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 AMICI CURIAE FAITH-BASED AND IMMIGRANTS' RIGHTS ORGANIZATIONS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

Amici Haitian-Americans United, Centro Presente, La Colaborativa, Brazilian Worker Center, the National Immigration Justice Center, and the American Jewish Committee are faith-based and immigrants' rights organizations that work extensively with immigrant populations, including undocumented individuals and individuals in mixed-status families.[1] Because of their work, *amici* are keenly aware of the mutable and highly complex nature of immigration law and have supported countless individuals whose status, through no fault of their own, is unclear or undefined under the Immigration and Nationality Act. They respectfully submit this brief to supplement the Court's understanding of "lawful immigration status," as utilized in the July 21, 2020 Memorandum, and to demonstrate that the Department of Commerce lacks the statutory authority and expertise to determine immigration status.

Haitian-Americans United (HAU) is a non-profit, membership organization committed to improving the quality of life of Haitians and Haitian-Americans. Many of HAU's members are undocumented, have been undocumented, or have undocumented family members, while others participate in humanitarian programs such as Temporary Protected Status. HAU has a strong

[1] All parties have consented to the filing of briefs by *amici curiae*. Counsel for *amici* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amici* and their counsel—contributed monetarily to preparing or submitting this brief.

interest in highlighting government efforts to deprive immigrants of lawful status and in preventing the dignitary harms that would result from the implementation of the July 21, 2020 Memorandum. HAU is the lead plaintiff in *Haitian-Americans United, Inc. et al v. Trump et al*, No. 20-11421, a lawsuit challenging the lawfulness and constitutionality of the Memorandum in the District of Massachusetts.

Centro Presente is a non-profit organization dedicated to the self-determination and self-sufficiency of the Latin American immigrant community of Massachusetts. The implementation of the Memorandum will severely threaten and impair Centro Presente's mission of empowering Latinx communities through civic action, as it will dilute the voting power of Latinx communities and continue to create fear and dignitary harm. Centro Presente is a co-plaintiff in *Haitian-Americans United, Inc. v. Trump*.

La Colaborativa is a non-profit membership organization in Chelsea, Massachusetts that has spent decades fighting for the dignitary rights of undocumented immigrants. Many of La Colaborativa's members are Latinx immigrants, undocumented residents, or members of mixed-status families. La Colaborativa has a strong interest in ensuring communities with significant numbers of undocumented immigrants are not stripped of financial resources or political representation, particularly given the active role of the federal government in depriving immigrants of lawful status.

La Colaborativa is a co-plaintiff in *Haitian-Americans United, Inc. v. Trump*.

Brazilian Worker Center (BWC) is a grassroots, community-based, non-profit worker center that represents, supports, and organizes the Brazilian and wider immigrant community in Massachusetts and New England. Inclusion of undocumented persons in the congressional apportionment base is critical for BWC to continue its fight against economic, social, and political marginalization of immigrant workers and their families. BWC is a co-plaintiff in *Haitian-Americans United, Inc. v. Trump*.

The **National Immigrant Justice Center** (NIJC) is a non-profit legal service provider that represents immigrants and asylum-seekers. NIJC collaborates with approximately 2000 pro bono attorneys to represent thousands of immigrants and asylum-seekers annually. NIJC also advises federal defenders and defense counsel on immigration matters relevant to their clients. NIJC represents hundreds of noncitizens whose precise "status" under the law is unclear. As a result, NIJC has a deep interest in challenging binary or fixed conceptualizations of immigration status and in combatting the unlawful exclusion of undocumented communities from the congressional apportionment base.

The **American Jewish Committee** (AJC), founded in 1906, is an advocacy organization of American Jews that from its inception has sought to attain fair and humane immigration policies.

SUMMARY OF THE ARGUMENT

The primacy of the Apportionment and Enumeration Clauses in our democratic framework is manifested by their placement in Article I of the Constitution. U.S. Const. art. I, § 2, cl. 3. President Donald J. Trump's July 21, 2020 Memorandum represents an unprecedented and unlawful attack on that framework. The Memorandum requires the Census Bureau, to the extent feasible under law, to identify "aliens who are not in a lawful immigration status" so that these individuals are excluded from the apportionment base. Never in this nation's history has the immigration status of an individual been considered for purposes of apportionment or enumeration—and for good reason.

The July 21 Memorandum ignores the legal and practical truths of immigration. As this Court has recognized, "[t]here are significant complexities involved in enforcing immigration law, including the determination of whether a person is removable." *Arizona v. United States*, 567 U.S. 387, 409 (2012). These complexities begin with the absence of any single clear definition of "lawful immigration status." Moreover, an individual's immigration status is both mutable and non-binary. Indeed, many individuals in the United States occupy a status that can best be characterized as somewhere between lawful and unlawful. This intermediate status, which places individuals in "legal liminality," is affected by a multitude of factors. For example, an individual's immigration status frequently depends not on her own action or inaction, but on the conduct of the federal

government itself. Additionally, delays in adjudicating appeals and obtaining necessary documentation have been exacerbated by a lack of funding and personnel of both the immigration courts and U.S. Citizenship and Immigration Services ("USCIS"). Global events and natural disasters, such as the novel coronavirus pandemic, can also affect a person's immigration status. Thus, determining an individual's status is more complicated than the simple choice between "lawful" and "unlawful" suggested by the July 21 Memorandum. Rather, this determination requires a complex, multifactorial legal analysis, the result of which is frequently not immediately apparent. For these reasons, it is practically impossible for the Census Bureau—which has neither the appropriate expertise nor sufficient resources—to identify "aliens who are not in lawful immigration status."

Moreover, the binary classification that the July 21 Memorandum seeks to engraft onto apportionment is incongruent with the Memorandum's stated purpose of promoting consonance with "the principles of representative democracy underpinning our system of Government." Instead, by seeking to tether immigration policy to the apportionment of Representatives among the States, the July 21 Memorandum eradicates the salutary effect that the Founders intended when they insisted on the counting of non-citizen and non-voting inhabitants. In doing so, it creates the very incentives to engage in gamesmanship and discrimination to gain political power that this nation has avoided for the last 230 years.

ARGUMENT

I. The July 21 Memorandum's framing of immigration status as "lawful" versus "unlawful" disregards the reality of our immigration system.

In brief, the July 21 Memorandum states that, for purposes of 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 . . . . consistent with the discretion delegated to the executive branch." 85 Fed. Reg. 44679 (July 23, 2020). The Memorandum then directs the Secretary of Commerce (the "Secretary") to supplement data gathered from the census questionnaires with data concerning immigration status from other agencies. *Id.* (citing Exec. Order 13880, 84 Fed. Reg. 33821 (July 11, 2019)).[2] However, the Memorandum contains no information about, for example, how the Census Bureau should conduct its analysis, what date should be used for determining status, what types of administrative records would be deemed sufficient to decide or confirm status, and how the Secretary would

[2] The July 21 Memorandum observes that in Executive Order 13880—promulgated in the wake of the defeat of the Administration's attempt to add a citizenship question to Census 2020—executive departments and agencies were instructed to share information with the Department of Commerce. The lawfulness and constitutionality of Executive Order 13880 are the subject of a pending case in the District of Maryland. *See La Union Del Pueblo Entero v. Ross*, C.A. No. GJH-19-2710, 2019 WL 6035604, *1–2 (D. Md. Nov. 13, 2019).

exercise discretion to make determinations where status was unclear.

The fulcrum of the July 21 Memorandum, of course, is the identification of "aliens who are not in lawful immigration status" under the Immigration and Nationality Act ("INA"). But the INA, itself, does not set forth a definition of what constitutes "lawful immigration status." *See, e.g., Gazeli v. Sessions*, 856 F.3d 1101, 1105 (6th Cir. 2017) ("Because the INA does not define 'lawful immigration status,' Congress has not 'directly spoken to the question at issue'—here, whether a pending request for labor certification confers lawful status."); *Lozano v. Hazelton*, 496 F. Supp. 2d 477, 485 (M.D. Pa. 2007) ("The INA provides no definition for the term 'illegal alien' or the term 'lawfully present.'"). Rather, examples of lawful status are littered throughout the INA, requiring the cobbling together of complex statutory provisions and federal regulations—and then application of an individual's circumstances—to make a status determination in any specific case.

Significantly, immigration status is fluid and constantly changing. An individual's immigration status on January 1 may be different from that on December 31 or even on January 2. Every year, USCIS

> processes millions of immigrant and nonimmigrant . . . benefit applications and petitions . . . from foreign nationals seeking to study, work, immigrate, or become citizens of the United States. USCIS receives approximately 711,000 applications per month and roughly 8 million each year. On

> an average day, USCIS employees process more than 30,000 applications covering more than 90 types of immigration benefits, issue at least 7,000 permanent resident cards, and naturalize nearly 2,000 new citizens.

Office of Inspector Gen., OIG-19-40, Data Quality Improvements Needed To Track Adjudicative Decisions at 2 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-05/OIG-19-40-May19.pdf. Because of this, and due to the complexity of the INA, at any given time potentially hundreds of thousands of immigrants live in a so-called, "liminal status"—that is, an "in-between existence of moving in and out of protective states of administrative grace." Jennifer M. Chacón, *Producing Liminal Legality*, 92 Denv. U. L. Rev. 709, 716 (2016). Liminal status describes not only those with pending applications for status (such as adjustment of status), but also those whose lawful status is suddenly canceled or lost. In short: "there is no simple dichotomy between being 'documented' and being 'undocumented.'" Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 U. Denver L. & Pol'y 265, 266 (2015).

In addition to ignoring the mutable and variable nature of lawful status, the July 21 Memorandum elides the numerous legal and practical complexities involved in determining immigration status. Interpreting the INA as well as its attendant regulatory scheme is an arduous process, not only in light of its conflicting provisions and exceptions, but because records may be incomplete or missing. This

documentation dilemma leaves many lawful immigrants simply unable to demonstrate their status. And, due to the strict confidentiality requirements imposed by Title 13 on census records, the Census Bureau cannot rely on other agencies' expertise; it must make determinations on immigration status—an area with which it has little familiarity or competency—on its own.

For all these reasons, the July 21 Memorandum delivers a directive that, on its face, cannot be executed accurately and will undoubtedly exclude even lawful immigrants from the apportionment base.

A. Immigration status is mutable and non-binary.

Nearly forty years ago, this Court properly recognized the mutability of immigration status in *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (holding that undocumented status is not "an absolutely immutable characteristic"). Immigrants entering the United States have available to them different options to potentially attain lawful status, with many steps (and sometimes missteps) along the way. "An illegal entrant might be granted federal permission to continue to reside in this country, or even become a citizen." *Id.* at 226; *see also id.* at 207 (observing district court held that "under current laws and practices, the illegal alien of today may well be the 'legal alien of tomorrow'"). Indeed, many who have entered this country without inspection are on the

journey to lawful status, but have not yet reached their destinations.[3]

That an individual's immigration status may change is reason enough to include those without "lawful immigration status" in the apportionment base. As the Census Bureau itself has acknowledged, other classifications of non-citizens are required to be counted; the only question is *where* they are counted. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525-01 (Mar. 12, 2018) ("The U.S. Census Bureau is committed to counting every person in the 2020 Census once, only once, and in the right place."). For Census 2020, the Residence Criteria provide that a person will be counted at their "usual residence," which is where that person "lives and sleeps most of the time." These rules thus dictate that citizens of foreign countries living in the United States (other than those visiting on a vacation or business trip) be counted. Thus, to exclude persons who inhabit our country from the apportionment base simply because they have not attained "lawful immigration status" at the time of the decennial census[4] is irrational and unconstitutional.

In fact, countless individuals are in various stages of the process to attain "lawful status," from

[3] Simply entering the United States without inspection does not mean that an individual is ineligible for nonimmigrant or immigrant status. For example, those who have been trafficked into the United States may apply for "T" status with USCIS. 8 C.F.R. § 214.11.

[4] The July 21 Memorandum does not specify whether the Census Bureau will exclude those who were undocumented at any time during the census-taking period (March to October 2020), or just those who it deems were not "lawful" on April 1, 2020.

applicants for asylum to those who seek permanent residence based on, for example, familial relationships or employment. As discussed more fully below, the INA permits many of these people to remain and even work in the United States while their applications are pending. *See, e.g.*, 8 U.S.C. §§ 1158(d)(2) (allowing work authorization for asylum seekers 180 days after filing of application); 8 C.F.R. § 274a.12 (allowing work authorization for various classes of immigrant or non-immigrant statuses, such as those admitted to United States as a nonimmigrant fiancé or a child of such individual). In an illustration of the contradictions of our immigration law, "[s]ubmitting an application does not change an individual's immigration status, even if the application is bona fide and will ultimately be approved." *Lozano*, 496 F. Supp. 2d at 531. Under the policy announced in the July 21 Memorandum, these "in-between" applicants will be excluded from the apportionment base even though—once their applications are approved—their lawful status will be applied retroactively to the date of their applications. *See* Unlawful Immigration Status at Time of Filing, 7 USCIS Policy Manual B.3, 2017 WL 2126549 (Jan. 16, 2020) ("In general, once an immigrant benefit application is approved, an alien is in lawful immigration status as of the date of the filing of the application."). Thus, not only does the July 21 Memorandum neglect the fact that an individual can be deemed "unlawful" one day and "lawful" the next, once acquired, her "lawful immigration status" is *ex tunc*.

B. Immigration status is difficult to discern both legally and practically.

Beyond the simple fact that immigration status is not the black-white binary suggested in the July 21 Memorandum, "lawful immigration status" is notoriously difficult to discern. In fact, one leading immigration scholar has estimated that as many as 1.15 million people who do not currently possess documentation of legal status nonetheless "hold current or incipient claims to legal status in the United States." David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, Migration Policy Institute Policy Brief 1–9 (2005). As outlined below, the Census Bureau possesses neither the statutory authority, the expertise, nor the requisite documentation to precisely and accurately identify and exclude undocumented immigrants from the congressional apportionment base before December 31, 2020.

1. "Lawful status" is an elusive legal concept.

Although the July 21 Memorandum suggests that a straightforward application of the INA will identify undocumented immigrants, the reality is far more complicated. This is due not only to the bewildering structure of the statute—marked both by absolute criteria and abundant exceptions—but also as a result of dissonance between Congress's intent and executive enforcement. The outcome of individual status questions against this patchwork system can therefore be difficult to predict or ascertain.

Even this Court has struggled to interpret the INA because statutory language within the same section of the Act is seemingly incongruous. In *Scialabba v. De Osorio*, the Court analyzed the status of minors who qualified as child beneficiaries when a sponsoring petition was filed under the INA, but who "aged out" before a family-based immigrant visa became available. 573 U.S. 41, 45 (2014). Justice Kagan observed:

> We might call [§1153(b)(3)] Janus-faced. Its first half looks in one direction, toward the sweeping relief the respondents propose, which would reach every aged-out beneficiary of a family preference petition. But . . . , the section's second half looks another way, toward a remedy that can apply to only a subset of those beneficiaries . . . . The two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what it says. That internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the sections' different parts.

Id. at 57. The Court ultimately concluded that it could not clearly determine what Congress intended.

Further, there is no reliable means of classifying an individual as "lawful" or "unlawful" if her status is the subject of pending judicial proceedings. An individual's legal status can change overnight as a result of court action. These cases include where an immigration judge makes a finding of removability, but decides not to immediately deport

an individual. *See* 8 U.S.C. §§ 1103(g), 1229(a); s*ee also Bonilla v. Lynch*, 840 F.3d 575 (9th Cir. 2016) (remanding case to Board of Immigration Appeals to reconsider denial of *sua sponte* reopening of deportation proceedings, in light of incorrect application of legal standard). In these and similar cases, there is no way for a third-party like the Census Bureau to appropriately assess the individual's status or predict whether or not she may be permitted to remain in the country. *See, e.g.*, *Plyer*, 457 U. S. at 236 (Blackmun, J., concurring) ("[T]he structure of the immigration statutes makes it impossible . . . to determine which aliens are entitled to residence, and which eventually will be deported.").

Another example relates to continuances during removal proceedings. "Continuances . . . are critical to give noncitizens time to find a representative, obtain corroborating evidence, present relevant witness testimony, and receive a decision from the USCIS on a pending visa petition that would create a path to legal status." Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 Tul. L. Rev. 707, 747 (2019). Put another way, a continuance may be essential to allow a noncitizen to take the very "steps to secure a lawful immigration status under our laws" referenced in the July 21 Memorandum. But despite their criticality, there is no evidence that the Census Bureau has the institutional competence to evaluate them. Immigration judges consider the following factors when exercising discretion to grant continuances: the likelihood that the immigrant will be granted collateral relief, whether the grant of relief will materially affect the outcome of the removal

proceedings; the DHS response to the motion; whether the underlying visa petition is prima facie approvable; the respondent's statutory eligibility for adjustment of status; whether the respondent's application for adjustment merits a favorable exercise of discretion; and the reason for the continuance and other procedural factors. *See Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 406–408 (2018). The Census Bureau, armed solely with administrative records, has no bases or expertise to evaluate these complex factors or to understand the relevant procedural nuances, on which many status determinations hinge. Similarly, the Bureau lacks the time and expertise to engage in rigorous factual findings or analyses. As just one example, the Bureau is poorly positioned to determine whether the beneficiary of an approved work-visa is still eligible to adjust their status to legal permanent residency because their failure to maintain continuous "lawful status" was "through no fault of [their] own or for technical reasons." *See, e.g.*, *Gazeli*, 856 F.3d at 1105 (citing 8 U.S.C. §§ 1255(a), (c)(2)).

Furthermore, the Memorandum completely disregards the fact that the INA permits those without "lawful status" to remain in the United States. Under the INA, removal must, in certain cases, be deferred or suspended for a variety of reasons, including for humanitarian considerations. *See, e.g.*, 8 U.S.C. § 1231(b)(3) (restriction on removal to a country where immigrant's life or freedom would be threatened); § 1254a (temporary protection from removal for fear of prosecution or ongoing armed conflict in home country); § 1182(d)(5)(A) (parole for "urgent humanitarian reasons or significant public benefit"); § 1227(a)(1)(E)(iii) (waiver of deportability for purposes

of family unity). The INA also allows the beneficiaries of approved I-140 employment petitions—who have lived in this country for years in liminal status—to remain and work here while they await the opportunity to apply for lawful permanent residence. *Id.* at § 1255.[5] According to recent estimates, the federal government has approved more than one million petitions for workers, investors, and their families who cannot receive legal permanent residence solely as a result of the annual caps, which were last updated thirty years ago. This backlog is estimated to reach 2.4 million by 2030. David J. Bier, *Backlog for Skilled Immigrants Tops 1 Million: Over 200,000 Indians Could Die of Old Age While Awaiting Green Cards*, CATO Institute (Mar. 30, 2020), https://www.cato.org/publications/immigration-research-policy-brief/backlog-skilled-immigrants-tops-1-million-over. Thus, not having "lawful"

[5] For example, an individual born in India who is the beneficiary of an I-140 second preference (EB-2) petition can apply for an immigrant visa in November 2020 only if her I-140 or, if applicable, labor certification application was received on or before May 15, 2011. *See* USCIS, When to File Your Adjustment of Status Application for Family-Sponsored or Employment-Based Preference Visas: November 2020 (2020), https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/when-to-file-your-adjustment-of-status-application-for-family-sponsored-or-employment-based-57. It is estimated that immigrants from India may wait fifty years before they can even apply to adjust their status. *See* Abigail Hauslohner, *Employment Green Card Backlog Tops 800,000, Most of them Indian*, Washington Post, Dec. 17, 2019, *available at* https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html.

immigration status under the INA does not *ipso facto* mean that an individual is not legally permitted to be in the United States or, as the July 21 Memorandum suggests, that she has committed any wrongdoing. *See Plyler*, 457 U.S. at 220 (observing it is "difficult to conceive of a rational justification" for penalizing those present in the United States "on the basis of a legal characteristic over which [they] can have little control.").

In addition, an individual who is removable under the INA may nonetheless have permission from the Executive Branch to remain in the country. For example, in 1987 the Reagan Administration adopted the "Family Fairness" program under which minor children were allowed "to remain in the United States even though they d[id] not qualify on their own" if their "parents ha[d] qualified under the provisions of IRCA." *See, e.g.*, Alan C. Nelson, Comm'r, INS, *Legalization and Family Fairness—An Analysis* (Oct. 21, 1987), 64 No. 41 Interpreter Releases 1191, app. I, at 1201 (Oct. 26, 1987). A few years later, President George H. W. Bush issued an Executive Order directing the Attorney General and Secretary of State to defer removal of certain nationals from the People's Republic of China in response to the suppression of the Tiananmen Square protests of 1989. Exec. Order 12711, 55 Fed. Reg. 835 (Jan. 9, 1990). More recently, under the Deferred Action for Childhood Arrivals ("DACA") program established by President Barack Obama, approximately 700,000 individuals brought to the United States as children were invited by USCIS to apply for a two-year forbearance of their removal rendered eligible for work authorization. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.

Ct. 1891, 1901 (2020). Critically, in many instances, deferred action does not confer "lawful immigration status." *See, e.g.*, *Zheng v. Gonzales*, 422 F.3d 98, 111 (3d Cir. 2005) (observing deferred enforced departure "is not an admission status . . . . This moratorium in enforcement of immigration laws against some aliens did not transform them into lawfully admitted immigrants."); Memorandum from Janet Napolitano, Sec'y of Homeland Security, to David V. Aguilar, U.S. Customs & Border Protection Acting Comm'r et al. at 3 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf ("This [DACA] memorandum confers no substantive right, immigration status or pathway to citizenship."); *but see Regents*, 140 S. Ct. at 1906 (noting that the DACA memorandum "does not announce a passive non-enforcement policy; it created a program for conferring immigration relief.").[6]

Accordingly, it is effectively impossible for the Census Bureau, given its statutory deadline, limited evidence, and lack of subject matter expertise, to identify those individuals without "lawful immigration status." The reality is that many immigrants who may lack "lawful immigration status"

[6] Further exemplifying the mutability of an individual's status, the complexity of the system, and the role of the courts, the United States District Court for the Eastern District of New York just recently held that Mr. Chad F. Wolf "was not lawfully serving as Acting Secretary of Homeland Security" . . . when he issued the July 28, 2020 memorandum," which effectively suspended DACA following this Court's decision in Regents. *Batalla Vidal v. Wolf*, Nos. 16-cv-4756, 17-cv-5228, 2020 WL 6695076 (E.D.N.Y. Nov. 14, 2020) (order granting motion for summary judgment).

have simultaneously been granted permission to remain in the United States. Because of this paradox, a "determination of whether a noncitizen . . . is or is not 'lawfully present' in the United States" is "a blunt binary classification that is inconsistent with the extensive array of immigration statuses provided under federal law and with the complex, often discretionary processes by which the federal government enforces and adjudicates immigration law." *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 547 (2013); *Taylor v. Barnhart*, 399 F.3d 891, 897–898 (8th Cir. 2005) (denying a writ of mandamus for social security benefits where it was unclear whether plaintiff, who had been adopted as a child and had lived in the United States for years, was lawfully present, based on her adoptive father's initial visa petition).

2. Incomplete, inaccurate, or absent documentation further complicates identifying "lawful" status.

The July 21 Memorandum's assumption that documentation alone can explain "lawful" status is faulty. Beyond the legal complexities of determining status, in many cases documentation is not readily available to prove status. This is due to several structural and practical problems, including that: (1) numerous governmental agencies are responsible for immigration matters, causing documentation to be scattered among various locations; (2) some statuses have no documentation associated with them at all; (3) inaccuracies in USCIS and other governmental databases; and (4) immigration agencies are facing

substantial backlogs that have only grown in light of COVID-19. The presence or absence of documentation simply cannot convey whether an individual has permission to be in the country.

As an initial matter, within the Department of Homeland Security, USCIS is responsible for adjudicating immigration relief petitions and applications, 6 U.S.C. § 271(b), while Immigration and Customs Enforcement ("ICE") is responsible for investigations relating to the enforcement of immigration laws. *See* ICE, *What We Do*, https://www.ice.gov/overview (last visited Nov. 11, 2020). Customs and Border Protection ("CBP") is responsible for securing the country's borders,[7] 6 U.S.C. § 211, and the Department of State administers immigrant and nonimmigrant visas and manages foreign policy. *See* 8 U.S.C. § 1201. Significantly, the Department of Justice, which includes the immigration courts and BIA, is responsible for adjudicating removal proceedings and deciding whether an individual qualifies for one of the many forms of protection and relief from removal. Thus, the existence and location of immigration documentation varies based on status, and—even when records exist—they could be located at various agencies within DHS (including USCIS, ICE, or CBP) or at the Department of State.

Additionally, for many immigrants, there simply is no documentation to support their status.

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[7] CBP also processes Canadian applicants for admission in TN or L-1 categories. USCIS, Traveling on TN or L1 Visa from Canada?, https://www.cbp.gov/travel/canadian-and-mexican-citizens/traveling-tn-or-l1-visa-canada.

This includes (but is not limited to) applicants for Temporary Protected Status ("TPS"), asylum, survivors of abuse self-petitioning for certain forms of relief under the Violence Against Women Act, victims of certain crimes, and travelers participating in visa waiver programs. *See* 8 U.S.C. § 1229b, 1231(b)(3); § 1254a. In fact, the federal government estimated that "over 14 million non-citizens were admitted in fiscal year 2009 under the visa waiver program who have no federal registration documents." *See* Brief of *Amici Curiae* the *Friendly House* Plaintiffs at 10, *United States v. Arizona*, 689 F.3d 1132 (2010). Further, when status is granted during removal proceedings, administrative files are likely to remain incomplete until biometrics data and confirmation of background checks are updated. *See* DHS, Fact Sheet: USCIS and ICE Procedures Implementing EOIR Regulations on Background and Security Checks on Individuals Seeking Relief or Protection from Removal In Immigration Court or Before the BIA (Aug. 2011), https://www.uscis.gov/sites/default/files/document/fact-sheets/EOIR_FactSheet_2011_FINAL.pdf. After asylum or adjustment of status is granted at a hearing, the only evidence of the immigrant's "lawful status" may be a hearing transcript until the individual attends an appointment at the local USCIS office to obtain documentation of their status. This process can take months and has been significantly delayed by the COVID-19 pandemic. DHS, Post-Order Instructions For Individuals Granted Relief Or Protection From Removal By Immigration Court (2019), https://www.uscis.gov/sites/default/files/document/guides/PostOrderInstructions.pdf; *see also* USCIS Response to COVID (2020),

https://www.uscis.gov/about-us/uscis-response-to-covid-19.

Even where documents may exist, substantial inaccuracies in administrative records have plagued USCIS. A 2015 report found that "USCIS ha[d] not implemented an effective process to track adjudicative decisions and ensure data integrity in its [information management system]." That analysis revealed that "only 66% of adjudicative decisions could be tracked," due to a "decentralized policy that allow[ed] service centers and field offices discretion in deciding which users can enter benefit decisions in the system," without adequate monitoring and system controls. *See* OIG-19-40, *supra* 15, at i. As a result, document mismatches due to processing errors, name changes, and transliteration may further result in exclusion of certain immigrants lawfully present here.

Erroneous reports on immigration status have also been a recurring problem. A study by the Migration Policy Institute found, "based on government data, . . . that from 2002 to 2004, when police queried names in the FBI's National Crime Information Center database, the officer received erroneous immigration hits in almost 9,000 cases. The rate of false positives was 42 percent overall, and some individual law enforcement agencies had error rates as high as 90 percent." Press Release, MPI Report Shows Database Errors Plague Federal Effort to Induce Immigration Enforcement by Local Police, Migration Policy Institute (Dec. 8, 2005), https://www.migrationpolicy.org/news/database-errors-plague-federal-effort-immigration-enforcement.

Finally, increasing backlogs of immigration applications, petitions, and appointments have caused significant delays and impacted the ability of individuals to complete their files or even to obtain documentation once relief has been granted. These backlogs have only been exacerbated by COVID-19. In March 2020, USCIS suspended a variety of services, including, among other things, interviews, biometrics appointments, immigration court proceedings (including Master Calendar Hearings), and naturalization services. Press Release, USCIS, USCIS Preparing to Resume Public Services on June 4 (Mar. 27, 2020), https://www.uscis.gov/news/alerts/uscis-preparing-to-resume-public-services-on-june-4. In a press release dated June 25, 2020, USCIS Director Joseph Edlow confirmed that, as a result of the coronavirus pandemic, "[f]orecasts predict a crippling budget shortfall that requires assistance from Congress to allow USCIS to maintain current operations." Press Release, USCIS, Deputy Dir. for Pol'y Statement on USCIS' Fiscal Outlook (June 25, 2020), https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook. Around the same time, the Acting Secretary of USCIS requested that the Committee on Appropriations approve funding of $1.221 billion, following a notification to Congress that the agency had sustained significant budget shortfalls as a result of the coronavirus pandemic. Letter from Russell T. Vought, Acting Dir., to Richard C. Shelby, Comm. on Appropriations Chairman (June 19, 2020), https://www.uscis.gov/sites/default/files/document/notices/OMB_letter.pdf; Letter from Chad F. Wolf, Acting Sec'y, to Richard C. Shelby, Comm. on Appropriations

Chairman (June 24, 2020), https://www.uscis.gov/sites/default/files/document/notices/DHS_letter.pdf.

Although USCIS attributes its current funding shortfall to the impact of the pandemic alone, the agency has in fact struggled with budget problems for many years. Even worse, due to budgetary concerns, the agency indicated that it would cancel some contracts "that assist USCIS adjudicators in processing and preparing case files," and as a result the agency predicts "increased wait times for pending case inquiries . . . , longer case processing times, and increased adjudication time" for immigration requests, including naturalization. Jorge Loweree et al., American Immigration Council, Special Report: The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system.pdf. In addition to delaying adjudication proceedings, the updating of administrative records after those proceedings have concluded has slowed. The Census Bureau should not be permitted to make determinations based on faulty, incomplete, or inaccurate immigration records, which—through no fault of the individual immigrant—will misrepresent the nature of their presence in the United States.

C. Longstanding confidentiality protections for census data make implementing the Memorandum's policy infeasible.

1. The Census Bureau cannot rely on other agencies to determine legal status.

Compounding the inherent legal and practical difficulties, the Secretary and the Census Bureau cannot share census data with other agencies to determine the legal status of individuals. The Census Act places strict confidentiality limits on how the Secretary and the Census Bureau use census data and prohibits the Census Bureau from providing census data to other agencies for assistance with determining legal status.

The Census Act strictly limits the Secretary of Commerce and the Census Bureau's use and disclosure of census data. Under the Census Act, "[n]either the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may . . . make any publication whereby the data furnished by any particular establishment or individual under this title can be identified." 13 U.S.C. § 9(a). Further, the Secretary and Census Bureau employees cannot allow anyone other than "the sworn officers and employees of the Department or bureau or agency" to examine the information provided by individuals as a part of the Census. 13 U.S.C. § 9(a). This Court has confirmed that these protections leave no room for discretion; they are critical to safeguarding personally identifying

information and encouraging trust and participation in the census. *See Baldrige v. Shapiro*, 455 U.S. 345, 355 (1982) ("Sections 8(b) and 9(a) explicitly provide for the nondisclosure of certain census data. No discretion is provided to the Census Bureau on whether or not to disclose the information referred to in §§ 8(b) and 9(a)."); *id.* at 358 ("[T]he Director of the Census has no discretion to release data, regardless of the claimed beneficial effect of disclosure.").

The President, the Secretary, and the Census Bureau have confirmed that these critical protections will be observed. See Exec. Order 13880, 84 Fed. Reg. 33821 (July 11, 2019) ("Information subject to confidentiality protections under Title 13 may not, and shall not, be used to bring immigration enforcement actions against particular individuals. Under my Administration, the data confidentiality protections in Title 13 shall be fully respected."); Letter from Wilbur Ross, Sec'y of Commerce, to Brian Schatz, U.S. Sen. of Haw. 2 (Dec. 19, 2018) ("Census employees and all Commerce employees with potential access to raw Census data, including Deputy Secretary Kelley and I, are bound by an oath of confidentiality. We take this oath and our obligations under Title 13 seriously."); U.S. Census Bureau, D-1280(RV), 2020 Census Complete Count Committee Guide 3 (2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf ("We will never share a respondent's personal information with immigration enforcement agencies, like ICE; law enforcement agencies, like the FBI or police . . . ."). Accordingly, because of the robust and necessary protections in place to preserve census response

confidentiality, the Secretary and Census Bureau cannot transmit census data to other agencies in order to obtain or analyze specific information about an individual's immigration status.

To that end, this case can and must be distinguished from other instances where entities outside of DHS have sought to determine immigration status. *See, e.g.*, *Arizona*, 567 U.S. at 397 ("ICE also operates the Law Enforcement Support Center. LESC, as the Center is known, provides immigration status information to federal, state, and local officials around the clock."). Because of the longstanding confidentiality protections on census data, the July 21 Memorandum unlawfully and impermissibly asks the Census Bureau to make status determinations on its own, which the Bureau is not competent or capable to do.

2. The Census Bureau lacks the expertise to make status determinations from administrative records.

To be sure, the Census Bureau can obtain administrative records—where they exist—from other federal agencies, including those with immigration enforcement responsibilities. *See, e.g.*, 13 U.S.C. § 6(a) ("The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title."); Exec. Order 13880, 84 Fed. Reg. 33821 (July 11, 2019) (ordering all agencies to share information requested by the Department of Commerce to the

maximum extent permissible under law). But the Census Bureau cannot make accurate determinations of legal status using these records.

The Census Bureau has no statutory role in immigration matters. As a legal matter, the INA is tremendously complex, with extensive caveats and exceptions. *See supra* at 12. Lacking any role in the INA's application or enforcement, the Census Bureau has a paucity of experience to navigate the INA, making it unsuitable to determine status.

Notably, even ICE cannot rely on name and address data as a basis for taking action against immigrants. "Because ICE officers cannot conclusively identify or apprehend aliens based solely on biographic information, they must interview the individuals to determine immigration status before taking enforcement action." Office of Inspector Gen., OIG-20-13, U.S. Immigration and Customers Enforcement's Criminal Alien Program Faces Challenges at 4 (2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-02/OIG-20-13-Feb20.pdf. Because the 2020 Census does not contain any questions about citizenship or immigration status, *see Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), but asks only ten questions regarding biographic and demographic data, the Census Bureau is similarly unable to make determinations regarding "lawful" status.

Moreover, the Census Bureau lacks the resources to analyze the sheer volume of immigration cases. There are over 1.2 million pending immigration cases being handled by approximately 460 immigration judges. *See* Dept. of Justice, *Office of the*

Chief Immigration Judge, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge; TRAC Reports, Inc., Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Nov. 13, 2020) (compiling data obtained through the Freedom of Information Act). Even assuming the Census Bureau obtained administrative records concerning these pending cases, it would be absurd to think that the Bureau could make status determinations in these cases before the fast-approaching statutory deadline outlined in the Census Act.[8] As just one example, the Census Bureau is not qualified to make the fact- and document-intensive determination that a marriage is bona fide for purposes of a person's pending application to adjust status based on a marriage to a U.S. citizen, which is required to determine status. *See* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625, 1683 (2007) ("Married people must therefore prove that they are married and that their marriage is 'bona fide'" to obtain immigration benefits based on marriage); *see also Matter of Laureano*, 19 I. & N. Dec. 1, 1 (1983) (to establish bona fide marriage, look to evidence including "proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding

[8] To date, Congress has not granted the Census Bureau relief from the statutory deadline of December 31, 2020. *See Nat'l Urban League v. Ross*, 977 F.3d 698, 704 (9th Cir. 2020) (noting that Congress did not act on the Census Bureau's request to extend the deadline by 120 days).

courtship, wedding, ceremony, shared residence, and experiences.").

Although administrative records have been utilized for narrow purposes in previous censuses, such as determining the "home of record" for overseas personnel in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), there is little similarity between establishing an address and determining status on an often incomplete immigration records, based on a dizzying legislative scheme like the INA. This is particularly true when the review is being conducted by the Census Bureau, an agency that has little familiarity with the complex subject of immigration.

Finally, the Census Bureau is statutorily precluded from using statistical sampling methods as a means of calculating or imputing the number of "illegal aliens" to be excluded from its apportionment count for any state. *See* 3 U.S.C. § 195; *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342 (1999) ("The Census Act prohibits the proposed uses of statistical sampling to determine population for congressional apportionment purposes."). Any administrative records relied on by the Census Bureau must represent an actual headcount of specifically-identified persons determined conclusively to be unlawfully in the country.

* * *

For the foregoing reasons, the July 21 Memorandum sets forth a legally untenable and practically unworkable task. There is simply no way

to assume, much less conclude, that the Secretary can accurately carry out the President's directive. The discretion afforded to the Secretary in conducting the census simply was not intended to encompass such a confounding subject.

II. By tying immigration policy to apportionment, the July 21 Memorandum undermines our democratic framework.

The binary classification set forth in the July 21 Memorandum is not only unworkable, but—by linking immigration policy to enumeration—it enables the Executive Branch to affect the apportionment of representation among the States. As such, the Memorandum both runs counter to the intent of the Framers, who sought to ensure that apportionment and enumeration were free from political influence, prejudice, and gamesmanship and erodes the very "principles of representative democracy" it purports to serve.

First, the July 21 Memorandum inappropriately condemns individuals and States for acts over which they have no control. It repeatedly utilizes the language of blame and reward to suggest that the absence of "lawful" presence is the singular fault of undocumented immigrants. For example, it deprecates those "many . . . aliens [who] entered the country illegally in the first place." And the Memorandum expressly seeks to punish 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," claiming that they violate the principles of representative

democracy "underpinning our system of Government." However, the Memorandum entirely fails to acknowledge the active role of the federal government in manufacturing and exacerbating undocumented status. The "conscious, indeed unlawful action" producing undocumented status that was decried in *Plyler* is often attributable to the federal government's own policy decisions and actions. *Plyler*, 457 U.S. at 220.[9]

The current administration, in fact, has shockingly announced its intention to revoke the protected status of more than one million immigrants who reside—and who have long resided—in the United States. For example, since March of 1991, certain Liberian nationals who are removable have been granted permission to remain in the United States without fear of deportation. Nonetheless, the President unlawfully announced the termination of Deferred Enforced Departure ("DED") for Liberian beneficiaries, forcing Congress, for the "first time," to "step[] in with a legislative solution to protect a group of immigrants the Trump Administration has tried to strip of legal status." Tania Karas, *"It doesn't feel real": Liberian immigrants in US rejoice at pathway to citizenship*, The World, Dec. 20, 2019, https://www.pri.org/stories/2019-12-20/it-doesn-t-feel-

[9] Although the Executive Branch has constitutional authority over immigration, U.S. Const. art. I, § 8, that power is not limitless; there are numerous cases (including several before this Court) that have challenged the federal government's exercise of discretion over immigration matters as discriminatory, arbitrary, capricious, or otherwise unlawful. *See, e.g., Regents*, 140 S. Ct. at 1913–14 (concluding that decision to rescind DACA was arbitrary and capricious).

very-real-liberian-immigrants-us-rejoice-pathway-citizenship; *see also* Presidential Memorandum on Extension of Deferred Enforced Departure for Liberians, 84 Fed. Reg. 12867 (Mar. 28, 2019). Likewise, this administration has sought to terminate TPS designations for beneficiaries from six countries, which has drawn challenges in courts around the country. *See, e.g., Saget v. Trump*, 375 F. Supp. 3d 280, 345–46 (E.D.N.Y. 2019) (concluding plaintiffs likely to succeed on their claim that the Acting DHS Secretary's decision to cancel TPS for Haiti was "not in accordance with law," as Secretary's decision "was preordained and pretextual, and it was made in part due to political influence," while ignoring "much of the evidence in the record."); *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. 2018) (same).

Second, there is little doubt that any president has a keen and partisan interest with respect to apportionment. For example, apportionment determines, among other things, each State's representation in Congress. This representation is also used to determine the number of electors that each State has in the Electoral College. U.S. Const. art. II, § 1, cl. 2. Accordingly, apportionment directly affects the makeup of both the Legislative and Executive branches of our tripartite government. The decision of any sitting President—or even Congress under its rule-making authority—to unconstitutionally influence that makeup through immigration policy, or to determine immigration policy based on apportionment, flatly contradicts the intentions of the Framers.

The hallmark of the Apportionment and Enumeration Clauses is impartiality. For that reason, since this country's founding, representation in the House of Representatives has been linked—not to citizenship or immigration status—but to total population. Indeed, James Madison specifically reflected on how the coupling of representation and taxation eliminated any incentive for a State to either overstate or understate its population:

> As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.

The Federalist No. 54 (James Madison).

The warning of James Madison, though directed at States, applies equally to an unchecked federal government seeking to eliminate residents from the congressional apportionment base at will. The July 21 Memorandum not only decouples representation from total population; in an act of

breathtaking unconstitutionality, it incentivizes and enables the Executive Branch to target and exclude populations located in particular States where the President may not hold favor. Such a policy cannot stand in a constitutional republic.

CONCLUSION

In light of the July 21 Memorandum's utter disregard of the legal and practical complexities of our immigration system, as well as the threat the President's policy poses to our democratic system, *amici curiae* respectfully request that the Court affirm the September 10, 2020 decision of the three-judge district court.

Respectfully Submitted,

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