

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Appellants,)
v.) No. 20-366
NEW YORK, ET AL.,)
Appellees.)
- - - - -

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Washington, D.C.

Monday, November 30, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

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APPEARANCES:

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on behalf of the Appellants.

BARBARA D. UNDERWOOD, Solicitor General, New York, New

York; on behalf of the Government Appellees.

DALE E. HO, ESQUIRE, New York, New York;

on behalf of the Private Appellees.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 20-366,
5 Trump versus New York.

6 General Wall.

7 ORAL ARGUMENT OF JEFFREY B. WALL

8 ON BEHALF OF THE APPELLANTS

9 GENERAL WALL: Mr. Chief Justice, and
10 may it please the Court:

11 This case should be over. The
12 district court held that appellees would be
13 injured because illegal aliens would be chilled
14 from participating in the enumeration. But that
15 counting is now over, and whatever chill ever
16 existed has fallen.

17 Appellees therefore pivot to possible
18 future injuries, but as of this very morning,
19 career experts at the Census Bureau confirmed
20 with me that they still don't know even roughly
21 how many illegal aliens it'll be able to
22 identify, let alone how their number and
23 geographic concentration might affect
24 apportionment. And if they don't know,
25 certainly, the other parties to this case do

1 not.

2 The Court, therefore, should follow
3 the course charted by the three-judge D.C.
4 district court last week: Vacate the judgment
5 below, allow the Secretary to comply with the
6 memorandum, and allow any effect on
7 apportionment to be litigated as it normally
8 would be in a post-apportionment lawsuit by
9 parties with concrete injuries.

10 On the merits, there's no procedural
11 problem with the memorandum. The President may
12 direct the Secretary to send him two sets of
13 numbers so that he may decide how to exercise
14 whatever discretion he has.

15 The real fight here is substantive,
16 over how much discretion the President has.
17 Text, history, and precedent are all clear about
18 the general test whether one is an inhabitant.
19 The question is how to apply that test to people
20 who are present in the country illegally.

21 Treating someone apprehended at the
22 border on March 31 or scheduled to be removed on
23 April 2 as a usual or settled resident of the
24 United States on April 1 flies in the face of
25 this Court's cases, common sense, and any sound

1 theory of political representation.

2 The President has at least some
3 discretion to determine that at least some
4 illegal aliens lack enduring ties to the states,
5 which means that the judgment should be
6 reversed.

7 I welcome the Court's questions.

8 CHIEF JUSTICE ROBERTS: General, my
9 first question goes to the very first point you
10 raised. We expedited this case in light of the
11 December 31 deadline for the Secretary to
12 transmit the census to the President.

13 Is that date still operative? Do you
14 still need a decision by that date?

15 GENERAL WALL: Well, the situation is
16 fairly fluid, Mr. Chief Justice. We -- because
17 of the two weeks that we lost to the California
18 injunction and some subsequent issues in
19 processing the data, we are not currently on
20 pace to send the report to the President by the
21 year-end statutory deadline.

22 But just this morning, I confirmed
23 with senior leadership at the Department of
24 Commerce and the Census Bureau that we are
25 hopeful, and it remains possible, that we can

1 get at least some of the PM-related data to the
2 President in January, so we do still need relief
3 from the Court, yes.

4 CHIEF JUSTICE ROBERTS: Sounds like
5 you had a busy morning. What -- what -- what do
6 you mean, "PM data"?

7 GENERAL WALL: I'm sorry. The
8 Presidential Memorandum data. So the data the
9 President has requested in order to -- to
10 potentially back out illegal aliens from -- from
11 the apportionment base.

12 CHIEF JUSTICE ROBERTS: On the
13 standing question, if the Court doesn't
14 intervene now before the Secretary transmits the
15 information to the President, I don't know when
16 the Court would be able to intervene. All --
17 all that would be left after that transmittal is
18 the transmittal by the President to -- to the
19 House.

20 So, if -- if the injury can't be
21 redressed at this point, when could it be?

22 GENERAL WALL: In a post-apportionment
23 lawsuit, just as in Franklin or Wisconsin or --
24 or Utah versus Evans, if the -- if the -- the
25 Bureau is able to feasibly identify enough

1 aliens and the President excludes those
2 categories and that affects the apportionment --
3 those are all three unknowns -- but, if that
4 happens, then you have a post-apportionment
5 challenge just as in Franklin for the Secretary
6 to revise his report and for the President to
7 send a new report to the House, in effect, to
8 redo the apportionment.

9 CHIEF JUSTICE ROBERTS: But isn't that
10 going to be like having to unscramble the eggs?
11 I mean, the apportionment, any -- any change in
12 any one state, of course, is going to have
13 ripple effects all across the country, and it
14 does seem like it would be more manageable at an
15 earlier stage.

16 GENERAL WALL: Well, Mr. Chief
17 Justice, I don't want to resist this too much
18 because we would prefer for the Court to reach
19 the merits and uphold the Presidential
20 Memorandum. We just think, for the reasons
21 given by the D.C. district court last week,
22 there are too many unknowns here.

23 I do -- I take the point that there --
24 there is a bit of an omelet to unscramble, but
25 we do unscramble that in post-apportionment

1 lawsuits. So it's possible to enter relief.

2 And on the flip side, you could have
3 the Court issuing an opinion on what the
4 President may or may not do, only to discover
5 days or weeks later that it's effectively
6 advisory because the numbers aren't large enough
7 to affect the apportionment and the appellees
8 here and other potential appellees wouldn't be
9 injured, either with respect to apportionment or
10 funding.

11 That strikes us as a fairly serious
12 problem, either as a matter of Article III
13 standing or prudential ripeness.

14 CHIEF JUSTICE ROBERTS: General, just
15 very quickly, should we assume that we're not
16 going to be talking about all illegal aliens in
17 the country but some subset, some uncertain
18 subset, like the ones in ICE detention?

19 GENERAL WALL: I think it is -- I
20 think it is very fair to say, Mr. Chief Justice,
21 that the President has not made a determination
22 yet, because we don't know what's feasible,
23 about excluding all illegal aliens and has
24 recognized that some subsets are going to be
25 much stronger cases for the exercise of his

1 discretion than other subsets. And that's --

2 CHIEF JUSTICE ROBERTS: Thank -- thank
3 you, General.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 General Wall, I -- I'd like you just
8 to discuss a bit as you understand the -- what
9 Respondent is arguing.

10 How does their alleged injury would be
11 redressable without including the or enjoining
12 the President? Because it's actually his
13 decision that it seems that they're ultimately
14 concerned about.

15 GENERAL WALL: Well, I think that's a
16 fair point, Justice Thomas, but the Court
17 crossed that bridge in Utah v. Evans over a
18 dissent by Justice Scalia that the relief wasn't
19 redressable because relief couldn't run against
20 the President.

21 And the Court held in Utah, and no one
22 has asked here that that decision be overruled,
23 that it was fair -- that you could obviously
24 enjoin the Secretary as a subordinate official
25 and that the judiciary would assume that the

1 President would comply.

2 And so too here there's no reason to
3 believe that the President would not comply with
4 this Court's judgment either now or in a
5 post-apportionment context.

6 JUSTICE THOMAS: The -- in Utah, is my
7 understanding, that that was actually the
8 census, wasn't it?

9 GENERAL WALL: Yes, it was a -- it was
10 a challenge to certain procedures that were
11 being used with respect to the -- the census.
12 It was, in effect, a sampling claim.

13 JUSTICE THOMAS: Okay. But, here,
14 we're talking about something separate from the
15 census, or am I -- am I mistaken?

16 GENERAL WALL: No, I -- I think that's
17 the other side's argument, Justice Thomas. I
18 think they have -- they have seized on the fact
19 that we've sometimes used the word "census" to
20 refer to the counting and said, a-ha, look, the
21 Census Bureau came up with a final number, and
22 the President essentially accepted that but then
23 sought to back out illegal aliens.

24 And I don't think that's right. The
25 Presidential Memorandum makes clear that he was

1 exercising his authority under Franklin to
2 determine the apportionment base after the
3 counting.

4 And so I -- I don't think -- it is
5 certainly our position that this is not somehow
6 outside or stands apart from the census.

7 JUSTICE THOMAS: Could you actually,
8 though, get the exact same information in a memo
9 that's from the Commerce Department or the
10 Census Bureau that says this is not the
11 Section 141 report, but here's our what we think
12 those numbers look like?

13 GENERAL WALL: The statutory scheme
14 seems to contemplate that the President will
15 rely on the Secretary's report in sending his
16 submission to Congress.

17 Now Franklin says he's entitled to
18 reform the data that the Secretary gives him.

19 But I think it would be a much more
20 difficult question if he tried to act entirely
21 outside of the process that the statute set up.
22 And, obviously, here, he hasn't done that. He's
23 just exercised his authority under Franklin to
24 tell the Secretary that he wants to look at
25 different sets of numbers so that he can make a

1 decision about the apportionment base.

2 JUSTICE THOMAS: Well, it just seems
3 to me that, you know, the -- I don't understand
4 why you couldn't get the exact -- the President
5 couldn't get the exact same advice outside of
6 the context of a formal report with -- with
7 separate numbers and then make his decision.

8 But, beyond that, the Chief Justice
9 asked you about the subset, subcategories of --
10 or subsets of illegal aliens. But could you
11 give us your idea of what the President means
12 generically by "illegal alien"?

13 GENERAL WALL: He means people who are
14 present in this country unlawfully, and that --
15 that -- that includes a number of different
16 subsets. We've named several of them in our
17 brief which I think are the clearest cases for
18 the exercise of the President's discretion, but
19 there are a number of other set -- subsets too.

20 But the entire category is -- is
21 people who are present in this country in
22 violation of federal law.

23 JUSTICE THOMAS: Thank you, General
24 Wall.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Yes, thank you.

3 I was also concerned with what Justice
4 Thomas brought up, and so, to clear away some
5 weeds from my mind, would you tell me where I
6 missed this or if I'm right.

7 We're looking at a statute, 141. A
8 says the Secretary shall take a Decennial
9 Census, okay? B says the tabulation of the
10 population that he just took, as required for
11 the apportionment of representatives, that
12 tabulation shall be reported to the Secretary --
13 by the Secretary to the President.

14 That's the report we're concerned
15 about. That's the tabulation we're concerned
16 about. And it is based on that, where you go to
17 2a, the President shall transmit a statement
18 showing the whole number of persons for the
19 purpose, again, of apportionment.

20 So we're not interested in other ways.
21 We're interested in this report, in this
22 tabulation, under 141(b).

23 Now, if I'm right so far, the
24 President's order says I'll tell you why I want
25 that. I want that because it's our policy that

1 illegal aliens will not be included in the
2 census. I can't tell you exactly what ones. It
3 doesn't say that. It just says illegal aliens
4 will not be included. And he asked for the
5 report so he can do that.

6 Now, if the Constitution forbids him
7 to, or if the statutes forbid him to, subtract
8 from the tabulation for purposes of the
9 statement, if it forbids him to subtract those
10 illegal aliens, or to the extent it does, the
11 tabulation and the report are not the tabulation
12 required for the apportionment of the census
13 and, therefore, he cannot ask -- he cannot ask
14 the Secretary for that report to contain that
15 information.

16 Right or wrong and, if wrong, why?

17 GENERAL WALL: I think I agreed with
18 you up to the very end, Justice Breyer. I think
19 you correctly understand how the statutory
20 provisions, which were passed together in 1929,
21 work.

22 And I -- I think it's true that if the
23 Constitution or the statutes constrain the
24 President's ability to back them out, then that
25 would mean that his statement -- setting aside

1 judicial review, his statement to Congress under
2 2a(a) would be unlawful.

3 But I don't know that any of that is a
4 constraint on his ability to simply request the
5 information from the Secretary.

6 JUSTICE BREYER: Well, it is not the
7 information if it's unlawful that is required
8 for the apportionment of rep -- the House of
9 Representatives because it is illegal.

10 Now whether it's illegal or not is a
11 different question. All we have on that is
12 about 40 briefs that show that the history, the
13 language, the consequences, the purposes, and a
14 bunch of other things argue against you, but you
15 have arguments against that.

16 But, if that side wins, then I don't
17 see how the information he's requested could be
18 the information required for the apportionment
19 of representatives, quoting the statute.

20 GENERAL WALL: I think all I would
21 say, Justice Breyer, is I don't want to run
22 together the procedural and the substantive
23 issues. I think what you're really getting at
24 is the substantive issue of what the President's
25 powers are here, not any of the procedural

1 issues that they've raised with respect to the
2 -- to the memorandum.

3 So I -- I agree with you that what's
4 really at issue here is that substantive
5 question that you're focused on.

6 JUSTICE BREYER: Well, maybe, but
7 we're not suing the President. They're not.
8 They're suing the Secretary. And they're
9 saying: Mr. Secretary, you cannot give to the
10 President this requested information and also
11 say that that piece of paper that you send him
12 is the tabulation as required for the
13 apportionment of representatives. It may be
14 something else, but it isn't that. And that's
15 what he's asked you to do, and that's what
16 you're trying to do. And, Mr. Secretary, if
17 it's illegal, you can't do it.

18 GENERAL WALL: That's right, Justice
19 Breyer. My only point was that doesn't have
20 anything to do with their procedural arguments
21 about the use of administrative records or
22 whether this is somehow part of the census.

23 JUSTICE BREYER: No, it doesn't.

24 GENERAL WALL: That's all just their
25 substantive claim --

1 JUSTICE BREYER: Yeah.

2 GENERAL WALL: -- that the President
3 doesn't have the power to ask for the --

4 JUSTICE BREYER: Okay, okay. Then
5 they don't -- on that one, it says "persons,"
6 this started in 1820, you know, and they've
7 always counted people who were here and not --
8 and not naturalized, and this has never happened
9 before that you excluded illegal aliens, and it
10 has a lot of negative effects on the states.
11 You know all those arguments. And they're fair
12 -- I think they're fairly strong ones.

13 GENERAL WALL: Justice --

14 JUSTICE BREYER: I mean, what do you
15 -- what do you want to say? They're persons,
16 aren't they?

17 CHIEF JUSTICE ROBERTS: Briefly,
18 counsel.

19 GENERAL WALL: So just very briefly,
20 Justice Breyer, there's two different things
21 there. One is the historical practice, which I
22 hope I'll be able to address later because I
23 think Franklin takes care of that. The other is
24 the text and the history. None of that goes
25 specifically to the question of illegal aliens.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: General Wall, if I
3 can, I want to try to press you a little bit on
4 some of the answers you gave to the Chief
5 Justice because I find the posture of this case
6 quite frustrating.

7 It could be that we are dealing with a
8 possibility that is quite important. It could
9 be that this is much ado about very little. It
10 depends on what the Census Bureau and the
11 Department of Commerce are able to do.

12 If I just take the numbers from the
13 district court in D.C.'s opinion last week, they
14 said that the -- the plaintiffs in that case
15 were claiming that there are 10.5 million people
16 in this country who would be counted as being
17 here illegally. But, if you look at the smaller
18 number of -- of those who are held in detention
19 facilities, it's -- it's something like 60,000.

20 The first number could easily change
21 the apportionment of representatives. The
22 second one, it's much more doubtful that it
23 would change the apportionment of
24 representatives.

25 There are only 31 days left in the

1 year. To exclude the 10.5 million seems to me a
2 monumental task, to do that without sampling, to
3 take 300 million plus names and determine
4 individually for each of those people whether
5 they are lawfully in the United States.

6 And I would think you would be able to
7 tell us whether that remains a realistic
8 possibility at this point.

9 GENERAL WALL: Justice --

10 JUSTICE ALITO: Can you not provide us
11 with any more information than what you provided
12 in your answer to the Chief Justice, was that,
13 basically, they're working on it?

14 GENERAL WALL: Well, I can provide you
15 with a little bit more. I don't know how
16 satisfying it'll be, but I think it is very
17 unlikely that the Bureau will be able to
18 identify all or substantially all illegal aliens
19 present in the country, so anything like the 10
20 or 11 or 12 million numbers that are flying
21 around.

22 They will be able, I think, to do ICE
23 facilities, which, as you say, is some number in
24 the tens of thousands. The question is where it
25 will fall in the middle. And we don't know, and

1 the reason we don't know is because it -- it --
2 it -- it turns a great deal on the level of
3 detail that we got in doing the enumeration.

4 And until we actually take the census
5 master file and these various administrative
6 records, once they're all cleaned up and ready
7 to go, and we actually run the models in a few
8 weeks or, you know, whenever it is, we won't
9 actually know how many people we pick up.

10 And so, you know, I pressed the deputy
11 director of the Census Bureau on this very
12 question, and the simple fact is that the
13 experts don't know. They don't know whether
14 it'll be 50,000 or 100,000 or 500,000 or a
15 million. So there's just substantial
16 uncertainty.

17 JUSTICE ALITO: Well, before my time
18 runs out, I -- I'm -- I have no expertise
19 whatsoever in this area. I could understand if
20 they say all we can determine is how many people
21 are in detention facilities or subject to final
22 orders of removal.

23 If they're going for the bigger
24 picture and trying to identify everybody who is
25 in this country unlawfully, I don't see how that

1 -- they can provide a partial answer to that.
2 If they were to say, well, you know, we've done
3 this for 200 million people, but we don't know
4 about the 100 million plus additional people,
5 there's no way an apportionment could be based
6 on that, is there?

7 GENERAL WALL: They're trying to get
8 the categories of illegal aliens that you could
9 identify based on the kinds of records we have,
10 so final orders of removal, for instance, or
11 people who have been removed who are found here
12 again and haven't been given any lawful status.

13 So it's not that we can pick up
14 everyone. There will be some undetected illegal
15 aliens who -- who we aren't even attempting to
16 screen for because they wouldn't be picked up,
17 obviously, by any record.

18 It's the categories that would be
19 shown by some sort of record that we have. And
20 the question is just, how feasible is it going
21 to be to capture large numbers within those
22 categories? And, unfortunately, we don't know
23 at this point.

24 And it's a feature, by the way,
25 though, I have to say, not of the government's

1 conduct. It's a feature of the fact that
2 appellees brought a pre-apportionment challenge
3 on the basis of this injury that was always
4 going to cease in the past --

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

7 GENERAL WALL: -- before the judgment
8 would take effect.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Yes. Mr. Wall, as
12 I understand and read the memo, the President's
13 memo, he says he intends to exclude every alien
14 who does not have permission to be here in the
15 United States.

16 Now, yes, he limits this to where it's
17 feasible to identify that, but right now his
18 policy is, if I can identify them, no matter
19 what the reason is for them being illegal -- an
20 illegal alien, I'm going to exclude them from
21 the census.

22 Following up on Justice Alito's
23 question, aren't those the very categories that
24 you already say that we've been told there have
25 been some of them who's in ICE is going to come

1 by December 31, and then, by January 11, the
2 Census Bureau says that it intends to provide
3 the President with the information "necessary to
4 fully implement the Presidential Memorandum."

5 I'm quoting the Census Bureau. So, if
6 I take that at its face, it means that the
7 number's not going to be 60,000. The number
8 intended is substantially large. And I think
9 that was Justice Alito's point, which is the
10 Census Bureau has been collecting data about
11 undocumented immigrants from other agencies for
12 over a year.

13 I don't see how you can represent to
14 us that you don't think it's going to be a
15 substantial number.

16 GENERAL WALL: Three quick points,
17 Justice Sotomayor.

18 First, that's -- I don't think that's
19 actually an accurate statement of the
20 memorandum. You're certainly right that that's
21 the policy, but there are two built-in
22 limitations. One is whether it's feasible, and
23 the second is whether the President decides that
24 he has the legal discretion to exclude all of
25 these subsets. And the subsets might have

1 different legal analysis depending on the kind
2 of ties they have or the type of status they --
3 they -- they have.

4 But the second, the fact --

5 JUSTICE SOTOMAYOR: Mr. Wall, I -- I'm
6 a little bit questioning of that for the
7 following reason: The Census Bureau already
8 defines what residency is, where you're living
9 as a snapshot date of April 1, 2020.

10 Now, whether you're in a prison, in
11 ICE detention, we're told by one of our amici
12 that 57 percent of the people in detention will
13 eventually be released to the United States
14 either through asylum or through some other
15 mechanism.

16 So I am not sure how you can identify
17 any class of immigrant that isn't living here in
18 its traditional sense, that this is where they
19 are, this is where they were on April 1 and
20 where they intend to stay if they can find any
21 way to do it.

22 GENERAL WALL: Justice Sotomayor,
23 based on my understanding from the Census
24 Bureau, there is a real prospect that the
25 numbers will not affect the apportionment. But,

1 as I said earlier to the Chief Justice, I'm
2 perfectly happy if the Court disagrees with us
3 on that and disagrees with the analysis of the
4 D.C. district court last week and moves to the
5 merits because we think, on the merits, the
6 Court should uphold the Presidential Memorandum
7 because at least some of the illegal aliens
8 captured by the Presidential Memorandum don't
9 satisfy the test for inhabitancy either as a
10 matter of the Constitution or the statutes.

11 JUSTICE SOTOMAYOR: Well, what you're
12 saying is the memo says, I think anyone -- the
13 Presidential memo says, I think anyone without
14 papers should not be counted. Now you're
15 saying: Well, maybe the President will limit
16 that sub-category.

17 But that's not what he's asking for.
18 He's asking for all of those illegal aliens that
19 can be unidentified.

20 And wouldn't Heller defeat this
21 argument that we shouldn't rule? In Heller, we
22 knew that there were certain people who states
23 could legitimately bar from possessing guns in
24 their homes, but we didn't say because there's
25 that subset we're not going to declare what the

1 general law is.

2 So why shouldn't we do the same thing
3 here, you can't exclude illegal aliens may --
4 because they're undocumented?

5 GENERAL WALL: The Court would have to
6 conclude, in order to say that, as the district
7 court here did, that the President doesn't have
8 the discretion to exclude any illegal aliens
9 from the apportionment base, even some subset,
10 because the injunction here prohibits him from
11 getting any of the information he needs to
12 exclude any subset.

13 And he did make clear in the
14 memorandum that although, as a matter of policy,
15 he wanted to exclude the entire set, that he had
16 not yet made a judgment on whether he had the
17 legal discretion to do that for the entire
18 class. He wanted to see what the people --

19 CHIEF JUSTICE ROBERTS: Justice Kagan.

20 GENERAL WALL: -- in the Bureau --

21 JUSTICE KAGAN: General Wall, I guess
22 I'd like to keep going with the line of
23 questioning that the Chief Justice and Justice
24 Alito talked about as to what categories we're
25 talking about.

1 As I read you, you're saying, well,
2 yes, there's this small category of ICE
3 detainees, that seems pretty feasible, but
4 that's just tens of thousands of people.

5 So how about a few others? As I
6 understand it, there are almost 200,000 persons
7 who are subject to final orders of removal.
8 Will the Bureau be able to report on those?

9 GENERAL WALL: It is working very hard
10 to try to report on that subset, yes.

11 JUSTICE KAGAN: Okay. There are
12 700,000 DACA recipients. Will the Bureau be
13 able to report on those?

14 GENERAL WALL: It is working on that
15 too. We can't be certain at this point, and we
16 don't know what the President will decide to do
17 with respect to that set. He hasn't --

18 JUSTICE KAGAN: Right. I mean, you --
19 I mean, obviously, you have papers, all kinds of
20 records on those people, so I -- I would think
21 that that sounds pretty feasible to me.

22 GENERAL WALL: But -- but the problem
23 is the matching, Justice Kagan, right? We -- we
24 have the administrative records. What we don't
25 know is the number that participated in the

1 census, either through questionnaires or other
2 proxies, and that provided sufficient detail to
3 do the matching. That's the problem here.

4 JUSTICE KAGAN: Okay. How about the
5 3.2 million non-detained individuals in removal
6 proceedings?

7 GENERAL WALL: It's the same thing.
8 We have to have reliable information on them and
9 that information has to match up with what they
10 provided to the census. So we --

11 JUSTICE KAGAN: Okay. So what I'm --
12 what I'm getting from you is we can get very
13 easily to 4 or 5 million people who you have
14 extensive administrative records on, and you're
15 saying, well, there's a matching problem.

16 So I guess this goes back to Justice
17 Alito's question. You're 30 days out. It seems
18 to me you either know whether you can do
19 matching or you don't know whether you can do
20 matching. Why the uncertainty on this?

21 GENERAL WALL: Be -- because, until
22 you actually compare the one set against the
23 other set, you just don't know how many hits
24 you'll get.

25 But, again, Justice Kagan, I'd -- I'd

1 love to move to the merits because, if the Court
2 decides we're wrong and that this really is teed
3 up constitutionally or prudentially, even though
4 there may not be an effect on apportionment, I
5 think that there are good reasons that we
6 haven't yet talked about why the entire category
7 of illegal aliens shouldn't be thought to
8 qualify under the inhabitancy test.

9 JUSTICE KAGAN: Can I ask you, before
10 we go to the merits, Mr. Wall, how would a
11 post-apportionment challenge of the kind you
12 talked about earlier work? It seems to me that
13 the time period, once it's post-apportionment,
14 is very crunched. States have to do their own
15 redistricting. How exactly does that work?
16 What's the time line on it?

17 GENERAL WALL: Well, here, the time
18 line's even easier than in a normal case because
19 the district courts have already decided the
20 merits. So I think this is going to move even
21 more quickly than this round of litigation,
22 which obviously only took a few months.

23 But you bring the -- you bring the
24 case, you get the order to the Secretary to --
25 to fix the report, and then the executive branch

1 would have the option of seeking review in this
2 Court. That could all play itself out fairly
3 quickly, I think.

4 JUSTICE KAGAN: Fairly quickly. Like,
5 what -- what -- what do you think it would play
6 itself out to?

7 GENERAL WALL: I think --

8 JUSTICE KAGAN: Like, when would the
9 end date be?

10 GENERAL WALL: I -- I -- it's -- I
11 couldn't say, Justice Kagan, because it depends
12 on when the report gets to the President, how
13 quickly the district courts enter relief, and
14 then the party that's, you know, aggrieved comes
15 up to this Court, but I would think a matter of
16 a few months.

17 JUSTICE KAGAN: Do you think that
18 given that you're uncertain when the report will
19 go to the President -- this goes back to the
20 Chief Justice's first question -- that there's
21 something to be said for not following the
22 expedate -- expedited procedures that -- that
23 you asked us to follow and just sort of keeping
24 this around in a normal way and you could tell
25 us whether expedition was necessary when you

1 knew?

2 GENERAL WALL: I think the problem,
3 Justice Kagan, is this is all fairly
4 fast-moving, and if the Court doesn't enter some
5 kind of relief, we would face a real prospect
6 that the Secretary would never be able to send
7 the report to the President, and the President
8 then wouldn't be able to turn around and send a
9 -- a report to Congress.

10 So, no, there's a live -- you know,
11 there's a live controversy between the parties
12 in -- in that sense, which is we want to be able
13 to have the President exercise his power, and
14 the injunction currently blocks us from doing
15 that. It's just no longer founded on some
16 injury to the appellees that is sufficient for
17 standing or ripeness purposes.

18 JUSTICE KAGAN: Thank you, General.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch.

21 JUSTICE GORSUCH: Good morning, Mr.
22 Wall. I'd -- I'd -- I'd like you, just to press
23 a little bit further, on what are the -- what
24 are the practical difficulties and -- and -- and
25 likelihood of actually being able to do the

1 matching process with respect to various
2 categories?

3 It -- it -- it seems like the one
4 common ground is the 10,000 or whatever number
5 it is currently in ICE detention is something
6 you think will -- will happen.

7 Beyond that, can you give us any sense
8 of the difficulties or likelihoods?

9 GENERAL WALL: I can't, Justice
10 Gorsuch. I -- I -- I -- the Bureau is working
11 very hard, but, as I say, until they actually do
12 the comparison, we just won't know how many
13 identifications we're able to make and whether
14 that stands to affect the apportionment.

15 JUSTICE GORSUCH: So is -- is -- is it
16 a reasonable -- reasonable prospect to think
17 that it would be limited to the number of
18 persons currently in ICE detention?

19 GENERAL WALL: I think that's
20 possible, but it is also very possible that they
21 will be able to do more. As I say, we just --
22 we don't know at this point.

23 I wish I could provide the Court with
24 more certainty. I can't. That's why we think
25 that the -- the Court should vacate the judgment

1 and not get into this.

2 But, if the Court disagrees, as I say,
3 I -- I would love an opportunity to turn to the
4 merits and talk about why I think they can't
5 satisfy either half of the usual resident test,
6 either the residency or the usual or settled
7 requirement.

8 JUSTICE GORSUCH: I -- I have a
9 question in a -- in an entirely different
10 direction. Your -- your colleagues on the other
11 side pointed in a footnote, I believe it was, in
12 their briefs, to the Federal Reports Elimination
13 and Sunset Act of nine -- in the 1990s, which
14 looks like it may have well repealed Section 2.

15 And so are we arguing over the meaning
16 of a statute that doesn't exist? I had hoped to
17 get some response from the government on that in
18 its reply brief but didn't see any. Perhaps I
19 missed it.

20 And what -- what is the government's
21 view about the status of Section 2? New York
22 suggests, well, maybe it is repealed, but to the
23 extent the government wishes to comply with the
24 repealed statute, it has to follow the repealed
25 statute's terms, as one response.

1 Another response is that -- that the
2 only thing repealed were reports and this is a
3 statement.

4 Does the government have any views on
5 any of that?

6 GENERAL WALL: Yes. In -- in our
7 view, it's not an annual, semi-annual, or other
8 periodic report covered by FRSA, the statement,
9 which is why, in 2001, in 2011, the executive
10 branch sent over the statement and the House
11 reapportioned as the statutes require. It's
12 never been litigated.

13 I'm -- I'm not aware if we've even
14 ever briefed it. But we have -- in our view,
15 there were various things on the clerk's list
16 that I think do -- clearly do not qualify as the
17 type of report covered by FRSA.

18 And in our view, this statement under
19 2a(a) is like those things. It's -- it's not a
20 other periodic report.

21 JUSTICE GORSUCH: What do we do about
22 the fact that it appears to be expressly
23 referenced by statute in -- in the -- in the
24 reports the President continues, the Decennial
25 Census report, Section 2a, right -- right there

1 listed?

2 GENERAL WALL: So, sorry, just to be
3 more clear, we don't think the language picked
4 up everything in the clerk's list because there
5 were things on the clerk's list that wouldn't
6 qualify. It only picked up things on the
7 clerk's list that said -- that qualify as an
8 annual, semi-annual, or other periodic report.
9 We don't --

10 JUSTICE GORSUCH: And periodic doesn't
11 include every 10 years?

12 GENERAL WALL: We don't think --

13 JUSTICE GORSUCH: Is that the -- is
14 that the government's view?

15 GENERAL WALL: We don't think the
16 other periodic report picks up the statement
17 which there's a deadline under this statute, but
18 it's not as if it has to go over at -- at some
19 set period or on a particular date every time.
20 So we don't think that statement qualifies.

21 JUSTICE GORSUCH: Okay. If -- if I --
22 if I were to disagree with you and think that
23 every 10 years does appear to be a regular
24 periodic report specified by -- by -- by -- on a
25 list, what -- what then?

1 GENERAL WALL: I suppose there'd have
2 to be supplemental briefing from the parties,
3 Justice Gorsuch. It's not jurisdictional.

4 JUSTICE GORSUCH: All right. All
5 right.

6 GENERAL WALL: And nobody's raised or
7 addressed it.

8 JUSTICE GORSUCH: Thank -- thank you,
9 Mr. Wall.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 And good morning, General Wall. You
15 -- you forcefully argue that there's too much
16 uncertainty, that the dispute will become a
17 concrete Article III controversy only after the
18 President transmits the statement. But I want
19 to button up some things on that to make sure
20 we're on the same page and follow up a bit on
21 what Justice Kagan was asking you.

22 First of all, you're not saying, as to
23 judicial review, not now, not ever. You're just
24 saying not now as I understand it.

25 But, as Justice Breyer indicated, the

1 posture of this will change after the President
2 transmits the statement, and there's a question
3 about injunctive relief against the President.

4 So I think you're saying that we can
5 assume, as the Court has before, that the
6 President would comply by a declaratory judgment
7 requiring him to transmit calculations that
8 include those non-citizens living -- living
9 unlawfully within the country if we were to
10 issue such an order after the President
11 transmits the statement. Is that accurate?

12 GENERAL WALL: Yes.

13 JUSTICE KAVANAUGH: Your argument for
14 waiting is based on uncertainty, uncertainty,
15 again, as Justice Kagan and the Chief Justice
16 and Justice Alito were asking about the numbers,
17 but one thing that was in the D -- D.C. opinion
18 of Judge Katsas, joined by Judge Friedrich, was
19 that it will be not possible to exclude all
20 non-citizens living in -- unlawfully in the
21 country because that would require the use of
22 sampling, is what the opinion said, and that the
23 memorandum, the Presidential Memorandum, rules
24 out the possibility of using an unlawful method.

25 Is that accurate, or what's your

1 response to that?

2 GENERAL WALL: We're not sampling.
3 This is what I was trying to say to Justice
4 Kagan earlier. We're taking the records from
5 the -- the -- the administrative agencies and
6 we're taking the data given by individuals with
7 respect to the census and we're comparing them.
8 We're literally trying to individually identify
9 people who are present in the United States in
10 violation of federal law.

11 And because we are not sampling and we
12 are doing this fairly cumbersome matching
13 process, it's just not clear what results we're
14 going to get or whether it's going to affect the
15 apportionment.

16 JUSTICE KAVANAUGH: Well, is it
17 possible to exclude -- is it possible to get the
18 information to exclude all non-citizens living
19 unlawfully in the country, or is it possible
20 only to get information as to subsets at this
21 point? You may not know the answer to that.

22 GENERAL WALL: No, the latter. It is
23 only possible -- the records will only cover
24 particular subsets.

25 JUSTICE KAVANAUGH: Okay. So it's not

1 possible to exclude all non-citizens living
2 unlawfully in the country, correct?

3 GENERAL WALL: No. If you took
4 somebody who crossed the border illegally, was
5 undetected, and did not participate in the
6 census, that person might not be found in any
7 administrative record, and they wouldn't be on
8 the other side of the ledger either because they
9 didn't participate in the census.

10 That person just would not be captured
11 by this process, not even arguably.

12 JUSTICE KAVANAUGH: And then, on the
13 question of ripeness or standing, our -- our
14 doctrine, as I see it, parts of the ripeness
15 inquiry are really similar, if not identical, to
16 parts of the standing inquiry if you look at the
17 phrasing in cases like Ohio Forestry on ripeness
18 and cases like Susan B. Anthony on standing.

19 The key point, I think, is that the
20 memorandum imposes no obligations on the
21 plaintiffs to do anything at that -- at this
22 point, unlike, for example, a typical agency
23 regulation that might, say, impose some duties
24 or requirements on the plaintiffs and we allow
25 pre-enforcement challenges.

1 We've called that lack of ripeness.
2 We've called that no standing. Do you think it
3 matters which we call it, and do you agree that
4 the two inquiries overlap on that particular
5 kind of analysis?

6 GENERAL WALL: Yes, there is
7 substantial overlap. We framed it as a
8 constitutional matter because we don't think
9 they satisfy the constitutional minima, but if
10 you thought they got the toe over that line,
11 then you'd get the same analysis, I think, as
12 the -- as Judges Katsas and Friedrich did as a
13 matter of prudential ripeness.

14 So I -- I agree that there is a lot of
15 overlap. And, obviously, under Steel Co. and
16 Senken, you can do prudential ripeness before
17 the merits because it's -- it's a threshold
18 doctrine. So nothing requires the Court to do
19 Article III rather than to do it as a prudential
20 matter.

21 JUSTICE KAVANAUGH: Thank you,
22 General.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett.

25 JUSTICE BARRETT: Good morning,

1 General Wall. I'm going to let you talk about
2 the merits for a minute here. You know, as
3 Justice Breyer said, a lot of the historical
4 evidence and longstanding practice really cuts
5 against your position. And, you know, there's
6 evidence that in the founding era, an inhabitant
7 was a dweller who lives or resides in a place.

8 You do have this Vattel quote that
9 defines an inhabitant as a -- distinguished from
10 a citizen, as a stranger who's permitted to
11 settle and stay in the country.

12 Do you think that Vattel quote is your
13 best evidence?

14 GENERAL WALL: Well, if you look only
15 at the founding, I think the Vattel quote is
16 good. I think Madison in Federalist 42, when he
17 talks about a state allowing you to become an
18 inhabitant, is fairly powerful.

19 And what I'd say is, look, there isn't
20 a lot of attention given to the specific
21 question of illegal aliens for the first half of
22 the country for obvious reasons, but the Court
23 does have to deal with the residence or dwelling
24 question in other statutes. And the answer it
25 consistently comes back with is, if you've

1 entered illegally, you are not treated as if
2 you're dwelling or residing here; you're treated
3 as if you're stopped at the border.

4 And the other side doesn't really have
5 any answer to why those cases shouldn't equally
6 apply here and say, look, if the test is usual
7 or settled resident, you're not thought to be a
8 resident, and even if you are, there's nothing
9 usual or settled about your residence if your
10 presence is violating federal law and the
11 sovereign hasn't agreed to let you stay.

12 JUSTICE BARRETT: But, if -- if an
13 undocumented person has been in the country for,
14 say, 20 years, you know, even if illegally, as
15 you say, why would some person not have a --
16 such a person not have a settled residence here?

17 GENERAL WALL: So take long-term
18 embassy personnel, so somebody who's worked at
19 an embassy for 15 or 20 years, Justice Barrett.
20 That person certainly has ties to the community,
21 and yet we have excluded them in some past
22 censuses because they're not the sort of ties,
23 just as with illegal aliens, that amount to
24 residence or dwelling or what Franklin calls
25 allegiance or an enduring tie.

1 And so too federal personnel overseas.
2 They're not residing here. They may spend years
3 at a time abroad, but we still think they have
4 the kind of tie that counts here.

5 And so I think -- I'm not disputing at
6 all that illegal aliens form ties to the
7 community in -- in the sense you're talking
8 about. But they're not the sort of ties that
9 are sufficient to qualify you within the
10 apportionment base because they don't count for
11 residence or dwelling within the meaning of
12 these federal statutes.

13 JUSTICE BARRETT: But you concede that
14 illegal aliens have never been excluded as a
15 category from the census?

16 GENERAL WALL: Well, yes, we have
17 taken account of alienage in certain ways
18 before, but, yes, and that's the best argument
19 on the other side. There is a historical
20 practice. And if we didn't have Franklin, it
21 could be tougher for us. But we know from
22 Franklin that the fact that you've got a fairly
23 unbroken practice doesn't necessarily mean it's
24 constitutionally compelled.

25 They need some evidence that that has

1 to be the rule as a constitutional or statutory
2 matter, and that's what they don't have. They
3 have a bunch of historical evidence that they --
4 that the founders and the framers of the
5 Fourteenth Amendment didn't want to limit it to
6 citizens or voters, completely agreed with --
7 with all of that.

8 But what they don't have is any
9 evidence that they specifically wanted to
10 include illegal aliens because they thought even
11 if you came here in violation of the law, you
12 were nevertheless an inhabitant. That's the
13 very question that in other contexts the Court
14 has answered in the negative by saying you're
15 not a resident.

16 JUSTICE BARRETT: So it's just been an
17 unexercised discretion; all along they could
18 have been excluded from the sentence -- census,
19 and the fact they had not been excluded before
20 doesn't mean the President can't make the choice
21 to do so now?

22 GENERAL WALL: Well, so too in
23 Franklin, Justice Barrett, but I guess I'd
24 qualify it a little bit. For the first half of
25 the -- the nation's history, the question

1 doesn't come up because you don't have federal
2 immigration restrictions. And for the second --
3 much of the second half, it doesn't matter
4 nearly as much as it matters now.

5 So, look, I'll certainly grant that no
6 President has made this judgment before. No
7 President's ever focused on it before. But I
8 think, in order to say, as in Franklin, that the
9 President can't do this, he can't include --
10 there, it was federal overseas personnel, even
11 though they hadn't been included for, you know,
12 a host of censuses, they need to point to
13 something in the text or the history that
14 clearly mandates that they be included in the
15 apportionment base.

16 And that's every illegal alien. It's
17 not the only -- only the ones you were talking
18 about that have ties to the community. It's
19 somebody who's apprehended at the border and in
20 an ICE detention facility, sometimes only for a
21 day or two, before being sent back to Mexico or
22 the northern triangle.

23 CHIEF JUSTICE ROBERTS: A minute to --

24 GENERAL WALL: They need --

25 CHIEF JUSTICE ROBERTS: -- a minute to

1 wrap up, General Wall.

2 GENERAL WALL: Thank you, Mr. Chief
3 Justice.

4 So, just as I was saying earlier, we
5 think that there are a handful of unknowns here:
6 what will be feasible for the Bureau to do,
7 whether the President will decide to exclude all
8 of the subsets that are feasible -- the
9 memorandum clearly indicates that the President
10 hasn't made that legal judgment; it's made a
11 policy call but not the legal judgment -- and
12 the effect on apportionment.

13 And as I said to Justice Kavanaugh, we
14 don't think it matters whether the Court labels
15 that under Article III or prudential ripeness,
16 but we're happy for the Court to disagree and go
17 to the merits because there is a fairly small
18 window of time here for the Court to decide the
19 merits. On the merits, they can't satisfy
20 either half of the test. They're not residents
21 and there's nothing settled about their
22 residence. And they've not offered any coherent
23 theory of political representation why all
24 illegal aliens should be included in the
25 apportionment base.

1 For those reasons, if the Court
2 reaches the merits, we think it should reverse
3 and uphold the memorandum.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General Wall.

6 General Underwood.

7 ORAL ARGUMENT OF BARBARA D. UNDERWOOD
8 ON BEHALF OF THE GOVERNMENT APPELLEES

9 MS. UNDERWOOD: Mr. Chief Justice, and
10 may it please the Court:

11 The Constitution and laws require the
12 seats in the House be apportioned according to
13 the number of persons in each state. The
14 President's new policy of refusing to count
15 people who are not in a lawful immigration
16 status is flatly inconsistent with that command.

17 Our laws reflect a deliberate choice
18 not to base apportionment on citizenship, voter
19 eligibility, or any other legal status but
20 instead to count the number of people living in
21 a state. That has always included people who
22 are ineligible to vote, including non-citizens,
23 and it has also included people who were present
24 in violation of law.

25 The memorandum treats counting people

1 as a reward to be withheld from states that
2 house undocumented immigrants. But our law
3 views counting people for apportionment as
4 finding fact, not giving and withholding
5 rewards.

6 The memorandum pretends that if under
7 the law a person should not be here, then the
8 person is not here. The government can do many
9 things to induce undocumented immigrants to
10 leave, but it cannot declare them to be gone
11 when, in fact, they're here and likely to
12 remain.

13 My friend says the policy must be
14 upheld because some undocumented immigrants
15 could be excluded from the count. Whether they
16 could is disputed, but, in any case, that would
17 not support this policy, which applies to all
18 undocumented immigrants and refuses to count
19 them solely on the basis of undocumented status.
20 As this Court recognized in *Shelby County*, an
21 unlawful policy can't be saved by the
22 possibility that a lawful policy could be
23 written.

24 The question here is whether a blanket
25 policy of not counting undocumented immigrants

1 is lawful, and it's not because undocumented
2 status alone doesn't tell us where a person
3 usually resides. This policy ignores the
4 undisputed fact that millions of undocumented
5 immigrants have lived here for decades and have
6 substantial community ties. Their undocumented
7 status doesn't erase their presence.

8 CHIEF JUSTICE ROBERTS: General
9 Underwood, could you tell me precisely what the
10 relief is that you seek? An order from the
11 Court saying what?

12 MS. UNDERWOOD: Well, an affirmance of
13 the injunction below, which was to declare the
14 policy invalid, in violation of law and the
15 Constitution as well, but the statute would do,
16 and an injunction against transmitting the
17 information about undocumented persons as part
18 of the report on which --

19 CHIEF JUSTICE ROBERTS: Well, that's
20 -- that's the precise issue I want to focus on.
21 It -- it -- it seems to me that you're asking
22 really for a gag order on the Secretary of
23 Commerce concerning his communications to the
24 President.

25 MS. UNDERWOOD: No --

1 CHIEF JUSTICE ROBERTS: Let's suppose
2 -- let's suppose that the Secretary conducts the
3 census and prepares the tabulation exactly as
4 you would have it and puts that in an envelope
5 to send to the President, but it also, in a
6 separate envelope, puts information on the
7 number of illegal aliens and he sends both of
8 those envelopes to the President.

9 Is that fine with you?

10 MS. UNDERWOOD: That does -- yes, that
11 does not violate the injunction. There is no
12 gag order to be placed on the Secretary of
13 Commerce. He can be asked for and respond with
14 all sorts of information.

15 But the 141 -- the -- the particular
16 statements and transmittals that are operative,
17 they aren't just the transmission of
18 information. They operate as steps in the
19 apportionment.

20 CHIEF JUSTICE ROBERTS: Well, but then
21 the President is --

22 MS. UNDERWOOD: Those the President
23 cannot --

24 CHIEF JUSTICE ROBERTS: -- the -- the
25 -- the President, I would assume, is then free

1 to report to the Congress information for the
2 apportionment, and he can -- it's okay, he can
3 do the math. He can take what the census that
4 the Secretary has transmitted, as you would have
5 it, and subtract the number of illegal aliens or
6 subcategories and use that information, can't
7 he?

8 MS. UNDERWOOD: Well, we are now at
9 the point where, if -- if you issued a
10 declaratory judgment saying that that policy is
11 unlawful, and my friend on the other side has
12 said the President would comply with such a
13 declaratory judgment, then the answer is, well,
14 he would have the information, and in principle,
15 he could use it. He couldn't issue a report to
16 Congress that was in violation of the
17 Constitution or law.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General.

20 Justice Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief
22 Justice.

23 General Underwood, I'm a little
24 confused. The -- did I understand you to say
25 that if the Census Bureau sent the information

1 in a separate envelope, that would be fine, at
2 least if -- if it was labeled not the 1 --
3 Section 141 report?

4 MS. UNDERWOOD: It would not -- yes,
5 it would not violate the law. It would be a
6 transmission of information.

7 JUSTICE THOMAS: So what does that
8 accomplish? Because I thought your -- your --
9 your major concern is the use of that
10 information by the President.

11 MS. UNDERWOOD: That's correct, that
12 -- the concern is that. And in the course of
13 directing the Secretary not to transmit this as
14 part of a report, this Court would presumably
15 also declare that the use of it was unlawful
16 without enjoining the President, because there
17 is that problem about injunctions against the
18 President.

19 JUSTICE THOMAS: So I'm trying to --
20 your -- so I -- your argument is that if it's
21 sent separately, it can't be used?

22 MS. UNDERWOOD: In the apportionment,
23 that's correct. It might be usable for many
24 other things, but not as part of the
25 apportionment.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer.

4 JUSTICE BREYER: Thank you.

5 General Underwood, I think, are there
6 not, many statutes which divide funds among the
7 states on the basis of population, and then they
8 say something like "as shown by the most recent
9 Decennial Census," and does that tie that to the
10 141(b) report? I think it does.

11 Do you know any -- are there not many
12 instances where it does?

13 MS. UNDERWOOD: There are many
14 instances where the distribution of funds is
15 talked -- is -- is -- has to be derived from the
16 census. I suppose we have an argument about
17 whether -- we would argue that if the
18 information is used in the census and in the
19 report that is sent to Congress, it also will
20 have an effect on the distribution of funds.

21 If the information is sent separately,
22 then --

23 JUSTICE BREYER: That's not what I'm
24 thinking of. I'm thinking of, suppose this
25 141(b) report has both the number of illegal

1 immigrants, the illegal aliens, and also the
2 total census. Okay. What do you use?

3 MS. UNDERWOOD: I don't think it can
4 have both. I -- the -- the --

5 JUSTICE BREYER: I know. But on the
6 -- I didn't think that was your theory. I
7 thought that's the government's theory.

8 MS. UNDERWOOD: Right. Right.

9 JUSTICE BREYER: So what happens under
10 their theory?

11 MS. UNDERWOOD: Well, I don't know
12 what happens under their theory. They have
13 sometimes said that a transmission of two sets
14 of numbers is all part of the 141(b) report, and
15 they have sometimes said it's separate. And I
16 don't know --

17 JUSTICE BREYER: Okay. If we both
18 don't know --

19 MS. UNDERWOOD: -- what we're to do.

20 JUSTICE BREYER: -- let -- let us go
21 to a different question, which is I'd like to
22 know what you have to say about Franklin versus
23 Massachusetts.

24 MS. UNDERWOOD: Well, Franklin/
25 Massachusetts, of course, said that the

1 Secretary has -- and the President have some
2 discretion, but it's not unlimited discretion.

3 Franklin recognized usual residents as
4 the test and then treated overseas government
5 workers like other situations recognized at the
6 founding, people absent from the state where
7 they have a residence and continuing ties and
8 intend to return. They think of themselves as
9 away from home. And Franklin recognized that
10 that situation was suitable for the exercise of
11 executive discretion.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MS. UNDERWOOD: There is no support in
15 that --

16 CHIEF JUSTICE ROBERTS: Justice --
17 Justice Alito.

18 JUSTICE ALITO: Thank you.

19 I have two questions that are
20 important to me. I hope I'm going to be able to
21 squeeze them both in in my time.

22 The first concerns your answer that it
23 would be fine for the Secretary of Commerce to
24 submit numbers that exclude illegal aliens if it
25 was done in a separate document.

1 Once you concede that, unless you are
2 asking us to overrule what Franklin said about
3 the President's directing the Secretary to
4 reform the census, then I don't really
5 understand where your argument is going.

6 Suppose the -- suppose the tables were
7 turned. Suppose the President wanted to count
8 every single person who was in the United States
9 on census day, but the Secretary of Commerce
10 took it upon himself to give the President
11 numbers that excluded every illegal alien.

12 Do you think the President would then
13 be unable to direct the Secretary of Commerce to
14 reform those numbers and make them comply with
15 the theory that the President accepted?

16 MS. UNDERWOOD: The President would,
17 under Franklin, have the ability to direct a
18 reformation of the census. There would be the
19 question -- the same question -- well, it would
20 be a different question.

21 There's always the question whether
22 that reformation is constitutional or not. You
23 know, it --

24 JUSTICE ALITO: Yeah. Well, that goes
25 to the substance of the -- of the issue, which I

1 do want to get to, but if the Secretary -- once
2 you concede that two documents are possible and
3 that the President can ask the Secretary to
4 reform the numbers that are sent to him, I don't
5 understand why there isn't a -- why -- why the
6 situation where both sets of figures are
7 submitted in a single document is any different?
8 It seems like a totally meaningless formality.

9 MS. UNDERWOOD: It's not a meaningless
10 formality in the sense that this is the moment
11 in the process when judicial intervention can
12 operate. The problem arises because once the --
13 the President -- because -- because of the
14 reluctance of the Court to enjoin the President.

15 So the injunction operates against the
16 Secretary and what he can transmit. And then
17 the President -- and -- and in telling the
18 Secretary what he can put in the -- in the 141
19 report, the Court will also be telling the
20 President what is lawful to use in his report to
21 Congress.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE ALITO: If I can -- if I can
25 move on to my second -- my second point. I want

1 to give you six categories of people and ask you
2 to answer yes or no, to the extent you can,
3 whether you think each of these -- people in
4 each of these categories must be counted for
5 apportionment purposes.

6 First category is a foreign diplomat
7 who is posted here for three years?

8 MS. UNDERWOOD: No, because he's --
9 for several reasons. Because he's --

10 JUSTICE ALITO: Okay. Well, he's a
11 no, all right. A tourist who's here on a valid
12 visa?

13 MS. UNDERWOOD: No.

14 JUSTICE ALITO: A tourist who
15 overstays her visa and is therefore here
16 illegally?

17 MS. UNDERWOOD: Well, that person is
18 now outside the realm of -- we expect them to
19 leave, and so that person is a resident like any
20 other undocumented person.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE ALITO: Chief --

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: General, I see
2 this as being very similar to Franklin because I
3 think you're arguing, and I think the Solicitor
4 General agreed, that the President has to use
5 only the numbers that are given to him by the
6 Secretary.

7 If the Secretary gives him illegal
8 numbers to exclude, then he can't use an outside
9 report to exclude those people from the
10 apportionment. Is that correct?

11 MS. UNDERWOOD: Cannot use -- he
12 cannot do an illegal report, yes. And -- and --

13 JUSTICE SOTOMAYOR: He can't use a
14 separate report. The tabulation has to provide
15 him with the numbers that he uses, correct?

16 MS. UNDERWOOD: Correct.

17 JUSTICE SOTOMAYOR: And so, if it is
18 illegal for him to exclude illegal aliens --
19 sorry for -- for -- for that -- then we can do
20 exactly what we said could be done previously,
21 which is to order the Secretary not to give the
22 President illegal numbers, correct?

23 MS. UNDERWOOD: Correct.

24 JUSTICE SOTOMAYOR: So that's your
25 point, which is, if he's going to tabulate and

1 exclude illegal aliens, we have to decide as a
2 matter of law whether the word "person," as used
3 in the statute and Constitution, who live here
4 permits the exclusion of illegal aliens,
5 correct? That's the legal question?

6 MS. UNDERWOOD: Correct.

7 JUSTICE SOTOMAYOR: If he later
8 decides that he wants a particular category of
9 people to be excluded who are illegal aliens,
10 then he gives a memo to the Census Secretary
11 earlier that says: This category, I think,
12 should not be here for these reasons.

13 And if the Secretary says, I'll give
14 you those numbers, then we would have an
15 identical Franklin decision where they could
16 come in and sue and say to the Secretary: No,
17 you shouldn't permit those illegal aliens, or
18 yes, you should, whatever the answer is,
19 correct?

20 MS. UNDERWOOD: Agreed, yes.

21 JUSTICE SOTOMAYOR: And that's what's
22 missing here, which is the President is asking
23 to exclude -- to give numbers on the category of
24 illegal -- illegal aliens that -- of any kind,
25 and some of those numbers legitimately cannot be

1 included; that's your argument, correct?

2 MS. UNDERWOOD: Yes.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: General Underwood, if
5 I could take you back to the standing question.
6 This is the way I understood what came out of
7 General Wall's minutes.

8 You -- the government has tons of
9 records on tons of people. I mean, we're not
10 just talking about ICE detainees. By the time
11 you think about DACA recipients and people in
12 removal proceedings and a number of other
13 categories, you easily get over 4 million
14 people.

15 But General Wall says that that's not
16 the problem. The problem is a matching problem.
17 And, essentially, the -- the Department has not
18 yet sort of gone through this process of trying
19 to match those numbers with the answers to the
20 census questionnaire.

21 Now I don't really quite understand
22 how that process works, so I'm wondering, if you
23 do, if you can tell me whether you think it's
24 credible that they, the Census Bureau, at this
25 point would not know approximately how many

1 people they'll be able to exclude of all the
2 people that they have administrative records on.
3 And I guess the second question would be, is
4 that what we should be focused on, or is that an
5 unimportant question?

6 MS. UNDERWOOD: Well, I am not a
7 master of the technology here. I do know that
8 there is a process by which matching occurs, and
9 I do not know -- I cannot opine on how
10 successful they will be.

11 I can only say that what we have is a
12 lot of evidence that they have a lot of numbers
13 available, that they are working as hard as they
14 can to do as much of this as they can, that
15 subtracting just some of that 4 million or so
16 from the count would be enough to take a seat
17 away from one or more states, and that
18 speculation at this point -- what we have on the
19 side of uncertainty is speculation.

20 We have repeated representations from
21 the Census Bureau and the Department of Justice
22 that -- and -- that they are -- they've been
23 working on this since July 2019, and they're now
24 starting to tell us about the categories that
25 they will be able to identify and match and

1 that, if there turns out to be a problem, there
2 isn't enough here to be the basis for any
3 judicial action. It's speculation that they
4 won't be able to do it at this point.

5 So it seems to me that it would make
6 sense, it might make sense, for this Court to
7 wait a couple of weeks and find out whether
8 there's more information that would shed some
9 light on this question.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE KAGAN: Thank you, General.

13 JUSTICE GORSUCH: Good morning,
14 Ms. Underwood. If it is a matter of speculation
15 whether they're going to be able to include or
16 exclude, why isn't that a standing problem or a
17 ripeness problem now, if -- if we must rule now?

18 MS. UNDERWOOD: Because it's a
19 substantial --

20 JUSTICE GORSUCH: As I understand it,
21 they can't use statistical sampling, so they're
22 going to have to match their detention records
23 or their docket records against the actual
24 enumeration in -- in -- in the census.

25 And at the present, they tell us that

1 they might not be able to -- to do more than
2 maybe the aliens in ICE detention facilities,
3 which would be in the tens of thousands and
4 perhaps not affect any apportionment at all.

5 MS. UNDERWOOD: Well, I think that
6 they're not saying they're only going to be able
7 to do ICE detention. They're saying that that's
8 a group they already know they'll be able to do
9 and that they're working feverishly to do the
10 same for other groups.

11 And we know from the last round of
12 census litigation that they have the ability to
13 do matching. Now I can't speak to the
14 technology of it, but they were quite confident
15 that they were going to be able to do matching.

16 So it seems to me that --

17 JUSTICE GORSUCH: But -- but,
18 Ms. Underwood, I guess -- my question is, you
19 know, you -- you -- you concede that it's
20 speculative as to how much they're going to be
21 able to do. And once we've -- once we're in
22 that world, then it's speculative whether
23 there's going to be any effect on the
24 apportionment. And -- and in that world, we
25 have a standing problem, don't we?

1 MS. UNDERWOOD: Well, I think that's
2 not quite the world we're in. I think we have a
3 substantial risk of injury. But all the
4 evidence until very recently was that they were
5 going to be able to do -- to implement the
6 Presidential Memorandum and that they are now,
7 just now, saying that they're not sure how fully
8 they're going to be able to do it.

9 So I think that's a substantial risk
10 of injury sufficient for Article III standing,
11 and I think there could be, as a matter of
12 prudence, some interest in waiting to get more
13 information since they seem to also be saying
14 there will be more information very soon.

15 But I think --

16 JUSTICE GORSUCH: Thank you.

17 MS. UNDERWOOD: -- we have Article III
18 standing. We have a substantial risk.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Thank you, Chief
23 Justice.

24 And good morning and welcome, General
25 Underwood. As Justice Barrett's questioning

1 illuminated, I think, you have advanced forceful
2 constitutional and statutory arguments on the
3 merits of a categorical exclusion of all
4 unlawful non-citizens. But I'm not sure that's
5 going to be the dispute, and so I want to
6 explore that.

7 If we said now, as you want us to say,
8 that the Secretary and the President cannot
9 exclude all non-citizens living here unlawfully,
10 suppose we say that, and then the President
11 excludes not all but some subsets, then we'll be
12 right back here with litigation, correct?

13 MS. UNDERWOOD: Well, I think that
14 what you would have is you would have
15 invalidated this policy and he couldn't act --
16 and the Secretary couldn't act pursuant to this
17 policy.

18 JUSTICE KAVANAUGH: But couldn't --

19 MS. UNDERWOOD: And he'd have --

20 JUSTICE KAVANAUGH: I'm sorry to
21 interrupt -- couldn't he then substitute a new
22 policy consistent with the decision on all by
23 saying we're going to exclude some subsets, and
24 then there will be litigation on that and we'll
25 be right back here, which is --

1 MS. UNDERWOOD: Perhaps. Perhaps. I
2 mean, now we're -- now we're speculating more
3 about what he might -- might do. I think that
4 --

5 JUSTICE KAVANAUGH: Well, I think it's
6 -- sorry to interrupt -- but I think the
7 Solicitor General has indicated it's going to be
8 very difficult, if not impossible, to exclude
9 all.

10 And I guess I'm wondering then, it
11 seems like part of this is -- and you -- you've
12 acknowledged this forthrightly -- is the
13 difficulty of an injunction against the
14 President if we wait to post-apportionment but
15 -- or post-transmission, but the President,
16 we've assumed in the past, would comply with a
17 declaratory judgment. We've said that. The
18 Solicitor General confirmed that today.

19 Does -- does that eliminate the
20 problem that has forced or encouraged you to
21 bring this litigation now?

22 MS. UNDERWOOD: Well, it could
23 mitigate it, but even, I mean, a declaratory
24 judgment action has to be addressed to somebody
25 who -- who can act. I don't think you -- we

1 would -- you would issue a declaratory judgment
2 action against the President.

3 And if the Secretary has already done
4 everything he's going to do, then it's not clear
5 exactly who the appropriate recipient of that
6 declaration is.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.

9 JUSTICE BARRETT: Good morning. I
10 have one question that's a follow-up to Justice
11 Kavanaugh's question, and that has to do with
12 the feasibility of counting all of these
13 categories of illegal aliens.

14 If, as General Wall said, the
15 President and the Secretary of Commerce are only
16 able to identify certain categories and, as
17 Justice Kavanaugh said, if that means that there
18 would be litigation on a case-by-case basis
19 about whether such categories should be in or
20 out, doesn't that cut in favor of waiting, that
21 maybe there's no injury here because we're not
22 really sure what the contours of the decision
23 would be?

24 MS. UNDERWOOD: Well, I -- I -- I
25 think I should just object to the idea that the

1 categories are so small that they won't make a
2 difference and that they would be litigated one
3 by one.

4 I -- I think that the policy that the
5 President articulated is as many as possible.
6 The memorandum -- while -- while Mr. Wall said
7 he was going to exercise -- the President would
8 exercise discretion after the information came
9 in, the memo says to the maximum extent of the
10 President's discretion.

11 So the policy is clearly not to
12 identify subcategories. It's to do as much as
13 possible. And the categories that are available
14 are just going to be whatever they can find.

15 And I think this Court can speak to
16 that policy now. Is it likely that they would
17 come back with other new policies? Perhaps. I
18 don't think -- that would always be true. I
19 don't think that's a reason not to decide the
20 question that's here now.

21 JUSTICE BARRETT: But what if -- what
22 if we say that he cannot categorically exclude
23 all illegal aliens? He says, fine, I'm not
24 going to do that. I'm going to count everyone
25 who's in an ICE detention facility, everyone

1 who's in removal proceedings, and maybe say all
2 DACA recipients. But I agree, you know, I have
3 reasons for thinking each of these don't satisfy
4 the inhabitancy requirement.

5 Wouldn't you just be back litigating
6 those specific issues?

7 MS. UNDERWOOD: Yes, I think we would,
8 yes.

9 JUSTICE BARRETT: Okay. Thank you.
10 My time's up.

11 CHIEF JUSTICE ROBERTS: A minute to
12 wrap up, General Underwood.

13 MS. UNDERWOOD: The Constitution and
14 law provide that House seats should be allocated
15 on the basis of total population. The framers
16 wanted a system that could not easily be
17 manipulated, so they decided to count just the
18 persons living in each state.

19 The policy here would for the first
20 time in this nation's history reject that
21 choice. People who live in a state without
22 lawful immigration status still live there.
23 They are not invisible. And, like other
24 residents, voting and non-voting, their presence
25 requires attention from the government and the

1 need for representatives to give that attention.

2 That is the rationale for -- one
3 rationale for including them. The decision to
4 refuse to count them has produced a live
5 controversy from the moment it was announced to
6 now.

7 This Court should resolve the
8 controversy and reject a policy that would
9 refuse to count millions of people who have
10 lived here for decades, have jobs, mortgages,
11 families, and community ties and reside in a
12 state under any reasonable interpretation of
13 those words.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 General.

16 Mr. Ho.

17 ORAL ARGUMENT OF DALE E. HO

18 ON BEHALF OF THE PRIVATE APPELLEES

19 MR. HO: Mr. Chief Justice, and may it
20 please the Court:

21 For 230 years, dating to the founding,
22 states have always held seats in the House
23 according to the number of persons in each state
24 without regard to immigration status.

25 Now, with respect to standing, the

1 test under Susan B. Anthony is whether there is
2 a substantial risk of injury. And past
3 experience shows that it's easy to risk changing
4 the apportionment.

5 In Utah versus Evans, according to the
6 parties' summary judgment briefs, the practice
7 of imputation added a total of 32,000 people in
8 North Carolina and 5,000 in Utah, and that
9 difference was enough to shift one seat from the
10 latter to the former.

11 We know that the numbers -- the
12 numbers here are much bigger. As Justice Kagan
13 pointed out, the government has information on
14 millions of undocumented immigrants. And
15 one-and-a-half years ago, when the President
16 issued an executive order in July of 2019, he
17 stated that the government could already match
18 citizenship records for 90 percent of the
19 population.

20 So there's substantial risk of injury
21 now, and it will be better to resolve this issue
22 now rather than in six months during the
23 redistricting process, which could be
24 disruptive.

25 CHIEF JUSTICE ROBERTS: Mr. Ho, what

1 is the problem with post-apportionment
2 litigation? Right now, as the questions have
3 shown, we don't know what the Secretary's going
4 to do. We don't know what the President is
5 going to do. We don't know how many aliens will
6 be excluded. We don't know what the effect of
7 that will be on apportionment.

8 All these questions would be resolved
9 if we wait until the apportionment takes place.
10 So why aren't we better advised to do that?

11 MR. HO: Well, I think waiting a
12 couple of weeks wouldn't be very disruptive, Mr.
13 Chief Justice, but the record establishes that
14 there's at least a substantial risk of a shift
15 in the apportionment now, which is enough for
16 standing.

17 And if the question is should the
18 Court wait now or send this back for another
19 round of expedited proceedings, then there are
20 many good reasons to decide this case now.

21 The government argued that waiting
22 would deprive the nation of prompt notice of
23 reapportionment, as required by statute, and
24 that it could be very disruptive to
25 redistricting processes in a number of states.

1 In Texas --

2 CHIEF JUSTICE ROBERTS: Well, waiting
3 a couple of weeks isn't going to give us much
4 more information than we have now. Waiting
5 until apportionment will give us all that
6 information that we -- we don't have.

7 MR. HO: I'm sorry, Mr. Chief Justice.
8 I did mean waiting the four weeks or so, maybe
9 four-and-a-half or five weeks, depending upon
10 when the apportionment report is delivered, to
11 see what those numbers look like. I'd agree
12 that that short of a wait wouldn't be
13 disruptive.

14 But, if we're talking about sending
15 this case back for additional proceedings in the
16 district court, another expedited appeal, and
17 doing this all over again over a period of
18 several months, then that would be, I think,
19 disruptive to ongoing redistricting processes.
20 In fact, the --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Yes, thank you, Mr.
25 Chief Justice.

1 Mr. Ho, if the additional information
2 would be beneficial in a few weeks, wouldn't it
3 be beneficial to actually resolving this case?

4 As the questioning seems -- seems to
5 suggest, there's some difficulty in assessing
6 exactly what information will be available and
7 what that information will be.

8 MR. HO: Well, Justice Thomas, the
9 challenge here is to a policy that broadly
10 mandates the exclusion of undocumented
11 immigrants to the maximum extent under law.

12 And the government's position is that,
13 under law, all undocumented immigrants may be
14 excluded. As Solicitor General Wall noted,
15 their view is that the entire category of
16 undocumented immigrants are not inhabitants.

17 So the Court is presented with a
18 facial challenge to a categorical policy. The
19 government's been free to issue a narrower
20 memorandum excluding one or more subgroups as
21 purported non-residents rather than taking aim
22 at undocumented immigrants writ large, and it
23 hasn't done that. It's the categorical policy
24 that's at issue, and it's unlawful.

25 JUSTICE THOMAS: Well, it -- I think

1 it would be the -- I think your argument would
2 be that the implementation of a categorical
3 policy would be unlawful, but what I'm hearing
4 is that we don't exactly know which category or
5 subcategory will be excluded.

6 MR. HO: Well, as I take Solicitor
7 General Wall's representations here, it's that
8 the government will exclude to the maximum
9 extent that's feasible and that's permitted
10 under law, and the government's view is that the
11 entire category of undocumented immigrants may
12 be excluded under law.

13 Even if we take the government's three
14 proposed subcategories of undocumented
15 immigrants who are supposedly per se excludable,
16 those categories are quite heterogeneous.
17 They're overbroad. I don't think that they are
18 all categorically non-inhabitant.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer.

22 JUSTICE BREYER: Thank you.

23 What do you think about excluding --
24 the -- the lawfulness of excluding just the
25 50,000 or so who are in ICE centers or under

1 final order to remove?

2 MR. HO: Well, Justice Breyer, the
3 population of people in ICE detention, as I
4 noted, is quite heterogeneous. Even under the
5 government's definition of inhabitant, many of
6 those people would qualify. You can be a lawful
7 permanent resident and be in ICE detention.
8 Even a person who is, say, detained at the
9 border, that person can apply for asylum. In
10 some years, more than half of asylum claims --

11 JUSTICE BREYER: So suppose you -- you
12 change it slightly and say we are going to
13 exclude, not count, people who are under a legal
14 order to remove.

15 MR. HO: Well, people under final
16 orders of removal can actually reside in the
17 country for quite a long time. They can
18 petition for review to courts of appeal. They
19 can seek other forms of relief. They can
20 challenge their orders collaterally. Some are
21 never actually deported even after going through
22 all of the -- those processes because their home
23 country --

24 JUSTICE BREYER: All right. So what
25 line would you draw between those whom they

1 could legally deport -- not count and those whom
2 they can't?

3 MR. HO: Well, the constitutional
4 standard, as this Court explained in Franklin,
5 is usual residence, and the plain meaning of
6 that term turns on whether or not someone
7 commonly resides in the United States. It
8 doesn't turn on their lawful immigration status.

9 Those -- that term, "usual residence,"
10 was defined at the founding as where a person
11 commonly lives or sleeps. That's in both the
12 Johnson and the Bailey dictionaries that we
13 cite. And if you look at the dictionary that
14 the government relies on, Webster's 1828, which
15 they rely on for the definition of inhabitant,
16 it defines residence as distinct from
17 nationality, offering the example of the
18 residence of an American in France or Italy for
19 a year.

20 So residence doesn't admit of
21 exclusions on the basis of lawful immigration
22 status. It turns on whether a person's physical
23 presence is transient or not.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: I'm going to try to

1 see if I can get you to answer Justice Breyer's
2 question. Last term, we had a case involving an
3 alien, Mr. Thuraissigiam, who crossed the border
4 unlawfully and was almost immediately
5 apprehended and then placed in detention.

6 Would he have to be counted?

7 MR. HO: Well, under the Bureau's
8 current residence rules, he would. But I -- I
9 just would note that the Court's holding in
10 Thuraissigiam, you know, was about whether or
11 not someone, you know, had entered for purposes
12 of --

13 JUSTICE ALITO: No, I understand that.
14 So is it your position that every single person
15 who is in -- every single alien who is in the
16 United States on census day must be counted?

17 MR. HO: I would say that every person
18 who is an alien in the United States under -- on
19 census day is subject to the same residence
20 requirements as anyone else who is a person
21 inside of a state.

22 If a United States citizen is usually
23 a resident abroad and is temporarily visiting
24 the country on April 1, on census day, to see
25 family or something like that, that person's not

1 counted in the census. I think the same would
2 apply --

3 JUSTICE ALITO: Well, you're saying
4 that for -- for each of these people, there has
5 to be a very specific -- a very fact-specific
6 determination about whether they -- whether they
7 are a resident or not. Is that administrable at
8 all?

9 MR. HO: Well, the rules that were
10 administered by the federal marshals in the
11 first census in 1790, Justice Alito, were to ask
12 whether or not a person usually resides at the
13 dwelling that's being visited. If not, where do
14 they actually usually reside? And if the person
15 has no stable residence, to count them simply
16 where they're found on April 1.

17 That's been the practice since the
18 founding. But I would agree, I just want to
19 make clear, I would agree that there is
20 discretion to make decisions on the basis of
21 residence, but the plain language of the
22 operative constitutional and statutory
23 provisions don't turn on lawful immigration
24 status. They turn on the facticity of a
25 person's residential circumstances.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Mr. Ho, I'd like
5 to follow up on the effect of waiting in this
6 case. Is -- is the waiting problem that the --
7 the census apportionment doesn't happen until
8 April 1, is that correct?

9 MR. HO: No, Justice Sotomayor. The
10 Commerce Secretary's report is due to the
11 President on December 31, and then the President
12 must submit a report to Congress within seven
13 days of the beginning of Congress's term.
14 That's either on January 10th or 11th. And then
15 the clerk of the House must, within 15 days of
16 that, send certificates to each of the states
17 notifying them how many seats in -- in Congress
18 each state can get.

19 So we're talking about --

20 JUSTICE SOTOMAYOR: So the
21 apportionment already begins once the report is
22 issued, and so we would have to unscramble the
23 egg --

24 MR. HO: I -- I think that's right.

25 JUSTICE SOTOMAYOR: -- to have -- all

1 right. Now can we go back to the -- the
2 question that seems to be at the nub of what
3 many of my colleagues are asking about, which is
4 can and should we rule that simply -- that not
5 counting illegal aliens because they're
6 undocumented, that that is a violation of the
7 statute and the Constitution? Is that enough
8 relief to you?

9 MR. HO: I -- I -- I think it is,
10 Justice Sotomayor, because the policy that we're
11 challenging is broad and -- and unequivocal.
12 We're bringing a facial challenge to it.

13 And the policy lacks a plainly
14 legitimate sweep. The vast majority of
15 undocumented immigrants qualify as usual
16 residents under any plausible interpretation of
17 that term, 66 percent --

18 JUSTICE SOTOMAYOR: Assume I even
19 agree with that, however. Could -- would that
20 just mean -- what does that mean practically?
21 Does the -- what does the Secretary do? He
22 doesn't send anything? How about if the
23 President comes back and says just send it to me
24 on these categories? What happens then?

25 MR. HO: Well, the injunction

1 prohibits merely the inclusion of information to
2 implement the existing Presidential Memorandum
3 in the Secretary's 141 report for apportionment.
4 It's not a gag order on the Commerce Secretary.
5 There's nothing that would prohibit the Commerce
6 Secretary from publishing various counts of
7 subcategories of undocumented immigrants on the
8 Internet. That's not something that's
9 prohibited by the injunction.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Mr. Ho, I guess I
12 would like you to -- to comment on -- on General
13 Wall's view of the feasibility of the matching
14 process, you know, whether you have any insight
15 into that, into how the process works, and --
16 and maybe as part of that, whether you have any
17 insight into the question of why it is that the
18 government knows now that it can do that
19 matching with respect to the ICE detainees but
20 isn't sure it can do that matching with respect
21 to categories of people for whom it has equally
22 good administrative records.

23 MR. HO: Well, Justice Kagan, I'm not
24 a social scientist, but here's what I know. In
25 July of 2019, the President issued an executive

1 order on the collection of administrative
2 records as they relate to citizenship, with one
3 of the goals being to ascertain the number of
4 undocumented immigrants in each state.

5 And the text of that memorandum states
6 that the Census Bureau at that time -- this was
7 in July of 2019, so about a year-and-a-half ago
8 -- the Census Bureau had determined based on
9 experience that administrative record to which
10 it already had access would enable it to
11 determine citizenship status for approximately
12 90 percent of the population.

13 So we know that the Bureau has a lot
14 of experience with matching. It can do it for
15 the vast majority of the population already.
16 That's with administrative records maintained by
17 the Social Security Administration and other
18 executive branch agencies.

19 They've been collecting more records
20 for the last year and a half. And, as Your
21 Honor noted, the -- the government has
22 information on millions of undocumented
23 immigrants. I think, when you add all of that
24 together, that's at least a substantial risk of
25 injury, because it doesn't take much to change

1 the apportionment. As Justice Breyer noted in
2 his opinion last year in the citizenship
3 question case, the difference of a few thousand
4 people in a state can mean the difference
5 between gaining or losing a seat.

6 JUSTICE KAGAN: Thank you, Mr. Ho.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch.

9 JUSTICE GORSUCH: Thank you, Chief.
10 No questions.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.

15 And good morning, Mr. Ho. First, I
16 want to make one point in response to something
17 General Underwood said, and I'm hope -- hoping
18 the Solicitor General can address this on reply,
19 about the declaratory judgment after
20 apportionment, who that would be addressed to
21 and how that would work. That's something that
22 I would appreciate more from the Solicitor
23 General on but not going to be able to ask at
24 that point.

25 As to -- as to you, I want to ask you

1 about your point that we should rule now because
2 the memo expresses the intent to exclude
3 non-citizens who are here unlawfully to the
4 maximum extent under law, is what you said, and
5 you quoted that a couple times.

6 You also referenced -- I think this is
7 important -- the memorandum says feasible. And
8 I think the argument has revealed, as did the
9 briefs, but the argument even more clearly, it's
10 going to be very difficult -- it's not going to
11 be particularly feasible to exclude all of the
12 non-citizens. We're going to be left with
13 categories.

14 How -- how do we think about
15 feasibility?

16 MR. HO: Well, the government's
17 identified three cat- -- subcategories of
18 undocumented immigrants, which -- in the -- in
19 the last few pages of their reply brief. So I
20 assume those are the ones that the government
21 thinks are the most feasible.

22 But each of those groups, I -- I
23 think, is overbroad. Those groups are
24 heterogeneous. And to exclude any of them would
25 violate constitutional and statutory commands.

1 There's people detained at the border, but, as I
2 mentioned, a lot of people --

3 JUSTICE KAVANAUGH: But --

4 MR. HO: -- who don't --

5 JUSTICE KAVANAUGH: I'm sorry to
6 interrupt, but could we --

7 MR. HO: Sorry.

8 JUSTICE KAVANAUGH: -- could we rule
9 to that effect now? We really haven't had
10 briefing and argument on the particular
11 subcategories.

12 MR. HO: I -- I'd agree that, to the
13 extent the government wants to rely on saving
14 this policy with respect, you know, by citing
15 one or two purportedly valid subcategories to
16 exclude, it would be better for this Court to
17 get full briefing on those categories. But
18 there's nothing that stops this Court from
19 ruling on the facial validity of this policy
20 because it plainly lacks legitimate sweep. It
21 applies broadly --

22 JUSTICE KAVANAUGH: And then -- and
23 then, in litigation in January, we would deal
24 with the subcategories? Is that how you foresee
25 this?

1 MR. HO: If that's what the President
2 ultimately ends up doing and issues a new
3 memorandum, I think that would be something
4 that, you know, we'd have to deal with one way
5 or another because the injunction in this case
6 that was issued by the district court doesn't
7 prohibit the exclusion of particular
8 subcategories under a different memo than the
9 blanket categorical one that's at issue in this
10 case.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett.

14 JUSTICE BARRETT: Mr. Ho, you -- do
15 you agree that there would be nothing wrong or
16 there would be no legal prohibition against the
17 President issuing a new memo articulating new
18 bases for excluding subcategories?

19 MR. HO: Well, the injunction in this
20 case doesn't so preclude the President, Justice
21 Barrett. I -- I -- I don't know if I would
22 commit to there being nothing wrong or it being
23 unlawful -- not being unlawful.

24 I -- I think that we would have to see
25 what the memo does, if it excludes people on the

1 basis of transient residence within the realm of
2 the President's discretion, as this Court held
3 in --

4 JUSTICE BARRETT: Let me -- let me
5 just clarify.

6 MR. HO: Yes.

7 JUSTICE BARRETT: I didn't -- I didn't
8 mean that the lawfulness of whatever the new
9 memorandum said would be determined. I just
10 meant that there would be nothing unlawful about
11 his switching positions and articulating a new
12 rationale for why certain categories of illegal
13 aliens were excluded.

14 MR. HO: In that hypothetical, Justice
15 Barrett, it wouldn't just be a new rationale.
16 It would be an entirely new policy with a -- a
17 different scope in addition to different
18 reasoning. So I --

19 JUSTICE BARRETT: He could do that,
20 right?

21 MR. HO: The injunction in this case
22 doesn't prohibit that, that -- that's right.
23 Now whether or not that particular policy would
24 be lawful, I think, would depend upon the --

25 JUSTICE BARRETT: It would be -- it

1 would be a different question. As you told
2 Justice Kavanaugh, that would be a bridge we
3 would have to cross later, right?

4 Like, if he said, listen, it's just
5 not feasible, we haven't been able to get the
6 information, so this is why we're going to
7 exclude those in ICE detention facilities, say?

8 MR. HO: Well, if the reason were
9 simply feasibility, but the basis for exclusion
10 were that they were undocumented and their lack
11 of lawful status, then I think that would run
12 into the same kind of reasoning that this Court
13 pointed to in Shelby County. It didn't matter
14 --

15 JUSTICE BARRETT: Right, but that --
16 but that -- excuse me, Mr. Ho -- but, in that
17 instance, you're saying that the policy itself
18 would be unlawful, but you're not taking the
19 position that he is precluded at this point from
20 changing positions and issuing a new policy, the
21 lawfulness of which would be a separate
22 question?

23 MR. HO: Yes, of course, that's right,
24 Justice Barrett --

25 JUSTICE BARRETT: Okay.

1 MR. HO: -- because the -- the -- the
2 injunction below, you know, is specific to the
3 policy that's been issued and its categorical
4 nature.

5 JUSTICE BARRETT: Thank you, Mr. Ho.

6 CHIEF JUSTICE ROBERTS: A minute to
7 wrap up, Mr. Ho.

8 MR. HO: In closing, Your Honors, no
9 court, no Congress, and no executive branch
10 before now has ever thought that undocumented
11 immigrants could be excluded from the whole
12 number of persons in each state.

13 In 1868, the Fourteenth Amendment
14 based apportionment on person, not citizens,
15 specifically to embrace the entire immigrant
16 population and to secure -- to secure
17 ratification by states with large immigrant
18 populations.

19 And in 1929, Congress mandated
20 apportionment on total population, the plain
21 meaning of which does not permit exclusions for
22 immigration status. While the President may
23 have some discretion in borderline cases, he
24 does not have authority to erase millions of
25 state residents from the apportionment based

1 solely on unlawful immigration status.

2 As the Latino justice amicus brief
3 notes, undocumented immigrants contribute \$1
4 trillion in GDP, \$20 billion in federal taxes.
5 Eighty percent are essential workers. One in
6 four are homeowners and pay property taxes.

7 They're our neighbors, our coworkers,
8 and our family members. They are usual
9 residents under any plausible definition of that
10 term.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, General Wall?

14 REBUTTAL ARGUMENT OF JEFFREY B. WALL
15 ON BEHALF OF THE APPELLANTS

16 GENERAL WALL: Thank you, Mr. Chief
17 Justice.

18 So, as I think appellees' responses
19 confirm, there's no live or ripe case now. So
20 they seem to accept that the Court should just
21 hold for a couple of weeks. But, as you said,
22 Mr. Chief Justice, by the time we actually run
23 the matching and have more information, the
24 Secretary will be ready to send his report.

25 This is all going to happen on an

1 extremely compressed time line in January. And
2 I don't think prudential ripeness should be used
3 to await a ripe claim that could run out the
4 clock on the President's opportunity to send a
5 statement to Congress.

6 On the merits, if the President can
7 consider immigration status for any subset, then
8 the Court needs to reverse the injunction below
9 and take just three categories: those in ICE
10 facilities, those who have committed crimes and
11 are subject to final orders of removal, and
12 those who have overstayed visas.

13 The President could decide that it's
14 consistent with his discretion, as the memo
15 says, to exclude those categories from the
16 apportionment base. And the question then is:
17 Do they have an enduring tie under Franklin?

18 They don't. They don't have a tie.
19 We know that from Kaplan. And even if they do,
20 it's not enduring because they can be removed.

21 The other side's test, which they
22 haven't spent a lot of time defending today, is
23 where you live or sleep most of the time. But
24 that doesn't fit long-term embassy personnel,
25 federal personnel overseas, even college and

1 boarding school students or members of Congress.

2 The test isn't just where you lay your
3 head at night. It is, as Franklin says, where
4 you have allegiance or an enduring tie.

5 And there's no coherent theory of
6 political representation that says every illegal
7 alien, no matter how little time they've been
8 here or no matter that they are imminently
9 facing removal, is a usual or settled resident.

10 It's the sovereign's prerogative to
11 define the political community, as Thuraissigiam
12 says, and the other side is left to say, look,
13 this is just what the founders wanted. But they
14 don't have an explanation for why the founders
15 would have wanted it, and that should give us
16 pause because, whatever the founders were, they
17 were not aimless people given to purposeless
18 structures.

19 The Court should vacate or reverse the
20 judgment and the other judgments in the other
21 cases and allow the Secretary to send his
22 report.

23 Finally, to you, Justice Kavanaugh,
24 that would open up the possibility of
25 post-apportionment litigation in the event that

1 there is an effect on apportionment or funding.
2 And if appellees prevail in that litigation on
3 the basis of whatever categories are excluded
4 and they then bring as-applied challenges, they
5 would be asking for the same relief as in
6 Franklin. They'd be asking for a declaratory
7 judgment against the Secretary of Commerce to
8 reform his Section 141 report. It would not be
9 a declaratory judgment against the President.
10 Franklin doesn't allow that.

11 But Utah tells us that we assume that
12 the President will comply with that judgment.
13 There's no reason to form a -- a -- a different
14 assumption here. The -- the President would
15 comply with a post-apportionment judgment.

16 In the event that litigation ever
17 happens -- again, we think there is a real
18 prospect that it will not -- but, if it does,
19 there is time enough for that to happen when you
20 have concrete injuries and you have a definitive
21 decision from the President on which groups will
22 be excluded from the apportionment base.

23 We ask that the Court vacate or
24 reverse the judgment here and the judgments in
25 the parallel cases.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General. The case is submitted.
3 (Whereupon, at 11:33 a.m., the case
4 was submitted.)
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