No. 20-366

In the Supreme Court of the United States

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

v.

STATE OF NEW YORK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

Congress has provided that, for purposes of apportioning seats in the House of Representatives, the President shall prepare "a statement showing the whole number of persons in each State * * * as ascertained under the * * * decennial census of the population." 2 U.S.C. 2a(a). It has further provided that the Secretary of Commerce shall take the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a), and shall tabulate the results in a report to the President, 13 U.S.C. 141(b). The President has issued a Memorandum instructing the Secretary to include within that report information enabling the President to implement a policy decision to exclude illegal aliens from the base population number for apportionment "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). At the behest of plaintiffs urging that the exclusion of illegal aliens would unconstitutionally alter the apportionment and chill some persons from participating in the census, a three-judge district court declared the Memorandum unlawful and enjoined the Secretary from including the information in his report. The questions presented are:

1. Whether the relief entered satisfies the requirements of Article III of the Constitution.

2. Whether the Memorandum is a permissible exercise of the President's discretion under the provisions of law governing congressional apportionment.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 10
Argument:
I. The relief awarded fails to satisfy Article III's requirements 13
A. The "chilling effect" injury supporting the judgment is now moot and has always been too speculative 15
B. Any alternative apportionment-based injuries are also too speculative 18
II. The Presidential Memorandum is lawful under the statutory and constitutional provisions governing apportionment 21
A. The Census Act permits the President to direct the Secretary, when taking the census and tabulating the population, to consider administrative records and include two sets of numbers in his report 22
B. The Reapportionment Act does not require the President to include all illegal aliens within the apportionment base 29
C. Appellees' constitutional claims should be rejected for the same reasons 46
Conclusion 48
Appendix — Constitutional, statutory, and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Already, LLC v. *Nike, Inc.*, 568 U.S. 85 (2013) 14, 15, 21
Alvarez v. *Smith*, 558 U.S. 87 (2009) 17
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 17
Bas v. *Steele*, 2 F. Cas. 988 (C.C.D. Pa. 1818)..... 35
Camreta v. *Greene*, 563 U.S. 692 (2011)..... 16
Clapper v. *Amnesty Int'l USA*, 568 U.S. 398 (2013)..... 18
Clinton v. *City of New York*, 524 U.S. 417 (1998) 8
Dalton v. *Specter*, 511 U.S. 462 (1994)..... 47
Department of Commerce v. *New York*, 139 S. Ct. 2551 (2019) 46
Department of Homeland Sec. v. *Thuraissigiam*, 140 S. Ct. 1959 (2020) 37, 39
Franchise Tax Bd. v. *Hyatt*, 139 S. Ct. 1485 (2019) 35
Franklin v. *Massachusetts*, 505 U.S. 788 (1992)..... *passim*
Friends of the Earth, Inc. v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167 (2000)..... 20, 21
Hall v. *Hall*, 138 S. Ct. 1118 (2018)..... 30, 43
Kaplan v. *Tod*, 267 U.S. 228 (1925)..... 36, 41
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 35
Knox v. *Service Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012)..... 15
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 15
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992).... 13, 18
Mathews v. *Diaz*, 426 U.S. 67 (1976) 44
National Urban League v. *Ross*, No. 20-cv-5799, 2020 WL 5739144 (N.D. Cal. Sept. 24, 2020)..... 9
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Cases—Continued: Page

Reno v. *Flores*, 507 U.S. 292 (1993) 40
Ross v. *National Urban League*, No. 20A62, (Oct. 13, 2020) 9
San Jose v. *Trump*, No. 20-cv-5167, 2020 WL 6253433 (N.D. Cal. Oct. 22, 2020), J.S. pending, No. 20-561 (filed Oct. 29, 2020) 14
Susan B. Anthony List v. *Driehaus*, 573 U.S. 149 (2014) 13, 19
Texas v. *United States*, 523 U.S. 296 (1998) 21
The Venus, 12 U.S. (8 Cranch) 253 (1814) 36
U.S. Bancorp Mortg. Co. v. *Bonner Mall P'ship*, 513 U.S. 18 (1994) 17
U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 794 (1995) 38
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 16
United States v. *Sanchez-Gomez*, 138 S. Ct. 1532 (2018) 15, 16
United States Dep't of Commerce v. *Montana*, 503 U.S. 442 (1992) 19
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United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 35
Utah v. *Evans*, 536 U.S. 452 (2002) 16, 28, 31
Warth v. *Seldin*, 422 U.S. 490 (1975) 14
Wesberry v. *Sanders*, 376 U.S. 1 (1964) 44, 45
Wisconsin v. *City of New York*, 517 U.S. 1 (1996) 16, 22, 47

Constitution, statutes, and regulations: Page

U.S. Const.:
Art. I 7, 30, 1a
§ 2:
Cl. 2 (House Qualifications Clause) 42, 1a
Cl. 3 ..... 2, 22, 30, 31, 46, 1a
Enumeration Clause 46, 1a
Art. III ..... *passim*
Amend. XIV 13, 32, 42, 43, 3a
§ 2 ..... 2, 30, 32, 37, 3a
Apportionment Clause 7, 30, 46, 47, 3a
Act of Mar. 1, 1790, ch. 2, 1 Stat. 101:
§ 1, 1 Stat. 101 32
§ 5, 1 Stat. 103 32
Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103-104 36
Act of May 23, 1850, ch. 11, 9 Stat. 428 32
Act of May 6, 1870, ch. 87, 16 Stat. 118 32
2 U.S.C. 2a 47, 3a
2 U.S.C. 2a(a) 3, 23, 30, 3a
13 U.S.C. 6(c) 28
13 U.S.C. 141 ..... 46, 5a
13 U.S.C. 141(a) 2, 12, 23, 25, 5a
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Miscellaneous:

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(1865) 43

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Vol. 1 ..... 37, 42

Vol. 2 ..... 37, 42

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No. 42 36

No. 54 32

Miscellaneous—Continued: Page

No. 56 32
No. 58 32
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Decennial Census Mgmt. Div., *2020 Census Detailed Operational Plan for: 20. Federally Affiliated Count Overseas Operation (FACO)* (May 24, 2019), https://go.usa.gov/xGR2r 27
Press Release, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), https://go.usa.gov/xGR2C 5, 8
1 Emmerich de Vattel, *The Law of Nations* (1760) 36, 43
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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-104a) is not yet reported but is available at 2020 WL 5422959.

JURISDICTION

Under 28 U.S.C. 2284, a three-judge district court was required because appellees' suit challenged on constitutional (and other) grounds the President's determination concerning standards for including individuals in the apportionment base for reapportioning congressional districts. See J.S. App. 112a-114a; D. Ct. Doc. 34, at 39-41 (Aug. 3, 2020); D. Ct. Doc. 62, at 64-67, 72-80 (Aug. 6, 2020).[1] The judgment of the three-judge district court, which included a permanent injunction, was entered on September 10, 2020. J.S. App. 105a-107a.

[1] Unless otherwise noted, all citations of district court documents are to those filed in No. 20-cv-5770.

The government filed notices of appeal on September 18, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1253. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 324 n.5 (1977); *White* v. *Regester*, 412 U.S. 755, 760-761 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. Amend. XIV, § 2. To make apportionment possible, the Constitution requires the federal government to conduct an "actual Enumeration" every ten years in "such Manner as" directed by Congress. Art. I, § 2, Cl. 3.

Congress has directed the Secretary of Commerce to conduct "a decennial census of population * * * in such form and content as he may determine." 13 U.S.C. 141(a) (Census Act). By December 31, 2020, the Secretary must submit to the President "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b) (the Secretary's report or the report). After receiving the Secretary's report, the President must "transmit to the Congress a statement showing the whole number of persons in each State * * * as ascertained under the * * * decennial census of the population, and the number of Representatives to which each State would be entitled * * * by the method known as the method of equal proportions,"

within one week of the first day of the next Congress's first regular session. 2 U.S.C. 2a(a) (Reapportionment Act); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 792 (1992) (describing sequence triggered by the submission of the Secretary's report).

While the President's role in applying the equal-proportions calculation to the apportionment population base is ministerial, his role in determining the population base itself is not. As this Court has recognized, "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census.'" *Franklin*, 505 U.S. at 799. Notably, one such "judgment" is whether a person should be deemed an "'inhabitant'" or "'usual resident'" of a State, which is "the gloss" that has historically been given to the constitutional and statutory phrase "persons 'in' each State." *Id.* at 803-804, 806 (brackets and citations omitted).

In 2018, the Census Bureau promulgated criteria to enumerate most people "at their usual residence," which it defines as "the place where they live and sleep most of the time." 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018) (Residence Criteria). Under the Residence Criteria, "[c]itizens of foreign countries living in the United States" are "[c]ounted at the U.S. residence where they live and sleep most of the time." *Ibid.* (emphasis omitted). By contrast, those visiting the United States (such as individuals on a vacation or business trip) are not counted under the Residence Criteria. *Ibid.*

The Bureau uses a number of methods to ensure that individuals are counted as part of the decennial census. For the 2020 census, individuals are being enumerated through (1) census-questionnaire responses online, by mail, or by phone; (2) visits by enumerators; (3) proxy

responses given by knowledgeable individuals such as neighbors or landlords; (4) high-quality administrative records from other federal agencies; and (5) potentially, data imputed from the same area (used as a last resort to fill data gaps). *New York* v. *United States Dep't of Commerce*, 351 F. Supp. 3d 502, 521 (S.D.N.Y.), aff'd in part, rev'd in part, and remanded, 139 S. Ct. 2551 (2019).

2. On July 21, 2020, the President issued a Memorandum to the Secretary of Commerce regarding the exclusion of illegal aliens from the apportionment population base under the 2020 census. 85 Fed. Reg. 44,679 (July 23, 2020). The Memorandum states that "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended, to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* at 44,680 (citation omitted). The Memorandum directs the Secretary to submit to the President two tabulations in the Secretary's report. One is an enumeration "tabulated according to the methodology set forth in" the Residence Criteria. *Ibid.* The second consists of "information permitting the President, to the extent practicable," to carry out the policy of excluding illegal aliens from the apportionment "to the maximum extent of the President's discretion under the law." *Ibid.*

The Bureau is evaluating the extent to which, as a practical matter, administrative records pertaining to immigration status can be used to identify and exclude individual illegal aliens from the apportionment population count. "A team of experts [is] examining methodologies and options to be employed for this purpose."

Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), https://go.usa.gov/xGR2C (Dillingham Statement). That process continues, and the "Bureau does not know exactly what numbers the Secretary may report to the President." D. Ct. Doc. 84-1, at 4, *San Jose* v. *Trump*, 20-cv-5167 (N.D. Cal. Sept. 10, 2020).

3. a. On July 24, 2020, appellees—a group of States and localities and a separate group of non-profit organizations—filed complaints challenging the Memorandum on various constitutional and statutory bases; the district court consolidated the cases. See J.S. App. 4a, 20a-21a. At appellees' request, a three-judge district court was convened pursuant to 28 U.S.C. 2284(b). See J.S. App. 21a, 110a-111a.

b. On September 10, 2020, the district court granted partial summary judgment to appellees, held that the Memorandum violates federal law, and entered declaratory and injunctive relief. J.S. App. 1a-104a.

i. The district court began by holding that appellees satisfied Article III's requirements to seek relief. J.S. App. 24a-68a. The court concluded that the Memorandum would "chill" participation during the field-data collection phase of the census—that is, the phase in which the Bureau accepts responses to the census questionnaire and deploys enumerators to follow up with non-responsive addresses. *Id.* at 38a. It reasoned that "in the wake of the Presidential Memorandum, some number of people will not participate in, and thus not be counted in, the census," because (1) various individuals are afraid of providing the federal government with in-

formation by which they believe "their citizenship status may be ascertained," and (2) illegal aliens may see no reason to participate if they think they ultimately may not be counted. *Id.* at 31a; see *id.* at 30a-35a, 47a. The court determined that this "chilling effect" would harm the governmental appellees by degrading census data used for apportioning certain federal funds and for other purposes. *Id.* at 47a-59a. The court further held that such injuries were fairly traceable to the Memorandum, rejecting the federal government's argument that the causal link was based on disinformation about the Memorandum and general fear among immigrant communities. *Id.* at 59a-63a. The court concluded that a judgment in appellees' favor would redress their "chilling effect" harm by eliminating the alleged disincentives discouraging census participation. *Id.* at 65a.

By contrast, the district court concluded that any alleged harm to appellees from a hypothetical future change to apportionment due to the Memorandum was likely too speculative to support Article III standing. J.S. App. 43a. The court reasoned that "it is not known whether that harm will come to pass, as the Secretary has not yet determined how he will calculate the number of illegal aliens in each State or even whether it is 'feasible' to do so at all." *Ibid.* (citation omitted).

ii. On the merits, the district court held that the Memorandum violates the Census and Reapportionment Acts by purportedly calling for an apportionment that is not "based on the results of the census alone." J.S. App. 74a (capitalization and emphasis omitted). The court read those statutes as requiring that the Secretary "report a single set of numbers"—one tabulation of the total population of each State—based on "the data from the decennial census," and declared that "once the

final decennial census data is in hand, the President's role is purely ministerial." *Id.* at 75a (citations and internal quotation marks omitted). In the court's view, the Memorandum violates those requirements because the second requested tabulation "will necessarily be derived from something other than the census itself, as the 2020 census is not gathering information concerning citizenship or immigration status." *Id.* at 78a. The court so held despite acknowledging that the Bureau has long used administrative records, with this Court's blessing, as part of the decennial census. *Id.* at 81a n.15.

The district court further held that the Memorandum violates the Reapportionment Act by purportedly "defining 'the whole number of persons in each State' to categorically exclude illegal aliens residing in each State." J.S. App. 83a. The court recognized that this statutory phrase is identical to the terms of the Fourteenth Amendment's Apportionment Clause, which in turn echoes Article I, but it did not examine the history of those constitutional provisions to determine their meaning when they were adopted. *Id.* at 87a. Instead, it concluded that, even assuming the original understanding of the constitutional provisions supported the Memorandum, the legislative history of the Reapportionment Act suggested that Congress had adopted a contrary understanding of the parallel statutory phrase in 1929. *Ibid.* Relying largely on unsuccessful legislative proposals to exclude all aliens from the apportionment population base, the court concluded that the President lacks "discretion to exclude illegal aliens on the basis of their legal status, without regard for their residency." *Id.* at 92a; see *id.* at 87a-90a.

iii. The district court determined that, because the Memorandum violates federal law, the President's actions were *ultra vires* and appellees were entitled to summary judgment. J.S. App. 93a-94a. Finding the remaining permanent-injunction factors satisfied, *id.* at 94a-100a, the court enjoined all defendants other than the President "from including in the Secretary's report to the President * * * any information concerning the number of aliens in each State 'who are not in a lawful immigration status,'" *id.* at 99a (citation omitted). The court also entered a declaratory judgment stating that the Memorandum is unlawful. *Id.* at 100a-102a.

c. On September 16, 2020, the government moved in the district court for a stay pending appeal. D. Ct. Doc. 171. The court denied that motion on September 29. D. Ct. Doc. 180. Because this Court has expedited the appeal, which will permit a decision on the merits before the December 31 statutory deadline, the government has not sought a stay pending appeal from the Court at this juncture. Cf. J.S. 11.[2]

4. After the district court entered its judgment, field-data collection concluded for the 2020 census. Although field operations were originally scheduled to end on July 31, the Bureau had extended them in response to the COVID-19 pandemic. See Dillingham Statement.

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[2] Although the three-judge district court was properly convened and entered an appealable order, see pp. 1-2, *supra*; cf. J.S. 11 n.2, the government has filed, in an abundance of caution, a protective notice of appeal to the United States Court of Appeals for the Second Circuit. See D. Ct. Doc. 170 (Sept. 16, 2020); see also C.A. Doc. 20, at 2 (Oct. 16, 2020) (holding that appeal in abeyance pending resolution of this appeal); cf. *Clinton* v. *City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (recognizing that an appeal to this Court may be deemed a petition for a writ of certiorari before judgment to the court of appeals).

Then, in separate litigation, a federal district court in the Northern District of California required the Bureau to continue field-data operations longer than the Bureau intended. *National Urban League* v. *Ross*, No. 20-cv-5799, 2020 WL 5739144 (N.D. Cal. Sept. 24, 2020). Following a stay from this Court, *Ross* v. *National Urban League*, No. 20A62 (Oct. 13, 2020), the Bureau concluded field-data collection on October 15, D. Ct. Doc. 343, at 4 (Oct. 23, 2020), *National Urban League*, *supra*.

5. On October 22, 2020, a three-judge district court for the Northern District of California presiding over separate litigation entered a final judgment holding that the Memorandum violates the constitutional and statutory provisions governing the decennial census and apportionment. J.S. App. at 128a-131a, *Trump* v. *San Jose* (No. 20-561) (filed Oct. 29, 2020). That court entered a permanent injunction barring the Secretary from complying with the Memorandum in his report to the President "or otherwise as part of the decennial census," and also entered a declaratory judgment stating that the Memorandum is unlawful. *Id.* at 130a. The government has noticed an appeal to this Court and filed a jurisdictional statement requesting that the appeal be held pending the disposition of this appeal, because the *San Jose* decision covers the same ground as the decision below, although it also relies on some theories that the district court here rejected or declined to reach. See J.S. at 10-12, *San Jose*, *supra* (No. 20-561).[3]

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[3] Additional challenges to the Memorandum are pending in other federal district courts. See, *e.g.*, *Common Cause* v. *Trump*, No. 20-cv-2023 (D.D.C. filed July 23, 2020); *Haitian-Americans United, Inc.* v. *Trump*, No. 20-cv-11421 (D. Mass. filed July 27, 2020); *Useche* v. *Trump*, No. 20-cv-2225 (D. Md. filed July 31, 2020).

SUMMARY OF ARGUMENT

I. The relief awarded by the district court does not satisfy Article III's requirements.

A. Most important, the claim for prospective relief granted by the district court became moot when the ongoing injury supporting it—the alleged "chilling effect" on field-data collection—ended on October 15. No exception to mootness applies here, and the Court thus should follow its normal approach and vacate the judgment. That will clear the path for future litigation, allowing the government to implement the Memorandum and appellees (or others) to bring a new suit if the implementation causes them cognizable injuries.

Even apart from the fact that it no longer exists, the "chilling effect" has always been too speculative to support Article III standing. There is a fundamental mismatch between the asserted injury and the redress provided. Whereas the theoretical threat to census participation was occurring in the *present*, the court granted relief that was limited to the Secretary's *future* actions after census field operations concluded—and thus was unlikely to eliminate the "chill," given the continuing uncertainty posed by the prospect of appellate review and reversal in the interim.

B. Appellees have argued against mootness based on the alternative theory of injury that implementing the Memorandum allegedly will reduce their States' populations in the apportionment tabulation and cause them to lose congressional representation and federal funding. Although the district court in the parallel California case adopted that theory, the district court here correctly concluded that such apportionment-based injuries were "likely too speculative for Article III." J.S.

App. 43a (citation and internal quotation marks omitted). It remains unknown to what extent it will be "feasible" for the Executive Branch to exclude illegal aliens from the apportionment population base, 85 Fed. Reg. at 44,680, and it is thus uncertain at this time whether the size of the illegal-alien population excluded in any State will be legally material to appellees' apportionment—let alone to their federal funding, which is not addressed by the Memorandum and is governed by separate statutes.

II. The district court also erred on the merits. The Memorandum is a permissible exercise of the discretion that Congress has vested in the Secretary to determine, subject to the President's direction, how to conduct the decennial census and ascertain the persons in each State for apportionment purposes. The court held otherwise for two reasons. First, the court asserted that the Memorandum's means are procedurally flawed, because by requiring the Secretary's report to the President to include two sets of numbers based in part on administrative records regarding individuals' immigration status, the Memorandum would violate the Census Act by resulting in an apportionment that is no longer based solely on the results of the census alone. Second, the court asserted that the Memorandum's ends are substantively flawed, because by excluding any illegal aliens from the Secretary's report to the President, the Memorandum would violate the Reapportionment Act's directive that all persons in each State must be included within the apportionment base. Each of those holdings is incorrect, as are the alternative constitutional grounds for affirmance urged by appellees and adopted by the district court in the parallel California case.

A. As to the district court's procedural objection to the data source, the governing legal provisions vest the Secretary, subject to the President's supervision, with virtually unfettered discretion as to what data will be used in enumerating the individual persons in each State for purposes of the decennial census and apportionment. This Court confirmed in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), that the President is entitled to instruct the Secretary to "reform the census, even *after* the data are submitted" by the Secretary to the President. *Id.* at 798 (emphasis added); cf. 13 U.S.C. 141(a). Accordingly, it is clear that the President permissibly directed in advance that the report include additional information. Likewise, the Executive Branch has long combined administrative records and data with information obtained from the census questionnaire in determining the apportionment population base, see *Franklin*, 505 U.S. at 794-795, 797-799, which is what the Memorandum permissibly instructs the Secretary to do here. In holding otherwise, the district court misunderstood the legal framework governing the decennial census, contravened this Court's precedent, and subjected the government to a novel and illogical standard.

B. As to the district court's substantive objection to excluding illegal aliens, it has long been understood that, under the governing legal provisions, the phrase "persons in each State" means "inhabitants" (or "usual residents"), and vests discretion in the Executive Branch to ascertain how that standard applies to particular categories of persons with debatable ties to a State. See *Franklin*, 505 U.S. at 804-806. Here, there is ample historical and structural evidence supporting the President's policy determination that the standard need not include all aliens living within a jurisdiction without the

sovereign's permission to settle there. Contrary to the district court's conclusion, legislative history from 1929 does not establish the remarkable proposition that Congress, by merely parroting the language of the Fourteenth Amendment, *required* the President to include within the population base for congressional representation *all* aliens living in this country in ongoing violation of federal law.

C. Finally, appellees' constitutional arguments are flawed for the same reasons. The constitutional provisions governing the enumeration and the apportionment do not impose a more constraining standard for the government than the statutory ones, so appellees' statutory and constitutional arguments fall together.

ARGUMENT

I. THE RELIEF AWARDED FAILS TO SATISFY ARTICLE III'S REQUIREMENTS

Under Article III, a plaintiff must establish at least three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a fairly traceable causal connection between the injury and defendants' challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Where, as here, a plaintiff seeks prospective relief, the injury element requires the plaintiff to demonstrate that the alleged injury is "certainly impending," or at least that "there is a substantial risk that the harm will occur." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (citation and internal quotation marks omitted). And the redressability element requires showing that the relief likely "will remove the harm" to some extent, such that the plaintiff "personally would benefit in a tangible way from the court's intervention."

Warth v. *Seldin*, 422 U.S. 490, 505, 508 (1975). Finally, standing under Article III must be satisfied throughout the litigation; even if a claim for relief meets Article III's requirements at the outset, it will become moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted).

For numerous reasons, appellees have failed to demonstrate that the prospective relief granted by the district court satisfies Article III's requirements. Most important, the claim has become moot on appeal, and thus the relief must be vacated. The sole injury the court relied on—that the Memorandum would "chill" participation in the census—is no longer occurring and can no longer be redressed, as field-data collection has concluded. Moreover, the allegations of a "chilling effect" were too speculative to support Article III jurisdiction in the first place. The district court's approach suffers from a fatal mismatch between the alleged injury and the relief entered.

Appellees' alternative theory of injury—which was accepted by the district court in *San Jose* v. *Trump*, No. 20-cv-5167, 20 WL 6253433 (N.D. Cal. Oct. 22, 2020), J.S. pending, No. 20-561 (filed Oct. 29, 2020)—cannot save the judgment from mootness. As the district court here correctly recognized, the apportionment-based injuries that appellees allege are far too speculative, because whether the Memorandum will result in the exclusion of a number of illegal aliens sufficient to impact apportionment is unknown. The Executive Branch thus should be allowed to implement the Memorandum, at which point suit can be brought by any actually injured parties.

A. The "Chilling Effect" Injury Supporting The Judgment Is Now Moot And Has Always Been Too Speculative

1. a. In finding Article III standing, the district court relied solely on a purported "chilling effect" that the Memorandum would have on census participation. Even accepting that dubious injury for the moment, but see pp. 17-18, *infra*, it no longer exists now that field-data collection has ended. The Bureau is no longer accepting responses to the census questionnaire and its enumerators are no longer engaging in follow-up operations, so there can be no further "'chilling effect' on census participation." J.S. App. 38a.

Accordingly, the purely prospective relief that the district court awarded—prohibiting the Secretary from implementing the Memorandum in his December 31 report to the President, see J.S. App. 106a—no longer provides "'any effectual relief whatever'" with respect to any past chilling injury. *Knox* v. *Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (citation omitted); see *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990) (explaining that "suits for prospective relief" are generally not permitted "to go forward despite abatement of the underlying injury"). There is thus no longer "any actual controversy about the [appellees'] particular legal rights," and the claim for relief is moot. *Already*, 568 U.S. at 91 (citations omitted). Indeed, even the district court recognized that once field-data collection "end[ed]," appellees' "arguments about harms to the census count itself would * * * become moot." J.S. App. 46a-47a.

This case does not fit into the limited exception to mootness for a controversy that is "capable of repetition, yet evading review." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (citation omitted).

"A dispute qualifies for that exception only 'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Ibid.* (citation omitted). Neither requirement is satisfied here.

As a threshold matter, it is far too speculative to predict whether the Executive Branch will adopt the same policy a decade or more from now in connection with a future decennial reapportionment. Moreover, the controversy over the Memorandum will not even evade review for the upcoming reapportionment. After the President submits his statement to Congress and any effects on apportionment have been determined, allegedly injured parties may seek review, and the courts can review the statutory and constitutional validity of the apportionment and order relief if appropriate. That would accord with this Court's normal approach: to decide such cases post-apportionment, when the actual apportionment figures are known and any purported injuries are no longer speculative. See, *e.g.*, *Utah* v. *Evans*, 536 U.S. 452, 458-459 (2002); *Wisconsin* v. *City of New York*, 517 U.S. 1, 10-11 (1996); *Franklin* v. *Massachusetts*, 505 U.S. 788, 790-791 (1992). Litigation over the Memorandum may occur after the President submits his statement of the apportionment, but not before.

b. Because this appeal has become moot, the Court should follow its "established practice" of ordering the district court "to reverse or vacate the judgment below." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur "rightly strips the decision below of its binding effect, and clears the path for future relitigation." *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011)

(citations and internal quotation marks omitted). Following the "equitable tradition" of vacatur is appropriate here because the government "ought not in fairness be forced to acquiesce in the judgment" merely because the district court ensured mootness would occur by awarding future relief against the Secretary's report based solely on injuries to field operations that necessarily would end months before the report was even due. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). Vacating that relief will ensure a clean slate going forward "while prejudicing none," *Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009): the government will not be constrained by a judgment that can no longer be reviewed on appeal, and appellees (or others) can seek relief if they suffer cognizable injuries from the Memorandum's implementation.

This case does not fall within the limited exception to *Munsingwear* vacatur that applies when the party seeking vacatur "caused the mootness" after the lower court entered its judgment. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24. Again, the district court's mismatched relief created the mootness problem, guaranteeing that the claim for relief would moot itself out. This case thus fits squarely within the normal parameters of this Court's vacatur practice, as mootness stems from "circumstances not attributable to the parties." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997).

2. Even apart from mootness, the relief below must be vacated. The "chilling effect" theory that the district court accepted was too speculative to support Article III standing from the outset, for two reasons.

First, the injury was too hypothetical: neither appellees nor the district court provided any evidence that there are any aliens, let alone a material number, who

(1) were planning to respond to the census, yet had not done so between April 1 and July 21; (2) were then chilled after the Memorandum issued even though it does not affect the census questionnaire; and (3) would not be accounted for by the Bureau's non-response follow-up or other means. See J.S. 17. With only a "highly attenuated chain of possibilities," appellees failed to "satisfy the requirement that threatened injury must be certainly impending." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013).

Second, redressability was too implausible: the district court's order dictating the content of the Secretary's report several months in the future was not likely to cure any present "chilling" injury by altering the conduct of third parties while census participation was ongoing. J.S. 15-16. Neither appellees nor the court provided any evidence to conclude that a material number of otherwise-chilled aliens were likely to become unchilled by a district court decision—subject to immediate appeal—holding that, months later, the Secretary would not be permitted to implement the Memorandum. See *Lujan*, 504 U.S. at 566 ("Standing is not an ingenious academic exercise in the conceivable.") (citation and internal quotation marks omitted).

B. Any Alternative Apportionment-Based Injuries Are Also Too Speculative

Appellees have tried to avoid mootness based on alternative theories of injury. They assert that the Memorandum, by causing a reduction to their States' populations in the apportionment tabulation, will lead them "to lose representation" in Congress and incur a "loss of federal funding." NY Mot. to Affirm (NY Mot.) 17 (capitalization and emphasis omitted); see NY Immigration Coal. Mot. to Dismiss or Affirm (ACLU Mot.) 31-

35. The district court concluded that such injuries were "likely too speculative for Article III" before the Memorandum is implemented. J.S. App. 43a (citation and internal quotation marks omitted). But the district court in *San Jose* held that such injuries were sufficient to support the entry of relief under Article III. J.S. App. at 32a-53a, *Trump* v. *San Jose* (No. 20-561). In light of that ruling, and to ensure that a favorable decision for the government here clears the path for the Secretary to timely submit his report to the President, this Court should address appellees' alleged apportionment-based injuries and hold that they are too speculative to satisfy Article III.

It remains uncertain to what extent it will be "feasible" to exclude illegal aliens from the apportionment population base. 85 Fed. Reg. at 44,680. It is therefore unknown whether the size of the illegal-alien population excluded in any given State will have a relative impact sufficient to decrease appellees' congressional representation. See J.S. App. 43a; see also *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 452-456 (1992) (describing the equal-proportions method of apportionment). Appellees have thus failed to demonstrate even a "substantial risk" that they will suffer apportionment harms from the Memorandum's implementation. *Susan B. Anthony List*, 573 U.S. at 158 (citation omitted).

It likewise is too speculative for appellees to allege that they might be "disproportionately deprive[d] * * * of federal funding." D. Ct. Doc. 77, at 58 (Aug. 7, 2020) (appellees' summary-judgment brief). Indeed, those allegations are far more speculative, because the Memorandum says nothing about funding at all; it merely di-

rects the Secretary to provide the President with decennial census data for calculating the base population for apportionment. Although some funding statutes require the Census Bureau to provide data derived from the decennial census (while others do not request decennial census data at all), appellees have not identified any statute that requires funds to be distributed based on the specific decennial census data set that tabulates each State's population for apportionment. See 13 U.S.C. 141(b) (requiring a tabulation of population for apportionment purposes from the results of the decennial census taken by the Secretary); see also, *e.g.*, D. Ct. Doc. 86-1, at 57-60 (Sept. 21, 2020), *San Jose*, *supra* (expert report describing 32 different datasets that the Bureau creates based on the overall census results to determine distribution of various federal funds). Nor have appellees demonstrated that the entities that administer any particular funding statute will use the apportionment tabulation. Thus, wholly apart from the Memorandum's speculative effect on the apportionment, appellees did not submit any evidence before the district court to establish that the Memorandum will have any effect at all on funding.

Appellees have suggested that they bear a lesser burden in showing their alleged apportionment-based injuries because they are seeking to defeat mootness rather than to establish standing. NY Mot. 17 (citing *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). Even setting aside that their premise is wrong—their "chilling effect" injuries were always insufficient to establish standing, see pp. 17-18, *supra*—their conclusion is legally flawed. When the "only legally cognizable injury" is "gone" and "cannot reasonably be expected to recur,"

a plaintiff cannot defeat mootness by relying, as appellees do, on "alternative theories" of injury that "would fail to establish standing in the first place." *Already*, 568 U.S. at 96, 100. The Court's holding in *Already* is entirely consistent with its prior decision in *Laidlaw*, which held only that there is a lower standard for overcoming mootness when a plaintiff can show a likelihood of "recur[rence]" of the *same injury*. 528 U.S. at 190.

Finally, at a minimum, ripeness principles support deferring judicial review of the Memorandum until it is implemented. The Memorandum's effects will be more concrete at that point, and appellees will suffer no harm at this time from that modest delay. See pp. 16-17, *supra*; *Texas* v. *United States*, 523 U.S. 296, 300 (1998).

II. THE PRESIDENTIAL MEMORANDUM IS LAWFUL UNDER THE STATUTORY AND CONSTITUTIONAL PROVISIONS GOVERNING APPORTIONMENT

On the merits, the district court invalidated the Memorandum on two separate statutory grounds. The court first held that the Memorandum's means are procedurally flawed, because the Memorandum requires the Secretary to include two sets of numbers in his report to the President based in part on administrative records regarding individuals' immigration status. Second, the court held that the Memorandum's ends are substantively flawed, because the Memorandum seeks to exclude illegal aliens living in the country from the apportionment base. Each of those statutory holdings is incorrect. And appellees' constitutional claims—adopted by the *San Jose* court—likewise should be rejected, because they add nothing to the defective statutory claims.

A. The Census Act Permits The President To Direct The Secretary, When Taking The Census And Tabulating The Population, To Consider Administrative Records And Include Two Sets Of Numbers In His Report

The Constitution and the relevant statutes make clear that the Secretary, subject to the President's direction, has virtually unfettered discretion as to what data will be used in enumerating individual persons in each State for purposes of the decennial census and apportionment. That discretion permitted the President to direct the Secretary to provide two sets of numbers as part of the census, based in part on administrative records related to immigration status, for the President to consider in formulating his statement to Congress. The district court's holding that this approach would cause the apportionment to no longer be "based on the results of the census alone," J.S. App. 74a (capitalization and emphasis omitted), contravenes the Census Act, this Court's decision in *Franklin*, and the well-established practice of using administrative records as part of the decennial census.

1. The Constitution authorizes Congress to decide the procedures for taking the decennial census. Indeed, by providing simply that "[t]he actual Enumeration shall be made" every ten years "in such Manner as [Congress] shall by Law direct," U.S. Const. Art. I, § 2, Cl. 3, "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" *Wisconsin*, 517 U.S. at 19 (citation omitted).

"Congress," in turn, "has delegated its broad authority over the census to the Secretary." *Wisconsin*, 517 U.S. at 19. To be sure, Congress specifically prescribed that the President must "transmit to the Congress a

statement showing the whole number of persons in each State * * * as ascertained under the * * * decennial census of the population," as well as "the number of Representatives to which each State would be entitled under * * * the [apportionment] method of equal proportions." 2 U.S.C. 2a(a). By contrast, however, Congress authorized the Secretary to take the "decennial census of population" upon which those calculations are based "*in such form and content as he may determine*," 13 U.S.C. 141(a) (emphasis added), and to use the results to create a report for the President of "[t]he tabulation of total population by States * * * as required for the apportionment," 13 U.S.C. 141(b).

Critically, this Court in *Franklin* held that the President maintains supervision and control over the Secretary for purposes of conducting the decennial census. The Court emphasized two related features of the statutory framework.

First, the President is the ultimate decisionmaker concerning the contents of the decennial census:

> Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the "decennial census." * * * [T]here is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him. It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives.

Franklin, 505 U.S. at 797-798. The Court contrasted this statutory framework with that of "other statutes that expressly require the President to transmit an agency's report directly to Congress." *Id.* at 797 (citing

examples). The Court concluded that there would be no "purpose for involving the President if he is to be prevented from exercising his accustomed supervisory powers over his executive officers." *Id.* at 800.

Second, the President retains discretion to make policy judgments in supervising the Secretary's determination of the population base to which the mathematical apportionment formula is then applied:

> The admittedly ministerial nature of the apportionment calculation itself does not answer the question whether the apportionment is foreordained by the time the Secretary gives her report to the President. To reiterate, § 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in "the decennial census"; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report.

Franklin, 505 U.S. at 799. For example, the policy question in *Franklin* was whether to include within the decennial census certain federal personnel and dependents living overseas. *Id.* at 790. Although the Secretary had chosen (for only the third time) to include such persons by using administrative records obtained from their personnel files, *id.* at 792-795, the Court held that the Secretary's decision was not subject to arbitrary-and-capricious review because the President could have used "his accustomed supervisory powers" to override the Secretary (even though he had not done so), *id.* at 800. *Franklin* thus makes clear that the President has full authority to direct an approach for completing the census different from that preferred by the Secretary.

2. Under that framework, the means employed by the Memorandum are lawful. The President has directed the Secretary, in taking the decennial census and

tabulating the population, to provide two sets of numbers: one that is "tabulated according to the methodology set forth in" the Residence Criteria, and a second that consists of "information permitting the President, to the extent practicable," to carry out the policy of excluding illegal aliens from the apportionment "to the maximum extent of the President's discretion under the law." 85 Fed. Reg. at 44,680.

The Memorandum requests those two sets of numbers to facilitate the President's ability, confirmed in *Franklin*, to make the ultimate policy judgment about the contents of the census. And it does so, as in *Franklin*, by using administrative records as a supplemental source of information beyond field operations to take the decennial census, which is a permissible decision about its "form and content." 13 U.S.C. 141(a).

3. The district court erroneously held that using administrative records to implement the Memorandum would mean that the apportionment was no longer based on the results of the census alone. That holding apparently rested on two distinct but related objections: (1) the Memorandum calls for the Secretary's report to include a second set of numbers distinct from those based on the Residence Criteria; and (2) the second set of numbers relies on administrative records to remove from the tabulation of population individuals who were counted by the Bureau during census field operations. Neither of those objections, either individually or collectively, has merit.

a. The district court erred in holding that "[t]he Secretary is required to report a single set of figures to the President * * * and the President is then required to use those same figures to determine apportionment." J.S. App. 78a. That holding is directly contrary to

Franklin's explanations that the President is entitled "to direct the Secretary in making policy judgments that result in 'the decennial census,'" and that the President is "not" even "require[d] * * * to use the data in the Secretary's report." 505 U.S. at 797, 799. That the President allowed the Bureau to complete an initial count under the Residence Criteria, and required the Secretary to include both sets of numbers in his report, simply reflects that "the 'decennial census' still presents a moving target[] even after the Secretary reports to the President." *Id.* at 797.

Neither the district court nor appellees have identified any authority suggesting that the President may not exercise his discretion by asking the Secretary to present him with two different tabulations. If the President has discretion "to reform the census" *after* the Secretary has submitted his report, *Franklin*, 505 U.S. at 798, then there can be no issue with the President requesting *in advance* information that will enable him to exercise that discretion. For example, the President in *Franklin* plainly could have directed the Secretary to provide two tabulations—one excluding overseas personnel and their dependents and one including them—so that he could make his final decision without having to send the matter back to the Secretary.

The district court also relied on the proposition that "once the final decennial census data is in hand, the President's role is purely 'ministerial.'" J.S. App. 75a (citation omitted); see *id.* at 74a-78a. That reasoning flatly contradicts *Franklin*, which made clear that the President's role is ministerial only with respect to *applying the mathematical formula* to apportion representatives across the population base. See p. 24, *supra*.

Nor is there any merit to the assertion (see J.S. App. 75a-79a; ACLU Mot. 6, 34-36) that the government itself has conceded that the Memorandum deviates from the results of the census. That assertion relies on the Memorandum's title—"Excluding Illegal Aliens From the Apportionment Base *Following the 2020 Census*," 85 Fed. Reg. at 44,679 (emphasis altered)—and similar statements in the government's briefs below, see *e.g.*, ACLU Mot. App. 110a-111a. But that language simply emphasizes that the Memorandum does not restrict or otherwise affect the Bureau in *counting* persons, including illegal aliens, during census field operations; it in no way concedes, contrary to law and fact, that the use of administrative records concerning individuals' immigration status for the second tabulation is somehow not part of the census. The assertion thus amounts to nothing more than wordplay.

b. The district court likewise erred in holding that using administrative records to implement the Memorandum would mean that the apportionment is "derived from something other than the census itself." J.S. App. 78a. The President's discretion plainly includes the power to direct the Secretary to use administrative records as part of the form and content of the census.

Notably, data concerning the individuals at issue in *Franklin*—overseas members of the armed forces, federal civilian employees, and their dependents—"were obtained from federal departments and agencies and *were principally based on administrative records*." Decennial Census Mgmt. Div., U.S. Census Bureau, U.S. Dep't of Commerce, *2020 Census Detailed Operational Plan for: 20. Federally Affiliated Count Overseas Operation (FACO)* 3 (May 24, 2019) (emphasis added), https://go.usa.gov/xGR2r; see *Franklin*, 505 U.S. at

794-795. That was not a novel approach. Congress has expressly directed the Secretary to acquire and use administrative records "instead of conducting direct inquiries" "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. 6(c). Moreover, during the 2000 census, this Court upheld the Bureau's decision to impute a variety of information about unresponsive addresses from similar addresses that had been personally surveyed during field operations. See *Evans*, 536 U.S. at 458-459.

Accordingly, wholly apart from the Memorandum, the Executive Branch always planned, as part of the 2020 census, to enumerate individuals through a variety of means in addition to census-questionnaire responses, including high-quality administrative records. See pp. 3-4, *supra*. Requiring the Bureau to rely solely on questionnaire responses would thus degrade the quality of the census by failing to enumerate a variety of individuals who reasonably may be considered inhabitants (*e.g.*, those who do not respond or who are temporarily outside the United States).

Notably, the district court acknowledged that the 1990 census at issue in *Franklin* used "administrative records rather than a questionnaire" to count overseas personnel in the first place (not merely to allocate them among the States). J.S. App. 81a n.15. But the court then failed to explain its conclusory assertion that the administrative records used in *Franklin* were "part of the census itself," *ibid.*, while the administrative records that would be used under the Memorandum are "something other than the census itself," *id.* at 78a. The court seemed to be suggesting that the President here has directed the Secretary to go beyond the census

questionnaire, whereas the Secretary in *Franklin* had independently chosen to do so as part of the census process. But that distinction is immaterial given *Franklin*'s holding that the President may direct the Secretary's exercise of policy judgment in conducting the census. The court also seemed to be suggesting that administrative records may be used to *add* people to "the census" for whom there were no questionnaire responses (as in *Franklin*), but may not be used to *remove* people from "the census" who were improperly included in questionnaire responses (as in the Memorandum). But that too is an illusory distinction under the Census Act's grant of authority to determine the form and content of the census.

B. The Reapportionment Act Does Not Require The President To Include All Illegal Aliens Within The Apportionment Base

As the district court acknowledged, the phrase "'persons in each State,'" whether in the Reapportionment Act or the Constitution, has long been understood to cover only a State's "'inhabitants,'" a term whose application "call[s] for 'the exercise of judgment.'" J.S. App. 83a-84a (citation omitted). The President validly exercised that judgment in deciding to exclude illegal aliens "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." 85 Fed. Reg. at 44,680. As history, precedent, and structure indicate, the President need not treat all illegal aliens as "inhabitants" of the States and thereby allow their defiance of federal law to distort the allocation of the people's Representatives. To the contrary, that an alien lacks permission to be in this country, and may be subject to removal, is relevant to whether he has sufficient

ties to a State to rank among its "inhabitants." In holding to the contrary that the Memorandum facially exceeds the scope of the President's discretion, the district court had to conclude that the term "inhabitants" *unambiguously* prevents the President from excluding *any* illegal alien living in the country. Neither inapposite legislative history from 1929 nor any other interpretive source establishes that remarkable proposition.

1. a. Even the district court acknowledged that the Reapportionment Act's directive to include the "persons in each State," 2 U.S.C. 2a(a), is properly read as limited to each State's "inhabitants." J.S. App. 84a (citation omitted). "[I]f a word is obviously transplanted from another legal source," it generally "brings the old soil with it." *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) (citation omitted). The statutory phrase was taken verbatim from the Fourteenth Amendment's Apportionment Clause, see U.S. Const. Amend. XIV, § 2, which in turn modified Article I solely to end the infamous three-fifths compromise, see Art. I, § 2, Cl. 3. And the constitutional provisions had never been understood to cover all persons physically in the country on census day, such as foreign tourists. See, *e.g.*, Timothy Farrar, *Manual of the Constitution of the United States of America* § 450, at 403 (1867) ("'The whole number of persons in each State' cannot mean everybody on the soil at the particular time."). Rather, it was well accepted that the person must be an "'inhabitant'" (or "'usual resident'") of the State, as that is "the gloss" that has historically been given to the phrase "persons in each State." *Franklin*, 505 U.S. at 803-804 (brackets, citation, and internal quotation marks omitted).

That interpretation is consistent with the constitutional drafting history. See *Franklin*, 505 U.S. at 804-

805 & n.3. The draft Constitution submitted to the Committee of Style would have required Congress to "regulate the number of representatives by the number of inhabitants, according to the rule hereinafter made for direct taxation." 2 *The Records of the Federal Convention of 1787*, at 566 (Max Farrand ed., rev. ed. 1966) (*Federal Convention*). The rule for direct taxation, in turn, rested on "the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description," with the exception of "Indians not paying taxes." *Id.* at 571; see *id.* at 566 (providing the number and allocation of Representatives "until the number of citizens and inhabitants shall be taken").

The Committee of Style changed that language to provide that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers," which were to "be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. Art. I, § 2, Cl. 3. But as this Court has explained, "the Committee of Style 'had no authority from the Convention to alter the meaning' of the draft Constitution." *Evans*, 536 U.S. at 474 (citation omitted). Hence, the language that emerged from the Committee of Style—"whole Number of free Persons"—should be understood to be equivalent to "whole number of free citizens and inhabitants." *Federal Convention* 571.

Consistent with that background, James Madison repeatedly explained in urging ratification of the Consti-

tution that apportionment would be based on the number of each State's "inhabitants." *E.g.*, *The Federalist No. 54*, at 369 (Jacob E. Cooke ed., 1961); see *id. No. 56*, at 383; *id. No. 58*, at 391. And the first enumeration act—titled "an act providing for the enumeration of the inhabitants of the United States"—directed "the marshals of the several districts of the United States" to count "the number of the inhabitants" at their "usual place of abode." Act of Mar. 1, 1790, ch. 2, §§ 1, 5, 1 Stat. 101, 103; see § 5, 1 Stat. 103 (providing that "every person occasionally absent at the time of the enumeration" shall be counted "as belonging to that place in which he usually resides in the United States").

The understanding that the apportionment base was limited to "inhabitants" was retained by the Fourteenth Amendment, which modified the Apportionment Clause to turn on "the whole number of persons in each State, excluding Indians not taxed," U.S. Const. Amend. XIV, § 2. As a member of the committee that drafted the Amendment explained, that revision fully included former slaves in the apportionment base but otherwise "adhered to the Constitution as it is." Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (Rep. Conkling). The first census after the Fourteenth Amendment's ratification was thus conducted in accordance with the same procedures that had been used for the 1850 census, see Act of May 6, 1870, ch. 87, 16 Stat. 118, which had required "all the inhabitants to be enumerated," Act of May 23, 1850, ch. 11, 9 Stat. 428.

b. Although the phrase "persons in each State" clearly refers to "inhabitants," this Court in *Franklin* recognized that the Executive Branch has significant latitude in determining who constitutes an "inhabitant" for apportionment purposes. That is because the term

"inhabitant" is itself indeterminate. See *Federal Convention* 216-217 (recording Madison's acknowledgment that "inhabitant" was a "vague" word).

Franklin, in particular, upheld the Executive Branch's decision to end its longstanding practice of excluding overseas federal personnel from the apportionment bases of their home States. 505 U.S. at 806. As the Court explained, the Executive Branch had "made a judgment, consonant with, though not dictated by, the text and history of the Constitution," that such individuals "had retained their ties to the States," *ibid.*, even though that overseas population had been excluded from the apportionment base since 1790 (with two exceptions in 1900 and 1970), *id.* at 792-793.

In recognizing such discretion, the Court discussed the varying ways in which the Executive Branch had treated certain populations over time, such as deeming college students to belong "to the State where their parents resided" until 1950 and allowing "Members of Congress" to "choose whether to be counted in the Washington, D.C., area or in their home States." *Franklin*, 505 U.S. at 806. Such decisions are not dictated by the Constitution (or the Reapportionment Act), but necessarily involve "policy judgments" concerning various populations' "ties to the States." *Id.* at 799, 806; cf. Farrar §§ 132, 450, at 158, 403 (explaining that the phrase "persons in each State" may be "construed by the lawmaking power"; and "[i]f the statute does not direct" in such matters, "it leaves it to the preference of the executive officers").

c. The President's discretion encompasses the policy judgment that illegal aliens should be excluded from the term "inhabitant" to the maximum extent possible. During the founding era, no single definition resolved

the circumstances when an alien was an "inhabitant." Although the term evidently covered at least *some* aliens—as evidenced by the draft Constitution's establishment of an apportionment base consisting of "citizens and inhabitants," *Federal Convention* 571—it did not apply to *all* aliens. Rather, as John Adams explained, although "[b]oth Citizens and Inhabitants have a Right to Protection, * * * every Stranger who has been in the United States, or who may be there at present, is not an Inhabitant," and "different States have different Definitions of this Word." Letter from John Adams to the President of Congress (Nov. 3, 1784), in 16 *Papers of John Adams* 362 (Gregg L. Lint et al. eds., 2012) (Adams).

At a minimum, an alien could not qualify as an "inhabitant" without establishing a residence within a jurisdiction and an intent to remain there indefinitely. See, *e.g.*, Adams 362 (noting that "[t]he Domicil and the animus habitandi is necessary in all" definitions). That baseline helps explain the exclusion of certain categories of aliens from the apportionment base. For example, aliens living in the country who do not intend to stay here indefinitely—such as foreign diplomats or those here for vacation or business—have been excluded from prior enumerations. See, *e.g.*, J.A. at 103, *Franklin*, *supra* (No. 91-1502) (explaining that "[f]oreign travelers in the United States," including "tourists or business persons," would "not be counted" in the 1990 census); Bureau of the Census, U.S. Dep't of Commerce, *Sixteenth Decennial Census of the United States, Instructions to Enumerators, Population and Agriculture* 20 (1940) (*1940 Instructions*), https://go.usa.gov/x7TuU ("Do not enumerate citizens of foreign countries employed in the diplomatic or consular service of their

country."). That makes sense, as such aliens are fairly characterized as "inhabitants" of their home countries rather than of the United States. See, *e.g.*, *Bas* v. *Steele*, 2 F. Cas. 988, 993 (C.C.D. Pa. 1818) (No. 1088) (Washington, Circuit Justice) (concluding that a Spanish subject who had remained in Philadelphia as a merchant for four months "was not an inhabitant of this country, as no person is an inhabitant of a place, but one who acquires a domicil there"); cf. *Franklin*, 505 U.S. at 805 (discussing history confirming that an American diplomat stationed overseas could still qualify as an "inhabitant" of his home State) (citation omitted).

Those who adopted the original Constitution and Fourteenth Amendment did not have occasion to make a specific determination as to how this understanding of "inhabitants" should inform the treatment in the apportionment of illegal aliens. Although the general inclusion of aliens was contemplated, see p. 34, *supra*; Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (statement of Rep. Conkling), the subset of *illegal* aliens came into meaningful existence only after the first federal immigration restrictions were enacted in 1875, *Kleindienst* v. *Mandel*, 408 U.S. 753, 761 (1972). Nevertheless, it was well known at the time that the term "inhabitants" could require that an alien have the sovereign's permission to remain within the country.

Notably, Emmerich de Vattel—the "founding era's foremost expert on the law of nations," *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1493 (2019), and "[t]he international jurist most widely cited in the first 50 years after the Revolution," *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978)—defined "inhabitants, as distinguished from citizens," as "strangers, who are permitted to settle and stay in the

country." 1 Emmerich de Vattel, *The Law of Nations* § 213, at 92 (1760). Unsurprisingly, prominent figures from the period such as Marshall and Story relied on Vattel's definition of "inhabitants" in various contexts. See, *e.g.*, *The Venus*, 12 U.S. (8 Cranch) 253, 289 (1814) (Marshall, C.J., concurring and dissenting in part); John C. Hogan, *Joseph Story's Essay on "Domicil"*, 35 B.U. L. Rev. 215, 222 (1955) (reprinting 1830 essay). And consistent with that understanding, Madison observed in *The Federalist* that the Articles of Confederation required every State "to confer the rights of citizenship in other States * * * upon any whom it may allow to become inhabitants within its jurisdiction." *The Federalist No. 42*, at 286.

After Congress enacted federal immigration restrictions, this Court's precedents continued to reflect a similar understanding. In *Kaplan* v. *Tod*, 267 U.S. 228 (1925), for instance, this Court held that an alien who had been denied admission but paroled into the country, where she lived for the next ten years, had not been "dwelling in the United States" or "resid[ing] permanently" in the country for purposes of certain statutes, including the latest version of a naturalization law dating from 1790. *Id.* at 230; see Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103-104 (conditioning derivative citizenship for children of naturalized citizens on whether they were "dwelling" in the country). As the Court explained, she "could not lawfully have landed in the United States" because she fell within an inadmissible category, and "until she legally landed [she] 'could not have dwelt within the United States.'" *Kaplan*, 267 U.S. at 230 (citation omitted). Instead, she was in "the same" position as an alien "held at Ellis Island for deportation." *Id.* at 231. Or, as this Court more recently put it

in the context of due process, aliens "detained shortly after unlawful entry" or who "arrive at ports of entry—even those paroled [into] the country for years pending removal—are 'treated' * * * 'as if stopped at the border.'" *Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (citation omitted).

This Court's understanding that such aliens are not "dwelling," "resid[ing] permanently," or otherwise "in" the United States supports deeming them not to be "inhabitants" of this country. Founding-era dictionaries defined "inhabitant" as one who "dwells or resides permanently in a place." 1 Noah Webster, *An American Dictionary of the English Language* (1828) (capitalization omitted); see, *e.g.*, 1 & 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) s.v. abode, inhabitant, reside, residence, resident (defining "inhabitant" as a "dweller" or one who "resides in a place," with the terms "reside," "residence," and "resident" defined with reference to an "abode"—*i.e.*, "continuance in a place") (capitalization omitted).

This understanding of "inhabitants" is also consistent with *Franklin*'s observation that the concepts of "'inhabitan[ce]'" or "'usual reside[nce]'" can mean "more than mere physical presence" and can connote "some element of allegiance or enduring tie to a place." 505 U.S. at 804; see 2 Alexander M. Burrill, *A New Law Dictionary and Glossary: Containing Full Definitions of the Principal Terms of the Common and Civil Law* 617 (1851) (in defining "inhabitant," explaining that the Latin "*habitare*, the root of this word, imports by its very construction frequency, constancy, permanency, habit, closeness of connection, attachment both physical and moral, and the word *in* serves to give additional force to these senses"); U.S. Const. Amend. XIV, § 2

(apportioning representatives "among the several States according to *their* respective numbers") (emphasis added). Concepts of allegiance and enduring ties support placing limits on illegal aliens' qualifying as "inhabitants," especially given that they may be subject to removal from the country.

Indeed, it is nothing new to use an alien's status as a proxy for whether he intends to, and will in fact, remain here. The 1910 through the 1940 censuses treated some aliens differently from otherwise-similarly-situated citizens solely on the basis of their alienage. Enumerators were to count "[a]ny citizen of the United States who is a member of a family living in [their] district[s], but abroad temporarily at the time of the enumeration," regardless of "how long the absence abroad is continued, provided the person intends to return to the United States." Bureau of the Census, U.S. Dep't. of Commerce and Labor, *Thirteenth Census of the United States, April 15, 1910, Instructions to Enumerators* 21, https://go.usa.gov/x7bqb. By contrast, "aliens who have left the country" were categorically excluded, "as nothing definite can be known as to whether such aliens intend to return to this country." *Ibid.*; see, *e.g.*, *1940 Instructions* 20. It is likewise uncertain whether all illegal aliens will remain here indefinitely, especially those who will likely be removed in the not-too-distant future.

Finally, construing the term "inhabitants" to mandate the inclusion of all illegal aliens in the apportionment base would be at odds with the Constitution's structure. Under our system of government, "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government." *U.S. Term Limits,*

Inc. v. *Thornton*, 514 U.S. 779, 794 (1995). The apportionment of representatives is the method by which "the people" have chosen to distribute their power among themselves. And there is no evident reason why illegal aliens, who by definition have already flouted "the sovereign['s] prerogative" to "exclude" them, *Thuraissigiam*, 140 S. Ct. at 1982 (citation omitted), must be able to leverage that defiance into a distortion of the people's allocation of their sovereign power. As this Court has explained, those aliens "who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise," and cannot "become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law." *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904). Neither all such aliens nor the States in which they are found may demand different treatment when it comes to the allocation of the people's political power. Accordingly, the requirement to include each State's "inhabitants" in the apportionment base, whether constitutional or statutory, does not eliminate the President's discretion concerning the exclusion of illegal aliens.

2. The district court nevertheless deemed the Memorandum facially invalid because, in its view, "the ordinary definition of the term 'inhabitant' is 'one that occupies a particular place regularly, routinely, or for a period of time,'" and that definition "surely encompasses illegal aliens who live in the United States." J.S. App. 84a (quoting *Merriam-Webster's Collegiate Dictionary* 601 (10th ed. 1997)). But to facially enjoin implementation of the President's policy—which excludes illegal aliens "to the maximum extent feasible and consistent with the discretion delegated to the executive branch,"

85 Fed. Reg. at 44,680—the court had to show that the term "inhabitants" both covers all illegal aliens and does so unambiguously. The court failed to do either.

a. To begin, under any relevant definition of "inhabitants," there are at least some aliens whose lack of lawful status is a proper basis for exclusion—such as aliens living in a detention facility after being arrested while crossing the border, aliens who have been detained for illegal entry and paroled into the country pending removal proceedings, or aliens who are subject to final orders of removal. Such aliens neither are "dwelling" in, see pp. 36-37, *supra*, nor have an "enduring tie to," any State, *Franklin*, 505 U.S. at 804, given that the government has detained them upon entry, allowed them into the country only on a conditional basis while considering whether to remove them, or has conclusively determined that they must be removed regardless of how they arrived here in the first place. The district court observed that "many" aliens "intercepted at the border" or in "removal proceedings" "ultimately obtain lawful status," J.S. App. 86a, but that does not mean that the President must treat *all* of them as "inhabitants" *now*, any more than he must presume that all aliens who have traveled abroad while leaving their families here will ultimately return, see p. 38, *supra*.

The district court brushed off such examples as irrelevant on the theory that the usual standard for facial challenges does not apply to a claim that the "President has exceeded the authority granted to him by Congress." J.S. App. 84a n.16. To the contrary, a facial challenge contending that a regulation "exceeds" the statutory "authority" of even a subordinate executive official must "'establish that no set of circumstances exists under which the regulation would be valid.'" *Reno* v.

Flores, 507 U.S. 292, 300-301 (1993) (brackets and citation omitted). The court provided no justification for its upside-down suggestion that a facial challenge contending that *the President* exceeded his statutory authority should be held to a *less* demanding standard.

b. Given that the district court could not establish that every illegal alien qualifies as an "inhabitant" under any traditional definition of that term, it instead asserted that the 1929 Congress adopted an expansive definition, drawn from a 1997 dictionary, in enacting the Reapportionment Act, notwithstanding that the Act parrots the constitutional phrase "persons in each State." But neither text nor history supports the conclusion that the Reapportionment Act unambiguously incorporates a definition of "inhabitant" that sweeps in anyone who "occupies a particular place * * * for a period of time," J.S. App. 84a (citation omitted)—a definition that would cover foreign tourists and diplomats.

i. Starting with text, the district court never addressed that Vattel, the founding era's most prominent commentator on the law of nations, defined alien "inhabitants" as those permitted to settle in a place, and that figures such as Marshall and Story applied this understanding. See pp. 35-36, *supra*. Nor did it grapple with this Court's reasoning in cases such as *Kaplan* that an alien who has not effected a lawful entry is not "dwelling" or "resid[ing] permanently" in the country. 267 U.S. at 230. And while the district court acknowledged "that the terms 'usual residence' and 'inhabitant' have 'been used broadly enough to include some element of allegiance or enduring tie to a place,'" J.S. App. 85a-86a (quoting *Franklin*, 505 U.S. at 804), it gave no explanation for how every illegal alien necessarily has such a connection to the United States.

At most, the district court assumed that the word "usual," read in connection with the word "resident," referred exclusively to frequency of residence. See J.S. App. 84a. But "usual" also can connote regularity. See, *e.g.*, *Webster's New International Dictionary of the English Language* 2099, 2807 (2d ed. 1942) (defining "usual" as "customary; ordinary"; synonymous with "regular," in turn defined as "[c]onstituted, selected, made, etc., in conformity with established or prescribed usages, rules, or discipline") (emphasis omitted); 1 & 2 Johnson (defining "[u]sual" as "customary," defined in turn as "according to prescription"). And it is far from evident that those who adopted the Constitution, the Fourteenth Amendment, or the Reapportionment Act would have thought there was anything "usual," "regular," or "customary" about aliens living in the country in continuous violation of federal law.

Similarly, the district court equated "inhabitant" with a "person living in a State." J.S. App. 86a. But it has long been recognized that if "the mere living in a place constituted *inhabitancy*, in the sense of the constitution," then "it would apply to foreign ministers," for example. M. St. Clair Clarke & David A. Hall, *Cases of Contested Elections in Congress, from the Year 1789 to 1834, Inclusive* 497 (1834) (addressing "Inhabitant" in the House Qualifications Clause, U.S. Const. Art. I, § 2, Cl. 2); see *Franklin*, 505 U.S. at 805 (quoting from this analysis). And just as the Executive Branch is not compelled to treat all diplomats living in the United States as if they have their "usual residence" here, J.S. App. 85a, it need not deem every illegal alien living in this country to be part of the apportionment base.

ii. Turning to history, the district court expressly declined to "delve into the meaning of the terms 'inhabitant' and 'usual residence' at the time of the Founding or of the Reconstruction Amendments." J.S. App. 88a n.17. In doing so, the court gave no reason for departing from the presumption that when "a word is obviously transplanted from another legal source," it "brings the old soil with it." *Hall*, 138 S. Ct. at 1128 (citation omitted). And having ignored the best evidence of the Reapportionment Act's meaning, the court compounded its error by instead relying on attenuated legislative history. See J.S. App. 87a.

In particular, the district court observed that the 1929 Congress (like the Framers of the Fourteenth Amendment) had failed to enact amendments to exclude *all* aliens from the apportionment base, and the Senate's legislative counsel had opined that such an exclusion would be unconstitutional. J.S. App. 87a-88a; cf. Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (Rep. Stevens). But that legislative history does not address whether the 1929 Congress prohibited the President from excluding *illegal* aliens from the apportionment base. Although aliens who are "permitted to settle and stay in the country," Vattel § 213, at 92, may well qualify as "inhabitants," that in no way resolves the question here: whether the Executive Branch reasonably may determine that aliens who are *not* permitted to settle, and remain subject to *removal* by the government, are not "inhabitants" of, and lack an "enduring tie to" and a "'usual residence'" in, the United States. *Franklin*, 505 U.S. at 804. In concluding otherwise, the district court overlooked that this Court has long distinguished between the "illegal entrant" and the lawful resident on the basis of "the character of the relationship between

the alien and this country." *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976). The district court gave no reason why all aliens living in the United States—a "heterogeneous multitude of persons with a wide-ranging variety of ties to this country," *id.* at 78-79—should be treated as a homogenous bloc for purposes of inclusion in the apportionment base.

In any event, legislative history of this sort carries particularly little weight in this context: the Court in *Franklin* upheld the inclusion of certain overseas personnel notwithstanding that Congress had failed to enact "several bills" so providing, 505 U.S. at 793, and that the Department of Justice had even "advise[d]" Congress that it had "doubts about the constitutionality" of such legislation, J.A. at 113, *Franklin*, *supra* (No. 91-1502); see *id.* at 240-241. And if the 1929 Congress meant to mandate that congressional representation be allocated on the basis of aliens who remain in the country in ongoing defiance of federal law, it presumably would have given a clearer indication of such a remarkable step than merely copying into the U.S. Code the constitutional text "persons in each State," which had never been understood to compel such a result.

Notably, the district court provided scant explanation for *why* Congress would have adopted such an approach, which even the court acknowledged could be seen as less "consonant with the principles of representative democracy underpinning our system of Government." J.S. App. 92a (quoting 85 Fed. Reg. at 44,680); see pp. 38-39, *supra*. The court cited *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), for the proposition that "Congress adopted a different theory of Government, in which the House of Representatives represents the whole population, not a subset of the population." J.S.

App. 92a. But *Wesberry* equated "'the people'" with "inhabitants," 376 U.S. at 13 (citation omitted), and nothing in that decision or its progeny indicates that those terms necessarily encompass all illegal aliens.

iii. The district court also pointed to Executive Branch statements from the 1980s opining that the exclusion of illegal aliens from the apportionment base would be unlawful. J.S. App. 90a-91a. But those assertions did not rest on any sustained historical analysis of whether all illegal aliens are necessarily "inhabitants" as that term was originally understood. They also predated this Court's decision in *Franklin*, which confirms that physical residence is neither necessary nor sufficient for inclusion within the apportionment base: the Executive has significant discretion in deciding whether individuals possess the necessary "ties to the States" to "be counted toward their States' representation," 505 U.S. at 806, even in the face of divergent historical practice, see *id.* at 792-793.

Franklin also disposes of the district court's reliance on the past inclusion of illegal aliens in the apportionment base. See J.S. App. 90a-92a. That practice shows at most that, as in *Franklin*, the Executive Branch may choose whether or not to include this population, not that it must adhere to past practice. The district court offered no justification for treating the historical inclusion of illegal aliens as more controlling than the historical exclusion of federal personnel overseas that was abandoned in the 1990 census. See p. 33, *supra*. And contrary to the court's suggestion, nothing in *Franklin* or in logic creates a ratchet in which the Executive may only "*include*" individuals who, despite living abroad, can reasonably be deemed to possess status as "inhabitants" of a State, such as federal personnel. J.S. App.

86a. The Executive likewise may "*exclude*" individuals who, despite living in a State, can reasonably be deemed to lack status as "inhabitants" there, such as foreign diplomats. Cf. *ibid.*

C. Appellees' Constitutional Claims Should Be Rejected For The Same Reasons

As alternative grounds for affirmance, appellees have asserted constitutional claims under the Enumeration and Apportionment Clauses. See, *e.g.*, ACLU Mot. 17-20, 24-25. Those claims, which were raised below, are fairly encompassed within the questions presented, see J.S. I, and although the district court declined to reach them, see J.S. App. 73a-74a, the *San Jose* court relied on them in granting relief, see J.S. App. at 128a-131a, *San Jose*, *supra* (No. 20-561). In order to dispose of both cases, and in light of the impending deadlines for the Secretary and President to make their reports, this Court should address and reject the constitutional claims, especially because they fail for the same reasons as the statutory claims. Cf. *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2565, 2566-2567 (2019) (addressing and rejecting an Enumeration Clause claim rejected in earlier proceedings but embraced in parallel litigation).

As for the Enumeration Clause, it provides that "[t]he actual Enumeration" upon which the apportionment of Representatives is based "shall be made" every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. And as discussed, Congress has directed that the census shall be taken in the manner set forth in 13 U.S.C. 141. See pp. 22-23, *supra*. Thus, because the Memorandum complies with the Census Act, it necessarily complies with the Enumeration Clause too. Indeed, that is why this Court has

emphasized that "the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and that "[t]hrough the Census Act, Congress has delegated its broad authority over the census to the Secretary." *Wisconsin*, 517 U.S. at 19 (citation omitted).

As for the Apportionment Clause, the phrase "persons in each State" is parroted in 2 U.S.C. 2a and carries the same meaning ("inhabitants"). See pp. 30-32, *supra*. Because the Memorandum's understanding of "inhabitants" comports with the Reapportionment Act, it necessarily comports with the Apportionment Clause too. Indeed, that follows *a fortiori*, because the constitutional text was adopted before illegal aliens even existed, rendering it particularly implausible that the vague language should be understood to unambiguously foreclose excluding any members of that population. See pp. 35, 43-44, *supra*.[4]

[4] The *San Jose* court also found that the Memorandum "violates the constitutional separation of powers" because it exceeds the President's discretion under the Census and Reapportionment Acts. J.S. App. at 120a, *San Jose*, *supra* (No. 20-561). The premise is incorrect for the reasons above, and the conclusion does not follow regardless, see *Dalton* v. *Specter*, 511 U.S. 462, 471-474 (1994).

CONCLUSION

This Court should vacate the district court's judgment as moot, or, in the alternative, reverse it.

Respectfully submitted.

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OCTOBER 2020

APPENDIX

1. U.S. Const. Art. I, § 2 provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The 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. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

2. U.S. Const. Amend. XIV, § 2 provides:

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. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the member of the Legislative thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. 2 U.S.C. 2a provides:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

4. 13 U.S.C. 141(a)-(b) provides:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

5. 85 Federal Register 44,679 (Vol. 85, No. 142, Thursday, July 23, 2020) provides:

Title 3—The President

Memorandum of July 21, 2020

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the "whole number of persons in each State," which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States,

and the President's discretion to settle the apportionment is more than "ceremonial or ministerial" and is essential "to the integrity of the process" (*Franklin* v. *Massachusetts,* 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the "persons in each State, excluding Indians not taxed," to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term "persons in each State" has been interpreted to mean that only the "inhabitants" of each State should be included. Determining which persons should be considered "inhabitants" for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are "persons" who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically "in" a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an "inhabitant" includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status. In Executive Order 13880 of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information

with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, noncitizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. *Policy.* For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than

2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. *Excluding Illegal Aliens from the Apportionment Base.* In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations,* 83 FR 5525 (Feb. 8, 2018).

Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ DONALD J. TRUMP
DONALD J. TRUMP

THE WHITE HOUSE,
Washington, July 21, 2020