UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	No. 1:20-cv-02023 (GGK) (CRC) (DLF)

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – cont'd

Page(s)

BOOKS, ARTICLES, AND OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are members of Congress who have a strong interest in ensuring that the federal government respects its constitutional duty to count all persons living in the United States, citizen and noncitizen alike. As members of Congress, *amici* know that Census data is used to make critically important decisions, including regarding how representatives are apportioned in Congress; how Electoral College votes are distributed amongst the states; how state, local, and congressional districts are drawn; and how billions of dollars of federal funds are allocated to local communities. *Amici* also appreciate that failing to count all persons in the United States in apportioning representatives to Congress—as our Constitution requires—would be enormously damaging, and the consequences of an unfair, inaccurate count would endure for at least the next ten years, and possibly much longer. *Amici* thus have a strong interest in this case.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Census is the cornerstone of our democracy. To ensure equal representation for all, the Constitution, through both Article I, Section 2 and the Fourteenth Amendment, explicitly requires the federal government to accurately conduct an "actual Enumeration" of the people for the purpose of apportioning representatives to Congress. U.S. Const. art. I, § 2, cl. 3. This critical, all-inclusive constitutional language places a clear duty on the federal government to count the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. And, consistent with that constitutional requirement, for more than "two centuries," "[t]he Census

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

Bureau has always attempted to count every person residing in a state on census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders." *Fed'n for Am. Immigration Reform v. Klutznick,* 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court).

On July 21, 2020, President Trump issued a memorandum that broke with this long-standing historical practice and flouted the Constitution's explicit mandate by establishing a "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 21, 2020). The President's policy of refusing to count undocumented immigrants in the apportionment base is blatantly unconstitutional.

The Constitution's text and history establish that the federal government must count *all* people living in the United States for the purpose of apportioning representatives to Congress, whether they are citizens or noncitizens, whether they were born in the United States or in a distant part of the world. It does not give the President the power to pick and choose among the people who live in the United States and decide that some people should be excluded from the apportionment base because of their immigration status. Quite simply, the federal government may not exclude persons who live in the United States from the constitutionally mandated census count used to apportion representatives to Congress simply on the ground that they are undocumented immigrants.

The constitutional imperative that there be an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3, of the entire people reflects the Framers' conclusion—first at the nation's Framing more than two centuries ago and then again in the aftermath of our nation's bloody civil war—

that total population is the "natural & precise measure of Representation," 1 *The Records of the Federal Convention of 1787*, at 605 (Max Farrand ed., 1911) (hereinafter "*Farrand's Records*"), and "the only true, practical, and safe republican principle," Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). "Numbers, not voters; numbers, not property; this is the theory of the Constitution." *Id.* "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). The Constitution draws no distinction between citizens and noncitizens, but rather requires that the "whole immigrant population should be numbered with the people and counted as part of them." Cong. Globe, 39th Cong., 1st Sess. 432 (1866). It imposes a constitutional duty on the federal government to conduct a complete and accurate count of everyone in order to realize the "Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). By treating undocumented immigrants as non-persons, the President runs afoul of the basic constitutional rule that our system of political representation depends on a count of the entire populace.

Our founding principles recognize the necessity of preventing political manipulation of the Census and our democracy. The Framers knew that "those who have power in their hands will . . . always when they can . . . increase it," 1 *Farrand's Records*, *supra*, at 578, and they enshrined the requirement that all persons be counted directly into the Constitution to "shut[] the door to partiality or oppression," *The Federalist No. 36*, at 220 (Hamilton) (Clinton Rossiter ed., 1961), and prevent the government from using "a mode" of taking the census "as will defeat the object[] and perpetuate the inequality," 1 *Farrand's Records*, *supra*, at 571. The President's effort to flout the Constitution's requirement to count all persons, citizen and noncitizen alike, in

the apportionment base is exactly the kind of manipulation of the rules of our democracy that the Framers sought to prevent.

ARGUMENT

I. The Constitution's Founders Established Total Population as the Standard for Apportioning Representatives to Congress in Order to Guarantee Equal Representation for Equal Numbers of People.

In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 21 (Jonathan Elliot ed., 1836) (hereinafter "*Elliot's Debates*"), Article I, Section 2 provides that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States" and that "[r]epresentatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 1, 3. To ensure a proper count of the nation's total population, Article I, Section 2 requires that an "actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Id.*

In choosing the total population standard, our Constitution's eighteenth-century Framers decreed "that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives." 1 *Farrand's Records*, *supra*, at 179 (James Wilson). Determining representation in Congress based on a count of all persons reflected that "every individual of the community at large has an equal right to the protection of government." *Id.* at 473; *id.* at 477 ("[T]he people shd. be repre[se]nted in proportion to [their] numbers, the people then will be free."); *Evenwel*, 136 S. Ct. at 1129 (explaining that "the principle of

representational equality figured prominently in the decision to count people, whether or not they qualify as voters").

Article I, Section 2's requirement that members of Congress be chosen by the people from districts "founded on the aggregate number of inhabitants," *The Federalist No. 54*, *supra*, at 338 (Madison), included both citizens who enjoyed the right to vote as well as those who lacked access to the ballot. "The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at a later time, aliens. Nevertheless, they declared that government should represent *all* the people." *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990); *see Fed'n for Am. Immigration Reform,* 486 F. Supp. at 576 ("The Framers must have been aware that th[eir] choice of words would include women, children, bound servants, convicts, the insane and aliens, since the same article of the Constitution grants Congress the power 'to establish a uniform rule of naturalization.'" (quoting U.S. Const. art. I, § 8, cl. 4)).

Ensuring representation for all had deep roots in America's bid for independence from England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Farrand's Records*, *supra*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all[.]" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (1776). Having seen the political system manipulated

for partisan ends in England, the Framers strove to design a system that would reflect the principle that a "free and equal representation is the best, if not the only foundation upon which a free government can be built." 2 *Elliot's Debates* at 25. "More than anything else this equality would prevent the 'unfair, partial, and corrupt elections' and the 'monstrous irregularity' of the English representational system . . . ." Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 170 (2d ed. 1998).

To achieve these goals, the Framers imposed on the federal government a duty to conduct a complete and accurate count of all people residing in the nation for the purpose of apportioning representatives to Congress, creating a structural protection for equal representation. This was a revolutionary undertaking. "While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document." *Utah v. Evans*, 536 U.S. 452, 510 (2002) (Thomas, J., concurring in part and dissenting in part); Margo Anderson, *The Census and the Federal Statistical System: Historical Perspectives*, 631 Annals of Am. Acad. of Poli. & Soc. Sci. 152, 154 (2010) ("With th[e Census Clause's] words, the United States became the first nation in the history of the world to take a population census and use it to allocate seats in a national assembly according to population."). Thus, at a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers made the Census the cornerstone of the democratic system of government they created.

The text of Article I, Section 2 provided a "conjectural ratio" for the apportionment of representatives "to prevail in the outset," but the Framers refused to permit guesswork to be used going forward. 1 *Farrand's Records*, *supra*, at 578; *Evans*, 536 U.S. at 475 ("[T]he original allocation of seats in the House was based on a kind of 'conjectur[e],' in contrast to the

deliberately taken count that was ordered for the future." (quoting 1 *Farrand's Records*, *supra*, at 578-79)). As George Mason argued, "a Revision from time to time according to some permanent & precise standard" was "essential to [the] fair representation required in the 1st. branch." 1 *Farrand's Records*, *supra*, at 578. While the Framers did not prescribe a "detailed census methodology," *Evans*, 536 U.S. at 479, they established a firm rule that the political branches cannot vary: all persons must be counted, regardless of where they are from.

Wary that those in power might try to undermine the promise of equal representation for all, the Framers insisted on an "actual Enumeration"—a national count of all inhabitants—once every ten years. As Founding-era dictionaries make clear, "an 'enumeration' requires an actual counting." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (1999) (Scalia, J., concurring in part) (collecting dictionary definitions); *Evans*, 536 U.S. at 475 ("Late-18th-century dictionaries define the word simply as an 'act of numbering or counting over[.]'" (quoting 1 Samuel Johnson, *A Dictionary of the English Language* 658 (4th rev. ed. 1773))). As James Madison observed during debates over the First Census Act, while "there will be more difficulty attendant on . . . taking the census, in the way required by the [C]onstitution," a count of all persons would provide an "exact number" rather than "assertions and conjectures[.]" James Madison, *Census* (Feb. 2, 1790), *in* 13 *The Papers of James Madison* 15-16 (Charles F. Hobson & Robert A. Rutland eds., 1981).

Over the course of the Convention, the Framers rejected other, more-restrictive provisions for apportioning representatives in favor of a rule counting all individuals. During the debates over Article I, § 2, Pierce Butler urged a rule of representation based on wealth or property, claiming that "property was the only just measure of representation" and the "great object of Governt." 1 *Farrand's Records*, *supra*, at 542. Others agreed that "ye. number of

inhabitants was not the proper index of ability & wealth; that property was the primary object of Society" and urged that "in fixing a ratio this ought not to be excluded from the estimate." *Id.* at 541 (Rufus King). These proposals to depart from the rule of equal representation for equal numbers of people were rejected. The Framers overwhelmingly concluded that "[t]he number of inhabitants" was the "only just & practicable rule." *Id.* at 542 (Charles Pinckney); *see also id.* at 587 (urging "propriety of establishing numbers as the rule" (Nathaniel Ghorum)). "[N]umbers" in other words, "were surely the natural & precise measure of Representation." *Id.* at 605 (James Wilson).

By writing the Census directly into the Constitution, the Framers sought to prevent political manipulation of our democracy. As the debates in the Constitutional Convention over the Census Clause reflect, the Framers understood that "those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." *Id.* at 578; *Evans*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part) (observing that "[d]ebate about apportionment and the census . . . focused for the most part on creating a standard that would limit political chicanery"). The Framers' decision to mandate a national count of all inhabitants every ten years to ensure equal representation for all persons "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised." 2 Joseph Story, *Commentaries on the Constitution* § 633, at 107 (1833). As Alexander Hamilton emphasized, "[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression." *The Federalist No. 36*, *supra*, at 220 (Hamilton).

During the debate about the Census Clause at the Constitutional Convention, both supporters and opponents recognized that a fixed constitutional standard would limit opportunities for manipulation of our representative democracy. Gouverneur Morris opposed the Census Clause as "fettering the Legislature too much," but he recognized that if the mode for taking the Census was "unfixt the Legislature may use such a mode as will defeat the object[] and perpetuate the inequality." 1 *Farrand's Records*, *supra*, at 571. In response, Edmund Randolph pointed out that "if the danger suggested by Mr. Govr. Morris be real, of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations." *Id.* at 580. This argument carried the day, and the Framers concluded that "the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." *Id.* at 582.

The Constitution's rule that representatives would be apportioned based on an "actual Enumeration" of the people, however, was undercut by the Three-Fifths Clause, which provided that, for the purpose of determining representation in Congress, enslaved persons would be counted as three-fifths of a person. "The more slaves the Deep South could import from the African continent—innocents born in freedom and kidnapped across an ocean to be sold on auction blocks—the more seats it would earn in the American Congress." Amar, *supra*, at 90. During the debates at the Convention, Gouverneur Morris and others argued strenuously against the adoption of the Three-Fifths Clause, pointedly asking "[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?" 2 *Farrand's Records, supra*, at 222. The upshot of the Clause was that "the inhabitant of Georgia and S. C. who goes to the coast of Africa, and . . . tears away his fellow creatures from their dearest connections &

dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind." *Id.* Despite these arguments, the Convention approved the Three-Fifths Clause. Nearly 80 years later, following a bloody civil war fought over our nation's original sin of slavery, the Framers of the Fourteenth Amendment would revisit the Constitution's system of representation in the wake of emancipation and abolition, as the next Section discusses.

II. The Fourteenth Amendment Reaffirmed the Total Population Standard in Order to Ensure Equal Representation for Equal Numbers of People.

With the adoption of Section 2 of the Fourteenth Amendment, which provides 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 Founding generation's commitment to equal representation for all as determined by a national count of all persons was finally realized. Yet it took seven months of heated debate for this guarantee of equal representation for all persons to emerge. During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. The Framers of the Fourteenth Amendment decisively rejected those arguments and reaffirmed total population as the Constitution's basis for representation. *Evenwel*, 136 S. Ct. at 1128. As Jacob Howard explained in introducing the Fourteenth Amendment, "numbers," that is, total population, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

When the 39th Congress met in December 1865, questions of representation were front and center. With the Three-Fifths Clause a nullity, the Framers of the Fourteenth Amendment were concerned that formerly enslaved people would now be counted as full persons, giving the Southern states far more representation in Congress and in the Electoral College than they had before they seceded from the Union. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 357 (1866) ("Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living?"). As the Joint Committee on Reconstruction, which was tasked with writing the Fourteenth Amendment, explained, "[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative." *Report of the Joint Committee on Reconstruction at the First Session Thirty-Ninth Congress* xiii (1866).

Even before the Joint Committee began its work, members of Congress proposed constitutional amendments aimed at changing the Constitution's basis of representation. On December 5, 1865, Rep. Thaddeus Stevens introduced an amendment, which provided that "[r]epresentatives shall be apportioned among the States . . . according to their respective legal voters" and required Congress to provide a "true census of the legal voters." Cong. Globe, 39th Cong., 1st Sess. 10 (1865). Stevens's proposed amendment, as well as other similar proposals, met fierce objection. On January 8, 1866, Rep. James Blaine explained that "population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id.* at 141 (1866). Stripping non-voters of their right to the representation guaranteed by the Constitution, Blaine argued, would lead to "gross inequalities of representation" in "the loyal States." *Id.*

Rather than changing the Constitution's system of representation, Blaine preferred a targeted amendment reducing congressional representation in states that denied the right to vote on account of race.

On the following day, January 9, the Joint Committee convened to consider proposed constitutional amendments. Rep. Stevens immediately proposed the same amendment he had proposed in the House. *See* Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*, at 41 (1914). Several days later, the Committee, by a vote of 8-6, voted down a resolution that proposed that "representatives should be apportioned among the several States according to their respective numbers of legal voters." *Id.* at 45. On January 16, the Joint Committee approved a constitutional amendment that reaffirmed Article I's mandate that representation be apportioned "according to their respective numbers, counting the whole numbers of persons in each State, excluding Indians not taxed" and added a proviso that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." *Id.* at 51-52, 53. Although the amendment initially provided for basing representation on the "whole number of citizens of the United States in each State," *id.* at 50, the Joint Committee overwhelmingly voted to change this language to conform to the Constitution's language requiring the counting of all persons, citizens and non-citizens alike. *Id.* at 52; *see also* Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (explaining Committee's amendment from counting "citizens" to counting "persons" because "'[p]ersons,' and not 'citizens,' have always constituted the basis" (Rep. Roscoe Conkling)).

When the Joint Committee's amendment was debated before the House, some objected to basing representation on total population. Rep. Godlove Orth insisted that "the true principle of

representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government." *Id.* at 380; *see also id.* at 379 (insisting that "those who are authorized to vote, who elect Representatives to this House, and they alone, shall constitute the basis of representation" (Rep. Ithamar Sloan)); *id.* at 404 (urging an amendment that "representation shall be based on citizens of the United States who may be male adult voters" so that "every voter should be equal in political power all over the Union" (Rep. William Lawrence)). But as the Supreme Court has recognized, "[v]oter-based apportionment proponents encountered fierce resistance . . . . Much of the opposition was grounded in the principle of representational equality." *Evenwel*, 136 S. Ct. at 1128. Proponents of the amendment in the House argued that such a change in our Constitution's system of representation would be "an abandonment of one of the oldest and safest landmarks of the Constitution" and would "introduce[] a new principle in our Government, whose evil tendancy and results no man can measure to-day." Cong. Globe, 39th Cong., 1st Sess. 377 (1866) (Rep. James Blaine). Instead, the Reconstruction Framers insisted on "leav[ing] the primary basis of representation where it was placed by our fathers, the whole body of the people." *Id.* at 385 (Rep. Elihu Baker).

Particularly relevant here, Rep. John Bingham argued that it would be unwise to "strike from the basis of representation the entire immigrant population not naturalized," observing that "[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." *Id.* at 432. In his view, the "whole immigrant population should be numbered with the people and counted as part of them." *Id.*; *see also id.* at 411 (arguing that representation based on number of voters "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)). In addition, Rep. Roscoe Conkling emphasized that counting only voters in determining representation "would shut out

four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and who are, and always have been, represented," *id.* at 358, resulting in some regions of the country receiving more representation than others. *Id.* at 411 (observing that "the voters of the country are unequally distributed" (Rep. Burton Cook)); *see also id.* at 434 ("[W]hat becomes of that large class of non-voting tax-payers that are found in every section? Are they in no manner to be represented? They certainly should be enumerated in making up the whole number of those entitled to a representative." (Rep. Hamilton Ward)).

On January 31, 1866, the House of Representatives approved the amendment by a vote of 120-46, and sent the measure to the Senate. Debate in the Senate, as it had in the House, focused on the question whether the Constitution's system of representation should be based on total population or on voting population. Supporters of the amendment urged that representation should be based "on the largest basis of population, counting every man, woman, and child," *id.* at 1280, explaining that "[t]he principle of the Constitution, . . . is that it shall be founded on population; that the people who are voters, . . . are not the whole people of a State; . . . . [W]e are attached to that idea, that the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution." *Id.* at 705 (Sen. William Fessenden). The amendment's proponents refused to "throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women," *id.* at 1256 (Sen. Henry Wilson), insisting that "[a] community may be represented, every man in the community may be represented, and every woman and child in the community may be represented, and yet not every man twenty-one years of age be a voter." *Id.* at 1279-80 (Sen. William Fessenden). As in the House, opponents of the amendment urged a change to a voter basis of representation, claiming that the "representative system is the agent of legal voters." *Id.* at 1229 (Sen. Charles Sumner). Ultimately, for other

reasons, the amendment failed to garner a 2/3 super-majority. On March 9, 1866, a number of Radical Republicans, led by Senator Charles Sumner, joined with Democrats to prevent approval of the amendment.

In April 1866, the Joint Committee approved and sent to Congress a new proposed amendment—which would become the Fourteenth Amendment—containing provisions guaranteeing individual rights and rules for apportioning representation in Congress. This new amendment reaffirmed total population as the basis for representation and added a penalty provision reducing representation in states that denied African Americans the right to vote. With this round of debates, only the Senate engaged in extended discussion of the Constitution's system of equal representation. The House, which had lengthy debates on total population as the Constitution's basis of representation only months earlier, did not debate these matters again.

In the Senate debates, Senator Jacob Howard explained that the Fourteenth Amendment's "basis of representation is numbers, whether the numbers be white or black," *id.* at 2766, calling representation in accordance with total population "the only true, practical, and safe republican principle," *id.* at 2767. Opponents of the Fourteenth Amendment urged that only "the voting population of the country should be represented," insisting on a change in the Constitution's system of representation so that "voters should have an equal voice." *Id.* at 2942, 2944 (Sen. James Doolittle). The Framers of the Fourteenth Amendment rejected such efforts to eliminate the Constitution's guarantee of equal representation for equal numbers of people. As Senator Luke Poland argued, the Constitution's "existing basis is the only true one, the only one consistent with the true idea of a representative republican government. . . . All 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 2962; *see also id.* at 2987 (describing proposal to change basis of representation from total population to voting population as "a blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis"). By a 31-7 vote, Senator Doolittle's proposals to base representation on the number of voters were rejected. *Id.* at 2986, 2991.

As these debates reflect, the Fourteenth Amendment featured a great debate over the nature of representation and democracy. Following more than seven months of debate in Congress, Congress adopted the Fourteenth Amendment, insisting that total population, not voter population, was the basis for our Constitution's system of representation. The Fourteenth Amendment, which was approved by the people and became a part of the Constitution in 1868, reaffirmed that our Constitution's system of equal representation for all depends on a count of the nation's entire population, including noncitizens. As this history shows, the purpose of the Census required by the Constitution has never been to count just citizens, but rather to count "the whole body of the people." *Id.* at 385.

III. The President May Not Refuse to Count Persons Living in the United States Simply Because of Their Immigration Status.

President Trump's memorandum claims that the "Constitution does not specifically define which persons must be included in the apportionment base," 85 Fed. Reg. at 44,679, but ignores that the Constitution explicitly mandates a count of the "whole number of persons" in the United States for purposes of apportioning representatives to Congress. It is plain that undocumented immigrants who live in the United States are among the "whole number of persons" the Constitution requires the federal government to count in the apportionment base. "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). As *Plyler* recognized, "[t]hat a

person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter." *Id.* at 215; *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 576 ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'").

The presidential policy at issue here thus cannot be squared with the Constitution's text and history, which reflect that "[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" and "numbered with the people and counted as part of them." Cong. Globe, 39th Cong., 1st Sess. 432 (1866). Excluding undocumented immigrants from the constitutionally mandated apportionment count and stripping them of representation in Congress would undermine our constitutional promises of equality and democracy, which proceed from the fundamental idea that all persons residing in the United States—no matter their citizenship status or where they come from—deserve to be represented in the halls of Congress. "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote," and our system of "total-population apportionment promotes equitable and effective representation." *Evenwel*, 136 S. Ct. at 1132. Because the President's policy of excluding undocumented immigrants from the apportionment base contravenes the requirement to count all persons in apportioning representatives to Congress, it is unconstitutional.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for partial summary judgment or, in the alternative, an expedited trial on the merits should be granted.

Dated: August 26, 2020

Respectfully submitted,

/s/ Brianne J. Gorod
Brianne J. Gorod

Elizabeth B. Wydra (DC Bar No. 483298)
Brianne J. Gorod (DC Bar No. 982075)
David H. Gans (DC Bar No. 461002)
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

APPENDIX:
LIST OF *AMICI*

Schatz, Brian
Senator of Hawaii

Booker, Cory A.
Senator of New Jersey

Blumenthal, Richard
Senator of Connecticut

Brown, Sherrod
Senator of Ohio

Heinrich, Martin
Senator of New Mexico

Menendez, Robert
Senator of New Jersey

Merkley, Jeffrey A.
Senator of Oregon

Warren, Elizabeth
Senator of Massachusetts

Wyden, Ron
Senator of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: August 26, 2020

/s/ Brianne J. Gorod
Brianne J. Gorod
Counsel for Amici Curiae