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.,
Appellees.

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

BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, AND CATHOLIC CHARITIES USA IN SUPPORT OF APPELLEES

Stephen W. Miller
Counsel of Record
Helen Marie S. Berg
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Fl. 8
Washington, DC 20036
(202) 730-1300
smiller@hwglaw.com

NOVEMBER 16, 2020 *Counsel for Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (cont'd)

Other References

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES
(cont'd)

INTEREST OF *AMICI CURIAE*[1]

At the end of next month, the Catholic Church around the world will delight in the story of the birth of Jesus Christ. In the Gospels, the narrative of Jesus' birth begins with the announcement of a census. Mary gives birth to Jesus in a stable in Bethlehem because Joseph was summoned there to be counted. There are few similarities between the United States census and the census of Caesar Augustus. But the image of the Holy Family in the stable—vulnerable and without adequate shelter—remains in the hearts of the Church's followers and motivates *amici* to file this brief in support of Appellees.

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, the rights of religious organizations and their adherents, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the value of human life from conception to natural death, and care for immigrants and refugees. When lawsuits have touched upon central Roman Catholic tenets

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have provided blanket consent to the filing of *amicus curiae* briefs.

such as these, the Conference has filed *amicus curiae* briefs to make its view clear, particularly in this Court.

The Catholic Health Association of the United States (CHA) is the national leadership organization of the Catholic health ministry, representing the largest not-for-profit provider of health care services in the nation. The Catholic health ministry includes more than 2,300 hospitals, nursing homes, long-term care facilities, health care systems, sponsors, and related organizations serving the full continuum of health care across our nation.

Catholic Charities USA (CCUSA) is a national membership organization representing more than 167 diocesan Catholic Charities member agencies. These member agencies operate more than 2,600 service locations across the 50 states, the District of Columbia, and five U.S. territories. Their diverse array of social services reached more than 13 million individuals in need last year.

Amici's mission is informed and motivated by the Catholic Church's teachings on the equal dignity of the human person and the sanctity of human life. This dignity is based on the fact that each and every human being is created in the image and likeness of God. Each person has the right to life and the right to the "means necessary for the proper development of life." Pope John XXIII, *Pacem in Terris*, no. 11 (Apr. 11, 1963). At the same time, the purpose and responsibility of civic government is to provide and protect this dignity. Civil authority, therefore, must be concerned for the entire human family, regardless of national identity. *Id*. at no. 56. In a representative

democracy, citizens elect national leaders to serve and represent the particular interests of their local community, along with those of the entire nation. Elected leaders must know and understand those in their communities in order to serve them. Otherwise, elected legislators and citizens alike are impaired in fulfilling their "scriptural call to welcome the stranger among us . . . by ensuring that they have opportunities for a safe home, education for their children, and a decent life for their families." United States Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship* 29 (2020), https://tinyurl.com/usccb20. It is this scriptural call that compels *amici* to speak up for the most vulnerable members of the human family by submitting this brief.

Excluding undocumented persons from the apportionment base sends a message that they are not equal members of the human family and not worthy of equal representation in government. Denying that undocumented persons are "inhabitants" in this context is effectively to deny that they are "persons." Although the Administration expressly disavows the argument that undocumented persons are not "persons," it has nonetheless made the argument indirectly. If an "inhabitant" is a "person" who "occupies a particular place regularly, routinely, or for a period of time," *Inhabitant*, Merriam Webster (11th ed. 2003), and if undocumented persons do so occupy a State, then the only way they can be excluded from the definition of "inhabitants" is if they are not "persons."

Denying that undocumented immigrants are "persons"—even indirectly—for purposes of apportionment recalls the overtly sinful and gravely unjust Three-Fifths Compromise, which was abrogated by the Fourteenth Amendment. Excluding any class of human beings regularly present in our country—especially some of the most vulnerable—from those considered "inhabitants" is to exclude them from the legal protection of "persons" in the eyes of the law. This exemplifies what Pope Francis has repeatedly described as the "throwaway culture." *See, e.g.*, Pope Francis, *Fratelli Tutti*, no. 18 (Oct. 3, 2020). *Amici* object to discarding any persons from the protection of the law, including their exclusion from the census count and the apportionment base.

INTRODUCTION AND SUMMARY OF ARGUMENT

In July 2020, President Trump issued a Memorandum calling for apportionment to be conducted in an unprecedented manner. *See* Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020) ("Memorandum"). The Memorandum instructs the Secretary of Commerce, in the course of fulfilling his duties under the Census Act and the Constitution, to provide the President two different sets of population numbers. In addition to the tabulation of the total population in each state, the Memorandum calls for the Secretary to provide the President, separately, with population data that excludes undocumented immigrants. Per the Memorandum, the President seeks this subset of incomplete census data to fulfill his policy of

transmitting to Congress apportionment figures that exclude undocumented immigrants. Based on the plain language of the Fourteenth Amendment and the Census Act, the intentions of the Founders and later legislators, and more than two centuries of practice, *amici* conclude that the Memorandum's policy for apportionment is unlawful.

The Constitution and the Census Act require apportionment to be based on the total number of persons in the United States—immigration status notwithstanding. And contrary to the Administration's claims, a person's immigration status has no bearing on whether they are an "inhabitant" for the purposes of apportionment. This is simply an indirect way of attacking the legal personhood of undocumented persons, without saying as much. Further, the Constitution and Census Act require that apportionment derive from the census enumeration alone, not any other information.

The inevitable consequences of the Memorandum's policy are dire and further illustrate its unlawfulness. This policy will distort representation among states—an outcome at direct odds with the constitutional purpose of the census—and decrease funding to communities that need it most. *Amici* serve these vulnerable communities, providing a host of health and social programs. As part of their mission to serve the common good, *amici* today shine a spotlight on how the Memorandum's policy will hinder these programs and harm communities in need.

ARGUMENT

I. Excluding Undocumented Persons from the "Whole Number of Persons in Each State" Violates Article I and the Fourteenth Amendment to the United States Constitution.

By denying that undocumented persons are among the "whole number of persons in each state," even when they usually occupy those states, the Memorandum's policy circumvents the Constitution in at least two respects. First, Article I and the Fourteenth Amendment require that the total population of each state be counted in a decennial census for the purposes of apportionment. Second, Article I further requires that the census provide the sole basis for apportionment.

The Constitution prohibits the exclusion of undocumented immigrants who reside in the United States from the apportionment base. The Fourteenth Amendment clearly specifies that "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." U.S. Const. amend. XIV § 2. As relevant here, the language is entirely unqualified.

The Memorandum adds an unlawful limitation to the Fourteenth Amendment. It interprets "whole number of persons" to exclude undocumented immigrants who regularly reside in the United States. This limitation is without basis in the text, logic, or fact. One's immigration status does not determine whether one is an "inhabitant" of the United States;

one's usual location in a State does. This Court has previously acknowledged that the word "inhabitant," in the context of the census, is used interchangeably with "usual place of abode" or "usual resident." *See Franklin v. Massachusetts*, 505 U.S. 788, 804–05 (1992). That an individual may be undocumented does not, without more, undermine his claim to be an "inhabitant" of the state of his usual residence. By denying that such immigrants are inhabitants, even though they are routinely present in a state, the Memorandum denies instead that they are "persons," in violation of the Constitution.

Indeed, the "whole number of persons in each state" means exactly what the plain language indicates. A review of constitutional history reveals the careful deliberation underlying the apportionment scheme. Both the Founders and drafters of the Fourteenth Amendment determined that apportionment in the House of Representatives would be based on the total number of people in each state. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016). As part of the Three-Fifths Compromise, the Founders determined that, although each state would have an equal number of Senators, representation in the House would be based on the state's total inhabitants—with enslaved persons counting as only three-fifths of an inhabitant. *Id.* Later, during the debates leading to the adoption of the Fourteenth Amendment, some members of Congress suggested changing the basis for apportionment from total population to voter population, out of fear that representation for Southern states would unfairly swell due to newly freed, but likely disenfranchised, people. *Id.* at 1128. Other legislators opposed this

shift on the principle of representational equality, noting that counting only voters in the apportionment base would leave large sectors of the population—such as women, children, and all others who could not vote—without representation. *Id.* Ultimately, the proponents of total-population-based apportionment prevailed and the Fourteenth Amendment incorporated language from Article I—that Representatives be apportioned according to the whole number of persons residing in each state, regardless of their eligibility to vote.

Thus, excluding undocumented people from among the "whole number of persons in each state"—and, in turn, the apportionment base specifically—runs contrary to the deliberately drafted constitutional requirement. In so doing, the Memorandum's policy would cause unequal representation, an outcome contrary to the text of the Constitution and one that the Framers of the Fourteenth Amendment were determined to avoid. *Id*. at 1129.

As for the second requirement, the Fourteenth Amendment provides that the apportionment base is determined by the "respective numbers" of persons in each state. U.S. Const. amend. XIV § 2. In turn, as provided in Article I, the "actual Enumeration" of the "whole Number of free Persons" in each state is determined by the decennial census. *Id.* art. I, § 2, cl. 3; *see Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996) ("The Constitution provides that the results of the census shall be used to apportion the Members of the House of Representatives among the States."). Apportionment is indelibly anchored to an actual enumeration of persons (an objective measure) in part

to avoid manipulation by those in power. *See Utah v. Evans*, 536 U.S. 452, 500 (2002) (Thomas, J., concurring) (noting "[t]he Framers knew that the calculation of populations could be and often were skewed for political or financial purposes").

It is also worth highlighting that the executive branch—prior to the current Administration—has for decades consistently maintained that undocumented persons should be included in the census. In 1988, for example, the Department of Justice under President Reagan took the position that excluding undocumented persons from the census and apportionment base would be unconstitutional. *See* Letter from Thomas M. Boyd, Acting Assistant Attorney Gen., to Rep. William D. Ford (June 29, 1988) (reprinted in U.S. Gov't Printing Office, 1990 Census Procedures and Demographic Impact on the State of Michigan 240–44 (1988)). This position was then reaffirmed a year later by the George H. W. Bush Administration. *See* Letter from Carol T. Crawford, Assistant Attorney Gen., to Sen. Jeff Bingaman (Sept. 22, 1989) (reprinted in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989)).

By instructing the Secretary of Commerce to exclude undocumented individuals from the count used for apportionment, the Memorandum's policy deviates from the constitutional requirement of basing apportionment on the census count. The President may not introduce a new source upon which to base apportionment when the Constitution is clear about the one it requires: the decennial census. *See Evans*, 536 U.S. at 491 (Thomas, J., concurring)

(noting the Census Clause must be interpreted according to its plain meaning).

II. Excluding Undocumented Persons from the "Whole Number of Persons in Each State" Violates the Census Act.

The Memorandum also contravenes the Census Act, which outlines procedures for conducting the census and apportioning Representatives among the states—procedures that have remained unambiguous in key respects since the very first census was taken. The violations parallel the constitutional infirmities.

A. The Language and History of the Census Act Make Clear That Immigration Status Is Irrelevant to Inclusion in the Apportionment Base.

In reporting "the number of Representatives to which each State would be entitled," the Census Act requires the President to base this apportionment on "the whole number of persons in each State," which is "ascertained under the . . . decennial census." 2 U.S.C. § 2a(a); *see also* 13 U.S.C. § 141(b) (specifying that the "tabulation of total population" taken for the decennial census is the calculation "required for the apportionment of Representatives"). The apportionment base—that is, "the whole number of persons in each State" as counted in the decennial census—has always included undocumented individuals. Indeed, the language in the Act reflects over a century of unequivocal understanding about who is to be included for apportionment purposes.

Since the first census of the United States in 1790, the "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." *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980). Thus, the apportionment base has always embraced all inhabitants of the country, regardless of whether they are documented.

This collective understanding underscores the plain meaning of the Census Act. As this Court has explained, "It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)). When Congress passed the Census Act, it did so alongside an unbroken history of including undocumented immigrants in the apportionment base. *See* Census Act of 1929, Pub. L. No. 71-13, 46 Stat. 21, 26 § 22(a). To be sure, congressional records show that Congress considered this history in constructing the original statute, as well as later updates—and that Congress deliberately chose to continue including undocumented immigrants for purposes of apportionment. In other words, Congress has made clear that a person's immigration status is irrelevant to the question of whether they are an inhabitant to be counted.

Before Congress enacted the Census Act of 1929, the House and Senate both rejected amendments that would have relied on immigration status for

apportionment. *See* 71 Cong. Rec. 1,907–08 (1929) (proposal by Senator Frederic M. Sackett to exclude "aliens"); *id.* at 2,065 (amendment's failure); *id.* at 2,360–63 (House amendment to exclude "aliens"); *id.* at 2,448–54 (House pursues law inclusive of aliens). Likewise, the House in 1940 again rejected a similar amendment. *See* H.R. Rep. No. 76-1787, at 1 (1940); 86 Cong. Rec. 4,384–86 (1940). In debating apportionment, members of Congress emphasized the need for all residents to be included in the apportionment base, no matter their immigration status. One senator observed that state services would suffer unless "every single human being residing within" each state were counted. 71 Cong. Rec. 1,971 (1929). To applause, a member of the House proclaimed, "The object of this Government is to take care of every man, woman, and child within the confines of this Republic." *Id.* at 2,270. The same representative noted, "The only complete, comprehensive basis for representation in this Congress is the population of the country, and it was upon that specific condition that the ratification of the Constitution of the United States was made possible." *Id.*

B. The Census Act Instructs that the Census's Enumeration Provide the Sole Basis for Apportionment.

The Memorandum's policy violates the Census Act in another way: It proposes that apportionment be based on figures other than the census's enumeration.

Per the language of the Act, apportionment must be based only on the results of the decennial census, not other extraneous data. Section 141(b) of the Act

explains that the Secretary of Commerce must report the "total population" for each state, "as required for the apportionment of Representatives." 13 U.S.C. § 141(a)–(b). And the Act specifies this total is calculated using the results of the "decennial census of population." *Id.* § 141(b) (cross-referencing § 141(a)). Upon receiving this report, the President transmits "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). This statement must also include the number of Representatives each State should receive, using the same apportionment formula, rather than a separate and distinct count. *Id.*

This process is meant to be simple and straightforward, as reflected in the plain language of the statute. It is a "virtually self-executing" scheme, *Franklin*, 505 U.S. at 791–92—a "wholly ministerial" process that leaves "no discretion whatsoever" to the President. *Id.* at 811 (Stevens, J., concurring). Notably, this automatic scheme is a "key innovation" of the Census Act, because it ensures that the process runs smoothly, with minimal partisan disruption. *Id.* at 809. This feature, in fact, plays an important role in furthering the intent behind Article I, Section 2: The Framers established an automatic, recurring census in order to prevent interests from becoming entrenched in the federal government. *See id.* at 791. They foresaw that parties might otherwise manipulate the process of apportionment to stay in power. *Id.* In sum, the Secretary's and President's duties are clear: report the results of the census, and apportion Representatives to the states based on nothing else but these results.

III. Excluding Undocumented Persons from the Apportionment Base Will Harm the Most Vulnerable and Impede *Amici*'s Mission.

In addition to being unlawful, the Memorandum's policy will harm the poor. If undocumented immigrants are excluded from the apportionment base, some of the most vulnerable in our society—those most in need of health and social services and without legal recourse—will be unrepresented in Congress. Leaders elected to serve the common good might otherwise be unaware of their communities' particular needs. Moreover, were the exclusion of such immigrants applied to the census count as a general matter, going beyond apportionment specifically, poor communities across the country would directly suffer from a decreased allocation of federal funds. In either case, the exclusion of undocumented immigrants would harm the communities that *amici* serve and *amici* themselves.

Amici have long been aware of the importance of an accurate census count. For its part in ensuring an accurate and effective count in the 2020 census, CCUSA joined a national network of nonprofit, corporate, public sector, and community organizations to educate the public about the 2020 census and encouraged households to complete their census form. CCUSA mobilized its national and local member agencies, which distributed 14,500 census promotional items as part of food distribution and other relief efforts in hard-to-count communities. Additionally—and consistent with its long history of public-private partnership generally—CCUSA

welcomed Robin Bachman of the U.S. Census Bureau to speak at its annual gathering in 2019 in order to better educate Catholic Charities agencies about the 2020 census.

Amici are guided by the Church's call for a preferential option for the poor and the common good. A just society must prioritize meeting the needs of its most vulnerable members. *Amici* strive to meet these needs by providing vital services to the poor in their communities, regardless of immigration status. As an example, Catholic Charities Chicago provided food, clothing, shelter, and rent and utility assistance to more than a quarter million people in a single year. Catholic Charities of the Archdiocese of Chicago, *Catholic Charities Chicago Fact Sheet*, at 1 (Feb. 5, 2016), https://tinyurl.com/ccnfacts. Catholic Charities Chicago is not unique—the fundamental mission of CCUSA is to provide services to people in need and to call others to do the same.

The exclusion of undocumented immigrants from the apportionment base particularly harms the vulnerable populations that CCUSA and other Catholic organizations serve—undocumented immigrants and citizens alike. If undocumented immigrants are not counted in the census, then there is a risk federal funding for critical resources—from food assistance programs to affordable health care—will be decreased in the communities that need it most. For example, census data determines the amount of funding each state receives for its Supplemental Nutrition Assistance Program and National School Lunch Program, both programs that provide food assistance to low-income families. *See*

U.S. Census Bureau, *2020 Census Results Inform Funding for Hospitals and Health Care* (July 13, 2020), https://tinyurl.com/cbresults2020. Census data also determines funding for the Health Centers Program, a program made up of clinics that provide primary and preventive care to patients regardless of their ability to pay. *See* The Leadership Conference Education Fund, *The Census and Health Care* (Apr. 6, 2018), https://tinyurl.com/tlcef2018. Excluding undocumented immigrants from the census count harms *amici* themselves as they will have to strain to fill a potential void in federal funding for these necessary social services.

Furthermore, an accurate census is critical for guiding more than one trillion dollars in annual federal and state health funding for Medicaid, Medicare, and the Children's Health Insurance Program (CHIP). Failure to count every person means states and localities would lack the financial resources needed to run effective health programs for their communities. State Medicaid program funding, for example, includes and relies on a federal match, the percentage of which varies by state based on a formula that compares each state's per capita income against the United States' per capita income. Lower income states receive a higher federal match. A population undercount in a state could result in a distortion of this formula, resulting in the loss of much-needed federal Medicaid funds for that state. *See* Anne Stauffer et al., The Pew Charitable Trusts, *The 2020 Census is Coming—and the Results Will Impact State Budgets* (Feb. 20, 2020), https://tinyurl.com/tpct2.

An inaccurate census or apportionment that fails to accurately reflect the number of people in, and needs of, communities will cause federal assistance for the poor and vulnerable to be inaccurately distributed, while simultaneously undermining the ability of elected officials to fully represent and understand the needs of those they serve. It further impairs Catholic health providers' ability to carry out population health management strategies and efforts to address the social determinants of health. *See* Michael Brady, Modern Healthcare, *2020 Census Holds Fate of Trillions in Federal Health-related Spending* (Aug. 25, 2020), https://tinyurl.com/healthmgmt.

* * *

Amici object to the Memorandum's policy on legal and moral grounds. Excluding undocumented persons from among the "whole number of persons in a state" on the basis that they are not "inhabitants" is unlawful and contrary to the common good. This policy of exclusion flouts the plain language and consistent interpretive history of the Constitution and the Census Act, denies the legal status of "persons" to undocumented immigrants, strips away representation, and could lead, both directly and indirectly, to a reduction in resources for poor and vulnerable families in our country. The repercussions of this policy will be concrete and disproportionately harmful to the vulnerable. Legal and moral considerations therefore align in favor of the same result—affirming the district court's judgment and rejecting the Memorandum's policy of exclusion.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

Stephen W. Miller
Counsel of Record
Helen Marie S. Berg
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Fl. 8
Washington, DC 20036
(202) 730-1300
smiller@hwglaw.com

Counsel for Amici Curiae