No. 20-366

IN THE

# Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

*Appellants,*

*v.*

NEW YORK, *et al.*,

*Appellees.*

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

## BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES


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Dated: November 16, 2020

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## INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization, founded in 1940 under the leadership of Thurgood Marshall, to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color.

Because equal political representation is foundational to our democracy, and the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for nearly a century to combat threats to equal political participation faced by Black people. LDF has been involved in many of the precedent-setting cases regarding minority political representation and voting rights before federal courts. *See*, *e.g.*, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991);

1. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

*Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

This case arises from the current Administration's latest attempt to undermine political representation of Black people and other communities of color by manipulating Census data to exclude undocumented immigrant persons, thereby exacerbating the undercount of communities of color and diminishing their Congressional representation. Many immigrant persons in the United States, including undocumented immigrants, are Black. Additionally, many Black people live in and adjacent to communities of immigrant people. Counting all persons in the apportionment of Congressional representatives is critical to securing equal political representation in the districts in which Black people and other people of color reside. Thus, LDF has a significant interest in ensuring the full, proper, and continued enforcement of both the United States Constitution and the federal statutes, including the Census Act, guaranteeing full political participation and proper apportionment.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In this appeal, the Administration seeks to disregard the express constitutional mandate that representatives be apportioned among the several states based on the decennial Census count of all persons residing in the United States. U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend.

XIV, § 2. This scheme would drastically amend the theory of equal representation in our democracy by creating an invisible class of persons who are disproportionately people of color and who would be denied political representation in our federal government. The lower court rejected this attempt, embodied in the Administration's Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020) (the "Memorandum").[2] Its decision should be affirmed for at least three reasons:

First, since the Founding, our nation has embraced a theory of representation requiring all *persons* to be counted for the purposes of apportionment—regardless of citizenship status. That basic principle is clear in the plain text of the Constitution and illustrated by over two centuries of historical practice. Indeed, since the Census Act of 1790, the Census Bureau has consistently sought to count every person residing within a state through the decennial Census, including people without documented citizenship status within the borders of the United States. *Fed'n for Am. Immigration Reform v. Klutznick* ("*FAIR*"), 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). In the rare instances when lawmakers have departed from this basic principle, they have done so expressly, according to constitutional provisions that have since been amended to mandate a full count of all persons residing in the United States.

Second, the Fourteenth Amendment was unambiguously and explicitly intended to secure equal

2. Available at https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/.

political representation for Black people—and thus mandated that apportionment be based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. The framers of the Fourteenth Amendment specifically considered—and rejected—proposals that would have narrowed the apportionment base to only citizens or the voting-eligible population. Instead, they adopted a broader principle affirming that all persons must be counted equally in apportioning political representation. The current Administration seeks to repudiate the clear original public meaning of the Fourteenth Amendment's mandate of representational equality for all persons living in the United States.

Third, the Memorandum's mandate would deprive Black people and other communities of color of the equal political representation to which they are entitled under the Constitution. Many undocumented immigrants are Black and other people of color, and many Black people and other people of color also live in and among immigrant communities. As a result, the Administration's approach would directly reduce the political representation afforded to people of color. Indeed, because communities of color are perpetually undercounted compared to white communities in the decennial Census, the Administration's approach would exacerbate both the pre-existing undercount of communities of color in the Census and their corresponding losses in apportionment based on that data. This Court must not allow the core objective of the Fourteenth Amendment—equal political representation for Black people—to be undermined by this unlawful executive action. Nor should it allow this Memorandum to effectuate the exclusion of a broad swath of persons living within our borders that this Court prohibited in a decision issued just last year. It should instead enforce the

original public meaning of the Fourteenth Amendment, which plainly mandates equal political representation for all persons living in the United States.

## I. THE CONSTITUTION HAS ALWAYS MANDATED THE COUNT OF ALL "PERSONS," WITHOUT REGARD TO CITIZENSHIP STATUS.

### A. The Constitution Requires a Count of Persons, Not Citizens.

At the Founding, the Constitution clearly established that apportionment would be based on a count of persons—not citizens:

> 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.

U.S. Const. art. I, § 2, cl. 3 (emphasis added).

"Person" had the same meaning at the Founding that it has today, "[a] general loose term for a human being." *Person*, Samuel Johnson, *A Dictionary of the English Language* (3d. ed. 1766); *City of San Jose, California v. Trump*, No. 20-CV-05167-RRC-LHK-EMC, 2020 WL 6253433, at *28 (N.D. Cal. Oct. 22, 2020). Thus, the plain text, requiring a count of "persons," mandated a count of all human beings in the United States, without regard to citizenship status or voting eligibility.

That citizenship status does not determine enumeration and apportionment is supported by the Founders' use of the terms "person" and "citizen" throughout the Constitution. The Constitution uses the terms "person" and "citizen" in different places, as context requires, confirming that a broader meaning was intended when the word "persons" was used, rather than "citizens." *See*, *e.g.*, U.S. Const. art. I, § 2, cl 2 ("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."). Accordingly, the Court has frequently held that references to "persons" in the provisions of the Constitution include all persons, including people who are present in this country without documented citizenship status. *See*, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) ("[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

When the Framers did wish to limit or exclude persons for apportionment purposes, they did so expressly. Thus, Article I specifically excludes "Indians not taxed" from the counting to be undertaken for apportionment persons. *See* U.S. Const. art. I, § 2, cl. 3. And, in a provision reflecting the Founders' refusal to acknowledge the humanity, much less the full citizenship, of Black people in this country, Article I also states that "three fifths of all other Persons,"

*i.e.*, enslaved Black persons, would be counted. *Id.* The Framers recognized that, without those exceptions, the term "persons" would include everyone. *FAIR*, 486 F. Supp. at 576. Otherwise, those exceptions would have been unnecessary.

In the Federalist Papers, James Madison explained that apportionment was to be "founded on the aggregate number of inhabitants" of each state. *The Federalist*, No. 54, at 369 (J. Cooke ed. 1961). "The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at a later time, aliens." *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990). The motivating principle was the theory of representational equality, under which all residents of the state are to be counted, even though only some individuals had the right to vote. *Evenwel*, 136 S. Ct. at 1128. As Alexander Hamilton explained, "[t]here can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government." *Id.* at 1127 (quoting 1 Records of the Federal Convention of 1787 473 (M. Farrand ed. 1911)).

### B. A Decennial Census Count That Excludes Non-Citizens Is Disconsonant with Constitutional and Statutory Mandates.

To enforce the constitutional requirement that representation be apportioned based on a count of persons, the Constitution requires Congress to count the entire population at least every ten years. U.S. Const. art. I, § 2, cl. 3; *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964). To do otherwise would run afoul of the constitutional mandate

that apportionment be based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2.

Not long after the first Constitutional Convention, Congress enacted the Census Act on March 1, 1790, providing for the enumeration of the inhabitants of the United States. *See* Act of Mar. 1, 1790, 1 Stat. 101 (1790). The original Census did not inquire whether a person was a citizen. It only asked whether the person was in his or her "usual place of abode" on the counting date. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 330-31 (rev. ed. 2009). Even when the Census Act was revised to add new questions, including one about "foreigners not naturalized," this subset of persons was included as free persons in the count. Act of Mar. 14, 1820, § 1, 3 Stat. 548, 550 (1820).

The Census Act requires the Secretary of Commerce to "take a decennial census of population" and report to the President the "tabulation of total population . . . as required for the apportionment of Representatives in Congress," 13 U.S.C. § 141(a), (b). Under the Act, the President's duty is clear. "[T]he President shall 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, no State to receive less than one Member." 2 U.S.C. § 2(a).

For more than two centuries since the first Census Act, "[t]he Census Bureau has always attempted to count every person residing in a state on Census day, and the population base for purposes of apportionment

has always included all persons, including aliens both lawfully and unlawfully within our borders." *FAIR*, 486 F. Supp. at 576. This interpretation has been consistent and uncontroversial. *See City of San Jose, California*, 2020 WL 6253433, at *8.

Rather than follow this unbroken line of authority and practice dating back to the founding of our constitutional Republic, the Administration has issued a Memorandum purporting to redefine the term "persons in each State" to exclude many "persons in each State," *i.e.*, undocumented immigrants. *See* Memorandum, 85 Fed. Reg. 44,679. The Memorandum instructs the Secretary of Commerce to provide information that allows the President to exclude undocumented immigrant people from the final count of the "whole numbers of persons in each State" that the President transmits to Congress as the basis for Congressional apportionment. *See id.* at 44,679–80. The Memorandum is premised on the theory that the term "persons in each State" refers only to the "inhabitants" in each state. *See City of San Jose, California*, 2020 WL 6253433, at *29. But its conclusion (*i.e.*, that undocumented persons should be excluded) does not follow from the premise. The word "inhabitant" refers merely to someone's "usual residence" or "usual place of abode"—or any circumstances where they have an "enduring tie to a place." *Franklin v. Massachusetts*, 505 U.S. 788, 789 (1992). All persons who reside in a state, including those without documented citizenship status, have the requisite "enduring tie to a place" to make them "inhabitants" with their "usual residence" in that state. *See Franklin*, 505 U.S. at 805; *City of San Jose, California*, 2020 WL 6253433, at *29. Thus, even accepting the Administration's premise of counting only inhabitants for Congressional apportionment, undocumented persons

residing in the United States are "inhabitants" who must be counted.

## II. THE FOURTEENTH AMENDMENT REQUIRES THAT ALL PERSONS BE COUNTED EQUALLY.

While the Constitution has never limited apportionment based on citizenship or immigration status, at the Founding, the Constitution treated enslaved people differently than free persons. Treating enslaved people as less than full humans, the Constitution decreed that each enslaved person would be apportioned as only "three-fifths" of a person, the so-called Three-Fifths Clause. U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment was a stark reversal. It abolished the racist and shameful denial of full citizenship to Black people reflected in the Three-Fifths Clause and instead embraced a critical principle: all persons must be equal before the law, and all must be apportioned equally and fully for the purposes of political representation.

The Fourteenth Amendment and the other Civil War Amendments were a repudiation of the anti-Black racism that led to the Three-Fifths Clause. Together with the Thirteenth Amendment, which abolished chattel slavery, and the Fifteenth Amendment, which granted all adult Black men the right to vote, the Fourteenth Amendment formally recognized that all persons within the jurisdiction of the United States were entitled to "the equal protection of the laws," and that all people must be valued equally in apportioning political representation. The Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of*

*persons in each State*, excluding Indians not taxed."[3] U.S. Const. amend. XIV, § 2 (emphasis added).

The ratification of the "whole number of persons" provision in the Fourteenth Amendment rendered the Three-Fifths Clause obsolete and mandated that formerly enslaved people be counted equally and fully for purposes of apportionment. *See* Shane T. Stansbury, *Making Sense of the Census: The Decennial Census Debate and Its Meaning for America's Ethnic and Racial Minorities*, 31 Colum. Hum. Rts. L. Rev. 403, 434-35 (2000); Janai S. Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 199 Colum. L. Rev. 1399, 1410–11 (2019).

The Fourteenth Amendment thereby abolished the anti-Black exception to representational equality embodied in the original Constitution, while reaffirming that fundamental theory of representation—one that is based on the counting and apportionment of all persons. Indeed, the drafters of the Fourteenth Amendment specifically considered, and rejected, proposals that would have made citizens or the voting-eligible population the apportionment base.

Representative Thaddeus Stevens of Pennsylvania introduced a proposal that would have apportioned representatives "according to their respective legal voters." Cong. Globe, 39th Cong., 1st Sess. 10 (1866); *see*

3. Another shameful provision excluding "Indians not taxed" from apportionment no longer has any effect. For nearly a century, it has been recognized that "all Indians are subject to the federal income-tax laws." *Exclusion of 'Indians Not Taxed,' When Apportioning Representatives*, 39 Op. Att'y Gen. 518, 519 (1940).

*also Evenwel*, 136 S. Ct. at 1128 (recounting the history of this proposal). The proposal "encountered fierce resistance from proponents of total-population apportionment." *Evenwel*, 136 S. Ct. at 1128. The New England states were strongly opposed, due to both their "disproportionately large number of women (who were universally excluded from voting at the time)" and "because many of its states imposed more restrictions on the franchise than some of the newer states." Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 Wm. & Mary L. Rev. 1921, 1931 (2018). Accordingly, when the Joint Committee of Fifteen on Reconstruction began deliberations and considered a resolution on apportionment that would base representation on legal voters, the resolution was defeated by eight members of the committee, with every member from New England voting against it. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93, 96 (1961).

The decision to continue to use total-population apportionment in the Fourteenth Amendment is consistent with the "theory of the Constitution" and the principle of representational equality—a principle that was addressed during Congressional debates about the Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess., 2766-2767; *Evenwel*, 136 S. Ct. at 1128. Senator Luke P. Poland recognized that "[a]ll the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866). Representative Burton Cook believed

that representation based on voter population would have improperly "take[n] from the basis of representation all unnaturalized foreigners," *id.* at 411, and Senator Henry Wilson demurred that excluding noncitizens from the apportionment calculus would "throw out of the basis at least two and a half millions of unnaturalized foreign-born" persons. *Id.* at 1256. Representative John Bingham affirmed that the "whole immigrant population should be numbered with the people" because "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation." *Id.* at 432. Representative Andrew Jackson Rogers of New Jersey similarly explained:

> Every man in this House knows perfectly well in the several States a person under the age of twenty-one years cannot vote, *unnaturalized citizens* cannot vote, and the whole class of females, constituting nearly one half of the population of this country cannot vote; yet for these persons the States are entitled to representation.

*Id.* at 353 (emphasis added). The text of the Constitution cannot be, and has not been, abrogated by subsequent legislation delineating different categories of immigrant persons (*i.e.*, documented and undocumented), as confirmed by the fact that every Administration since 1875—when the Page Act, the first federal immigration law to create such categories by formally prohibiting entry into the United States, was passed—has counted all immigrant persons regardless of immigration status as part of the decennial Census.

Considering this history, the Administration's argument that it is entitled to exclude undocumented immigrant people from the count used for apportionment purposes—because the Reapportionment Act of 1929, 2 U.S.C. § 2(a), provides it with discretion to determine which people are properly counted as "inhabitants" of the several states—is meritless. *See* Appellants' Br. 29–42. The Census count already excludes people who are not inhabitants or residents of a given state. What the Memorandum seeks to do is exclude all immigrant people who lack lawful status—even those that intend to reside in the United States indefinitely and thus qualify as inhabitants or residents. Moreover, even assuming the Administration may have some discretion in conducting the Census count, as of now, that count has already occurred; once the President has received the decennial Census data from the Secretary of Commerce, the apportionment calculation itself is a "ministerial" act. *Franklin*, 505 U.S. at 799.

Importantly, the Fourteenth Amendment has been consistently interpreted to cover all persons for apportionment purposes notwithstanding the various federal immigration restrictions that were passed beginning with the Page Act of 1875.[4] "'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see also Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) ("[A] contemporaneous

4. In addition to the Page Act, the Fourteenth Amendment's interpretation remained consistent through subsequent federal immigration legislation such as the Chinese Exclusion Act of 1882 and the Immigration Act of 1924.

legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction to be given" to the Constitution).

The Administration's position would undermine an important equality objective of the Fourteenth Amendment, which even its opponents understood required "giv[ing] negroes political and social equality with the whites." Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 Nw. U. L. Rev. 1627, 1647 (2013). As discussed below, because many immigrants are Black and other people of color, and many Black people and other people of color live in proximity to immigrant communities, including undocumented immigrant persons, construing the Amendment to allow the exclusion of undocumented people from the apportionment base would impede this objective—and directly reduce the political representation afforded to Black people.

## III. THE MEMORANDUM HAS THE PURPOSE AND EFFECT OF DECREASING THE REPRESENTATION OF BLACK PEOPLE AND OTHER COMMUNITIES OF COLOR, THEREBY IMPEDING THE OBJECTIVE OF THE FOURTEENTH AMENDMENT.

Enumeration of the national population through the constitutionally mandated decennial Census is not a mere bureaucratic exercise. It dictates critical aspects of our democracy, including the allocation of elected representatives to each State; the structure of congressional and state legislative districts; the distribution of billions of dollars of federal and state funds; and shaping of policies that address the needs of Black

communities. Historically, despite the requirements of the Fourteenth Amendment, the decennial Censuses have consistently undercounted Black people, and thereby deprived Black people of equal political representation and equal access to government resources. The Administration's scheme to exclude undocumented people from the apportionment count will further limit Black people's access to political representation and resources.

The population of immigrant and noncitizen individuals within the Black community is substantial. Approximately one-in-ten Black people in the United States are immigrants, of whom approximately 42 percent are noncitizens and approximately 15 percent are undocumented. *See* Monica Anderson & Gustavo Lopez, *Key Facts About Black Immigrants in the U.S.*, Pew Research Ctr. (Jan. 24, 2018).[5]

Thus, on top of the historic undercount that has consistently disadvantaged Black people, the Administration now attempts to remove undocumented individuals, including a disproportionate number of Black people and other people for color, from the apportionment base—undermining the Fourteenth Amendment's core objective to provide Black people with equal political representation. In so doing, the Administration continues its shameful pattern of targeting immigrants of color and resurrects the ignoble history of denying equal political representation to people of color in our democracy.

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5. Available at https://www.pewresearch.org/fact-tank/2018/01/24/key-facts-about-black-immigrants-in-the-u-s/.

### A. The Memorandum Continues a Pattern of Discriminatory Targeting of Immigrants of Color.

The Memorandum at issue in this case is the latest in a series of unlawful policies by this Administration that target immigrants of color, including Black immigrants.

The President has made his biased and discriminatory views about race and immigration clear in connection with specific policy choices. In a conversation with members of Congress about legislation to address immigration policy, he reportedly stated that Haitians "all have AIDS," that Haitian immigrants should not be admitted into the United States, and that Haiti and African countries are "shithole countries." *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568, 572 (D. Md. 2019); *see also* Michael D. Shear & Julie Hirschfeld David, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017)).[6] Furthermore, the President is reported to have voiced a "preference" for immigrants from countries comprised overwhelmingly of white people "like Norway." *Id.*; *see also* Josh Dawsey, *Trump Derides Protections for Immigrants From 'Shithole' Countries*, Wash. Post (Jan. 12, 2018)).[7]

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6. Available at https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

7. Available at https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.3ca1973048c5.

These are not just words. In November 2017, the Administration terminated the Temporary Protected Status designation for Haitian nationals living in the United States, which the U.S. government has maintained since 2010 as a result of the devastation from an earthquake, a subsequent cholera outbreak, and hurricanes. *See NAACP*, 364 F. Supp. 3d at 571–72. No change in circumstances warranted or justified this termination. Four district courts have recognized as legitimate plaintiffs' claims that "this act was motivated at least partially by racial discrimination." *Id.* at 578; *Saget v. Trump*, 345 F. Supp. 3d 287 (E.D.N.Y. 2018); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018); *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. 2018).

The President likewise engaged in notoriously discriminatory rhetoric in urging that Muslim persons should be excluded from our country, and his Administration now generally excludes residents of thirteen predominately Muslim countries from admission. Proclamation on Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry, 85 Fed. Reg. 6,699 (Feb. 5, 2020) Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to Travel Ban*, N.Y. Times (Jan. 31, 2020).[8] Among his statements, the President has referred to Mexican immigrants as "criminals, drug dealers, [and] rapists" and has compared undocumented immigrant people to "animals." *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1917 (2020). This Court recognized that the Administration acted unlawfully in rescinding the Deferred Action for Childhood Arrival ("DACA") program, which disproportionately impacted

8. Available at https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html.

Latinx immigrants from Mexico, representing 78 percent of DACA recipients. *Id.* at 1915. Black immigrant people, and Black communities generally, are among these targeted groups. For example, approximately 11 percent of foreign-born Muslim people in the United States identify as Black, and Afro-Latinx immigrant peoples comprise 11 percent of the Black immigrant population. *See Muslims in America: Immigrants and Those Born in U.S. See Life Differently in Many Ways*, Pew Research Ctr. (Apr. 17, 2018); Monica Anderson, *A Rising Share of the U.S. Black Population is Foreign Born*, Pew Research Ctr.

### B. The Memorandum Represents an End-Run Around This Court's Decision Rejecting the Use of Citizenship Status Question to Manipulate Redistricting.

The current Administration has also engaged in a years-long strategy to misuse the Census as a tool to manipulate redistricting and political representation of communities of color. Just last year, this Court rejected the addition of a citizenship status question to the 2020 decennial Census, recognizing that the Administration's purported justification for adding the question was pretextual. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

The Memorandum calls for exclusion of undocumented immigrant persons from the apportionment base in a manner that, as the Republican, also referred to the Grand Old Party ("GOP"), gerrymandering strategist Thomas Hofeller concluded, would politically benefit Republicans and non-Hispanic white people. *See* Memorandum, 85 Fed. Reg. at 44,679–80; Thomas Hofeller, *The Use of Citizenship Voting Age Population in Redistricting*,

Common Cause (2015).[9] Mr. Hofeller specifically concluded that removing non-citizens from the apportionment base and packing remaining non-white and non-Republican voters along racial and party lines into as few districts as possible would serve to dilute their political power, identifying the addition of a citizenship status question to the Census as one method of facilitating this strategy. Common Cause, The Hofeller Files (June 17, 2019).[10] Accordingly, as evidenced via multiple legal challenges to the citizenship status question and discriminatory redistricting plans, the Memorandum is a culmination of years of repeated attempts by political operatives to manipulate our democracy using the decennial Census and redistricting schemes. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sep. 03, 2019) (ordering redrawing of new redistricting maps in light of direct evidence in Hofeller files of focus on maximizing partisan advantage in 2017 plans); *Kravitz v. United States Dep't of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019) (Secretary's addition of citizenship question to Census questionnaire was arbitrary and capricious, violated the Enumeration Clause, and warranted permanent injunction with nationwide scope).[11] Evidence

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9. Available at https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf.

10. Available at https://www.commoncause.org/resource/the-hofeller-files/.

11. *See also* Memorandum in Support of Plaintiffs' Emergency Motion for Preliminary Injunction and Injunction Pending Appeal, *Kravitz v. U.S. Dep't of Commerce*, 2019 WL 8688662 at *3-4 (D. Md. June 26, 2019) ("Hofeller and Neuman[—this Administration's former adviser on census issues—]collaborated on developing a pretextual justification to conceal that discriminatory intent – a pretext that [U.S. Commerce] Secretary Ross adopted and, through Neuman, presented to DOJ.").

of this strategy similarly undermined the current administration's explanation for adding the citizenship status question to the 2020 decennial Census. *See Dep't of Commerce*, 139 S. Ct at 2556.

This Memorandum picks up where these efforts left off, representing yet another effort to misuse the Census to target immigrants of color and limit political representation for people of color more broadly. Indeed, the President references the failed Executive Order calling for the Citizenship Status Question on the decennial Census in the Memorandum at issue here, noting that, "in Executive Order 13880 of July 11, 2019 . . . [a]s 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." *See* Memorandum, 85 Fed. Reg. at 44,680. The Memorandum seeks to circumvent this Court's decision rejecting the Administration's attempted addition of a citizenship status question on the decennial Census, and it carries the same taint of that pretextual endeavor. *See Dep't of Commerce*, 139 S. Ct. at 2551.

### C. The Memorandum's Proposal to Exclude Undocumented Persons from Apportionment Counts Would Have Devastating Repercussions for Black Communities.

Black people, and communities of color generally, have historically faced continuous political affronts at the nexus of citizenship, eligibility to vote, and apportionment. Excluding non-citizens from the Census count would further exacerbate an existing and quantifiable representational disparity arising from the

historical undercounting of Black people in the Census. The source of impact is twofold: the Memorandum effects both direct exclusion of Black undocumented persons from the apportionment count and the diminution of political representation for Black people living in proximity to undocumented immigrants. As a result, the Memorandum would deprive Black people of the fair and equal political representation that the Fourteenth Amendment guarantees.

The Census historically has undercounted racial and ethnic minorities despite its intended "goal of accomplishing an 'actual Enumeration' of population." *Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996). Even after the Fourteenth Amendment eliminated the Three-Fifths calculation in the Census Clause, Black people were "egregiously undercounted" in the decennial Census "but lacked the political clout to secure a recount." Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 Rev. Litig. 1, 6 (1993).

This undercount continues to threaten the equal political representation of Black people. The 1940 Census suffered from an 8.4 percent undercount of the Black population, compared to only a 5.0 percent undercount for the white population. *Wisconsin,* 517 U.S. at 7. In the 2010 Census, Black people were undercounted by 2.1 percent, while non-Hispanic white people were *overcounted* by 0.8 percent. *See Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census*, U.S. Census Bureau (May 22, 2012).[12]

12. Available at https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html.

Excluding persons without documented citizenship from the apportionment base would further exacerbate these preexisting representational and resource disparities in Black communities. Immigrant persons comprise 13.7 percent of the United States population, with a quarter of this population being undocumented. *See* Abby Budiman, *et al.*, *Facts on U.S. Immigrants, 2018: Statistical Portrait of the Foreign-Born Population in the United States*, Pew Research Ctr. (Aug. 20, 2020).[13] Additionally, immigrant persons comprise a growing share of the nation's Black population, at approximately 10 percent nationally and higher in metropolitan areas like New York (about 28 percent) and Miami (about 33 percent). *See* Anderson, *A Rising Share*. Approximately 42 percent of Black immigrant persons do not hold U.S. citizenship, and approximately 15 percent do not have documentation.[14] *See* Anderson & Lopez, *Key Facts*. Thus, any effort to exclude undocumented persons from apportionment base would negatively impact the representation and attendant policies and resources afforded to Black communities.

Excluding undocumented persons from the Congressional apportionment base following the Census count would not only reduce the political representation of Black communities; it would adversely skew the Census data the Government uses in dispensing government funds. "The Federal Government considers Census

13. Available at https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/.

14. Among the population of undocumented immigrant people in the United States, Black people are overrepresented by five times in immigration detention and deportation proceedings. *See* Breanne J. Palmer, *The Crossroads: Being Black, Immigrant, and Undocumented in the Era of #BlackLivesMatter*, 9 Geo. J. L. & Mod. Critical Race Persp. 99, 107 (2017).

data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts." *Wisconsin*, 517 U.S. at 5–6. This data is also used in drafting "legislation, urban and regional planning, business planning, and academic and social studies." *Baldridge v. Shapiro*, 455 U.S. 345, 353 n.9 (1982). Additionally, policymakers, federal agencies, and civil rights advocates rely on Census data to address barriers to equal opportunity in areas such as voting rights, employment, education, housing, lending, healthcare, and criminal justice, among others. *See* Race and Ethnicity in the 2020 Census: Improving Data to Capture a Multiethnic America, The Leadership Conference & Educ. Fund 1, 11 (Nov. 2014). The current Administration's tally of the apportionment base would deny thousands of people access to these programs and opportunities.

### D. The Presidential Memorandum Undermines the Fourteenth Amendment's Objective to Provide Black Persons with Equal Representation.

The clear objective of the Fourteenth Amendment was to end the lack of representation for disfavored persons, namely Black people, and to ensure they had political representation on equal footing with the white population. Despite this history, by erasing undocumented immigrant persons from the apportionment base following the Census count, the Memorandum would deprive Black people and other communities of color of vital political representation and socio-economic opportunities. Communities with large Black and minority populations stand to lose significant federal funding and equal political representation if unauthorized immigrant persons are no longer counted in

apportioning Congressional representatives. For example, California, Florida, and Texas are all at risk of losing representatives, even though their populations are expected to grow or remain stable. Jeffrey Passel and D'Vera Cohn, *How Removing Unauthorized Immigrants from Census Statistics Could Affect House Reapportionment*, Pew Research Ctr., (July 24, 2020).[15] This would adversely impact the representation of Black communities, as those states represent three of the five states with the largest Black populations according to the 2010 Census. *See* U.S. Census Bureau, *The Black Population: 2010 Census Briefs* 1, 8 (Sept. 2011) (reflecting 3.2 million Black persons residing in Florida, 3.2 million in Texas, and 2.7 million in California). Moreover, these three states alone represented 21.5 percent of the Black population in the United States in 2010. *Id.* at 10 (Florida accounted for 7.6 percent of the Black population, Texas 7.5 percent, and California 6.4 percent). As a result, Black people in these areas would have larger numbers of people per representative, undermining the principle of equal representation and "one person, one vote." *See Evenwel*, 136 S. Ct. at 1131.

15. Available at https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment/.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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Dated: November 16, 2020