Undocumented immigrants are longstanding residents of amici's communities, with enduring familial, economic, and cultural ties. And just like other residents of amici's jurisdictions, undocumented residents participate fully in many aspects of community life: they attend locally run public schools, use government healthcare facilities, are an indispensable part of local labor forces, and pay taxes to local, state, and federal governments.

The Memorandum's claim that undocumented residents may be excluded from the apportionment base is therefore fundamentally divorced from the undeniable lived reality in amici's jurisdictions that undocumented individuals meaningfully and substantially inhabit amici's communities. The Memorandum would deprive all of amici's residents—not just undocumented individuals—of full and equitable representation. Many amici are localities in states that are home to significant numbers of undocumented residents, and thus may be deprived of congressional seats to which they would otherwise be entitled under the Memorandum. As the Memorandum itself appears to acknowledge, California—where amici the Counties of Santa Clara and Alameda, the Cities of Oakland, Alameda, Santa Cruz, and Santa Monica, and the Los Angeles Unified School District (“LAUSD”) are located—is home to approximately 2.2 million undocumented residents and stands to lose one or more congressional seats if these residents are excluded. Similarly, Texas, which is where amici Travis County, Dallas County, and Cameron County are located, is home to an

estimated 1.6 million undocumented immigrants and “will almost certainly . . . lose a seat in Congress” under the Memorandum. *New York v. Trump*, ___ F. Supp. 3d ___, 2020 WL 5422959, at *11 (S.D.N.Y. Sept. 10, 2020).³ Illinois, home to nearly 500,000 undocumented immigrants, could also lose a seat. *Id.*⁴

Moreover, amici’s communities represent a significant population of undocumented residents within these states. For example, approximately seven percent of the 1.9 million people living in Santa Clara County are undocumented, and the greater Sacramento metro area is home to an estimated 60,000 undocumented immigrants.⁵ Alameda County, which includes the Cities of Oakland and Alameda, is home to roughly 109,000 undocumented immigrants.⁶ The Los Angeles metro area, significant parts of which are served by LAUSD, has more than 900,000 undocumented immigrants—the second-largest undocumented population in the country, and the largest in California.⁷ Cook County is home to more than 300,000 undocumented immigrants, and Dallas County has an

³ See also Migration Policy Institute, *Unauthorized Immigrant Population Profiles* (last visited Nov. 9, 2020), <https://perma.cc/K457-P823>.

⁴ *Id.*

⁵ *Id.*; Pew Research Center, *Estimates of U.S. unauthorized immigrant population, by metro area, 2016 and 2007* (Mar. 11, 2019), <https://perma.cc/9MX4-3BBA>.

⁶ Migration Policy Institute, *Unauthorized Immigrant Population Profiles*, *supra*.

⁷ Pew Research Center, *Estimates of U.S. unauthorized immigrant population, by metro area, 2016 and 2007*, *supra*.

undocumented population of about 247,000.⁸ With high concentrations of community members who will be omitted from the apportionment base under the Memorandum, amici have a particular interest in the legality of the Memorandum and would suffer particular harm if it is allowed to go into effect.

Amici are: the County of Santa Clara, Calif., the County of Alameda, Calif., the City of Sacramento, Calif., the City of Alameda, Calif., the City of Oakland, Calif., the City of Santa Cruz, Calif., the City of Santa Monica, Calif., the Los Angeles Unified School District, Cook County, Ill., the County of Dallas, Tex., the County of Cameron, Tex., and the County of Travis, Tex.

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SUMMARY OF ARGUMENT

Since its founding, the United States has counted *all* persons residing in a state when allocating congressional representation among the states. This reflects the policy decision made by the Framers of the United States Constitution—and revisited and reaffirmed by the drafters of the Fourteenth Amendment—that all members of a community, regardless of immigration status, are entitled to representation and have a stake in legislation that affects their daily lives.

⁸ Migration Policy Institute, *Unauthorized Immigrant Population Profiles*, *supra*.

The Memorandum’s attempt to remove undocumented immigrants from the population count—based on the premise that they are not “inhabitants”—is a radical deviation from two centuries of settled law and policy. And it is blind to the reality, reflected in amici’s jurisdictions and communities across the country, that undocumented individuals, like all residents, are integral members of the community. Many have spent much of their lives in this country and have U.S. citizen or legal permanent resident family members. They make invaluable economic contributions to communities nationwide and perform critical jobs that help keep everyone safe and healthy—including as essential workers on the front lines of the COVID-19 pandemic and as members of the U.S. military. Just like other community members, they attend local schools, are treated in local hospitals, are part of the local labor force, and pay taxes in the communities in which they live.

The Memorandum claims that undocumented individuals can be erased from the population upon which this country’s representative democracy is formed. Yet the fact remains that these people have always been, and will continue to be, important parts of amici’s communities. And while they cannot vote, they are no less constituents of the congressmembers elected to represent these communities. Voters and non-voters alike—including people who are undocumented—have an important stake in critical policy debates that affect daily life in amici’s communities, including on public health and healthcare policy,

education, and workers' rights. In this respect, the Memorandum's attempt to artificially deflate the population for purposes of allocation of congressional representatives will harm everyone in amici's communities and states. Because the Memorandum would allocate representatives based on a calculation that does not reflect the true constituency of these states, federal representatives in states like amici's will have to be responsive to a significantly larger number of people than representatives in other parts of the country. This will result in inequitable and ineffective representation, as representatives in amici's states will have less time and resources to devote to addressing the needs of each of their constituents—native born and immigrant alike—compared to representatives in other states.

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ARGUMENT

By purporting to exclude undocumented individuals from the apportionment base, the Memorandum violates the fundamental policy of representation based on total population articulated by the Framers and by subsequent Congresses; is untethered from the reality that undocumented immigrants are “inhabitants” in every sense of the word, often with enduring ties to amici's communities; and undermines representational equality nationwide.

I. Since the Founding, All Persons Whose Usual Abode is in a State Have Been Counted for Purposes of Apportionment.

The constitutional and statutory underpinnings of congressional apportionment uniformly reflect a policy decision, originally made by the Framers of the Constitution and consistently reaffirmed since, that representation should include *all* persons whose usual abode or usual residence is in a state, regardless of their immigration status, age, or eligibility to vote.

The Enumeration Clause of the United States Constitution, drafted in 1787, requires that representation in Congress be apportioned among the states based on the number of “persons” in each state, including those bound to terms of service and three fifths of all enslaved people, but excluding Indians not taxed. U.S. Const. art. I, § 2, cl. 3. Appellants do not appear to dispute that undocumented individuals are “persons,” but instead rely on the term “inhabitants”—which was used in an earlier draft of the clause but does not appear anywhere in the ratified text—to justify the Memorandum’s policy of excluding individuals without lawful immigration status.

Appellants’ linguistic gymnastics are irrelevant. Even if one were to rely on the use of “inhabitants” in the draft language rather than the ratified text of the Enumeration Clause, the Framers’ intent is clear: the only prerequisite for being counted for purposes of apportionment is usual residence in a community. For example, a contemporary dictionary defined “inhabitant”

simply as “[a] dweller; one that resides in a place.” John Ash, *The New and Complete Dictionary of the English Language*, Vol. 1, 1775. And in the debates of the Constitutional Convention, the Framers endorsed the principle that “every individual of the community at large” is entitled to be counted for purposes of representation, regardless of their ability to vote. 1 *Records of the Federal Convention of 1787* at 473 (M. Farrand ed. 1911) (hereinafter “Farrand”) (notes of Rep. Robert Yates describing speech by Alexander Hamilton); see also *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (noting that the Framers settled on the principle of “equal representation for equal numbers of people”); *Federation for American Immigration Reform (“FAIR”) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (“The Framers must have been aware that this choice of words would include women, children, bound servants, convicts, the insane and aliens. . . .”). Indeed, the Census Act of 1790—passed by the first Congress, which included several Framers—required the enumeration of everyone whose “usual place of abode” is, or who “usually resides,” in the United States. See *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992) (describing “usual residence” in the first Census Act as the “gloss” given to the Enumeration Clause).

The Framers’ concept of representation—i.e., that everyone usually residing in a community must be counted—was revisited less than a century later, after the Civil War. In the debates over the Fourteenth Amendment, Congress considered proposals to limit the apportionment base to voters. See *Evenwel v.*

Abbott, ___ U.S. ___, 136 S. Ct. 1120, 1128 (2016). In rejecting these proposals, both houses of Congress extensively debated the issue of whether to count foreigners not naturalized, and specifically considered the prospect that some states would gain additional representation based on their proportionately larger populations of immigrants. *See City of San Jose v. Trump*, ___ F. Supp. 3d ___, 2020 WL 6253433, at *3-4 (N.D. Cal. Oct. 22, 2020) (reviewing the debates over the Fourteenth Amendment); *FAIR*, 386 F. Supp. at 576 (noting that proposals to limit the apportionment base to voters were rejected in part because they would dilute representation in Congress for certain states with large populations of immigrants).⁹

⁹ *See also, e.g.*, Cong. Globe 39th Cong., 1st Sess. 359 (Jan. 22, 1866) (statement of Rep. Conkling) (“Many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States are to pass upon the amendment. It must be acceptable to them.”); *id.* at 432 (Jan. 25, 1866) (statement of Rep. Bingham) (opposing a provision that would base representation on male citizens over 21 because it would “strike from the basis of representation the entire immigrant population not naturalized,” which was disproportionately present in the northern states); *id.* at 705 (Feb. 7, 1866) (statement of Sen. Fessenden) (discussing concern of western states with “a large number of foreigners” that limiting the basis of apportionment to citizens would result in those states having “no benefit of political power in the legislation of the country arising from the number of those foreigners who make a portion of their population”); *id.* at 2986 (June 6, 1866) (statement of Sen. Sherman) (providing as example of why representation should be based on voters: “There is no reason why, because in the city of New York there is a very large element of unnaturalized foreigners, a voter in the city of New York should have more political power than a voter anywhere else.”).

Ultimately, the drafters of the Fourteenth Amendment reaffirmed that representation would be based on the number of “persons” in each State, not voters. U.S. Const. amend. XIV, § 2. This reflected a recognition that “women, children, and other non-voting classes”—including immigrants and foreigners not naturalized—all “have as vital an interest in the legislation of the country as those who actually deposit the ballot.” Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James G. Blaine); *id.* at 1256 (statement of Sen. Henry Wilson) (noting that the Fourteenth Amendment “cannot throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women.”); *see also FAIR*, 486 F. Supp. at 567 (concluding that “Congress was aware of the all-inclusive scope of the language it was adopting” in the Fourteenth Amendment). The simple fact that an individual resided in the community—not his or her immigration status—was the relevant inquiry for purposes of enumeration and apportionment.

Even after Congress began regulating immigration in 1875, it reaffirmed that immigrants—regardless of lawful status—were entitled to be counted for purposes of representation. Of greatest relevance here, in enacting the Reapportionment Act of 1929, Congress debated multiple proposals to specifically exclude unlawfully present immigrants from the apportionment base, a population that may have numbered between 3-4 million people. *See City of San Jose*, 2020 WL 6253433, at *5-6 (discussing the debates over the Reapportionment Act, including on whether to count

those “‘who enjoy no legal status [and] are subject to deportation if the Government could find them’” (citation omitted)). But the Senate Legislative Counsel and several members of Congress understood that the Fourteenth Amendment required counting all persons, and that excluding undocumented immigrants from apportionment would therefore be unconstitutional. *Id.* at *5. As such, the Reapportionment Act, as enacted, hewed to the language of the Fourteenth Amendment: it requires that the President 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).¹⁰

In the years since the Reapportionment Act, Congress has on numerous occasions debated the exclusion of undocumented immigrants from the apportionment base. Each such proposal has been rejected. *City of San Jose*, 2020 WL 62534333, at *7. Further, in more than two centuries of administering the decennial census, the Executive Branch has never attempted to exclude immigrants residing in a community from the apportionment count, and indeed, has repeatedly taken the view that the constitution requires that undocumented immigrants usually residing in a state be included in the apportionment base. *Id.* at *7-8. This settled historical practice further confirms that the Enumeration

¹⁰ Regardless of whether the congressional debate over the Reapportionment Act provides persuasive authority on the meaning of the Fourteenth Amendment, these debates clearly establish that the Reapportionment Act itself was intended to include undocumented immigrants in the population count.

Clause and Fourteenth Amendment have never been understood to permit the exclusion of residents in a community purely based on their immigration status. See *Dep't of Commerce v. New York*, ___ U.S. ___, 139 S. Ct. 2551, 2567 (2019) (“[A]s in other areas, [judicial] interpretation of the Constitution is guided by a Government practice that has been open, widespread, and unchallenged since the early days of the Republic.”); *Wisconsin v. City of New York*, 517 U.S. 1, 21 (1996) (emphasizing “the importance of historical practice in” understanding the Enumeration Clause specifically).

Thus, while Appellants attempt to manufacture ambiguities in the term “inhabitants,” the through-line of constitutional and statutory language and history is pellucid: since the Founding, the population count for purposes of representation has always been construed to include all persons who usually reside in a community, regardless of their immigration status. The Memorandum, therefore, represents an unlawful and unprecedented rejection of the concept of representational democracy articulated by the Framers and repeatedly and without exception reaffirmed over the last two centuries.

II. Undocumented Immigrants Are Usual Residents With Substantial, Often Enduring Ties to Amici’s Communities.

Not only is the Memorandum’s exclusion of undocumented immigrants anathema to the plain language and intent of the relevant constitutional and statutory

provisions, but it is also squarely at odds with the reality in amici’s jurisdictions and communities across this country. Contrary to Appellants’ portrayal, undocumented immigrants are neither a monolith nor a transient population without meaningful links to their communities. Appellants’ Br. at 38, 43. Rather, these individuals are often longstanding members of amici’s communities with deep familial, economic, and cultural ties.

A. Undocumented Immigrants Are Inhabitants of the Communities Where They Live.

As discussed in Part I, *supra*, since the founding, usual residence in a community has been the only prerequisite for individuals—other than Indians not taxed—to be counted in the apportionment base. Appellants contend that “residence within a jurisdiction” is not sufficient, but that there must also be “an intent to remain there indefinitely” in order to establish inhabitancy for purposes of the apportionment count. Appellants’ Br. at 34. But whether the Court accepts Appellants’ heightened standard for residency or not, undocumented immigrants clearly qualify as usual residents entitled to be counted.

Almost two-thirds of undocumented immigrants in the United States have lived here for 10 or more

years.¹¹ Reliable estimates indicate that ninety percent of undocumented immigrants in California, 89 percent of those in Illinois, and 84 percent in Texas, have been in the country for more than five years.¹² The same is true in amici's jurisdictions. For example, 80 percent of undocumented residents in Santa Clara County and 81 percent of the undocumented residents of Alameda County have resided in the country for five or more years.¹³ Similarly, 85 percent of undocumented residents in Cook County, Illinois, have lived in the United States for five or more years.¹⁴ And in neighborhoods in East Oakland, the median length of residency for the undocumented community is almost a decade.¹⁵

Indeed, many of the individuals the Memorandum would exclude have spent much of their lives in the

¹¹ Joseph Hayes and Laura Hill, *Undocumented Immigrants in California*, Public Policy Institute of California (Mar. 2017), <https://perma.cc/6JYB-8AP7>.

¹² Pew Research Center, *U.S. unauthorized immigrant population estimates by state, 2016* (Feb. 5, 2019), <https://perma.cc/E7NW-W9DE>.

¹³ Migration Policy Institute, *Profile of the Unauthorized Population: Santa Clara County, CA* (last visited Nov. 1, 2020), <https://perma.cc/7RCK-NEZ8>; Migration Policy Institute, *Profile of the Unauthorized Population: Alameda County, CA* (last visited Nov. 1, 2020), <https://perma.cc/S9B2-N4Y6>.

¹⁴ Migration Policy Institute, *Profile of the Unauthorized Population: Cook County, IL* (last visited Nov. 10, 2020), <https://perma.cc/XQ4N-74BM>.

¹⁵ Enrico A. Marcelli and Manuel Pastor, *Unauthorized and Uninsured: East Oakland and Alameda County*, San Diego State University and the University of Southern California at 3 (2015), <https://perma.cc/F9AT-33A8>.

United States. This includes individuals brought to the United States without lawful authorization as young children, who know no country but this one. The federal government has recognized that these individuals have an interest in remaining in the United States and has protected 800,000 of these individuals from deportation through the Deferred Action for Childhood Arrivals (“DACA”) program.¹⁶ Over 200,000 DACA recipients live in California, and over 106,000 live in Texas.¹⁷

Further, the Memorandum not only seeks to exclude those who entered without authorization, but also individuals who originally immigrated legally to the United States. This includes numerous green card holders who have resided in the country for many decades, but no longer have lawful status, often due to minor offenses committed years ago.¹⁸ Nor does the Memorandum acknowledge or account for the fact that immigration status is often fluid, not static: A person who has entered the country without authorization or lost lawful status may well obtain or regain lawful status, for example, if she is granted asylum, obtains

¹⁶ U.S. Citizenship & Immigration Services, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals 2012-2017* (last visited Nov. 1, 2020), <https://perma.cc/QK42-3S2N>.

¹⁷ Hayes and Hill, *supra*; American Immigration Council, *Immigrants in Texas* (Aug. 6, 2020), <https://perma.cc/D945-NVTF>.

¹⁸ See, e.g., Brittny Mejia, *It’s not just people in the U.S. illegally – ICE is nabbing lawful permanent residents too*, L.A. Times (June 28, 2018), <https://perma.cc/8NM4-PD3Z>; Manya Brachear Pashman, *Green card veteran facing deportation starts hunger strike*, Chicago Tribune (Feb. 1, 2018), <https://perma.cc/FP2L-K8QC>.

temporary protected status, qualifies for cancellation of removal, gains citizenship through military service, or marries a citizen or lawful permanent resident.

Appellants argue that even though undocumented individuals may reside in the community for years or decades, they are not usual residents and have no intent to remain in the country because they are subject to removal by the government. *See, e.g.*, Appellants' Br. at 38. Yet even aside from the fact that the 1929 Congress considered and rejected this view, the mere possibility that the federal government may at some future date initiate removal proceedings does not justify excluding undocumented immigrants from the current apportionment base. Military personnel in the United States, for example, are enumerated in the location of the military bases to which they are assigned, despite the fact that the government often relocates them to bases in other states, or to duty stations overseas, depending on the needs of the military. *See, e.g.*, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018) (conclusion of the Census Bureau that military personnel in the United States are enumerated at their residences on or off the base to which they are assigned); *see also* Craig A. Bond, et al., *Tour Lengths, Permanent Changes of Station, and Alternatives for Savings and Improved Stability*, at 1, 68 Rand Corporation (2016), <https://perma.cc/7RQX-72NR> (noting that the Department of Defense "moves about one-third of its military service-members each year" and calculating that the average time spent stationed in a particular location is 2.5 years for officers and 3.1 years for enlisted personnel).

Moreover, as a factual matter, the prospect of removal is slim for many undocumented immigrants. First, as discussed above, many hundreds of thousands of undocumented immigrants are currently protected by the DACA program. Second, numerous undocumented immigrants are not currently subject to removal proceedings, and, indeed, do not fall within the enforcement priorities identified by the Administration. *See* Enhancing Public Safety in the Interior of the United States § 5, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (identifying enforcement priorities). The Administration has not taken any action or indicated its intent to remove these individuals from the communities where they reside and often have deep and abiding ties, and it is unclear when, if at all, they might be subject to removal.

B. Undocumented Immigrants Have Substantial Ties And Make Important Contributions to Amici's Communities.

Beyond their longstanding presence, undocumented immigrants are an inextricable part of community and economic life in amici's jurisdictions.

Undocumented immigrants have deep familial bonds to the United States and amici's communities. A significant portion of undocumented immigrants live in mixed-status households with U.S. citizen spouses or children. Nationally, 16.7 million people live in a mixed-status family with at least one undocumented

member.¹⁹ In California, 2 million U.S. born citizens—including 1.6 million children—live in a household with an undocumented family member, and nine in ten undocumented parents have a U.S. citizen child.²⁰ Similarly, 1.4 million Texans who are citizens live with at least one undocumented family member, and one in seven children in the state is a U.S. citizen with at least one undocumented family member.²¹

The numbers of mixed-status households are also significant in amici’s jurisdictions. For example, in Santa Clara County, one of every three undocumented persons lives in a household with a U.S. citizen child.²² In East Oakland, about 35 percent of children reside with at least one undocumented immigrant parent, and, of those children, 79 percent are U.S. citizens.²³ Large numbers of mixed-status households with U.S.

¹⁹ Sylvia Mathema, *State-by-State Estimates of the Family Members of Unauthorized Immigrants*, Center for American Progress (Mar. 16, 2017), <https://perma.cc/4D34-3TFU>; see also *id.* (noting that nearly 400,000 U.S. born and naturalized citizens in Illinois have at least one undocumented family member).

²⁰ *Id.*; Sara Kimberlin and Aureo Mesquita, *No Safety Net or Federal COVID-19 Relief: California’s Undocumented Workers and Mixed Status Families Are Locked Out of Support*, California Budget & Policy Center (Apr. 2020), <https://perma.cc/QZ6V-VQDD>.

²¹ American Immigration Council, *supra*.

²² Migration Policy Institute, *Profile of the Unauthorized Population: Santa Clara County*, *supra*.

²³ Marcelli and Pastor, *supra*.

citizen children similarly reside in Dallas County and Travis County.²⁴

The children of undocumented residents attend local schools alongside the children of other residents. More than 13 percent of school-age children in Texas, and more than 12 percent in California and roughly 8 percent in Illinois, have undocumented parents.²⁵ As amicus LAUSD has recognized, “all parents in Los Angeles have an equal stake in the important decisions made by” the LAUSD Board—regardless of parents’ or students’ immigration status.²⁶ As such, the LAUSD Board has voted to explore possible ballot measures to extend the right to vote in Board elections to all caregivers of children residing in LAUSD boundaries, regardless of immigration status.²⁷

Undocumented immigrants are also a vital part of the labor force in amici’s communities. Undocumented residents make up 9 percent of the workforce in California and 8 percent of workforce in Texas—and an

²⁴ Migration Policy Institute, *Profile of the Unauthorized Population: Dallas County, TX* (last visited Nov. 10, 2020), <https://perma.cc/9V4D-9M2T>; Migration Policy Institute, *Profile of the Unauthorized Population: Travis County, TX* (last visited Nov. 6, 2020), <https://perma.cc/P463-S7DW>.

²⁵ Hayes and Hill, *supra*; Pew Research Center, *U.S. unauthorized immigrant population estimates by state, 2016, supra*.

²⁶ *Expanding the Electorate to Raise the Voices of All Parents in the Los Angeles Unified School District*, Res. 001-19/20 (Gonez), Board of Education of the City of Los Angeles, Regular Meeting Order of Business at pp. 5-6 (Nov. 5, 2019), <https://perma.cc/5TN4-PBQA>.

²⁷ *Id.*

even higher share in several industries, like agriculture, food services, and construction.²⁸ In Santa Clara County, 74 percent of undocumented residents are part of the labor force, and 69 percent are employed.²⁹ For example, the County employs undocumented immigrants who are DACA recipients in critical roles, including as in-home care aides to provide assistance with activities of daily living to eligible aged, blind, and disabled individuals who would otherwise be unable to remain safely in their own homes. The County is also home to numerous Silicon Valley tech companies, many of which have similarly benefited from employing undocumented DACA recipients. *See, e.g.,* Amicus Br. of Tim Cook, Deirdre O'Brien and Apple, *Dep't of Homeland Security v. Regents of the Univ. of California*, Case Nos. 18-587, 18-588, 18-589 (2020) (noting that Apple has employed 443 DACA recipients). Labor force participation and employment numbers for undocumented immigrants are similarly high in other amici's jurisdictions.³⁰

²⁸ Hayes and Hill, *supra*; Kimberlin and Mesquita, *supra*; American Immigration Council, *supra*.

²⁹ Migration Policy Institute, *Profile of the Unauthorized Population: Santa Clara County*, *supra*.

³⁰ *See, e.g.,* Migration Policy Institute, *Profile of the Unauthorized Population: Alameda County*, *supra*; Migration Policy Institute, *Profile of the Unauthorized Population: Cook County*, *supra*; Migration Policy Institute, *Profile of the Unauthorized Population: Dallas County*, *supra*; Migration Policy Institute, *Profile of the Unauthorized Population: Travis County*, *supra*.

These individuals, therefore, are an integral and irreplaceable part of the economy in amici's jurisdictions. Undocumented residents contributed \$20 billion in federal taxes and \$11.8 billion in state and local taxes in 2018.³¹ They account for \$3 billion in taxes in California and \$1.6 billion in taxes in Texas.³² As an illustration, if undocumented residents were removed from the labor force—as the Memorandum seeks to remove them from the apportionment base—the resulting labor shortage would reduce private sector output by between \$381.5 billion and \$623.2 billion.³³ Similarly, removing undocumented residents as consumers would likely eliminate more than \$217 billion in spending.³⁴

Not only do undocumented workers contribute significantly to local economies, but they also work in areas critical to the safety, security, and health of our communities—including during the present COVID-19 pandemic. For example, DACA recipients who participate in Santa Clara County's New American Fellows Program were assigned to assist with the County's emergency response effort. Undocumented workers also play a vital role in industries that the federal

³¹ New American Economy, *Undocumented Immigrants* (last visited Nov. 8, 2020), <https://perma.cc/V9DA-A3XD>.

³² Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, National Immigration Forum (Sept. 6, 2018), <https://perma.cc/KU4C-D3HZ>; Kimberlin and Mesquita, *supra*; American Immigration Council, *supra*.

³³ Kosten, *supra*.

³⁴ New American Economy, *supra*.

government has deemed to be part of the “critical infrastructure,” the operation of which is “imperative during the response to the COVID-19 emergency for both public health and safety as well as community well-being.”³⁵ Studies estimate that approximately three out of four undocumented immigrants work in these critical infrastructure sectors.³⁶

For example, undocumented immigrants account for 12 percent of employees in essential healthcare operations that are vital to treating those affected by the virus.³⁷ They make up more than 45 percent of workers in the agriculture and food processing industries necessary to secure the nation’s food supply, at times risking exposure in work environments that have seen some of the highest concentrations of COVID-19.³⁸ Countless more undocumented employees ensure that grocery store shelves are stocked and provide disinfecting, cleaning, and other essential sanitation services

³⁵ Memorandum from Christopher C. Krebs, Director, Cybersecurity and Infrastructure Security Agency (CISA), *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 Response* (Mar. 28, 2020), <https://perma.cc/4ZFS-LYSM>.

³⁶ *Immigrants as Essential Workers During COVID-19*, Testimony of Tom Jawetz, Vice President for Immigration Policy at Center for American Progress, before the U.S. House Judiciary Subcommittee on Immigration and Citizenship (Sept. 28, 2020) (hereinafter “Jawetz”), <https://perma.cc/3W3N-7UBQ>; Don Kerwin, et al., *U.S. Foreign-Born Essential Workers by Status and State, and the Global Pandemic*, Center for Migration Studies (May 2020), <https://perma.cc/GSH9-TQB4>.

³⁷ Kerwin, et al., *supra*.

³⁸ Jawetz, *supra*; Kerwin, *supra*.

that are necessary for businesses to operate safely during the pandemic.³⁹

And beyond their vital role in addressing the COVID-19 pandemic, many of those who would be excluded under the Memorandum are immigrants who have demonstrated their allegiance to this country by serving in the military, including in wartime deployments in Vietnam, the Gulf War, Iraq, and Afghanistan.⁴⁰

Thus, the Memorandum's unsupported conclusion that the undocumented population are not inhabitants with "an intent to remain here indefinitely," Appellants' Br. at 34, simply does not correspond to lived reality. In amici's experience, undocumented residents' allegiance and enduring ties to this country and amici's communities is plainly evident: they have built families in amici's jurisdictions, have U.S. citizen spouses and children, attend or send their children to local schools, make valuable economic contributions to the community, and play a vital role in critical professions that keep us safe and healthy.

³⁹ Jawetz, *supra*; Kerwin, *supra*.

⁴⁰ Bardis Vakili, et al., *Discharged, then Discarded: How U.S. veterans are banished by the country they swore to protect*, ACLU of California (July 2016), <https://perma.cc/WS8G-ZEVC>; see also Pashman, *supra*.

III. Excluding Undocumented Immigrants From the Apportionment Base Harms All Members of Amici's Communities.

While the Memorandum purports to erase undocumented immigrants from the population count used to allocate congressional seats, these individuals will nevertheless continue to be residents of amici's communities and constituents of the congressmembers elected to these seats. As this Court has recognized, "the Framers of the Constitution and the Fourteenth Amendment comprehended [that] representatives serve all residents, not just those eligible or registered to vote." *Evenwel*, 136 S. Ct. at 1132. This is because "[n]onvoters have an important stake in many policy debates . . . and in receiving constituent services." *Id.*

Just like any other resident, undocumented individuals are impacted by issues that affect the community and have a stake in legislative proposals to address these issues.

The COVID-19 pandemic, for example, has had grave public health and economic effects on all of amici's residents, undocumented or otherwise. Undocumented residents, just like other residents, seek COVID-19 testing at public test sites and treatment at public hospitals. Many are on the front lines as essential workers in critical infrastructure industries, including in hospitals, food processors, and disinfecting service providers. *See* Part II.B, *supra*. And as with so many other residents, the livelihoods of many undocumented workers have been severely disrupted. Indeed,

because undocumented immigrants are ineligible for most currently available federal relief, they are even more vulnerable to the economic hardships caused by the pandemic. Thus, undocumented residents have at least as much of an interest in solutions to this nationwide crisis as do other members of the community. And because COVID-19 lays bare that everyone in the community affects everyone else, the whole community benefits when the particular needs and concerns of undocumented residents are addressed and they are involved in policy discussions about the pandemic.

Likewise, undocumented workers often work side by side with native-born and other foreign-born workers and share a similar stake in federal legislation on safe working conditions and protections against employment discrimination. And children who are undocumented and the children of undocumented parents attend the same public schools as other residents. These families have an interest in federal education policy and legislation, including funding for schools and programs under Title I, Title II, and the Individuals with Disabilities Education Act.⁴¹

By ignoring the reality that undocumented immigrants are constituents of their elected representatives, the Memorandum threatens to undermine

⁴¹ Indeed, at the local level, amicus LAUSD has recognized that all parents have an equal stake in decisions made by the LAUSD Board, and has voted to explore granting all parents—regardless of immigration status—a voice in the election of Board representatives. See *Expanding the Electorate to Raise the Voices of All Parents in the Los Angeles Unified School District*, *supra*.

representational equality in a way that will harm all residents—including citizens and immigrants with lawful status. As this Court has recognized, “[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the business of a legislator.” *McCormick v. United States*, 500 U.S. 257, 272 (1991). Similarly, representatives play an important role in drawing attention to, and securing resources to address, local problems. But “equitable and effective representation” can only be achieved when “each representative is subject to requests and suggestions from the same number of constituents.” *Evenwel*, 136 S. Ct. at 1132.

The Memorandum, however, will artificially deflate the apportionment base by excluding undocumented constituents. This will skew the allocation of congressional seats such that representatives in states with significant undocumented populations—like California, Texas, Florida, Arizona, New Jersey, New York, and Illinois, *New York v. Trump*, 2020 WL 5422959, at *11—will have more people in their districts than representatives in other states. The ability of these representatives to provide effective and equitable representation to all constituents will suffer as a result. Representatives with more residents in their districts will be disproportionately overburdened in terms of the community needs they must address, and disproportionately underpowered in the amount of government influence they can bring to bear on these problems, compared to representatives in less populated districts.

The history of intrastate legislative redistricting provides a stark example of the inequity that results from unequal representation. Before this Court’s ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964), that legislative districts must have equal populations, districts in each state had wildly different populations. In particular, densely populated urban areas had significantly less proportional representation than sparsely populated rural areas. As a result, state policy was driven by rural districts; urban populations faced underfunding and local issues affecting urban areas went unaddressed. See U.S. Advisory Comm’n on Intergovernmental Relations, *Apportionment of State Legislatures* 28 (1962), <https://perma.cc/BY9N-VQEJ> (finding that the most pronounced effect of malapportionment of legislative districts was on allocation of funding, labor, and welfare matters, and that the functions most affected “involve problems closely tied to urban areas”); Stephen Ansolabehere & James M. Snyder Jr., *The End of Inequality, One Person, One Vote and the Transformation of American Politics* 68-74 (2008); (describing how representatives serving urban and suburban communities struggled to address community needs pre-*Reynolds*); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 90-95 (1984) (noting that states reapportioned after *Reynolds* “became more responsive” to the needs of more populated areas).

A similar problem is likely to arise if the Memorandum is implemented, creating a disparity whereby states with large undocumented populations will have

a larger population per congressional district than districts in other parts of the country. With more residents in their districts, representatives in these states will likely face a larger list of community issues and concerns requiring government attention as compared to less-populated districts. For example, the need for services like schools, police and fire protection, transportation and infrastructure, and healthcare is proportional to the population—regardless of whether that population is undocumented or not. But because these representatives can only advocate for a limited number of issues, and because each representative is entitled to the same voting power regardless of the population of his or her district, representatives in more-populated districts will likely be unable to address a large swath of their community’s needs. *See generally* Ansolabehere and Snyder, *supra* (finding that transfers of public funds to a district increase proportionally with the district’s representation, and that malapportionment leads to underfunding of more populous districts); Choper, *supra* (reviewing studies finding that reversing malapportionment of districts produced more aid to previously under-represented districts).

Likewise, elected representatives in these more-populated districts will have less time to devote to each constituent needing assistance—including for example helping eligible residents “navigat[e] public benefits bureaucracies.” *Evenwel*, 136 S. Ct. at 1132; *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (equalizing districts by total population avoids “diminution

of access to elected representatives” by all constituents, including voters). Similarly, when it comes to debating whether proposed legislation “will benefit the district and individuals and groups therein,” *McCormick*, 500 U.S. at 272, constituents in more-populated districts will have less ability to voice their concerns and interests because their elected representatives will have to divide their time between more affected individuals and groups than representatives in less-populated districts.

Thus, contrary to Appellants’ arguments, there is no basis to exclude undocumented individuals from “the method by which ‘the people’ have chosen to distribute their power among themselves.” Appellants’ Br. at 39. In fact, it is the Memorandum that will create “a distortion of the people’s allocation of their sovereign power.” *Id.* The text and history of the Enumeration Clause and the Fourteenth Amendment make clear that representation—and thus power—in this country is distributed by counting *all* persons residing in the community, regardless of immigration status, because *all* community members are affected by, and have an interest in, governmental decisions. *See Evenwel*, 136 S. Ct. at 1132; *see also* Part I, *supra*. By violating this fundamental principle, the Memorandum undermines the fair allocation of representation and disempowers all residents—citizens and lawful immigrants included—in several states. As a result, communities like amici’s will be underserved and underfunded.



CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the ruling below, permanently enjoining the Memorandum.

Respectfully submitted,

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