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 OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS THE NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, THE ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL, THE NATIONAL EDUCATION ASSOCIATION AND AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are educational organizations that are deeply concerned about the effects of the Presidential Memorandum at the center of this case, and the resulting misallocation of federal funds that would result from an undercount of certain populations. If this Court does not rein in this *ultra vires* action, future census counts and vital federal funding streams will be jeopardized for communities in the most need.

Public schools have a constitutional duty to educate all students regardless of citizenship status. *See Plyler v. Doe*, 457 U.S. 202 (1982). As organizations that play a vital role in providing public education, *amici* urge this Court to uphold the district court panel's decision to protect the collection of census data, which facilitates *amici*'s ability to meet that constitutional duty to educate all.

The following education associations respectfully submit this *amici curiae* brief in support of appellees:

The National School Boards Association ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards across the country. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 local school districts serving nearly 50

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[1] The parties have filed blanket consents to the filing of briefs *amici curiae*. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than *amici curiae* and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in numerous cases before this Court. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA is particularly concerned about the ramifications for public education and the students it serves that will result from the chilling effect on the census count caused by the Presidential Memorandum at issue in this case.

The National Association of Secondary School Principals ("NASSP") is the leading organization of, and voice for, principals and other school leaders across the United States. NASSP believes that each child is entitled to an excellent public school education regardless of immigration status.

The National Association of Elementary School Principals ("NAESP") is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. NAESP seeks to serve as an advocate for children and youth by ensuring them access to an excellent education. NAESP supports a comprehensive census data collection to ensure the allocation of federal dollars accurately reflect community needs.

The Association of School Business Officials International ("ASBO"), through its members and affiliates, represents approximately 30,000 school business professionals worldwide. ASBO members are the financial leaders of school systems who manage educational resources to support student learning. School business officials rely on accurate census data to inform Title I and

other critical program funding formulas to support each student's unique educational needs.

The National Education Association ("NEA") is the largest educational association in the country. Founded in 1857, NEA represents three million educators and education support professionals. NEA's mission is to advocate for education professionals and to fulfill the promise of public education for every student. The success of vital education programs depends on a full and accurate census count. The Presidential Memorandum, if let to stand, would thwart NEA's mission by depriving vital education programs of full funding based on accurate census data.

The School Superintendents Association ("AASA") represents more than 13,000 school system leaders and advocates for the highest quality public education for all students. Our nation's superintendents and the districts and students they serve rely on robust, accurate census data to ensure federal education dollars are appropriately allocated to the areas of true need.

SUMMARY OF ARGUMENT

The Presidential Memorandum at issue here attempts to reach beyond firmly established parameters established by the framers and Congress to ensure an accurate count of all persons. By directing the Secretary of Commerce to provide additional data showing state population counts excluding undocumented immigrants, and by expressing an intention to use these lower numbers as the base for congressional apportionment, the

Memorandum threatens the process, accuracy, and framework of the census now and for years to come.

The decennial census has been the basis of representative democracy in the United States since our founding. Through this constitutionally required count of all persons in each state, we apportion representative in Congress and corresponding electoral votes. Because it is seen as an accurate tally of all individuals of every age living in a state, the census count has become a fulcrum for the allocation of hundreds of billions of dollars of funding for vital governmental programs. Countless public and private institutions rely on an accurate census to shape policy, set priorities, and distribute resources. As *amici* can attest, even relatively small errors in the census count can have far-reaching effects on tens of millions of individuals.

Amici urge this Court to firmly reject this assertion of unfettered executive power in this area of enormous public importance. The Court should affirm the district court's holding that the Presidential Memorandum is an *ultra vires* violation of Congress' delegation of its constitutional responsibility to count the whole number of persons in each state and to apportion members of the House of Representatives among the states according to their respective numbers, as well as its injunction.

ARGUMENT

I. THE PRESIDENTIAL MEMORANDUM IS UNLAWFUL ON ITS FACE.

On July 21, 2020, President Trump issued a Memorandum directing the Secretary of Commerce to provide the data necessary for the President to

exclude undocumented individuals from the state population counts that would be used to apportion congressional seats. Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (Jul. 21, 2020). The policy goal and directive expressed in the Memorandum conflict with the plain language of the applicable federal statutes, and 230 years of practice and constitutional interpretation. *City of San Jose, California v. Trump*, No. 20-cv-5167, 2020 WL 6253433, *1 (N.D. Cal. Oct. 22, 2020), J.S. pending, No. 20-561 (filed Oct. 29, 2020).

The policy goal stated in the July 21 Presidential Memorandum could not be clearer: "For the purpose of the reapportionment of Representatives following the 2020 census," it states, "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. § 1101 *et seq*.), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." 85 Fed. Reg. at 44,679, 44,680. The Memorandum explains that the intended objective of the expressed policy is to deny additional congressional representation and corresponding political influence to "States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws," and to punish "States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress." *Id*.

As two three-judge panels have now determined after weighing the considerable evidence and

conducting significant legal analyses, the Memorandum violates both the Census Act, 13 U.S.C. § 1 *et seq*., and the Reapportionment Act. 2 U.S.C. § 2a. Neither statute gives the President discretion to exclude undocumented immigrants from the apportionment base. *San Jose*, 2020 WL 6253433, *46; accord, *New York v. Trump*, No. 20-CV-5770 (RCW) (PWH) (JMF), 2020 WL 5422959, *27 (S.D. N.Y. Sept. 10, 2020). The Northern District of California panel conducted additional constitutional analysis, ultimately determining that the Memorandum violates the Apportionment and Enumeration Clauses of Article I, Section 2; Section 2 of the Fourteenth Amendment; and the constitutional separation of powers. *San Jose*, 2020 WL 6253433, *1.

"The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself[,]' " or from a combination of the two. *Medellin v. Texas*, 552 U.S. 491, 523 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *See also In re United Mine Workers of America Intern. Union*, 190 F.3d 545, 551 (D.C. Cir. 1999)("Needless to say, the President is without authority to set aside congressional legislation by executive order …"). The novel Memorandum and pursued in this and other litigation, ignores two centuries of contrary interpretation, and disrupts statutory frameworks and realities in which public schools operate. *Amici* urge the Court to determine that this overreach of

executive authority is invalid under the clear language of the Constitution and Acts of Congress.

A. The Memorandum Violates the U.S. Constitution.

The Fourteenth Amendment phrase, "the whole number of persons in each State," which was codified into the Reapportionment Act and later the Census Act, includes undocumented people residing in each state. This has been the consistent reading of the plain words by Congress, legal scholars, the Department of Justice, and census officials for two centuries. *San Jose*, 2020 WL 6253433, *47. The administration concedes that undocumented immigrants are "persons," as this Court has recognized. *Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term"); *New York v. Trump*, 2020 WL 5422959, *29 (S.D.N.Y. 2020)("The ordinary meaning of the word 'person' is 'human' or 'individual' and surely includes citizens and noncitizens alike.").

Both the framers of the Constitution and the ratifiers of the Fourteenth Amendment after the Civil War knew that apportionment of representatives relied on a census count of individuals residing in a state – not citizens, and not voters. The relevant text of the Fourteenth Amendment thus reads, "'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" (emphasis added). *San Jose*, 2020 WL 6253433, *4.

It was clear to Congress in later years that immigrants must be included in population counts.

The California panel notes numerous members of Congress recognizing that, "Under 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." *San Jose*, 2020 WL 6253433, *4 (citation omitted) (citing statement of Rep. John Bingham of Ohio). This understanding by Congress that it would be unconstitutional to exclude noncitizens from the apportionment base prevented the addition of any such provision in the Reapportionment Act of 1929, or the Census Act (which, in 1954, codified census-related provisions into one place) in 1989. *Id.* at *7-8. One Senator remarked, "I wish the Founding Fathers had said you will only enumerate 'citizens,' … but they did not. They said 'persons,' and so that is what it has been for 200 years. We have absolutely no right or authority to change that peremptorily on a majority vote here.' *Id*. at *7, (citing statement of Sen. Dale Bumpers of Arkansas).

The Department of Justice, across decades and administrations, "has consistently maintained that all residents of each state must be counted, regardless of their legal status or citizenship." *Id.*

The Constitution provides for an "actual Enumeration." U.S. Const. art. I, § 2, cl. 3. This provision creates both a mandatory requirement (to conduct a census) and a justiciable limit on the means of conducting it—such that the count be "actual," i.e. accurate. This Court has emphasized this two-fold constitutional purpose. *Utah v. Evans*, 536 U.S. 452, 478 (2002) ("[C]ertain basic constitutional choices . . . to use population rather than wealth, to tie taxes and representation together, to insist upon periodic recounts, and to

take from the States the power to determine the methodology all suggest a strong constitutional interest in accuracy."); *Wisconsin v. City of New York*, 517 US. 1, 19-20 (1996) (Secretary's implementation of the census must "bear . . . a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census.").

This Court also has recognized the Census Bureau's longstanding interpretation of "person in each State" to mean inhabitants or residents for purposes of allocating people to their states, starting with the first enumeration Act. *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992); *See also* Final 2020 Census Residence Criteria and Residence Situations Rule, 83 Fed. Reg. 5525 at 5533 (Feb. 8, 2018) (counting persons based on their "usual residence, which is the place where they live and sleep most of the time"). As this Court has stressed, the term can mean more than physical presence, and can be used broadly enough to include close ties to a place. *Franklin*, 505 U.S. at 804. The term may include people temporarily living out of state to attend school or to live abroad. *Id*. at 805-806.

Now, the administration takes the position that, two centuries of practice notwithstanding, the Executive Branch may exclude undocumented people from the apportionment base because they are no longer considered "inhabitants" or "residents" of their states. That interpretation threatens the statutory frameworks and on-the-ground realities in which publics schools operate.

In communities across the country, undocumented individuals live, work, pay taxes, attend places of worship, volunteer, and send their

children to school. *See Dept. of Homeland Security v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1914 (2020) (Undocumented recipients of Deferred Action for Childhood Arrivals ("DACA") "have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program.") (citation omitted); *San Jose*, 2020 WL 6253433, *29. ("A clear majority of undocumented immigrants have lived in the United States for over five years and have families, hold jobs, own houses, and are part of their community.") (citation omitted). As *amici* can attest, undocumented residents of school districts across the country participate in their community's public schools as parents, students, and educators. The Migration Policy Institute estimates that there are 9,000 immigrants protected under the DACA program working as educators.[2] Many of these educators have helped to alleviate the shortage of qualified teachers, particularly in high-needs schools and communities.

Like the Census Bureau's historical reliance on residency for a count of "persons in each state," states historically have tied public school attendance to residency. *See, e.g.* NY EDUC § 3202; 8 NY ADC 110.2(y)(1).[3] This usually means presence with an

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[2] Jie Zong *et al.*, A Profile of Current DACA Recipients by Education, Industry, and Occupation (Nov. 2017), https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation.

[3] All state parties to this case require parent and/or child residency in the school district to attend public school – not citizenship. C.R.S.A. § 22-1-102; 14 Del.C. § 3402; D.C. Code

intent to remain. For example, in New York, a parent or child establishes residency for purposes of attending public school tuition-free "through physical presence as an inhabitant of the school district and intent to reside in the district." 8 NY ADC 110.2(y)(1). In fact, some states affirmatively prohibit public schools from requiring documentation that might reveal citizenship. New York forbids schools from requesting:

> on any enrollment/registration form(s) or in any meeting or other form of communication any of the following documentation and/or information at the time of and/or as a condition of enrollment: (1) Social Security card or number; or (2) any information regarding or which would tend to reveal the immigration status of the child, the child's parent(s) or the person(s) in parental relation, including but not limited to copies of or information concerning visas or other documentation indicating immigration status."

8 NY ADC 100.2(y)(3)(i)(a). Illinois similarly prohibits districts from requiring the submission of

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Ann. § 38-309; HRS § 302A-1143; 105 ILCS 5/10-20.12b, 105 ILCS 5/14-1.11-1.11a; 20-A M.R.S.A. § 5202; M.G.L.A. 72 § 2; M.C.L.A. 380.1148; MD Code, Education, § 7-101; M.S.A. § 120A.20; NRS 10.155; N.J.S.A. 18A:38-1; N.C. Gen. Stat. Ann. § 115C-364; Or. Rev. Stat. Ann. § 339.133; 24 Pa. Stat. Ann. § 13-1302; 16 R.I. Gen. Laws Ann. § 16-64-1; Va. Code Ann. § 22.1-3; Wash. Rev. Code Ann. § 28A.225.215; *In State ex rel. Sch. Dist. Bd. v. Thayer,* 74 Wis. 48 (1889), the Wisconsin Supreme Court held that students are entitled to a free public education from the resident district. If the student is living in a school district "for other, as a main purpose, than to participate in the advantages which the school affords," then the student is a resident for school purposes.

documents that would "result in a requirement for proof of legal presence, such as a Social Security number. 23 Il ADC 1.240(b).

State public school residency requirements thus reflect this Court's ruling in *Plyler v. Doe* that children of undocumented individuals who are residents of a state may not be denied access to public schools. 457 U.S. at 226. The U.S. Department of Education reflects this ruling in its guidance, as well: "All children in the United States are entitled to equal access to a public elementary and secondary education, regardless of their or their parents' actual or perceived national origin, citizenship, or immigration status." *Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. Department of Education (last visited Nov. 12, 2020), https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html.

Because public school attendance is tied to parents' residency, and census counts are similarly based on residency, there is consistency between the number of children enrolled in public school districts and the federal funding streams apportioned based in part on census data. *Amici* urge this Court to apply the original meaning and longstanding interpretation of the constitutional census language: all residents of each state must be counted through the census and those counts are to be used for apportionment of Congressional representation.

"Residency" is the key characteristic on which an accurate count hinges.

B. The Memorandum Violates the Census and Reapportionment Acts.

The Presidential Memorandum attempts to extend Executive Branch authority beyond that granted by the Census and Reapportionment Acts, which together require the census count to include undocumented immigrants who are residents of their states, and to be used for the apportionment base. *San Jose*, 2020 WL 6253433, *41, *citing New York v. Trump*, 2020 WL 5422959, *29–32. Both district court panels that have analyzed this issue agreed on these points. *Id*.

The plain meaning of the Reapportionment Act's text indicates Congress' clear intent that the President's required report show "the whole number of persons in each State," according to which Congress will apportion the state's apportionment of representatives:

> [T]he President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal

> proportions, no State to receive less than one Member.

2 U.S.C. § 2a(a).

Congress passed the Reapportionment Act with a clearly-articulated understanding that the census count would be used for the apportionment base, and that both would include undocumented immigrants. *See San Jose*, 2020 WL 6253433, *6. As described above, members of Congress understood this approach to be required by the Constitution.

The Census Act was passed in 1954, adding language and codifying into Title 13 of the U.S. Code all census-related provisions. 13 U.S.C. § 1 *et seq*. It requires the Secretary to conduct the "decennial census of population," 13 U.S.C. § 141(a), and then report to the President "[t]he tabulation of total population by States under [§ 141(a), the "decennial census" requirement] … as required for the apportionment of Representatives in Congress." *Id*. § 141(b). The President must send to 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 ...." 2 U.S.C. § 2a(a). *See New York v. Trump*, 2020 WL 5422959, *25. Once the census count is prepared by the Secretary, the President's role is to transmit that count to Congress for purposes of apportionment.

One need to go no farther than the plain words of the statutes, though the history, practice, and judicial interpretations of those words offer even more evidence that "Congress has mandated through the statutes it enacted that the numbers

used to apportion House seats among the states will come from the decennial census." *San Jose*, 2020 WL 6253433, *46.

The Presidential Memorandum indicates an intention to use an alternative method for reporting to Congress the population counts to be used for apportioning representation –one not taken from the census count. But any use of a method to determine the apportionment base other than that required by the applicable statutes lies outside of the authority granted to the President by Congress.

By directing agency action, and indicating an intent to proceed, contrary to the clear and original meaning of the applicable constitutional and statutory language, the Memorandum attempts to legislate by executive fiat. Such action threatens the framework of delegated Executive Branch power and disregards the separation of powers doctrine. As explained by the *San Jose* panel, the Constitution clearly "vested the power to enumerate and reapportion solely in Congress," *Id*. at *49, citing U.S. Const., art. I, § 2, cl. 3. The President is authorized only to faithfully execute his duty under the law. *Id., citing* U.S. Const. art. II, § 3, and *Youngstown*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). Because the Memorandum is incompatible with the will of Congress and beyond any power enumerated by the Constitution, it therefore violates the separation of powers doctrine. *San Jose*, 2020 WL 6253433, *49.

As entities involved in the provision of public education, *amici* are impacted by a complex and interlocking set of Executive Branch agency

regulations and actions. They share a strong interest in ensuring that Executive Branch officials respect statutory requirements and limitations set by Congress so as not to take actions that unnecessarily harm state and local educational interests. This Court's check on Executive Branch authority provides a critical bulwark against unlawful action.

II. THIS COURT SHOULD CABIN THIS ATTEMPT TO LEGISLATE BY EXECUTIVE FIAT.

It is a foundational principle of our constitutional system that the actions of government must be grounded in constitutional or statutory authority. The founders created a government of enumerated, not general, powers. If the constitution or valid statute does not provide authority for a government official to exact power, that power is not his or hers. It belongs to the people. Officials of the Executive Branch, including the President, are not beyond this requirement. *See Youngstown*, 343 U.S. at 579 ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."); *See also In re United Mine Workers*, 190 F.3d at 551 ("Needless to say, the President is without authority to set aside congressional legislation by executive order …").

Amici are concerned that absent a strong judicial rebuke of this *ultra vires* act by the Executive Branch, two things are at substantial risk: the framework by which the Executive is awarded limited power from Congress to provide the census

count, and billions of dollars of federal funding for public schools apportioned through that framework.

A. Federal Courts May Rein in *Ultra Vires* Government Action.

It is the task of the judiciary to determine whether a government official has acted *ultra vires* – outside of his legal authority – considering the constitutional and statutory limits at play. Courts have done so for decades.[4] By making such determinations, Courts preserve the constitutional framework enumerating government power.

Executive Branch action must be grounded in law, as legislation by executive fiat will result in the thwarting of the will of Congress as expressed in federal statutes. *Youngstown*, 343 U.S. at 588-89 ("It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations . . . are *ultra vires* his authority and therefore may be made the object of specific relief.").

As happened in this case, federal courts may grant equitable relief to someone injured by the *ultra vires* acts of a government official. *Harmon v.*

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[4] *See* Stack, Kevin M., The Reviewability of the President's Statutory Powers, 62 Vanderbilt Law Review 4, Note 135.

Brucker, 355 U.S. 579, 581-82 (1958) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."); *See also Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 329 (2015)("equitable relief that is traditionally available to enforce federal law"). The courts must, in theory, reestablish and clarify the limits on the government official's authority. *New York v. Trump*, 2020 WL 5422959, *32 (citations omitted). This Court should do so here.

B. The Memorandum Must Be Invalidated to Protect Federal Programs Affecting Public Schools.

Amici urge this Court to invalidate the Presidential Memorandum as an *ultra vires* action outside of federal statute and constitutional requirements. This Court's action is necessary to protect other programs affecting schools from similar overreach. *See Youngstown*, 343 U.S. at 588-89.

For over a century, this Court has recognized that the judiciary is authorized to set limits on the extent to which Congress may delegate its legislative function in specific instances to the Executive Branch, and to restrain that branch when it attempts to legislate. *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). And federal courts have reined in Executive Branch activity – including that of sitting presidents. *E.g., Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996) (Holding President Clinton's executive order to withhold government contracts from firms that hired strikebreakers conflicted with the National Labor Relations Act,

voiding the executive order in its entirety, and quoting *Stark v. Wickard*, 321 U.S. 288, 310 (1944) as follows: "[T]he responsibility of determining the limits of statutory grants of authority ... is a judicial function....").

Just this year, three federal courts invalidated the Interim Final Rule issued by the Department of Education that stepped beyond congressional delegation of authority. The ruled addressed how local educational agencies ("LEAs") including school districts were to apportion federal dollars for private schools under the "equitable services" requirement of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020). The courts determined that the rule was invalid as a misapplication of the Act, and a violation of Congress' clear intent. *Washington v. DeVos*, No. 2:20-cv-1119-BJR, 2020 WL 5079038, *1 (W.D. Wash. 2020 Aug. 21, 2020) (the rule "misconstrues Congress's intent and effectively diverts emergency relief funding from economically disadvantaged public schools to less disadvantaged private schools."); *Michigan v. DeVos*, No. 3:20-cv-04478-JD, 2020 WL 5074397, *4 (N.D. Cal. 2020 Aug. 26, 2020)(the rule defies Congress's mandate in the CARES Act to allocate federal funds to non-public schools "in the same manner" as required under Title I); *National Association for the Advancement of Colored People, et al. v. DeVos, et al.*, No. 20-cv-1996 (DLF), 2020 WL 5291406 at *3-4 (D.D.C. 2020) (rule is "in excess of statutory authority," "not in accordance with law," and "contrary to the unambiguous mandate of the Act.").

Amici are concerned that if this Court does not restrain the directive contained in the Presidential

Memorandum, which is certainly *ultra vires* in light of the clear language of the binding statutes and constitutional mandates, numerous federal programs that apportion funding to state and local education agencies based on clear formulas provided by statute are subject to tinkering at Executive whim.

Amici offer three examples. First, Title I of the Elementary and Secondary Education Act of 1965, Title I, Part A, 20 U.S.C. §§ 6301 *et seq*., is the foundational funding program for students living in poverty. Congress chose to award Title I grants to LEAs including school districts, based on four different funding formulas that take into account the number of low-income students and other factors, such as the cost of education in the state. Annual congressional appropriations bills indicate portions of the Title I-A appropriation to be allocated to state and local education agencies under each of the four formulas within the larger program.[5]

Second, Congress directed that Title II, Part A "Teacher Quality" grants be awarded to states based

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[5] *Allocation of Funds Under Title I-A of the Elementary and Secondary Education Act*, Congressional Research Service, Updated Sept. 17, 2018, https://fas.org/sgp/crs/misc/R44461.pdf. The National Center for Education Statistics explains, "Basic Grants are the largest component of Title I funding ($6.4 billion in fiscal year 2015 [FY 15]); Concentration Grants, the smallest of the four grants ($1.3 billion in FY 15), are available to districts in which the number of formula-eligible children exceeds 6,500 or 15 percent of the district's 5- to 17-year-old population; Targeted Grants ($3.3 billion in FY 15) are allocated to districts according to a student weighting system benefiting districts with high numbers or percentages of formula-eligible children." NCES Fast Facts, National Center for Education Statistics (last

an intricate formula using the state's total appropriation under Title II, and taking into account the State's relative population of five through seventeen year-olds, and the State's population of five through seventeen year-olds from families with incomes below poverty line. 20 U.S.C. §6611.[6] The National Center for Education Statistics ("NCES") calculates all allocations, and sends them to specific offices within the Department of Education, which then sends instructions for the distribution of funds, along with the funds themselves, to the states and territories.[7] Funds must then be apportioned to LEAs based on a formula that accounts for the number of school-aged children and how many are from low-income families. 20 U.S.C. §6611 (twenty percent based on the relative number of individuals age five through seventeen, and 80 percent based on the relative number of individuals age five through seventeen in households with incomes under the poverty line, in the area served by the LEA, based

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visited Nov. 12, 2020), https://nces.ed.gov/fastfacts/display.asp?id=158.

[6] *See The Allocation Process for the Improving Teacher Quality Grants (Title II)*, National Center for Education Statistics at P. 5-7, ("*Allocation Process*") https://nces. ed.gov/ surveys/ annualreports/pdf/itq20030428.pdf.

[7] *Allocation Process* 1-2, 8-10.

on figures from the census or state alternative poverty data).[8]

Finally, the Individuals with Disabilities Act ("IDEA"), allocates funding to states, which in turn disperse funds to local districts for purposes including "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A)-(C)). Congress decided to apportion IDEA funds based on the funding level each state received in the base-year of the program (1999). States also receive a share of "new money" — additional appropriated funds that differ in amounts from year to year, which is apportioned according to a funding formula dictated by Congress.[9] LEAs receive formula grant funds and can also apply for competitive grants. 20 U.S.C. § 1411; 34 CFR Part 300. The IDEA grants the Secretary of Education authority to make its

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[8] *Id*; *See also, Fiscal Year 2018–19*, California Department of Education (Sept. 28, 2018), https://www.cde.ca.gov/fg/aa/ca/title2pa18apptltr1.asp.

[9] To each state's 1999 funding allocation base, Congress requires that the Secretary add new money as follows: "If the total program appropriation increases over the prior year, 85 percent of the remaining funds are allocated based on the number of children in the general population in the age range for which the states guarantee FAPE to children with disabilities. Fifteen percent of the remaining funds are allocated based on the number of children living in poverty that are in the age range for which the states guarantee FAPE to children with disabilities." *Special Education--Grants to States (Grants to States for Education of Children with Disabilities, Part B, Sec. 611)*, U.S. Department of Education (last visited Nov. 12, 2020), https://www2.ed.gov/programs/osepgts/index.html.

formula grants to States and outlying areas and "to assist them to provide special education and related services to children with disabilities" as required by IDEA. 20 U.S.C. § 1411 (a)(1).

Consider a scenario in which the Department of Education, on its own or at the direction of the President, were to decide to base a school district's Title I, Title II, or IDEA funding not on the formulas required by statute, which focus on specific data points related to the policy goal of the statutes (children in poverty for Title I and Title II, children with disabilities for the IDEA), but on another indicator, say parental citizenship. Such an action could change federal funding dollars awarded to many states and LEAs drastically, as they base their annual budgets in part on federal funding streams determined by statutory formulas.

Amici are concerned that, left unchecked by this Court, the Presidential Memorandum sets precedent allowing Executive Branch officials to disregard the plain language of legal authority directing their duties and limiting their powers. Statutes like those described above provide critical financial support to students in the most need, and school districts across the country depend on those funds to support those students and their communities. If Executive Branch officials are free to reinterpret statutory requirements, the swing in federal funding amounts from year to year would cripple school budgeting processes and prevent meaningful planning.

III. THE PRESIDENTIAL MEMORANDUM CREATES UNCERTAINTY FOR PUBLIC EDUCATION ENTITIES THAT DEPEND ON CENSUS DATA FOR FEDERAL FUNDING AND SOUND POLICY CHOICES.

The importance of an accurate census count extends far beyond the electoral process. *Wisconsin*, 517 U.S. at 5. Census data is relied on to create 52 other Census Bureau surveys and datasets, which are used in a variety of statistical ways, including population estimates.[10]

Through myriad federal programs, distribution of federal funds to states is linked directly to the population count obtained during the census. Countless public and private institutions rely on an accurate census to shape policy, set priorities and distribute resources.[11] Census data guide how more than $675 billion in federal funds across 132 programs is distributed to states and communities each year.[12] These funds support vital community

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[10] Andrew Reamer, GW Institute of Public Policy, George Washington University, *Census-derived Datasets Used to Distribute Federal Funds* 5 (Dec. 2018), https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%20%234%20Census-derived%20Datasets%20rev%2001-19.pdf.

[11] Businesses like retail stores use census data to determine where to open new locations and what products to feature. Jim Tankersley and Emily Baumgaertner, *Here's Why An Accurate Census Count is So Important*, New York Times, Mar. 27, 2018, https://nyti.ms/2DYZc6F.

[12] Maria Hotchkiss & Jessica Phelan, U.S. Census Bureau, *Uses of Census Bureau Data in Federal Funds Distribution* 3

programs that benefit children, such as schools, housing, hospitals, and food assistance.

Census data has a particularly acute impact on federal funding for education. In fiscal year 2015, of the top 11 programs ranked by federal assistance distributed using census data, four specifically involved young children and education. The National School Lunch Program, which provides low-cost or free lunches to children each school day, distributed $18.9 billion.[13] Title I grants disbursed $14.2 billion.[14] IDEA grants to states dispensed $11.3 billion.[15] The Head Start program distributed $8.5 billion to help prepare children under five from low-income families for school.[16] And those amounts have only increased. In recent years, the distribution of Title I grants and IDEA grants to states rose to $15.8 billion and $12.3 billion, respectively.[17]

These funds are apportioned to states and local agencies based on the population statistics obtained

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(Sept. 2017), https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Head Start: Early Childhood Learning & Knowledge Center, *Head Start Programs*, https://eclkc.ohs.acf.hhs.gov/programs/article/ head-start-programs (last updated Feb. 12, 2019); Uses of Census Bureau Data 3.

[17] Andrew Ujifusa, *Here's How Changes to the U.S. Census Could Impact Education Funding*, Education Week (Mar. 28,

through the census. States with higher levels of child poverty depend on federal funds for education more than states with lower levels. In fiscal year 2015, the public school systems in Louisiana and Mississippi received 14.7 percent of their funding from the federal government, the highest level among states.[18] In a recent year, those same two states ranked among the top three for highest child poverty rates, defined as an annual income below $25,283 for a family of four, with 28 and 26.9 percent of children under 18 living in poverty.[19] "An inaccurate count . . . [thus] means that the children most dependent upon and in need of the services subsidized by federally funded programs miss out on dollars that support infrastructure and programs promoting the foundations that foster success later in life . . . ."[20]

When the Presidential Memorandum was issued, more than three months remained for census field

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2018), http://blogs.edweek.org/edweek/campaign-k-12/2018/03/us_census_changes_education_funding_impact.html.

[18] U.S. Census Bureau, Newsroom Release, *More Than Half Of School Expenditures Spent on Classroom Instruction* (June 14, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-97-public-education-finance.html.

[19] Children's Defense Fund, *Child Poverty in America 2017: State Analysis 2* (Sept. 13, 2018) https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-State-Fact-Sheet.pdf.

[20] Nonie Lesaux & Stephanie Jones, *Opinion: When a low census count hurts children's well-being*, Hechinger Report (Sept. 20, 2018), https://hechingerreport.org/opinion-when-a-low-census-count-hurts-childrens-well-being/.

operations. Census workers were gathering data based on the resident status of people living in each state, as has been done for over 200 years. The Memorandum dealt a devastating blow to the orderly operations of census data collection by stating in no uncertain terms that the administration planned to exclude undocumented immigrants from census population counts for purposes of apportioning representation in Congress, and corresponding electoral votes, with an ultimate purpose to weaken the political influence of states with larger populations of undocumented immigrants, especially in jurisdictions the administration perceived to be at odds with its immigration policy. Memorandum, 85 Fed. Reg. at 44,680.

In turn, the Memorandum undoubtedly harmed the Government Appellees, as it deterred immigrant household responses to the ongoing census count, leading to a lower count than would otherwise have been achieved. *New York v. Trump*, 2020 WL 5422959, *17. As the District Court ruled in this case, the "Presidential Memorandum has created, and is likely to create, widespread confusion among illegal aliens and others as to whether they should participate in the census, a confusion which has obvious deleterious effects on their participation rate." *Id.* at *13 (citations omitted).

Young children are already vulnerable to undercounting in the decennial census. The Census Bureau has studied this phenomenon in depth. According to its findings, in the 2010 decennial census, approximately one million young children,

ages 0 to 4, were not counted.[21] Currently, approximately 5.9 million United States citizen children under the age of 18 live with an undocumented family member.[22] The Memorandum is thus poised to adversely impact a population already vulnerable to undercounting.

Perhaps even more concerning for *Amici*, the District Court determined that by decreasing the participation of certain populations, the Memorandum injured the Government Appellees by degrading the *quality* of census data – the foundation for numerous policy decisions. *New York v. Trump*, 2020 WL 5422959, *19. The exclusion of undocumented immigrants from apportionment base and the resulting chilling effect and anticipated undercount of the immigrant population affects state and local redistricting (by diluting the political power of areas with high concentrations of affected immigrants) and the provision of public services. The Government Appellees will continue to be harmed now that the count has ended due to the effect the policy change expressed in the Memorandum would have on apportionment. The

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[21] U.S. Census Bureau, *Investigating the 2010 Undercount of Young Children—Analysis of Census Coverage Measurement Results: A New Design for the 21st Century* (Jan. 2017), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-2017_04-undercount-children-analysis-coverage.pdf.

[22] American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (Nov. 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement.pdf.

Northern District of California found similarly. *San Jose*, 2020 WL 6253433, *16.

Accurate census information not only informs federal government programs but facilitates efficient management of local school systems. Through the School District Review Program, state officials are able to review census data related to individual school districts.[23] This information, in turn, can be used to guide local education decisions, such as attendance zones, school board election zones, and capital budget needs. Counties and their school districts use this data to plan for the construction and renovation of school facilities. Further, census data is the tool local school districts rely upon to draw district boundaries, to assess and plan for staffing needs, and to develop appropriate district centric curriculum goals. Without an accurate and fair count, districts will be working with deficient data to inform those important activities.

Public school districts must educate children of all residents, not just those who are counted in the census or considered for congressional apportionment. *Plyler*, 457 U.S. 202. By threatening an inaccurate count of undocumented adults and children alike,[24] the Presidential Memorandum

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[23] U.S. Census Bureau, *School District Review Program, About This Program*, https://www.census.gov/programs-surveys/sdrp/about.html.

[24] Roughly 1.8 million of the nation's undocumented population is eighteen years old or younger, and an estimated 65,000 undocumented students graduate from American high schools each year. Angela Adams & Kerry S. Boyne, *Access to Higher*

endangers federal funding streams tied to census data. Decreased funding in any area requires school districts to redirect non-categorial general revenue dollars to those areas. This, in turn, reduces the revenues available generally to serve all students. *Amici* urge this Court to protect the integrity of the census data collection process, which facilitates public schools' ability to meet their constitutional duty to educate all students.

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The ability of public schools to carry out their mission is severely undermined by the Presidential Memorandum, which threatens the accuracy of the final census count. An undercount of the number of children and families our schools serve means fewer federal resources for schools and for students and families who need them most, and an overall reduction in resources available to public education generally. At a time when immigrant communities are being disproportionately affected by the ongoing coronavirus pandemic,[25] and schools struggle to educate children under extraordinary challenges, the need for consistent federal funding streams is particularly high. A decrease in overall funding available to public schools likely to result from the

Education for Undocumented and "Dacamented" Students: The Current State of Affairs, 25 Ind. Int'l & Comp. L. Rev. 47 (2015).

[25] Fernanda L. Cross, Odessa Gonzalez, *The Coronavirus Pandemic and Immigrant Communities: A Crisis That Demands More of the Social Work Profession*, Affiliate: Journal of Women and Social Work, https://doi.org/10.1177/0886109920960832.

Memorandum harms all students and their school communities.

CONCLUSION

For the foregoing reasons, this Court should summarily affirm the judgment of the district court.

Respectfully submitted,

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