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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 CITY OF SAN JOSE, CALIFORNIA, et al.,

19 Plaintiffs,

20 v.

21 DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,

22 Defendants.

Case No. 5:20-cv-05167-LHK-RRC-EMC

23 STATE OF CALIFORNIA, et al.,

24 Plaintiffs,

25 v.

26 DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,

27 Defendants.

Case No. 5:20-cv-05169-LHK-RRC-EMC

**Brief of the U.S. House of Representatives
As Amicus Curiae in Support of Plaintiffs**

28 Date: October 8, 2020
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor
Judge: Honorable Richard R. Clifton
Honorable Lucy H. Koh
Honorable Edward M. Chen

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY.....	2
ARGUMENT.....	3
I. THE MEMORANDUM VIOLATES THE CONSTITUTIONAL AND STATUTORY REQUIREMENT OF APPORTIONMENT BASED ON THE TOTAL POPULATION.....	3
A. The Constitution’s Text, History, and Purpose Require Apportionment Based on the Total Population.....	4
B. Congress Has Long Understood the Constitution to Require Apportionment Based on Total Population and Has Implemented that Requirement by Statute.....	7
C. The Executive Branch Has Consistently Recognized the Constitutional Requirement of Apportionment Based on Total Population.....	9
D. The Memorandum Is Invalid Under the Constitution and Applicable Statutes.....	12
II. THE MEMORANDUM HARMS THE INTEGRITY OF THE HOUSE AND PUBLIC PERCEPTIONS OF ITS LEGITIMACY.....	16
A. The Memorandum Continues Efforts to Manipulate the Census, Undermining the Reality and Perception of Impartiality.....	17
B. The Memorandum Will Result in a Flawed and Inaccurate Apportionment.....	20
C. The Memorandum Will Distort the Composition of the House.....	23
CONCLUSION.....	25

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 Bingham (Sept. 22, 1989) 12
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 Ford, House of Representatives (June 29, 1988) 11

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1 The U.S. House of Representatives hereby submits this brief as *amicus curiae* in support
2 of Plaintiffs pursuant to this Court’s Order Granting Stipulation to Permit Filing of Amicus
3 Briefs, Dkt. No. 62.

4 **INTEREST OF *AMICUS CURIAE***¹

5 *Amicus curiae*, the United States House of Representatives (House),² respectfully submits
6 this brief in furtherance of its compelling institutional interests in this case.

7
8 First, the House has a paramount interest in the integrity of its own composition, *see*
9 *Powell v. McCormack*, 395 U.S. 486, 548 (1969), which depends upon the lawful and accurate
10 apportionment of Representatives among the States based on the decennial census.

11 Second, Article I of the Constitution places responsibility for the census and
12 apportionment with Congress. *See* U.S. Const. Art. I, § 2, cl. 3 (the enumeration shall be
13 conducted “in such Manner as [Congress] shall by Law direct”). The House therefore has a
14 compelling interest in ensuring that the President does not transgress constitutional and statutory
15 constraints in the administration of the census and the certification of the apportionment to
16 Congress.

17
18 Third, federal law requires the Clerk of the House, on the basis of the apportionment, to
19 notify each State’s governor of the number of Representatives to which the State is entitled.
20 2 U.S.C. § 2a(b). The House has an interest in the integrity and legality of the process its
21 officers and personnel are directed to carry out.

22
23
24 ¹ No person or entity other than amicus and its counsel assisted in or made a monetary
contribution to the preparation or submission of this brief.

25 ² The Bipartisan Legal Advisory Group (BLAG) of the United States House of
26 Representatives has authorized the filing of an *amicus* brief in this matter. The BLAG comprises
27 the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority
Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy,
28 Republican Leader, and the Honorable Steve Scalise, Republican Whip, and “speaks for, and
articulates the institutional position of, the House in all litigation matters.” Rules of the U.S.
House of Representatives, 116th Cong., Rule II.8(b) (2019), <https://perma.cc/M25F-496H>. The
Republican Leader and Republican Whip dissented.

1 Finally, the House has a powerful interest in ensuring that all of our Nation's
2 communities—which contribute to the public fisc and are equally subject to its laws—receive the
3 representation in the House to which they are entitled.

4 INTRODUCTION AND SUMMARY

5 By memorandum issued on July 21, 2020, President Trump ordered the exclusion of
6 noncitizens “who are not in a lawful immigration status” from “the reapportionment of
7 Representatives following the 2020 census.” Excluding Illegal Aliens From the Apportionment
8 Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the
9 Memorandum). The Memorandum attempts to justify that exclusion on the basis of the
10 President's purported discretion to redefine which U.S. residents qualify as “inhabitants” in
11 determining the total population of each State for purposes of apportionment. *Id.* at 44,679.
12

13 The Constitution, as well as the Census and Reapportionment Acts, prohibit the
14 President's action. Section 2 of the Fourteenth Amendment requires the “counting [of] the
15 whole number of *persons* in each State,” U.S. Const. Amend. XIV, § 2 (emphasis added), and
16 commands that “Representatives shall be apportioned among the several States according to their
17 respective numbers,” as determined in the enumeration. *Id.*; *see also* U.S. Const. Art. I, § 2, cl.
18 3. Based on this language and the enactment history of the original Constitution and the
19 Fourteenth Amendment, all three branches of the Federal Government have long understood that
20 the Constitution requires the Congressional apportionment base to encompass all “persons”
21 residing in each State—irrespective of citizenship or immigration status. The statutes
22 implementing the constitutional text reflect the Constitution's clear mandate, requiring “the
23 tabulation of total population by States,” 13 U.S.C. § 141(b), and counting the “whole number of
24 persons in each State,” 2 U.S.C. § 2a(a). The President therefore cannot lawfully transmit an
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1 apportionment calculation based on anything other than “the whole number of persons in each
 2 State.” *Id.*

3 The actions directed by the Memorandum not only violate the law but also threaten
 4 serious harm to the integrity of the House and its composition. This Administration’s
 5 implementation of the census has been marked by efforts to manipulate the count for apparently
 6 political purposes, and the Memorandum is a new and troubling chapter in that history. The
 7 Memorandum compounds the perception that the Administration is using the census for partisan
 8 purposes to suppress the voting power of disfavored groups. Even setting these problems aside,
 9 the Memorandum’s goal of ascertaining the number of immigrants without lawful status is
 10 impossible as a practical matter to do accurately, because any attempt to do so would either use
 11 statistical sampling that federal law prohibits or would yield wildly inaccurate figures that would
 12 distort the composition of the House. An inaccurate census tainted by partisan influence will
 13 harm the public’s faith in the apportionment, impair effective governance, and undermine the
 14 foundational principle, central to the House’s legitimacy, that in our democracy all the people
 15 count.
 16
 17

18 **ARGUMENT**

19 **I. The Memorandum Violates the Constitutional and Statutory Requirement of** 20 **Apportionment Based on the Total Population**

21 Every tool of constitutional and statutory interpretation demonstrates that the
 22 Memorandum is unlawful. The text of Article I and the Fourteenth Amendment, viewed in light
 23 of the history and purpose of those provisions, confirms that apportionment must be based on a
 24 count of the population of all persons residing in the United States. Congress, the courts, and the
 25 Executive Branch have consistently interpreted the Constitution to require an all-persons
 26 enumeration. Congress has not only enacted statutes that implement the Constitution’s
 27 command to count all persons, but has also refused to enact legislation that would accomplish
 28

1 what the Memorandum attempts to achieve by executive fiat.

2 **A. The Constitution’s Text, History, and Purpose Require Apportionment**
 3 **Based on the Total Population**

4 As originally drafted, the Constitution required that all persons be counted for purposes
 5 of apportioning seats in the House, *see* U.S. Const. Art. I, § 2, cl. 3; *id.* Art. II, § 1, cl. 2, subject
 6 to two notorious and explicitly identified exceptions: Enslaved people were counted as only
 7 three-fifths of a person, and “Indians not taxed” were excluded from the total population. *Id.*
 8 Art. I, § 2, cl. 3. The Fourteenth Amendment, ratified in the wake of the Civil War to establish
 9 political representation for all, amended the Enumeration Clause of Article I to remove the
 10 Three-Fifths Clause and require that apportionment of Representatives be based on the “whole
 11 number of persons in each State.” U.S. Const. Amend. XIV, § 2.³

13 The meaning of these provisions is clear. The term “person” includes any “human
 14 being,” Black’s Law Dictionary (11th ed. 2019), and necessitates that *every* individual residing
 15 in the United States be included in the decennial count. This was the understanding of the
 16 Constitution’s framers. James Madison explained in the Federalist Papers that “the aggregate
 17 number of representatives allotted to the several states” was to be “founded on the aggregate
 18 number of inhabitants,” even though a State could deny many of its residents the franchise. The
 19 Federalist No. 54, at 284 (G. Carey & J. McClellan eds., 2001) (quoted in *Evenwel v. Abbott*, 136
 20 S. Ct. 1120, 1127 (2016)). Alexander Hamilton, speaking in support of apportionment based on
 21 total population, stated: “There can be no truer principle than this—that every individual of the
 22 community at large has an equal right to the protection of government.” 1 Records of the
 23

24
 25 ³ The exception for “Indians not taxed” was retained in the Fourteenth Amendment but is
 26 no longer applicable. *See, e.g.*, An Act to Provide for Taking the Tenth and Subsequent
 27 Censuses, ch. 195 § 8, 20 Stat. 475 (1879) (authorizing the Census Bureau to enumerate all
 28 Native Americans); *Exclusion of “Indians Not Taxed” When Apportioning Representatives*, 39
 Op. Att’y Gen. 518, 519–20 (1940) (recommending that the Secretary of Commerce continue
 enumerating all Native Americans in light of both the Supreme Court’s determination that all
 Native Americans are subject to federal income tax laws and the uncertainty about the meaning
 of the constitutional phrase “Indians not taxed”).

1 Federal Convention of 1787, at 473 (M. Farrand ed., 1911) (quoted in *Evenwel*, 136 S. Ct. at
2 1127). The debates at the Constitutional Convention make “abundantly clear” that “when the
3 delegates agreed that the House should represent ‘people’ they intended that in allocating
4 Congressmen the number assigned to each State should be determined solely by the number of
5 the State’s inhabitants.” *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).
6

7 The Fourteenth Amendment abandoned the Three-Fifths Clause but otherwise retained
8 total population as the apportionment base, specifying that Representatives must be apportioned
9 “according to their respective numbers, *counting the whole number of persons in each State.*”
10 U.S. Const. Amend. XIV, § 2 (emphasis added). That the Fourteenth Amendment uses distinct
11 language in other provisions to refer specifically to citizens underscores that the broader
12 reference to “persons” includes all inhabitants, regardless of citizenship status. *Compare id.*, § 1,
13 cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities
14 of citizens of the United States . . .” *with id.*, § 1, cl. 3 (“[N]or shall any State deprive any person
15 of life, liberty, or property, without due process of law . . .”).
16

17 The drafting history of the Fourteenth Amendment further confirms that the provision
18 encompasses all persons, regardless of immigration status. The framers of the Fourteenth
19 Amendment deliberately chose a total-population basis for the apportionment of Representatives
20 in the House. *See Evenwel*, 136 S. Ct. at 1127–29; *see also* Cong. Globe, 39th Cong., 1st Sess.
21 2767 (1866) (remarks of Sen. Jacob Howard) (“Numbers, not voters . . . [or] property; this is the
22 theory of the Constitution.”).
23

24 The selection of the word “persons” for the apportionment base reflected an
25 understanding that all individuals “have as vital an interest in the legislation of the country as
26 those who actually deposit the ballot.” *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th
27 Cong., 1st Sess., 141 (1866) (remarks of Rep. James Blaine)); *see also* Akhil Reed Amar, *The*
28

1 Bill of Rights: Creation and Reconstruction 169–72, 217–18 (1998) (emphasizing the framers’
 2 choice to use the term “persons” to encompass “nonvoting aliens” in the wake of the Supreme
 3 Court’s *Dred Scott* decision). In making this choice, the Amendment’s framers recognized that
 4 elected federal officials represent and act in the name of *all* their constituents, including
 5 nonvoting classes, like women (at the time), children, incarcerated persons, and noncitizens.⁴
 6

7 In light of the text and history of the Fourteenth Amendment, the Supreme Court has
 8 explained that “[a]liens, even aliens whose presence in this country is unlawful, have long been
 9 recognized as ‘persons’” under the Fourteenth Amendment. *Plyler v. Doe*, 457 U.S. 202, 210
 10 (1982). “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any
 11 ordinary sentence of that term.” *Id.* The Fourteenth Amendment’s references to “persons” “are
 12 universal in their application, to all persons within the territorial jurisdiction, without regard to
 13 any differences of race, of color, or of nationality.” *Yick Wo v. Hopkins*, 118 U.S. 356, 369
 14 (1886).
 15

16 Contrary to the Memorandum’s assertion, the Fourteenth Amendment did not leave open
 17 the possibility that some classes of residents would be excluded from the enumeration and
 18 apportionment. The primary drafter of the Fourteenth Amendment, Representative John
 19 Bingham, made clear that the Fourteenth Amendment’s use of the term “whole number of
 20 persons” encompasses all persons living in each State, including the “entire immigrant
 21 population not naturalized.” Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (remarks of Rep.
 22 John Bingham); *see also id.* at 1256 (remarks of Rep. Henry Wilson) (recognizing that
 23 “unnaturalized foreign-born” individuals and others ineligible to vote are included in the census
 24
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26
 27 ⁴ See Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (remarks of Rep. James Blaine)
 28 (describing rejected amendment’s proposed use of “suffrage instead of population [as] the basis
 of apportioning Representatives”); *id.* at 353 (remarks of Rep. Andrew Rogers) (asserting “the
 States are entitled to representation” for women and children, who “constitut[ed] nearly one half
 of the population of this country, [but] cannot vote”).

1 count). Bingham argued vehemently against alternative proposals that would have limited the
2 apportionment base, asserting that “[u]nder the Constitution as it now is and as it always has
3 been, *the entire immigrant population* of this country is included in the basis of representation.”
4 *Id.* at 432 (emphasis added); *see also id.* at 411 (remarks of Rep. Burton Cook) (expressing
5 concern that representation based on number of voters would inappropriately “take[] from the
6 basis of representation all unnaturalized foreigners”).

8 The unambiguous text and drafting history of Article I and the Fourteenth Amendment
9 thus make clear that the Constitution requires “the population base for purposes of
10 apportionment” to “include[] all persons, including aliens both lawfully and unlawfully within
11 our borders.” *Fed’n for Am. Immigr. Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.
12 1980) (three-judge court).

14 **B. Congress Has Long Understood the Constitution to Require Apportionment**
15 **Based on Total Population and Has Implemented that Requirement by**
16 **Statute**

17 Congress has consistently understood that the Constitution mandates apportionment
18 based on all who reside in the United States. Every statute that Congress has ever passed
19 regarding the census has reflected this understanding, and every census has included
20 undocumented immigrants in the apportionment count. *FAIR*, 486 F. Supp. at 576.

21 In light of Congress’s understanding of the constitutional requirement to count all
22 inhabitants, legislative efforts to alter the apportionment to exclude certain noncitizens from the
23 apportionment count have always failed. Immediately after adoption of the Fourteenth
24 Amendment, a proposal to exclude “aliens” from apportionment was defeated in the House. *See*
25 *Cong. Globe*, 39th Cong., 1st Sess. 535, 538 (1866) (proposal to exclude); *see also id.* at 2767
26 (remarks of Sen. Jacob Howard) (explaining that the “basis of representation” is the “whole
27 population” as “the principle upon which the Constitution itself was originally framed . . .
28

1 [which] is the safest and most secure principle upon which the Government can rest”).

2 Subsequent attempts to exclude either all aliens or undocumented immigrants from the
3 apportionment base failed in the Seventy-first, Seventy-sixth, Ninety-sixth, One Hundredth, and
4 One Hundred Eleventh Congresses.⁵ These efforts were rejected due to a broad recognition that
5 the “statutory exclusion of aliens from the apportionment base would be unconstitutional” absent
6 constitutional amendment. 71 Cong. Rec. 1821 (1929); *see also* 86 Cong. Rec. 4372 (1940)
7 (remarks of Rep. Emanuel Celler) (“The Constitution says that all persons shall be counted,”
8 including “those aliens here illegally.”); *1980 Census: Counting Illegal Aliens: Hearing Before*
9 *the S. Subcomm. on Energy, Nuclear Proliferation, & Fed. Services of the Comm. on Gov’tl*
10 *Affairs (1980 Census)*, 96th Cong. 10 (1980) (remarks of Sen. Jacob Javits) (maintaining that the
11 Constitution cannot mean “anything other than as described in Federalist papers, the aggregate
12 number of inhabitants, which includes aliens, legal and illegal.”).⁶ Congress has routinely
13 received counsel on this question reaching the same conclusion.⁷
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17 ⁵ *See* Margaret Mikyung Lee & Erika K. Lunder, *Constitutionality of Excluding Aliens*
18 *from the Census for Apportionment and Redistricting Purposes*, Cong. Research Serv. at 6, n.37
19 (Apr. 13, 2012) (citing H.J. Res. 20, 101, 263, 356, and 484, 71st Cong. (1931); 86 Cong. Rec.
4372 (1940) (Senate); S. 2366, 96th Cong. (1980)); *see also* H.R. 3639, 100th Cong. (1987)
(House)); H.R. 3797, 111th Cong. (2011) and S. 1688, 111th Cong. (2011).

20 ⁶ Although the Senate passed two bills with a provision “prohibit[ing] the use of funds to
21 include illegal aliens in the census for apportionment,” neither of these measures was enacted.
22 Margaret Mikyung Lee & Erika K. Lunder, *Constitutionality of Excluding Aliens from the*
Census for Apportionment and Redistricting Purposes, Cong. Research Serv. at 13 (2012)
(referencing S. 358, § 601, 101st Cong. (1989) and Senate-passed version of H.R. 2991, 101st
Cong. (1989)).

23 ⁷ *See* Thomas M. Durbin, *The 1990 Decennial Census and the Counting of Illegal Aliens*,
24 Cong. Rsch. Serv., 88-62 A (1988) (concluding that “aliens, legal and illegal,” are included
25 within “persons” in the Enumeration Clause and “that a constitutional amendment would seem to
26 be necessary to exclude illegal aliens from the decennial census”); Margaret Mikyung Lee &
27 Erika K. Lunder, Cong. Rsch. Serv., *Analysis of Whether Unauthorized Aliens Must be Included*
in the Census 1 (2009) (concluding that the Framers intended that “persons” would be “all-
28 inclusive,” so the “apportionment calculation” must be “based on the states’ total resident
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Purposes 2 (2012) (finding “the total resident population of the states . . . includes both citizens
and aliens”); Jennifer D. Williams, Cong. Rsch. Serv., *Answers to Selected Questions About the*
Decennial Census 3 (2017) (citing Census Bureau’s analysis concluding “the Constitution

1 The statutes that currently implement the Apportionment and Enumeration Clauses
 2 reflect this consistent understanding of the Constitution’s meaning. The Census Act requires the
 3 “tabulation of *total population* by States . . . as required for the apportionment of Representatives
 4 in Congress among the several States.” 13 U.S.C. § 141(b) (emphasis added). The
 5 Reapportionment Act then requires the President to “transmit to the Congress a statement
 6 showing *the whole number of persons* in each State . . . as ascertained . . . [by the] decennial
 7 census of the population” and, in turn, to transmit an apportionment of Representatives
 8 calculated based on that full count. 2 U.S.C. § 2a(a) (emphasis added); *see also* S. Rep. No. 71-
 9 2, at 4–5 (1929) (requiring the President “to report upon a problem in mathematics . . . for which
 10 rigid specifications are provided by Congress itself, and to which there can be but one
 11 mathematical answer”).
 12

13
 14 While the President has certain policy discretion in the administration of the census, his
 15 role in the reapportionment process is limited to reporting the “whole number of persons in each
 16 State” to Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 791, 799 (1992). Like the
 17 Constitution itself, the statutory framework provides the President with no discretion to deviate
 18 from apportioning Congressional districts based on the “total,” “whole,” or “full” population.
 19

20 **C. The Executive Branch Has Consistently Recognized the Constitutional
 21 Requirement of Apportionment Based on Total Population**

22 The Executive Branch, throughout both Republican and Democratic administrations, has
 23 joined Congress and the Judicial Branch in reading the Constitution to require the enumeration of
 24 all persons and the inclusion of all those enumerated in apportionment. In particular, the Census
 25 Bureau and the Department of Justice (DOJ) have both acknowledged the constitutional
 26 requirement that apportionment account for all persons, including undocumented immigrants.

27 Since the first census, “[t]he Census Bureau has always attempted to count every person
 28 specified persons as the basis for apportionment, without regard to citizenship or legal resident
 status”).

1 residing in a state on Census day, and the population base for purposes of apportionment has
 2 always included all persons, including aliens both lawfully and unlawfully within our borders.”
 3 *FAIR*, 486 F. Supp. at 576. Thus, the census has historically counted individuals who have been
 4 present without regard to legal status.⁸ For instance, enslaved persons who escaped to a free
 5 State were counted as inhabitants of that State, despite the fact these individuals were considered
 6 under law to be fugitives illegally residing there.⁹ The Bureau has similarly always relied on
 7 total population in making apportionment determinations, because “[t]he apportionment
 8 population count for each of the 50 states includes the state’s total resident population (citizens
 9 and non-citizens).”¹⁰ No census has ever systematically excluded undocumented immigrants.¹¹

11 Recent history is in accord. As recently as 2018, the Census Bureau issued a rule
 12 recognizing that the Constitution and federal statutes compel the conclusion that “[f]oreign
 13 citizens are considered to be ‘living’ in the United States if, at the time of the census, they are
 14 living and sleeping most of the time at a residence in the United States.” Final 2020 Census
 15 Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525, 5,530 (2018). Earlier this year,
 16 the Director of the Census Bureau told Congress that the Bureau’s directive and mission is to
 17 “count everyone, wherever they are living.” *Hearing Before the H. Comm. on Oversight &*
 18 *Reform*, 116th Cong. 12 (Feb. 12, 2020). And four former Directors of the Census Bureau

21 _____
 22 ⁸ See Margaret Mikyung Lee & Erika K. Lunder, *Analysis of Whether Unauthorized*
 23 *Aliens Must be Included in the Census*, Cong. Rsch. Serv., 4 (2009) (referencing “reprint[ed]
 24 instructions [disseminated] to the Marshals for the 1820 and 1830 censuses” in Carroll D. Wright, *History and Growth of the U.S. Census, Prepared for the Senate Committee on the Census*, Department of Labor (1900), at 135, 140–41).

25 ⁹ U.S. Census Bureau, *Population of The United States in 1860*, at ix–xii, <https://perma.cc/MBR8-AKDU> (assessing fluctuations in the fugitive slave population).

26 ¹⁰ U.S. Census Bureau, *Frequently Asked Questions on Congressional Apportionment*, <https://perma.cc/2HCH-NYVZ>; see also U.S. Census Bureau, *Computing Apportionment*, <https://perma.cc/29ZD-9V76> (explaining “Equal Proportions Method” of calculating apportionment, used since 1941, relies on “a state’s total population”).

28 ¹¹ See *Hearing, Counting Every Person: Safeguarding the 2020 Census*, H. Comm. on Oversight & Government Reform (testimony of Kenneth Prewitt and Robert M. Groves).

1 recently testified before a House committee that President Trump’s effort to exclude
 2 undocumented immigrants from the apportionment count was unconstitutional.¹²

3 Like the Census Bureau, the DOJ has made clear that enumeration and apportionment
 4 must include the entire population, including unauthorized immigrants. In 1980, DOJ correctly
 5 observed that removing undocumented immigrants from the census and apportionment counts
 6 would constitute “a radical revision of the constitutionally mandated system for allocation of
 7 Representatives to the States of the Union and an equally radical revision of the historic mission
 8 of the decennial census.” Federal Defs.’ Post-Trial Proposed Findings, 15 Arg. Mem. at 1,
 9 *Klutznick*, No. 79-3269 (D.D.C. Feb. 15, 1980) (acknowledging that “for 200 years the decennial
 10 census has counted all residents of the states irrespective of their citizenship or immigration
 11 status”); *see also Ridge v. Verity*, 715 F. Supp. 1308, 1311 (W.D. Pa. 1989) (describing DOJ’s
 12 argument “that they are constitutionally mandated . . . to count all persons in the 1990 census,
 13 including illegal aliens, for purpose of apportionment” and that they have done so for 200 years).
 14

15
 16 DOJ has espoused the same position outside of litigation. In 1988, DOJ’s Office of
 17 Legislative Affairs asserted there was a “clear” constitutional mandate to count “all persons,
 18 including aliens residing in this country” in the census and “insisted upon their inclusion [in the
 19 apportionment base] . . . notwithstanding their acknowledgement that aliens were not bona fide
 20 members of the body politic.” Letter from Thomas M. Boyd, Acting Assistant Attorney, to Rep.
 21 William D. Ford, House of Representatives (June 29, 1988) (reprinted in *1990 Census*
 22 *Procedures and Demographic Impact on the State of Michigan*, U.S. Gov’t Printing Off., 240–44
 23 (1988)). In writing to Members of Congress, the DOJ has recognized that “the original
 24 Apportionment and Census Clauses of Article I section two of the Constitution require that
 25
 26

27
 28 ¹² *See* Press Release, H. Comm. on Oversight & Reform, *Four Former Census Bureau Directors Testify the Trump Administration’s Attempt to Ban Undocumented Immigrants from 2020 Census is Unconstitutional* (July 29, 2020).

1 inhabitants of States who are illegal aliens be included in the census count.” Letter from Carol
2 T. Crawford, Assistant Attorney General, to Senator Jeff Bingham (Sept. 22, 1989) (reprinted in
3 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989) (noting that DOJ “found no basis for
4 reversing this position”). These longstanding DOJ analyses correctly reflect the unambiguous
5 historical and legislative record of the Enumeration and Apportionment Clauses.
6

7 The consistent historical understanding of the Enumeration and Apportionment Clauses
8 by all three branches establishes an unbroken precedent that the President may not transgress: *all*
9 *persons* residing in the United States, regardless of immigration status, are to be, and
10 Representatives must be apportioned based on that count. Congress is entitled to rely on such
11 uniform judicial, administrative, and legislative treatments of the Constitution’s text. *See*
12 *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) (noting that “the longstanding practice of
13 government can inform our determination of what the law is” (internal citation and quotations
14 marks omitted)).
15

16 **D. The Memorandum Is Invalid Under the Constitution and Applicable Statutes**

17 The Memorandum conflicts with the clear constitutional and statutory command that all
18 persons must be included in the apportionment base, and the rationales offered in support of
19 excluding immigrants without lawful status do not withstand scrutiny. The President asserts that
20 “the term ‘persons in each State’” in the Enumeration Clause “has been interpreted to mean that
21 only the ‘inhabitants’ of each State should be included” within the apportionment base.
22 Excluding Illegal Aliens, 85 Fed. Reg. at 44,679. The Memorandum then reasons that Congress
23 has delegated to the President the discretion “to determine who qualifies as an ‘inhabitant,’” and
24 that this discretion “includes authority to exclude from the apportionment base aliens who are not
25 in a lawful immigration status.” *Id.* This logical leap fails under the plain language of the
26 Constitution and the applicable statutes.
27
28

1 Any discretion the President might have to determine who qualifies as an “inhabitant”
2 does not include the discretion to exclude residents based solely on their immigration status. The
3 inclusion of all “persons” in the Constitution’s mandate for enumeration and apportionment, in
4 addition to the historical reliance on total population for both, establishes that legal status is not a
5 prerequisite for habitancy. The Act of March 1, 1790, passed just three years after ratification of
6 the Constitution, specified that persons be enumerated at their “usual residence.” Final 2020
7 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525-01. An individual’s
8 residence is his or her “usual place of abode,” which is assessed without regard to the
9 individual’s immigration status. *Id.* Thus, “[t]he apportionment population base always has
10 included those persons who have established a residence in the United States,” regardless of their
11 legal status.¹³

12
13
14 Treating undocumented immigrants as if they do not in fact reside in the United States
15 departs so substantially from reality that the President’s interpretation is simply implausible.
16 Many immigrants, whatever their legal status, are longstanding members of their communities.
17 While there is no accurate data regarding the actual number of unauthorized immigrants living in
18 the United States, the Pew Research Center estimates that, in addition to 12.3 million lawful
19 permanent residents and 2.2 million temporary lawful residents, an estimated 10.5 million
20 unauthorized immigrants live in the United States.¹⁴ Per Pew’s estimates, “[a]bout two-thirds
21 (66%) of unauthorized immigrant adults in 2017 had been in the U.S. more than 10 years,” with
22 at least half of undocumented adults having “lived in the U.S. for a median of 15.1 years.”¹⁵ If
23 the President had discretion to construe “inhabitant” to exclude someone living in the United
24

25
26 ¹³ U.S. Census Bureau, Historical Perspective (2020), <https://perma.cc/Y6LW-XKF8>.

27 ¹⁴ Jynnah Radford, *Key Findings About U.S. Immigrants*, Pew Rsch. Ctr. (June 17, 2019),
<https://perma.cc/USU7-L9BM>.

28 ¹⁵ Jens Manuel Krogstad, et al., *5 Facts About Illegal Immigration in the U.S.*, Pew Rsch.
Ctr. (June 12, 2019), <https://perma.cc/YQU8-J9E3>.

1 States for over a decade, there would be few limits on his ability unilaterally to manipulate who
2 is represented in our democracy.

3 Not only does the Presidential Memorandum stretch the meaning of “inhabitant” beyond
4 recognition, it also conflicts with other federal legal regimes that treat undocumented immigrants
5 who have settled here as “inhabitants” or “residents.” For example, for tax purposes, noncitizens
6 who reside in the United States are considered “resident aliens,” regardless of their legal status,
7 and are required by law to “file a tax return following the same rules that apply to U.S. citizens.”
8 Internal Revenue Service, Publication 17, *Tax Guide 2019 For Individuals* at 7,
9 <https://perma.cc/UBR4-2F9J>; *see also* Internal Revenue Service, Publication 519, *U.S. Tax*
10 *Guide for Aliens* at 4-8, <https://perma.cc/A9N4-NCFK> (establishing a “substantial presence test”
11 for resident-alien status that does not account for legal status).
12

13
14 Indeed, contemporaneously with crafting the Fourteenth Amendment, Congress enacted a
15 seminal civil rights statute now codified at 18 U.S.C. § 242, which (until 1994) protected
16 “inhabitants” of any State from deprivation of their federal rights under color of law on account
17 of, among other things, “such inhabitant being an alien.” *See United States v. Williams*, 341 U.S.
18 70, 73 (1951); Pub. L. No. 103-322, § 320201, 108 Stat. 1796 (1994) (amending the statute to
19 protect all “persons”). Undocumented immigrants residing in the United States qualified as
20 “inhabitants” under this statute. *See United States v. Contreras*, 950 F.2d 232, 243 (5th Cir.
21 1991) (concluding that an “illegal alien” living in Texas was an “inhabitant” because her
22 “presence in the United States was sufficiently permanent”); *United States v. Otherson*, 637 F.2d
23 1276, 1284 (9th Cir. 1980) (it is “impossible to believe that Congress in 1870 could have
24 intended its statute to apply only to ‘legal’ immigrants”).¹⁶
25
26
27

28 ¹⁶ *Cf.* Case of Bailey, Report of the Committee of Elections, 18th Cong., 1st Sess. Rep. No. 67, at 5 (1824) (finding ineligible an elected member of Congress because he was not an

1 The Administration has offered no basis to treat undocumented immigrants as
2 “inhabitants” for purposes of federal taxation and civil rights protection but not Congressional
3 apportionment. The Administration’s treatment of undocumented immigrants as non-inhabitants
4 thus not only threatens to harm the apportionment count, but also is inconsistent with statutory
5 regimes in which Congress intended undocumented immigrants to qualify as inhabitants.
6

7 The Administration has sought to support the Memorandum by noting that the Executive
8 has discretion to *include* within the category of “inhabitants” persons who have been serving in
9 the military overseas but “retained their ties to the States.” *See* Mem. in Support of Defs.’ Mot.
10 to Dismiss at 33, *New York v. Trump*, No. 20-cv-5770 (RCW) (PWH) (JMF), Dkt. 118 (citing
11 *Franklin*, 505 U.S. at 806). But nothing in *Franklin* suggests that the Executive has discretion to
12 *exclude* persons who are physically present and have long-term ties to their communities.
13

14 The Administration has also noted that some undocumented immigrants, such as
15 inadmissible noncitizens paroled within the United States, are subject to a legal fiction that they
16 have not “entered” the United States even when they are physically present within its borders.
17 *See id.* at 35 (citing *Kaplan v. Tod*, 267 U.S. 228 (1925)). But that legal fiction is entirely
18 inapplicable here. It distinguishes between noncitizens “on the threshold”—including those who
19 have been paroled pending an admission determination—“and those who are within the United
20 States after an entry, irrespective of its legality.” *Leng May Ma v. Barber*, 357 U.S. 185, 187
21 (1958) (emphasis added)). Once noncitizens effect an “entry” under the immigration laws,
22 however, they are treated like other “persons” subject to the Fourteenth Amendment, regardless
23 of whether the entry was unlawful. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).
24

25 The Memorandum’s attempt to exclude immigrants without lawful status from the
26 apportionment base violates the applicable statutes for an additional reason. The Memorandum
27

28 “inhabitant” of his district and explaining that “inhabitant,” in contrast to “citizen,” “is derived
from habitation and abode, and not from the political privileges persons are entitled to exercise”).

1 assumes that the census process will provide data on which the President can reliably determine
 2 which persons are immigrants without lawful status, and thus excludable from the count. That
 3 assumption is incorrect. The 2020 census does not include any question about citizenship status,
 4 let alone address the more complex question whether each person counted is lawfully present in
 5 the United States. *Id.*; *see infra* Section II(A). And the Census Bureau itself has announced that
 6 it lacks “accurate estimates of the resident undocumented population” in each State.¹⁷
 7

8 Presumably, therefore, to discern the number of people who should be excluded from the
 9 enumeration, the Executive Branch would need to resort to the type of statistical sampling
 10 methods that the Census Act explicitly prohibits. *See* 13 U.S.C. §§ 141(a), 195 (prohibiting the
 11 use of statistical sampling “for the determination of population for purposes of apportionment of
 12 Representatives in Congress among the several States”); *U.S. Dep’t of Com. v. U.S. House of*
 13 *Representatives*, 525 U.S. 316, 343 (1999) (holding that the use of sampling in the decennial
 14 census to complete the enumeration “for apportionment purposes” violates the Census Act).¹⁸
 15 Thus, the President not only lacks the discretion he claims, but also could not rationally exercise
 16 any such discretion in compliance with the Census Act, even if he had it.
 17

18 **II. The Memorandum Harms the Integrity of the House and Public Perceptions of its** 19 **Legitimacy**

20 The census count has direct and substantial stakes for the distribution of political power
 21 across the country. For that reason, an objective and impartial process, resulting in accurate and
 22 reliable data, is critical to implementing a constitutionally sound census. *See, e.g., Dep’t of Com.*
 23

24 ¹⁷ Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.’ Supp. Rule 26(a)(1)
 25 Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep’t of Com.*, No. 2:18-cv-00772-
 RDP (N.D. Ala. Mar. 13, 2020); *see infra* Section II(B).

26 ¹⁸ Both Pew and the Department of Homeland Security use sampling to estimate the
 27 number of unauthorized immigrants. *See* Jeffrey S. Passel, *Measuring Illegal Immigration: How*
 28 *Pew Research Center Counts Unauthorized Immigrants in the U.S.*, Pew Rsch. Ctr. (July 12,
 2019), <https://perma.cc/5ZP8-77KL>; Dep’t of Homeland Sec., Off. of Immigr. Stat., *Population*
Estimates: Illegal Alien Population Residing in the United States: January 2015 (Dec. 2018),
<https://perma.cc/U8LN-V6Y7>.

1 *v. House*, 525 U.S. at 348–49 (Scalia, J., concurring in part) (discussing the need for the census
2 process to pursue “the most accurate way of determining population with minimal possibility of
3 partisan manipulation”).

4 The Trump Administration, however, has attempted to manipulate the census in novel
5 and troubling ways, and the Memorandum deepens serious concerns that the Administration’s
6 goal throughout has been to use the enumeration as a means of achieving partisan political ends.
7 The Memorandum will also result in a grossly inaccurate count of the population for
8 apportionment purposes. It therefore poses a direct institutional threat to the House, which draws
9 its legitimacy from the accuracy and integrity of the census upon which its composition is
10 determined.

11
12
13 **A. The Memorandum Continues Illegal Efforts to Manipulate the Census,
Undermining the Reality and Perception of Impartiality**

14 The Memorandum does not arise in isolation. Instead, it is the latest step in the Trump
15 Administration’s broader unlawful manipulation of the census process. That pattern began with
16 the attempt to add a citizenship question to the 2020 Census questionnaire—an apparent effort to
17 enhance the political representation of “Republicans and non-Hispanic whites.”¹⁹

18
19 In March 2018, the Secretary of Commerce directed the Census Bureau to include a
20 citizenship question on the 2020 Census. In a public memorandum, Secretary Ross claimed that
21 the question was added to help the Department of Justice enforce the Voting Rights Act²⁰—a law
22 intended to protect the political power of racial minorities. During litigation, however, it became
23 clear that the White House had in fact encouraged Secretary Ross to consider adding the question
24 and to speak to Kansas Secretary of State Kris Kobach, who urged Ross to address “the
25

26 ¹⁹ Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting* at 8
27 (2015), <https://perma.cc/22RT-5EWN>.

28 ²⁰ Memorandum from Wilbur L. Ross, Jr., Sec’y of Com., to Karen Dunn Kelley, Under
Sec’y of Commerce for Econ. Affairs, *Reinstatement of a Citizenship Question on the 2020
Decennial Census Questionnaire*, 1 (Mar. 26, 2018), <https://perma.cc/2XDF-Q7E8>.

1 problem” of undocumented residents being counted for apportionment.²¹ As explained by a
 2 Republican gerrymandering expert who consulted with both White House staff and DOJ,
 3 including only voting-age citizens for purposes of legislative districts “would be advantageous to
 4 Republicans and Non-Hispanic Whites,” but would be “functionally unworkable” without a
 5 citizenship question in 2020.²² Secretary Ross endorsed the citizenship question over the
 6 objections of career Census Bureau officials, who warned that its inclusion would “harm[] the
 7 quality of the census count.”²³

9 The District Court for the Southern District of New York concluded that Secretary Ross’s
 10 explanation had been “materially inaccurate” and that Secretary Ross had made similar
 11 misrepresentations to the court itself and to two committees of the House. *New York v. Dept. of*
 12 *Com.*, 351 F. Supp. 3d at 547. The Supreme Court subsequently rejected the Commerce
 13 Department’s attempt to add the question, holding that the Court could “[n]ot ignore the
 14 disconnect between the decision made and the explanation given” for adding the question, and
 15 further noting that the sole rationale provided for adding the question “seems to have been
 16 contrived.” *U.S. Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). This holding
 17 represented the first time in history that the Supreme Court had invalidated an agency’s
 18

21 ²¹ See Email from Brooke Alexander, Executive Assistant to the Sec’y, Dep’t of Com., to
 22 Hilary Geary (Apr. 5, 2017, 4:24 PM), <https://perma.cc/8NJF-T73G?type=image>; Email from
 23 Kris Kobach, Kansas Sec’y of State, to Wilbur L. Ross, Jr., Sec’y of Com. (July 14, 2017, 9:12
 AM), <https://perma.cc/P2NU-7S5P?type=image>; Email from Kris Kobach, Sec’y of State of
 Kansas, to Wendy Teramoto, Chief of Staff, Dep’t of Com. (July 21, 2017, 4:34 PM),
<https://perma.cc/8WQG-QYEH?type=image>.

24 ²² Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting* at 8
 (2015), <https://perma.cc/22RT-5EWN>.

25 ²³ Email from Dr. Ron Jarmin, Acting Director, Census Bureau, to Arthur Gary, Gen.
 26 Counsel, Justice Management Division, Dep’t of Justice, 1, (Dec. 22, 2017, 3:32 PM). White
 27 House staff members had discussed the citizenship question since the 2016 transition, including
 28 with Hofeller. Dep. of A. Mark Neuman at 33, 40–41, *Kravitz v. Dep’t of Com.*, No. 18-cv-1041
 (D. Md. Oct. 28, 2018). In 2017, Hofeller was also involved in reviewing DOJ’s draft
 correspondence with the Census Bureau, in what the District Court for the Southern District of
 New York later described as an effort to “launder” Secretary Ross’s decision through DOJ. *New*
York v. U.S. Dep’t of Com., 351 F. Supp. 3d 502, 570 (S.D.N.Y. 2019).

1 explanation for its action as pretextual. *Id.* at 2574–76; *see also id.* at 2583 (Thomas, J.,
2 dissenting).

3 After the Supreme Court decided the case, the President hinted at the real purpose of the
4 citizenship question: “You need it for Congress, for districting. You need it for
5 appropriations.”²⁴ The Executive Branch, however, has refused to provide Congress with the
6 documents that would reveal the true motivation of the Administration’s effort to add the
7 citizenship question, even after the House held the Attorney General and Secretary of Commerce
8 in contempt and sued to enforce its subpoenas in federal court.²⁵

9
10 With this Memorandum, the President has abandoned any pretense. He released the
11 Memorandum with the statement: “I told the American people that I would not back down in my
12 effort to determine the citizenship status of the United States population. Today, I am following
13 through on that commitment by directing the Secretary of Commerce to exclude illegal aliens
14 from the apportionment base following the 2020 census.”²⁶ The Memorandum, following
15 closely on the heels of the failed effort to insert a citizenship question onto the census, appears to
16 confirm that the Administration has all along intended to use the census to enhance the voting
17 power of certain favored constituencies at the expense of others. These efforts to manipulate the
18 census can only undermine the public’s faith in the impartiality, objectivity, and integrity of the
19 enumeration so essential to a successful census.
20
21

22
23 ²⁴ *Remarks by President Trump Before Marine One Departure*, White House (July 5,
24 2019), <https://perma.cc/QK6V-833H>.

25 ²⁵ *See* Memorandum from Rep. Carolyn B. Maloney, Acting Chairwoman of the Comm.
26 on Oversight & Reform, to Members of the Committee on Oversight & Reform, Update on
27 Investigation of Census Citizenship Question Since House Held Attorney General Barr and
28 Commerce Secretary Ross in Contempt of Congress 1–3 (Nov. 12, 2019),
<https://perma.cc/A4WB-HVAP>; *see also* Complaint, *Comm. on Oversight & Reform v. Barr*, No. 19-cv-3557 (D.D.C. Nov. 26, 2019).

²⁶ *Statement from the President Regarding Apportionment*, White House (July 21, 2020),
<https://perma.cc/PZ5Y-23GS>.

1 **B. The Memorandum Will Result in a Flawed and Inaccurate Apportionment**

2 The Memorandum not only supports the perception of improper partisan influence, but
3 also will seriously diminish the accuracy of the count and thereby skew the apportionment. As
4 explained above, the Executive Branch cannot attempt to determine the number of “aliens
5 without lawful immigration status” except by using sampling techniques in direct violation of the
6 law. *See supra*, Section I(D). Aside from those legal obstacles, there are insurmountable
7 practical problems to arriving at an accurate figure of undocumented immigrants. Using
8 inaccurate figures for apportionment would inflict lasting harm to public faith in the census and
9 resulting apportionment.
10

11 The Executive Branch has long acknowledged the difficulty of accurately capturing the
12 kinds of data that would be necessary to implement the Memorandum. The Census Bureau has
13 historically lacked the ability to obtain data regarding undocumented immigrants. *See FAIR*, 486
14 F. Supp. at 568 (D.D.C. 1980) (noting the Census Bureau’s position “that it is constitutionally
15 required to include all persons, including illegal aliens, in the apportionment base” and that “as a
16 practical matter” methods for counting illegal aliens “would take months to develop, *if it could*
17 *be done at all.*” (emphasis added)). The current Administration has admitted that the Census
18 Bureau’s citizenship data, obtained through the American Communities Survey, is “not reported
19 at the level of the census block, the basic component of legislative districting plans; ... ha[s]
20 substantial margins of error; and ... [does] not align in time with the census-based population
21 counts used to draw legislative districts.” *Dep’t of Com. v. New York*, 139 S. Ct. at 2562 (citing
22 Secretary Ross’s decision not to pursue an ACS-based model to estimate citizenship because the
23 Census Bureau “‘could not confirm’ that such ACS-based data modeling was possible ‘with a
24 sufficient degree of accuracy’”). In other words, the Census Bureau’s data is inadequate to
25
26
27
28

1 calculate either the number of undocumented immigrants or the total number of immigrants in
2 the country.

3 Similar issues would arise with the use of records from other federal agencies. *See*
4 *Excluding Illegal Aliens*, 85 Fed. Reg. at 44,680 (referencing E.O. 13880). In 2018, Secretary
5 Ross argued that other agencies’ records were “inadequate” for identifying immigrants because
6 “they were missing for more than 10% of the population.” *Dep’t of Com. v. New York*, 139 S.
7 Ct. at 2563. Even if these records could create a reliable data set to estimate the citizen and
8 immigrant populations, neither the White House nor the Commerce Department has articulated a
9 reliable methodology to determine which percentage of immigrants are “not in a lawful
10 immigration status under the Immigration and Nationality Act.” *See Excluding Illegal Aliens*, 85
11 Fed. Reg. at 44,680; 13 U.S.C. § 141. The Census Bureau has neither the resources nor the legal
12 expertise to answer this statutory question. As one court recognized:
13

14 the determination of [this] legal fact can be a complicated process, as our
15 numerous cases involving attempts by the [Immigration and Naturalization
16 Service] to deport residents of this country demonstrate. The Immigration and
17 Nationality Act is long and complex, full of provisos and exceptions. It would be
18 absurd to expect the Census Bureau to develop figures . . . of the number of
19 deportable aliens present in this country. . .

20 *FAIR*, 486 F. Supp. at 573 n.12.

21 The status of the 2020 census exacerbates these data problems. Senior Census Bureau
22 recently officials acknowledged they would be unable to complete a full census by the statutory
23 deadline, with fewer than two-thirds of households having responded to the Census as of August
24 13, 2020.²⁷ The challenge of enumerating the remaining population of the United States—an
25 estimated 120 million people—has been made more difficult by the Bureau’s abrupt decision not
26 only to decline to seek an extension of the census deadline, but to end its follow-up efforts by

27
28 ²⁷ *See* Hansi Lo Wang, *Republicans Signal They’re Willing to Cut Census Counting Short*, NPR (July 28, 2020), <https://perma.cc/VXX4-MF7P>; *Response Rates*, United States Census 2020, <https://2020census.gov/en/response-rates.html>.

1 September 30, a month earlier than originally planned.²⁸ These factors all but guarantee a
 2 substantial undercount that will be “most severe among urban minority populations.” *See*
 3 *Assembly of State of Cal. v. U.S. Dep’t of Com.*, 968 F.2d 916, 917 (9th Cir. 1992).

4 Even if the Memorandum is never implemented, it still threatens to worsen the
 5 undercount. The accuracy of the census depends on the willingness of members of the public to
 6 provide their information to the government and to trust that this information will be used for
 7 legitimate ends. But noncitizens and members of their households have “historically responded
 8 to the census at lower rates than other groups.” *Dep’t of Com. v. New York*, 139 S. Ct. at 2566.
 9 Undocumented immigrants are particularly “fearful” of responding to the census given a concern
 10 about the “possibility of [census] information being used against them.” *FAIR*, 486 F. Supp. at
 11 568; *see also Young v. Klutznick*, 652 F.2d 617, 619 n.4 (6th Cir. 1981) (citing “attitudes toward
 12 government” and “immigration status” as reasons for not responding to the census).
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15 The very existence of the Memorandum, and the hostility it demonstrates toward
 16 undocumented residents, risks further suppressing response rates of those residents and members
 17 of their households. And many undocumented residents, already fearful of the Administration,
 18 may decline to respond to the census if they believe that they will not be counted anyway. Thus,
 19 a former Census Bureau Director recently testified that there is cause to be “very concerned that
 20 the release of this directive will increase the fear of many” that “their information will be given
 21 to immigration enforcement,” which would likely result in “increased undercounts of these
 22 populations.”²⁹
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26 ²⁸ Stephanie Ebbs, *2020 Census to end data collection Sept. 30, raising concerns about*
 27 *undercounting*, ABC News (Aug. 4, 2020, 4:24 PM), <https://perma.cc/54KX-NUUB>.

28 ²⁹ Press Release, H. Comm. on Oversight & Reform, *Oversight Committee Held*
Emergency Hearing on Trump Administration’s Unconstitutional Politicization of 2020 Census
 (July 29, 2020).

1 An undercount impairs Congress’s functioning and has a host of negative downstream
 2 consequences. Congress depends on accurate census data to legislate effectively. Census data
 3 guides many of the most significant federal programs, including Medicaid assistance, Medicare,
 4 the Supplemental Nutrition Assistance Program, the National School Lunch Program, and the
 5 Children’s Health Insurance Program.³⁰ In addition, “policy makers at all levels of government,
 6 as well as private businesses, households, researchers, and nonprofit organizations, rely on an
 7 accurate census in myriad ways that range far beyond the single fact of how many people live in
 8 each state.” *New York v. Dep’t of Com.*, 351 F. Supp. 3d at 519. An undercount thus distorts the
 9 data on which many of the government’s most important decisions are based. Even if the
 10 Memorandum is never implemented, it risks worsening an undercount of populations that are
 11 already among the least represented in government decision-making.
 12

13 **C. The Memorandum Will Distort the Composition of the House**

14 As explained above, the Memorandum, if implemented, will violate the law and yield an
 15 inaccurate apportionment of Representatives among the States, corrupting the composition of the
 16 House for at least the next decade. Because the success of the census depends on the public’s
 17 trust and cooperation, the Memorandum is also likely to harm the quality of future enumerations.
 18

19 Such an outcome obviously compromises the House’s “[u]nquestionabl[e] . . . interest in
 20 preserving its institutional integrity.” *Powell*, 395 U.S. at 548. But the Memorandum’s harms to
 21 the House also accrue on a broader level. Since its inception, the House has been uniquely
 22 connected to its constituents. The House of Representatives—or the “People’s House”—is the
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27 ³⁰ See America Counts Staff, *Responding to the Census Will Help Plan Health Care*
 28 *Programs for the Next Decade*, U.S. Census Bureau (July 13, 2020), <https://perma.cc/8TL2-6A2P>.

1 only federal body that has been directly elected since the Constitution’s ratification in 1788.³¹
 2 Members of the House are the closest federal representatives to their constituents: whereas
 3 Senators represent the residents of their whole State, Representatives generally represent smaller
 4 communities within each State. Members of the House represent the interests of *all* residents in
 5 their districts—including the interests of non-voters, like children—and provide important
 6 services to their constituents, regardless of citizenship status.
 7

8 Nor is it simple to separate the interests of citizens from the interests of noncitizens
 9 within a community. For example, according to one recent analysis, over 4 million U.S.-citizen
 10 children under 18 were living with at least one unauthorized immigrant parent between 2009 and
 11 2013. Randy Capps et al., *A Profile of U.S. Children with Unauthorized Immigrant Parents*,
 12 Migration Policy Inst. 1 (2016), <https://perma.cc/9TDT-BYKL>. Any benefits or assistance
 13 provided to the child thus aids the parent as well as the broader community in which that family
 14 lives. *Cf. Plyler*, 457 U.S. at 230.
 15

16 Basing apportionment on anything other than the actual population of each State would
 17 not affect just the House’s composition, but also undermine its members’ ability to represent
 18 fairly and fully all of their constituents. As the DOJ has told the Supreme Court, “the federal
 19 government act[s] in the name of (and thereby represent[s]) all people, whether they [are] voters
 20 or not, and whether they [are] citizens or not.” Brief for the United States as *Amicus Curiae*
 21 Supporting Appellees at 19, *Evenwel v. Abbott*, No. 14-940, 2015 WL 5675829 (W.D. Tex. Sept.
 22 25, 2015).
 23

24 Therefore, when Congress enacts new laws; provides funding for federal, state, and local
 25 programs; or performs oversight, its actions affect *all* segments of American communities—
 26

27 ³¹ Prior to the ratification of the Seventeenth Amendment in 1913, U.S. Senators were
 28 elected by state legislatures, rather than directly by the public. *See* U.S. Const. Art. I, § 3; *id.*
 Amend. XVII.

1 regardless of immigration status. The foundational logic of democratic representation therefore
2 demands what federal law requires: Congressional representation must reflect the country’s full
3 population, not merely voters or those lawfully present. Alexander Hamilton’s words bear
4 repeating: “There can be no truer principle than this—that every individual of the community at
5 large has an equal right to the protection of government.” 1 Records of the Federal Convention
6 of 1787, at 473 (M. Farrand ed., 1911) (quoted in *Evenwel*, 136 S. Ct. at 1127).
7

8 **CONCLUSION**

9 The Constitution requires that “Representatives shall be apportioned among the several
10 States according to their respective numbers, counting the whole number of persons in each
11 State.” U.S. Const. Amend. XIV, § 2; Art. I, § 2. This unambiguous mandate, also reflected in
12 federal statutes, leaves no room for interpretation or deviation by the President. Accordingly, the
13 House joins Plaintiffs in requesting that this Court hold the Memorandum unlawful.
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³² Attorneys for the Office of General Counsel for the U.S. House of Representatives and “any counsel specially retained by the Office of General Counsel” are “entitled, for the purpose of performing the counsel’s functions, to enter an appearance in any proceeding before any court of the United States or of any State or political subdivision thereof without compliance with any requirements for admission to practice before such court.” 2 U.S.C. § 5571