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

MOTION TO AFFIRM FOR GOVERNMENT APPELLEES

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QUESTIONS PRESENTED

The Fourteenth Amendment requires apportionment of seats in the House of Representatives based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. This "number" must in turn be drawn from the decennial census's enumeration of total population. *Id.* art. I, § 2, cl. 3. In the Census Act, Congress required the Secretary of Commerce, after each decennial census, to send to the President a report with the census's "tabulation of total population by States… as required" for apportionment. 13 U.S.C. § 141(b). The President must then transmit to Congress "a statement showing the whole number of persons in each State" under the "decennial census of the population," and the number of Representatives each State receives. 2 U.S.C. § 2a(a).

In July 2020, the President issued a Memorandum directing the categorical exclusion of all undocumented immigrants from the apportionment base. Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020). The Memorandum orders the Secretary to provide the President a Section 141(b) report containing both (i) the census's total-population counts of each State, which will include undocumented immigrants, and (ii) separate figures that will allow the President to exclude undocumented immigrants from the apportionment base "following the decennial census." *Id.* at 44,680. The questions presented are:

1. Whether plaintiff-appellees' challenge to the Memorandum satisfies the jurisdictional requirements of Article III of the U.S. Constitution.

2. Whether the Memorandum's direction to exclude undocumented immigrants who reside here from the apportionment base violates the Census Act.

3. Whether the Memorandum's direction to base apportionment on figures other than the total-population count established by the decennial census violates the Census Act.

4. Whether the decision below may be affirmed on the alternative ground that the Memorandum's directives violate the Fourteenth Amendment and Article I of the United States Constitution.

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INTRODUCTION

Since the Founding, the population base used to apportion seats in the House of Representatives has never excluded any resident based on immigration status. This unbroken practice is not only tradition; it is compelled by both statutory and constitutional mandates to count every person living in a State in both the decennial census and the corresponding apportionment base.

Government Appellees—twenty-two States, the District of Columbia, fifteen cities and counties, and the U.S. Conference of Mayors—challenge a Presidential Memorandum that disregards these mandates and breaks with more than two hundred years of history by excluding from the apportionment base millions of undocumented immigrants who indisputably reside here. A three-judge court of the U.S. District Court for the Southern District of New York (Wesley, Hall, Furman, JJ.) issued a final judgment declaring the Memorandum unlawful because it violates the Census Act, and permanently enjoining all Appellants except the President from providing an apportionment report that allows the President to implement the Memorandum's policy.

This Court should reject Appellants' baseless request for summary reversal, and should instead summarily affirm or note probable jurisdiction. Appellants assert meritless Article III arguments that improperly seek to evade judicial review of their unlawful manipulation of the apportionment. The district court correctly found, based on the uncontroverted evidence, that the Memorandum is harming Government Appellees by deterring immigrant households' responses to the ongoing census count. To

redress that current harm, the court properly declared the Memorandum invalid and enjoined its implementation—relief that took effect immediately to redress the Memorandum's ongoing harms to the census count. There is thus no "mismatch" between the relief ordered by the court and the present injury it remedied. Nor does Appellants' speculation about potential future mootness provide any basis for reversal. Given that the census count is ongoing, the case is not moot now—let alone when the district court issued its judgment. When the census count ends, the case still will not be moot because, among other reasons, Government Appellees have standing based on the Memorandum's imminent harms to the forthcoming apportionment—harms that Appellants are actively taking steps to implement.

The "merits of the parties' dispute are not particularly close or complicated." (J.S.A.6a.) The Census Act and the Constitution plainly require the inclusion of all persons who usually reside here in the apportionment base, regardless of immigration status. Whatever discretion Appellants may have to determine who is a "usual resident," it does not extend to disregarding usual residence entirely and excluding from the apportionment base millions of undocumented immigrants who live here. Nor do Appellants have any authority to use population figures separate from the decennial census's count of total population to manipulate the apportionment base. The district court correctly found the Memorandum's policy unlawful on both of these grounds.

JURISDICTION

A three-judge court was convened under 28 U.S.C. § 2284. On September 10, 2020, the court entered final judgment, holding that the Memorandum's policy violates the Census Act and issuing declaratory and permanent injunctive relief. (Jurisdictional Statement Appendix (J.S.A.) 105a-107a.) The notice of appeal was timely filed on September 18, 2020. (J.S.A.108a-109a), and the jurisdictional statement was filed on September 22, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.[1]

STATEMENT

1. The Constitution requires that 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." U.S. Const. amend. XIV, § 2. The "respective numbers" of "persons in each State" is determined by the decennial "actual Enumeration" of all persons living here. *Id.* art. I, § 2, cl. 3. The decennial enumeration shall be made "in such manner as [Congress] shall by Law direct." *Id.*

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[1] Although the district court declined to adjudicate Appellees' constitutional claims, this Court has jurisdiction under § 1253 because the district court resolved the merits of Government Appellees' challenge, invaliding the Memorandum as an *ultra vires* act that contravenes the Census Act. *Cf. MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (no jurisdiction under § 1253 where district court did not reach merits and dismissed complaint based on abstention). The Court may also avoid any question about its jurisdiction under § 1253 by construing Appellants' jurisdictional statement as a petition for a writ of certiorari before judgment. (*See* J.S. 11 n.2.)

Congress has set requirements for conducting both the enumeration and the corresponding apportionment of House seats. The Census Act requires the Secretary of Commerce to take the "decennial census of population" on April 1, 2020. 13 U.S.C. § 141(a). Within nine months of that date, i.e., by December 31, 2020, the Secretary must report to the President "[t]he tabulation of total population by States under subsection (a) of this section"—i.e., the "decennial census of population" mandated by Section 141(a)—to be used "for the apportionment of Representatives." *Id.* § 141(b). Between January 3 and January 10, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the…decennial census of the population, and the number of Representatives to which each State" is entitled under the method of equal proportions. 2 U.S.C. § 2a(a). Within fifteen days of receiving the President's statement, the Clerk of the House of Representatives transmits to "each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

2. More than two years ago, the Secretary of Commerce announced his plan to include a citizenship question on the decennial census questionnaire. In June 2019, this Court held that the Secretary's professed reason for adding a citizenship question was pretextual and thus arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706. A few weeks later, in July 2019, President Trump issued an Executive Order directing federal agencies to assist the Census Bureau in compiling "accurate citizenship data" about "the number of citizens and non-citizens in the country" by means

other than a citizenship question. Exec. Order 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order did not direct the collection of information specifically about *undocumented* immigrants, nor did it state that the federal government would exclude undocumented immigrants from the decennial enumeration or apportionment base. (*See* J.S.A.13a.)

The decennial census of population began in January 2020, counting every person where they usually reside on April 1; it remains ongoing. (J.S.A.15a.) The Census Bureau is endeavoring to enumerate every single person who usually resides here—i.e., who lives and sleeps here most of the time. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525, 5,526 (Feb. 8, 2018). That enumeration will indisputably include undocumented immigrants who live here and whom the Bureau will determine are usual residents under its long-standing criteria. *See id.* at 5,529.

Shortly after the census began, Appellants determined that the COVID-19 pandemic required extending the census's operational deadlines. Appellants emphasized that these changes were necessary to ensure a complete and accurate enumeration of population. Appellants' new schedule provided for census field operations to continue until October 31, 2020, rather than the pre-pandemic deadline of September 30, 2020. The schedule also provided for the Secretary to send the Section 141(b) report containing each State's total-population tabulation to the President by April 30, 2021, rather than by the statutory deadline of December 31, 2020. The President and several Census Bureau officials represented that meeting the original December 31 deadline would be impossible without sacrificing

census completeness and accuracy. (J.S.A.16a.) *See National Urban League v. Ross*, No. 20-cv-05799, 2020 WL 5739144, at *5-7 (N.D. Cal. Sept. 24, 2020).

3. On July 21, 2020, with more than three months remaining for census field operations, President Trump issued the Memorandum at issue here. The Memorandum declares that "[f]or the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude" undocumented immigrants from the congressional apportionment base "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

The Memorandum makes clear that the President seeks to reallocate political power among the States and to weaken the political influence of States with larger populations of undocumented immigrants. Referring to the more than two million undocumented immigrants who live in California, the Memorandum states that "[i]ncluding these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.* The Memorandum further asserts that "States adopting policies . . . that hobble Federal efforts to enforce" immigration laws "should not be rewarded with greater representation" based on undocumented immigrants living there. *Id.*

To implement the policy of excluding all undocumented immigrants from the apportionment base, the Memorandum directs the Secretary of

Commerce to send two different sets of numbers to the President in the Section 141(b) report. First, the Memorandum requires the Secretary to send the tabulation of total population in each State determined by the decennial census; that count will indisputably include all undocumented immigrants whom the Census Bureau determines are usual residents of a State (J.S.A.19a). Second, the Memorandum directs the Secretary to include in the Section 141(b) report "information permitting the President," "following the census," to exclude undocumented immigrants from the apportionment figures that the President transmits to Congress under § 2a(a).[2] 85 Fed. Reg. at 44,680. The Memorandum thus expresses a policy of using a population base other than the decennial census's tabulation of total population for apportionment purposes.

3. On July 24, 2020, Government Appellees filed a lawsuit in the U.S. District Court for the Southern District of New York. They alleged that the Memorandum violates, inter alia, the Census Act, Article I of the United States Constitution, and the Fourteenth Amendment. The district court (Furman, J.) consolidated Government Appellees' case with a similar case filed by private organizations. Under 28 U.S.C. § 2284, the Chief Judge of the Second Circuit convened a three-judge court to adjudicate Appellees' claims. (J.S.A.21a-22a.)

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[2] The Memorandum does not identify any subpopulation of undocumented immigrants (such as individuals in immigration detention) and does not direct the Secretary to provide information about such subpopulations.

Nine days after these lawsuits were filed, Appellants suddenly announced that they were accelerating their operational deadlines to complete census field operations and to submit the Secretary's Section 141(b) report to the President. Despite previously stating that an October 31, 2020, deadline was necessary to obtain a complete and accurate population count, Appellants abruptly rescheduled the end of census field operations to September 30, 2020. They also shortened their deadline for submitting the Section 141(b) report from April 30, 2021, to December 31, 2020. Appellants asserted that they instituted these abrupt changes because Congress had not altered the Census Act's December 31 deadline for transmitting the Section 141(b) report—even though Appellants had repeatedly represented that they cannot meet the December 31 deadline in any event. *See National Urban League*, 2020 WL 5739144, at *5.

4. The district court in this case granted summary judgment to Government Appellees on their statutory claims and entered final judgment declaring the Memorandum unlawful and permanently enjoining Appellants, except for the President, from including in the Section 141(b) report information about the number of undocumented immigrants in each State. (J.S.A.94a-107a.)

The court determined that Government Appellees have standing because the Memorandum is interfering with the ongoing census count by deterring immigrant households—regardless of their legal status—from responding to the census. The extensive unrebutted evidence, the court explained, demonstrated that the Memorandum causes widespread confusion and fear among immigrant households, and sends the message that their census participation is futile. (J.S.A.25a-

35a, 44a-48a.) The court further determined that this reduction in census participation injures Government Appellees by, among other harms, degrading the accuracy of census data that Government Appellees rely on for important government functions. (J.S.A.48a-59a.) The court did not reach Appellees' separate assertion that their standing was established by the harm that will be inflicted on them through any apportionment from which undocumented immigrants have been intentionally excluded.

On the merits, the court held that the Memorandum violated the Census Act in "two independent ways." (J.S.A.93a.) First, the court concluded that the Memorandum's categorical exclusion of millions of undocumented immigrants who indisputably reside here violated Congress's command to include in the apportionment base all "persons" who live "in each State," regardless of immigration status. (J.S.A.83a-92a.) Second, the court concluded that the Memorandum contravened the Act's mandate "to use the results of the census—and only the results of the census—in connection with the apportionment process." (J.S.A. 79a.) As the court explained, the Memorandum unlawfully directed the Secretary to send two sets of numbers in the Section 141(b) report: (i) the decennial census's total-population counts and (ii) separate figures that will allow the President to subtract undocumented immigrants from the apportionment base following the census. (J.S.A.74a-82a.)

5. Shortly after the district court invalidated the Memorandum, the U.S. District Court for the Northern District of California (Koh, J.) issued a preliminary injunction in a separate lawsuit that reinstated the extended operational deadlines that Appellants had followed before abruptly changing course. Under this

injunction, the deadline for completing census field operations is October 31, and the deadline for the Secretary to send the Section 141(b) report is April 30, 2021. *National Urban League*, 2020 WL 5739144, at *48.

Despite this preliminary injunction, Secretary Ross announced on September 28 that the Census Bureau would terminate field operations by October 5, 2020. *National Urban League v. Ross*, No. 20-cv-5799, 2020 WL 5876939, at *4 (Oct. 1, 2020). The district court then issued an order clarifying that the injunction reinstated the October 31 deadline for field operations and the April 1 deadline for submission of the Section 141(b) report unless the Secretary cures identified legal defects in the agency's attempt to accelerate those deadlines. *Id.* at *13-14.

Appellants' efforts to truncate the census count directly serve their aim of fully implementing the Memorandum's unprecedented policy. Appellants seek to terminate the census count nearly a month earlier than planned to send a Section 141(b) report by December 31 that contains both the state total-population counts ascertained under the decennial census and a separate count of the undocumented immigrants currently living in Immigration and Customs Enforcement detention facilities. (Appellants' Suppl. Br. 5.) That second number will allow the President to "partially implement[]" the Memorandum. (*Id.*) Appellants will then "fully implement[]" the Memorandum's exclusion of all undocumented immigrants (*id.* at 4) by subsequently sending the President "other Presidential Memorandum related outputs" by January 11, 2021 (*id.* at 5 (alteration marks omitted)).

ARGUMENT

I. The District Court Had Article III Jurisdiction.

Appellants' Article III arguments are meritless. Appellants contend that there was no live controversy for the district court to redress. But that assertion ignores the immediate real-world harms of Appellants' conduct. During a census count that is already facing extraordinary challenges from the COVID-19 pandemic, Appellants suddenly announced that they would, for the first time in history, exclude people from the apportionment base solely because of their immigration status. Since that announcement, Appellants have stated that they are "fully implementing" this policy and have begun doing so. (*E.g.*, Suppl. Br. 4.) Appellants' zealous and well-publicized pursuit of this policy has caused immediate harms to the ongoing enumeration—and threatened imminent future harm to Government Appellees' political representation. It was thus proper, indeed essential, for the district court to adjudicate the live legal controversy and issue relief to redress ongoing harms. Appellants' arguments to the contrary improperly seek to avoid judicial review so that they can conduct an unprecedented and blatantly unlawful exclusion of undocumented immigrants from the apportionment base.

A. The District Court Properly Ordered Relief that Redressed Ongoing Harm to the Census Count.

1. The district court held that Appellees had Article III standing because Appellants' decision to exclude undocumented immigrants from the apportionment base has a "deterrent effect on census participation," which in turn injures Government Appellees through, among other things, degradation of the census data they need for essential government functions. (J.S.A.43a, 48a.) The court based its finding of the "predictable effect" of Appellants' actions, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), on "the undisputed facts in the record," including uncontested declarations from both expert and lay witnesses (J.S.A.48a). This deterrent effect is unsurprising: it is common sense that people will be less likely to participate in the census if told that their responses will be ignored for one of the census's principal functions (J.S.A.65a). *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.) ("common sense" is "useful tool" in predicting causal effects). Indeed, the Census Bureau seeks to encourage self-response by publicizing that "[r]esults from the 2020 Census will be used to determine the number of seats each state has in Congress."[3] The Memorandum directly undermines that motivation to participate.

Appellants assert that any deterrent effect on census participation is "speculative" (J.S. 17), but they failed to provide any evidence that would counter the evidence establishing concrete injury. Appellants' remaining arguments on Article III injury and

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[3] U.S. Census Bureau, *2020 Census*, https://my2020census.gov.

redressability are baseless. Contrary to Appellants' assertion, it is immaterial that the deterrent effect of their actions here "is not premised on . . . any changes to the questionnaire or field data collection." (J.S. 17.) "Article III requires no more than *de facto* causality," *Department of Commerce*, 139 S. Ct. at 2566 (quotation marks omitted), and Government Appellees established that factual connection here through concrete evidence, which Appellants never rebutted. Appellants are likewise incorrect in asserting that their attempt to reverse the judgment on appeal means that the judgment cannot encourage census participation. (J.S. 15-16.) The judgment has the force of law and directly counters the Memorandum's pronouncement that certain individuals will not count for apportionment purposes. Potential census participants who are aware of the prospect of appellate review will know that the final judgment may be affirmed, *e.g.*, *Department of Commerce*, 139 S. Ct. at 2576, and will be encouraged to respond so that they will be counted in that event.[4] (*See* J.S.A.42a-43a, 65a-66a, 101a.)

2. Appellants attempt to manufacture an Article III defect by asserting that there is a "mismatch" (J.S. 13) between the census-count injury found by the district court and the court's relief. But this argument is based on a fundamental mischaracterization of the judgment. The district court did not solely award "relief in the future" (*id.*), as Appellants contend. *See*

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[4] Appellants do not support their speculation that the Memorandum's harms to census participation will "be accounted for by other means." (J.S. 17.) Indeed, the district court found that nonresponse follow-up operations will "replicate or exacerbate the effects" of the decline in immigrant households' self-response rates. (J.S.A.35a.)

New York v. Trump, No. 20-cv-5770, 2020 WL 5796815, at *3 (S.D.N.Y. Sept. 29, 2020) (per curiam). Rather, the court's "unambiguous judicial declaration that the Presidential Memorandum is unlawful" (J.S.A.102a) has immediate effect on "the rights and other legal relations" of the parties, 28 U.S.C. § 2201(a). The permanent injunction also took effect immediately and is presently constraining the Secretary (and others) from including information about undocumented immigrants in the Section 141(b) report.[5] (J.S.A.106a-107a.) Both forms of relief also have the immediate effect of redressing the Memorandum's deterrent effect on census participation during the ongoing count by, for example, reassuring immigrant households that they will count for apportionment purposes and removing the Memorandum's adverse effects on state, local, and private efforts to encourage census responses. (J.S.A.42a-43a, 65a-66a, 101a.)

The relief ordered by the district court will *also* provide future relief by preventing Appellants from violating the law after the census count is completed. But no principle of law restrains a federal court from issuing declaratory and injunctive relief that redresses both present *and* future harm. Indeed, Appellants admit that an injunction against "future acts" could be justified solely based on "future injury." (J.S. 16.) It would be bizarre for the federal judiciary to have less power when, as here, a defendant's actions cause present injury as well.

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[5] Although December 31 is the statutory deadline, under Section 141(b), the Secretary may issue the report earlier.

3. Appellants are also incorrect in asserting that the district court's judgment "will inevitably become moot" when the census count ends (J.S. 15).

First, as Appellants admit, the relief ordered by the district court is not *currently* moot because the census count is ongoing—and is scheduled to continue until October 31. *See National Urban League*, 2020 WL 5739144, at *1. And because the Memorandum's harms to census participation existed when this litigation commenced and continued through the date of the final judgment, Article III imposed no barrier on the district court's power to order relief. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) ("standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). Indeed, courts routinely and properly conclude that plaintiffs have standing based on harms that may not persist throughout the litigation. *See id.* at 734-36; *Norman v. Reed*, 502 U.S. 279, 287-88 (1992). Thus, the mere prospect of future mootness was not a basis for the district court to violate its "strict duty to exercise" its jurisdiction. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

Second, this case would "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). The issues here will recur in the immediate future because the President fully intends "to vindicate his policy determination" to exclude undocumented immigrants from the apportionment base and "implement that policy decision in his [§ 2a] statement to Congress" (J.S.A.15-16 (quotation marks and original brackets omitted)), thereby harming Government Appellees' representational interests and triggering the same legal disputes.

See *infra* at 17-20. And given the relatively short timeframe for conducting the census and Appellants actions here, another last-minute exclusion of undocumented immigrants in the next decennial census would again evade review. Indeed, the only reason that the harm to the census count may end before the resolution of this appeal is that Appellants unilaterally decided to (i) publicly announce the unprecedented policy in the Memorandum mere months before the end of the count, and (ii) accelerate the end of the count to fulfill the Memorandum's policy. Nothing compelled Appellants to choose this course of action. "The President could have issued his Presidential Memorandum well before the census began, in which case [Appellees and the courts] would have had ample time" to adjudicate the claims' merits. (J.S.A.67a.) Similarly, Appellants were not required to shorten the time for census operations; indeed, they repeatedly represented that they needed more rather than less time to conduct an accurate enumeration. *See National Urban League*, 2020 WL 5739144, at *4-8. Appellants cannot manufacture mootness by their own actions and seek to vacate an unfavorable judgment on that ground. *See Knox v. Service Employees*, 567 U.S. 298, 307 (2012) ("maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye").

Third, even if this dispute were to become moot, Appellants are wrong to assume that vacatur of the judgment below would follow. (J.S. 15.) Vacatur is inappropriate when "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). Here, any mootness would be the result of Appellants' mid-census issuance of the

Memorandum and shortening of the census count, and thus would provide no basis for vacating the final judgment. Moreover, the "public interest" would weigh against vacatur because the ruling below—which concerns the once-a-decade enumeration that affects not only the apportionment of representatives but also many other significant matters—is "valuable to the legal community as a whole" and should not be discarded. *Id.* at 26 (quotation marks omitted).

B. The District Court Also Had Article III Jurisdiction Because Appellants' Actions Will Cause Some States to Lose Representation and Will Result in Loss of Federal Funding.

In addition to the ongoing harm to the census count, at least two further injuries independently conferred jurisdiction on the district court and confirm that the case will not become moot when the census count ends. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (harms may overcome mootness even though they would not have supported standing at case's outset).

1. The Memorandum's directive to exclude undocumented immigrants from the apportionment base threatens injury to several Government Appellees by placing them at substantial risk of losing a House seat and an elector in the Electoral College. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 331-32 (1999). Appellants do not dispute that this apportionment injury is traceable to the Memorandum and redressed by the judgment's requirement to include undocumented immigrants for apportionment purposes. The

apportionment injury is also redressed by the judgment's prohibition on including information about undocumented immigrants in the Section 141(b) report, since that report is the sole basis for the apportionment of House seats among the States.

Although the district court declined to resolve the issue (J.S.A.43a), this apportionment injury is also sufficiently imminent and concrete to satisfy the injury-in-fact requirement. A future injury provides standing and is ripe for review when it is "certainly impending, or [when] there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation marks omitted). Here, that substantial risk is proven by the Memorandum's open announcement—confirmed by unrebutted evidence—that implementing the Memorandum's policy will likely cause California (where three Government Appellees are located), Texas (where another three Government Appellees are located), and Appellee New Jersey to lose at least one House seat each. *See* 85 Fed. Reg. at 44,680. (Decl. of Christopher Warshaw ¶¶ 11, 48 (filed Aug. 7, 2020), SDNY ECF No. 76-58.)

There is no merit to Appellants' assertion (J.S. 18) that Government Appellees must wait until they actually lose representation to file suit. This Court and others have regularly considered challenges to census- or apportionment-related policies *before* the actual loss of political representation. *See U.S. House of Representatives*, 525 U.S. at 331-32; *New York v. United States Department of Commerce*, 351 F. Supp. 3d 502, 573-74 (S.D.N.Y. 2019); *Carey v. Klutznick*, 508 F. Supp. 404, 407, 411-12 (S.D.N.Y. 1980).

In the district court, Appellants also asserted that any apportionment injury was speculative because they might ultimately fail to do what the President has ordered. (*See* J.S.A.6a (Secretary "could conceivably conclude that it is not feasible" to exclude undocumented immigrants).) But every indication from Appellants is that they will fully "vindicate [the President's] policy determination before the Supreme Court" and then "implement [that] policy decision" in his statement to Congress. Office of the Press Secretary, The White House, Statement (Sept. 18, 2020). Indeed, Appellants have stated that they have already begun taking the "steps required for fully implementing" the Memorandum. (Suppl. Br. 4.) And they have asked this Court to expedite their appeal precisely so that they may promptly complete those steps. (*See* J.S. 8; Mot. to Expedite 3.) Such expedition would hardly be worth the additional burden on this Court if Appellants actually believe that they might refrain from excluding undocumented immigrants from the apportionment base.

2. The Memorandum on its face seeks to exclude undocumented immigrants only for apportionment while still including them in the decennial census count for other purposes. 85 Fed. Reg. at 44,680. However, Appellants now appear to argue that the President will exclude undocumented immigrants from the decennial census itself. (*See* J.S. 3, 19.) If so, such exclusion will impose far broader consequences on Appellees, independent of the ongoing deterrent effect on census participation and imminent harm to the apportionment.

First, excluding undocumented immigrants from the decennial census's population counts places Government Appellees at significant risk of losing

funding from programs that distribute funds based on the decennial census. *See Department of Commerce*, 139 S. Ct. at 2565. For example, many programs' funding formulas use population counts from, e.g., "the most recent decennial census" in allocating funds. 49 U.S.C. § 5336(a), (c); *see also id.* § 5305(d)-(e) ("latest available decennial census"); *id.* § 47114(d) ("population stated in the latest decennial census"). If Appellants subtract undocumented immigrants from the decennial enumeration itself, they will *directly* cause a reduction in Government Appellees' funding under these statutes—even if undocumented immigrants fully respond to the census.

Second, excluding undocumented immigrants from the decennial census's population counts may also cause disruption and uncertainty to Government Appellees' redistricting processes. Several Government Appellees "require use of federal decennial census population numbers" for their congressional or state legislative redistricting. *U.S. House of Representatives*, 525 U.S. at 333; *see, e.g.*, N.J. Const., art. IV, § II, para. 1; Va. Code Ann. § 30-265. Subtracting undocumented immigrants from the decennial census's population counts will thus at least raise uncertainty as to which population figures States should use for redistricting. The resulting disruption and harms to Government Appellees' redistricting processes independently confer standing and demonstrate that this case will not be moot when the census count ends.

II. Excluding Undocumented Immigrants from the Apportionment Base Violates Both the Census Act and the Constitution.

The Memorandum implements a policy that breaks with more than two hundred years of history and violates the plain text and purpose of both the Census Act and the Constitution. Under the Memorandum, the decennial census will first complete an enumeration of all persons who usually reside (i.e., usually live and sleep) in each State—a count that will indisputably include undocumented immigrants. From this census count of the total population in each State, the policy in the Memorandum will then exclude all undocumented immigrants from the apportionment base, solely because of their immigration status.

The district court correctly found that this categorical exclusion of immigrants who are indisputably usual residents of a State violates the Census Act "in two independent ways." (J.S.A.93a.) First, this exclusion violates 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). Second, this exclusion violates the Act's directive to use solely the results of the decennial census as the apportionment base. *Id.*; *see* 13 U.S.C. § 141(a)-(b). Because the "merits of the parties' dispute are not particularly close or complicated" (J.S.A.6a), the Court should summarily affirm.

Given these statutory violations, the district court found it unnecessary to resolve whether Appellants' exclusion of undocumented immigrants from the apportionment base also violated the Constitution.

Even so, this Court may summarily affirm the judgment below on constitutional grounds as well. Because Congress correctly understood what the Constitution itself requires in enacting the Census Act, we discuss both sources of law together below.

A. The Census Act and the Constitution Prohibit the Exclusion of Undocumented Immigrants Who Indisputably Live Here from the Apportionment Base.

1. The Census Act requires the President to report to Congress and use as the apportionment base all "persons" living "in each State," "as ascertained under the . . . decennial census of the population."2 U.S.C. § 2a(a).

When Congress first enacted § 2a(a)'s precursor in 1929, the terms "in each State" and "decennial census of the population" had well-established meanings. As Appellants acknowledge (J.S. 14a-15a), since the first Census Act in 1790, every branch of government had interpreted Article I's mandate to apportion based on the "respective Numbers" of persons enumerated in each State, U.S. Const. art. I, § 2, cl. 3, and the Fourteenth Amendment's requirement to apportion based on "the whole number of persons in each State," *id.* amend. XIV, § 2, to encompass all individuals who usually reside here for both the decennial enumeration of total population and the corresponding apportionment base. *See* Census Act of 1790, Ch. 2, § 5, 1 Stat. 101, 103; *Franklin v. Massachusetts*, 505 U.S. 788, 804-05 (1992); *New York*, 351 F. Supp. 3d at 514; *Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980); 83 Fed. Reg. at 5,526. Moreover, following Congress's consistent legislative directive, every decennial census

has enumerated and included in the apportionment base all persons who usually reside here, without regard to immigration or other legal status—with the sole exceptions of Indians not taxed and slaves under the three-fifths clause. (J.S.A.90a-92a.)

Congress incorporated this long-settled historical meaning and consistent legislative practice into the Census Act when it compelled the President to provide in his Section 2a report all "persons in each State" under the "decennial census of population" and to calculate the apportionment based on these population figures. Census Act of 1929, Ch. 28, § 22(a), 46 Stat. 21, 26; *see Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (interpreting statute according to "ordinary public meaning of its terms at the time of its enactment"). Indeed, the legislative history of the 1929 Act demonstrates that Congress was acutely aware of the uniform historical understanding and practice that it chose to codify into law. *See* 71 Cong. Rec. 1,822 (1929) (Senate legislative counsel memo); *id.* at 1,971 (Senator Blaine) (apportionment must include "every single human being residing within the State").

Congress was specifically aware that its legislative mandate incorporated a long legislative and administrative history of including all immigrants who are usual residents (i.e., who usually live and sleep here) in the enumeration and apportionment base, regardless of their immigration status. *See id.* at 1,822 ("apportionment legislation [had] been uniformly in favor of inclusion of aliens"). *See McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013) (2019) ("Congress legislates against the backdrop of existing law."). Tellingly, in enacting the 1929 Act, the House and Senate each rejected proposed amendments that would have used immigration status to exclude

persons who usually reside here for apportionment purposes.[6] The House later rejected a similar amendment in 1940.[7] Each time, Congress made clear that subtracting any usual resident, including undocumented immigrants, from the apportionment base would undermine the foundational principle that Congress's apportionment statutes had always maintained: equal representation for equal numbers of people. As legislators explained, "[t]he only complete, comprehensive basis for representation in Congress is the population of the country." 71 Cong. Rec. at 2,270 (Representative Lea); *see* 86 Cong. Rec. 4,372 (1940) (Representative Celler). No matter a person's immigration or other legal status, legislators emphasized, "every man, woman, and child within the confines of this Republic" was entitled to representation. 71 Cong. Rec. at 2,270; *see id.* at 1,912 (Senator Bratton) ("although a foreigner could not vote . . . so long as he was compelled to pay tribute to the Government through taxation, he was entitled to be represented").

Congress separately understood the inclusion of all persons living here, including undocumented immigrants, to be not only legislatively wise but also constitutionally mandated. In 1929, the Senate's legislative counsel provided a legal opinion confirming that all immigrants living here must be included given the Constitution's "'natural and obvious' meaning," "the

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[6] *See* 71 Cong. Rec. at 1,907 (Senator Sackett proposed amendment to require President's statement to report "persons in each State, exclusive of aliens"); *id.* at 2,065 (amendment fails); *id.* at 2,360-63 (House amendment excluding "aliens"); *id.* at 2,448-54 (House adopts substitute without alienage exclusion).

[7] *See* H.R. Rep. No. 76-1787, at 1 (1940); 86 Cong. Rec. 4,384-86 (1940).

history of the fourteenth amendment, the evidence of the records of the Constitutional Convention, and the uniform past congressional construction of the term by Congress." *Id.* at 1,822. The constitutional command was so compelling that even legislators who would have preferred to exclude noncitizens nonetheless explained that they were voting against proposals to do so based on Congress's "continuous and consistent" understanding that the Constitution required apportionment based on all residents, without regard to immigration status. *Id.* at 1,958 (Senator Reed).

Appellants are wrong to contend (J.S. 8, 32-33) that the history of the 1929 Act did not specifically address undocumented immigrants. By 1929, Congress had enacted numerous statutes restricting immigration. *See* Immigration Act of 1924, Ch. 190, 43 Stat. 153; Chinese Exclusion Act, Ch. 126, § 14, 22 Stat. 58, 61 (1882). In debating the 1929 Act, legislators repeatedly and expressly discussed the millions of immigrants who had arrived "illegally." *E.g.*, 71 Cong. Rec. at 1,973 (Senator Barkley); *id.* at 2,283 (Senator Robsion). Indeed, the House rejected a proposed amendment to the 1929 Act under which census enumerators would have obtained "a statement by each alien showing by what right or authority of law he had entered the United States." *See id.* at 2,456. The statute's history and context thus make clear that Congress affirmatively rejected an apportionment base that turns on *any* immigration status and instead required an apportionment base that includes "every single human being residing" here. *See* 71 Cong. Rec. at 1,971 (Senator Blaine).

The Memorandum turns on its head the Census Act's requirements. It treats as dispositive a factor that Congress has always considered immaterial for

apportionment (immigration status). And it treats as immaterial the factor that Congress has always made dispositive of the apportionment base (usual residence). Indeed, the Memorandum seeks to exclude undocumented immigrants who indisputably live here and whom the Census Bureau will *already* have determined usually reside in a State. The district court correctly found the Memorandum's policy to be unlawful on this ground.

2. As Congress correctly understood in enacting the Act, both the Founders and the Framers of the Fourteenth Amendment required inclusion of all usual residents in the apportionment base when they adopted both Article I and Section 2 of the Fourteenth Amendment. There was a deliberate decision to "allocat[e] House seats to States" with "total population as the congressional apportionment base"—a mandate grounded on a fundamental "theory of the Constitution." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2016) (quotation marks omitted).

The Framers of the original Article I purposefully made a person's residence the constitutional lodestar for apportionment. To resolve deep disputes about representation in the new government, the Framers adopted "the Great Compromise," providing each State two Senate seats, and allocating "House seats based on States' total populations." *Id.* at 1127. In selecting all residents as the basis for apportionment, the Framers rejected other proposals, such as apportionment "based on wealth or property." 1 *The Records of the Federal Convention of 1787*, at 542 (Max Farrand ed., 1911) (William Davie). Instead, they selected total population to serve the fundamental purpose of providing every person representation in the House, regardless of their legal status, thus

ensuring that the House is "the most exact transcript of the whole Society." *Id.* at 132 (James Wilson).

When drafting the Fourteenth Amendment, Congress reaffirmed that apportionment must be based on *all persons living* in each State—regardless of immigration status. "Concerned that Southern States would not willingly enfranchise freed slaves, and aware that a slave's freedom could swell his state's population for purposes" of apportionment, the Fourteenth Amendment's Framers "considered at length the possibility of allocating House seats to States on the basis of voter population" or citizen population. *Evenwel*, 136 S. Ct. at 1127 (quotation marks omitted). But Congress rejected these proposals, *id.*, and made clear that the Fourteenth Amendment's requirement to apportion based on "persons in each State" includes *all* immigrants.

Indeed, this choice was essential to enacting the Amendment. Proponents of maintaining the total-population apportionment base repeatedly declared their refusal to "throw[] out of the basis at least two and a half millions of unnaturalized foreignborn" persons. Cong. Globe, 39th Cong., 1st Sess. 1,256 (1866) (Senator Wilson); *see id.* at 2,987 (Senator Wilson) (refusing to "strike[] the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation"); *id.* at 411 (Representative Cook) (representation based on voters improperly "takes from the basis of representation all unnaturalized foreigners"). Excluding immigrants for apportionment purposes, they warned, risked turning States with large immigrant populations against the Fourteenth Amendment. As Representative Conkling explained, "the number of aliens in some States is very

large," and "the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States" needed to accept the Amendment. *Id.* at 359.

Including all immigrants in the apportionment base also continued the Constitution's fundamental principle of providing equal representation to each person in "the whole population." *Id.* at 2,766-67 (Senator Howard); *see also Evenwel*, 136 S. Ct. at 1128 (quoting Senate debate). As Representative John Bingham explained, the "*whole immigrant population* should be numbered with the people" because "[u]nder the Constitution as it now is and as it always has been, the *entire immigrant population of this country* is included in the basis of representation." Cong. Globe, at 432. The Framers emphasized that regardless of a person's legal status, "[a]ll the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." *Id.* at 2,962 (Senator Poland). The Memorandum's exclusion of an entire category of persons living in this country breaks this foundational promise to set "total population as the congressional apportionment base," *Evenwel*, 136 S. Ct. at 1128, and improperly strips representation from not only the undocumented immigrants who indisputably live here, but also the States, localities, and communities where they reside.

3. Appellants' arguments in support of the Memorandum's policy are meritless.

First, Appellants miss the point in arguing that the President has "discretion" to determine whether a particular individual usually resides here. (J.S. 23-

28.) Whatever discretion the President might have on the margins in determining usual residence, it does not extend to excluding undocumented immigrants whom the Census Bureau will *already* determine to be usual residents, and who qualify as usual residents under any standard applied under any decennial census since 1790. *See Montana v. Wyoming*, 563 U.S. 368, 387 (2011) (rejecting statutory interpretation that would "drastically redefine" term "from its longstanding meaning"). Neither the Census Act nor the Constitution authorizes Appellants to exclude undocumented immigrants who are longtime residents of a State—yet the Memorandum purports to exercise such authority.

Appellants can draw no support for this authority from *Franklin*, 505 U.S. 788. In *Franklin*, the Court determined that the Secretary of Commerce had properly included overseas federal personnel in the enumeration precisely because they were reasonably considered "usual residents of the United States." *Id.* at 806. Such personnel had maintained their "ties to their home States," during their temporary postings abroad, *id.*, and intended to continue living in their home States when their assignments ended, *see id.* at 793. The policy in *Franklin* thus adhered to the core principles of usual residence. The Court's endorsement of that policy offers no support for Appellants' opposite judgment here to *disregard* the concept of usual residence to exclude millions of undocumented immigrants whom the Census Bureau will find usually live and sleep here. (J.S.A.85a-86a.)

Second, Appellants are wrong to assert that the relevant question on appeal is whether the Census Act (or the Constitution) requires including *all* undocumented immigrants who are physically present here,

and that Appellants thus prevail so long as some hypothetical subset of undocumented immigrants could be excluded—including for reasons unrelated to their immigration status. (J.S. 30-31.) That argument simply does not describe the Memorandum. The Memorandum does not purport to exclude any subcategory of undocumented immigrants for apportionment purposes; it expressly states, without limitation, a categorical "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." 85 Fed. Reg. at 44,680. Appellants' defense of some hypothetical and nonexistent narrower policy thus provides no support for the categorical exclusion actually expressed in the Memorandum.

Appellants' examples of subpopulations of undocumented immigrants who purportedly could be excluded from the apportionment base thus miss the mark. Appellants argue that noncitizens who are here temporarily, such as "on vacation or business" or "certain foreign diplomatic personnel," are not included in the apportionment base. (J.S. 27.) But that exclusion is consistent with the Census Act and the Constitution because it turns on such individuals' *transient* status, not their *immigration* status. *See* 83 Fed. Reg. at 5,533. Many people in immigration detention or removal proceedings (J.S. 29-30) have resided here for a long time, and may continue to do so if they obtain legal status; they are thus usual residents who must be counted in the enumeration and apportionment base. (J.S.A.86a-87a.) In any event, they are also a fraction of the undocumented population, and excluding them based on their detention or immigration proceedings would not support the Memorandum's exclusion of millions of undocumented immigrants who are not in detention or immigration proceedings—

many of whom have lived here for years. *See* Pew Research Ctr., *5 Facts about Illegal Immigration in the U.S.* (June 12, 2019) (66% of undocumented adults have lived in United States for more than 10 years).

Third, Appellants' arguments about the Fourteenth Amendment's drafting history undermine their own position and further establish that the apportionment base must include undocumented immigrants who reside here. Appellants note historical references to the apportionment base including all "inhabitants" in each State. (J.S. 24-26.) But as Appellants acknowledge (J.S. 10, 24), the word "inhabitants" in the context of apportionment is simply another way of saying "usual residents"; both terms are the same "gloss" that has been applied to the number of "persons" living "in each State" since the Founding. *See Franklin*, 505 U.S. at 804-05. As this Court has explained, apportioning Representatives "solely by the number of inhabitants" in each State ensures the "Constitution's plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House." *Evenwel*, 136 S. Ct. at 1129 (quotation marks omitted). Indeed, the Framers (and Congress) used distinct language, such as the word "citizen," when they wanted to refer to a subset of persons based on a legal status rather than to all inhabitants or persons. *E.g.*, U.S. Const. art. 1, § 2, cl. 2; *id.* amend. XIV, § 2; 5 U.S.C. § 552a(a)(2). The Memorandum violates both the Census Act and the Constitution by excluding millions of undocumented immigrants who indisputably reside here and are thus "persons" "in each State" for purposes of apportionment.

B. The Census Act and the Constitution Require Appellants to Produce Apportionment Figures Based Solely on the Census's Enumeration.

The Memorandum's policy also violates both the Census Act and the Constitution on an independent ground: it purports to base apportionment calculations on population figures that are separate from the enumeration of total population produced by the decennial census.

Appellants do not dispute that the Census Act requires the President to use the decennial census's population counts as the apportionment base. The statute's plain language says as much: Section 141(a) requires the Secretary to conduct the "decennial census of population," and Section 141(b) directs the Secretary to report to the President "the tabulation of total population by States under subsection (a)"—i.e., the "decennial census of population"—"as required for the apportionment of Representatives." 13 U.S.C. § 141(a)-(b). The Act then requires the President to transmit to Congress "a statement showing the whole number of persons in each State . . . as ascertained under the... *decennial census of the population*," along with the number of Representatives each State receives under the apportionment formula. 2 U.S.C. § 2a(a) (emphasis added). Congress thus required "the Secretary to report a single set of numbers" to the President—the total-population counts determined by the decennial census—and required the President to use solely the census's population counts to calculate the apportionment. (J.S.A.75a.)

Congress's decision to compel both the Secretary and the President to use the decennial census, rather

than some other figure of the Secretary's or President's devising, was a deliberate choice. Congress enacted § 2a's language to make apportionment a "virtually self-executing scheme" that would follow immediately from the decennial census's tabulation of total population. *See Franklin*, 505 U.S. at 791-92; *id.* at 809 (Stevens, J., concurring in part); S. Rep. No. 71-2, at 4 (1929) ("a purely ministerial and mathematical formula"). The Act thus left the Secretary no discretion to deviate from the requirement to provide the decennial census's population count to the President, and required the President to report the census's population figures to Congress "together with a table showing how, under these figures, the House" is reapportioned. S. Rep. No. 71-2, at 4. This "automatic connection" between the decennial census's population counts and the apportionment was the 1929 Act's "key innovation," *Franklin*, 505 U.S. at 809 (Stevens, J., concurring in part), leaving the President with "no discretionary power" to alter "the population of each State" in calculating the apportionment, H.R. Rep. No. 70-2010, at 74 (1929). Given this statutory language and history, the Executive Branch "has long adhered to the view" that the President's § 2a statement must "be based solely on the tabulation of total population produced by the census." (J.S.A.76a-78a.)

Congress's enactment appropriately implements an underlying constitutional mandate. Article 1, § 2 requires that the apportionment of House seats be based only on the "numbers" determined by the decennial census's "actual Enumeration" of population in each State. U.S. Const. art. I, § 2; *see Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996). The Framers set the census's population count as the "permanent and precise standard" used for apportionment to

protect the distribution of representation in the House from manipulation and "political chicanery." *Utah v. Evans*, 536 U.S. 452, 500 (2002) (Thomas, J., concurring in part and dissenting in part) (quotation marks omitted). Neither the Census Act nor the Constitution contemplates that the Secretary or the President may base apportionment on anything other than the decennial census's total-population counts.

The Memorandum's unprecedented policy violates these constitutional and statutory mandates. The Memorandum requires the Secretary to report "two sets of numbers" (Defs. Mem. of Law in Supp. of Mot. to Dismiss 42 (SDNY ECF No. 155)), only one of which is the decennial census's tabulation of total population —a count that will indisputably include undocumented immigrants whom the Census Bureau determines usually reside here. 85 Fed. Reg. at 44,680; *see* 83 Fed. Reg. at 5,533. But the exclusion of undocumented immigrants will then take place using "a second set of figures" (J.S.A.78a) compiled separately from the census's population counts. *See* 85 Fed. Reg. at 44,680. This second set of numbers "will necessarily be derived from something other than the census" because the decennial census process is not ascertaining anyone's immigration status; and using this second set of numbers will, by definition, produce an apportionment base that is a modification, rather than a reflection, of the total population counted by the decennial census. (J.S.A.78a). *See* 83 Fed. Reg. at 5,533. This blatant refusal to use the results of the decennial census for apportionment purposes violates the plain terms of both the Census Act and the Constitution.

Appellants' argument in response is that, under *Franklin*, the President has discretion to direct the conduct of the decennial census itself and may thus

order a tabulation of total population different from what the Secretary (or the Census Bureau) might have reached. (J.S. 19-20.) "But for whatever strategic reason, that is not what the Presidential Memorandum does." *New York*, 2020 WL 5796815, at *3. Instead, the Memorandum directs the Secretary to *complete* the decennial census as planned and report total-population figures that will indisputably include all undocumented immigrants who usually reside here. 85 Fed. Reg. at 44,680. The President will then use different population figures that excludes undocumented immigrants for the apportionment base "*following the 2020 Census*." *Id.* (emphasis added).

That decision is no accident, and Appellants should be held to the consequences of their choice. Appellants have repeatedly represented that the Memorandum does not alter any "procedure that will be used in the actual census but an apportionment number that will be chosen by the President after the census is complete." (Joint Letter 5 (SDNY ECF No. 37).) Appellants have repeatedly promised that, regardless of the Memorandum's apportionment policy, the Census Bureau will maintain its "commitment to count each person in their usual place of residence" in completing the decennial census. (Decl. of Albert Fontenot Jr. ¶ 12 (SDNY ECF No. 120).) *See Counting Every Person*, Hr'g Before H. Comm. on Oversight & Reform at 3:14:55 (July 29, 2020) (Director Dillingham testifying that Memorandum has "nothing to do with our operation right now with the census. We're counting everyone. It has to do with a tabulation that has been requested on apportionment"). But because the decennial census itself will produce total-population figures that include undocumented immigrants, neither the Secretary nor the

President has discretion to depart from those figures in apportioning House seats.

Appellants also miss the mark in arguing (J.S. 21-23) that the Executive Branch has discretion to use administrative records in conducting the decennial census. As the district court recognized, nothing in the judgment below precludes Appellants from conducting the census's population count through both in-person enumeration and administrative records. (J.S.A.81a-82a.) *See New York*, 2020 WL 5796815, at *3. But once the decennial census count is complete and produces the total-population counts, Appellants may not take the further step of using a *different* set of numbers to reduce that population and apportion House seats. That subsequent, post-census step is unlawful regardless of whether Appellants use administrative records or other means to alter the completed census population counts to exclude undocumented immigrants living here.

CONCLUSION

The Court should deny Appellants' request for summary reversal, and should instead summarily affirm or note probable jurisdiction.

Respectfully submitted,

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