NO. 20-366

IN THE

Supreme Court of the United States

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

Appellants,

v.

STATE OF NEW YORK, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF *AMICI CURIAE* U.S. REPS. MORRIS JACKSON "MO" BROOKS, JR., BRADLEY BYRNE, AND ROBERT ADERHOLT IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Does the President possess the discretion to exclude illegal aliens from the apportionment of congressional seats following the decennial census?

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Morris Jackson "Mo" Brooks, Jr., is the United States Representative for Alabama's 5th congressional district. *Amicus Curiae* Bradley Byrne is the United States Representative for Alabama's 1st congressional district. And *Amicus Curiae* Robert Aderholt is the United States Representative for Alabama's 4th congressional district.

The State of Alabama currently has seven seats in the United States House of Representatives and nine votes in the Electoral College. If illegal aliens are counted in the apportionment base following the 2020 census, it is likely that one seat will be reapportioned away from Alabama to a state with a larger population of illegal aliens. Alabama would be left with six seats in the House and eight votes in the Electoral College. In contrast, if illegal aliens are not counted in the apportionment base, it is likely that Alabama will retain its seven seats in the House and nine votes in the Electoral College. *Amici* therefore have a direct interest in the outcome of this case, as it is likely to determine the number of seats their state will possess in the House and the number of votes their state will have in the Electoral College.

In 2018, *amicus* Representative Brooks, along with the State of Alabama, brought suit against the Secretary of Commerce, the Department of Commerce, the Census Bureau, and the Bureau's Acting

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, counsel for *amici* authored this brief. No counsel for a party in this case authored this brief in whole or in part. Only *amici* and their counsel contributed monetarily to the preparation and submission of this brief.

Director. *Alabama, et al. v. U.S. Dep't of Commerce*, *et al.*, 2:18-cv-772-RDP (N.D. Ala.). That suit—which is still pending in the Northern District of Alabama—relates directly to the question presented before this Court. Instead of challenging the President's Memorandum to exclude illegal aliens from the apportionment base, which had not yet been issued when the suit was commenced, *amicus* Representative Brooks and the State of Alabama contend that both the Constitution and the Administrative Procedure Act *require* such aliens to be excluded. The outcome of the instant case is likely to affect the outcome of that case, as well as the interests of *amici* and the State of Alabama as described above.

SUMMARY OF ARGUMENT

The Appellees in this case challenge the July 21, 2020, presidential memorandum excluding illegal aliens from the apportionment base following the 2020 decennial census. Their challenge would bind the President to violate the United States Constitution's guarantee of equal protection of the laws, gutting the principle of "one-person, one-vote." It also distorts the wording of Section 2 of the Fourteenth Amendment. The President not only has the discretion to exclude illegal aliens from the apportionment base, he also has an obligation to do so.

In its "one-person, one-vote" body of jurisprudence, this Court has repeatedly focused on the need, under the Constitution's Equal Protection Clause, to equalize the relative weight of each *voter*. Total population has in the past been an adequate proxy for the eligible voter population, but that is no longer true today. the

reasoning of this Court's prior cases requires that illegal aliens be excluded from apportionment base, in order that the votes of some citizens are not diluted when compared to the votes of others.

Such a conclusion is also fully consistent with, indeed compelled by, the text of Section 2 of the Fourteenth Amendment. The wording of that section militates strongly against the inclusion of illegal aliens in the apportionment base. A contrary reading of the Constitution would lead to unreasonable results that undermine federal law and provide perverse incentives to the States. Finally, the political understandings of the Founding period also support this reading.

ARGUMENT

I. Under this Court's "One-Person, One-Vote" Jurisprudence, it is Essential that Congressional Districts Contain Nearly-Equal Numbers of *Citizens* Eligible to Vote.

It is axiomatic that the districts of the United States House of Representatives are based on the principle of equal representation. As explained below, that principle gives rise to the rule that each representative's district should contain, as nearly as possible, an equal number of citizens who are eligible to vote. However, the significant increase in the number of aliens unlawfully present in the United States over the past five decades has impaired the equality of voter representation.

After more than five decades of massive illegal immigration, huge differences now exist in the distribution of the U.S. citizen population among the several states versus the distribution of illegal aliens among

the several states. Illegal aliens have disproportionately travelled to, and remained in, a relatively small number of states. In other words, the population of illegal aliens is both large and highly concentrated. The U.S. Department of Homeland Security (DHS) estimates that in 2015, a majority (52 percent) of the nearly 12 million illegal aliens lived in just four states: California, Texas, Florida, and New York. And 72 percent of illegal aliens lived in just ten states.[2] Consequently, the counting of illegal aliens in congressional apportionment skews the allocation of congressional seats dramatically. It also violates the principle of "one-person, one-vote."

To illustrate the problem using round numbers, consider one congressional district containing 710,000 U.S. citizens, and a second congressional district containing 355,000 U.S. citizens and 355,000 illegal aliens. In such a scenario, the voting strength of a citizen in the latter district would be exactly twice that of a citizen in the former district. The principle of "one-person, one-vote" would be shattered. Although the difference in voting strength is not always as dramatic as 2 to 1, the principle of "one-person one-vote" is offended wherever the counting of a large number of illegal aliens in apportionment results in a substantially smaller number of U.S. citizens in the district. This is the case in many congressional districts today. The presence of illegal aliens in some districts in-

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[2] Bryan Baker, "Estimates of the Illegal Alien Population Residing in the United States: January 2015," U.S. Department of Homeland Security, Office of Immigration Statistics, available at https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

creases the voting strength of citizens in those districts and dilutes the voting strength of citizens in other districts. A long line of precedents issued by this Court makes clear that the principle of equal representation is violated when the number of U.S. citizens in legislative district varies greatly.

Article I, Section 2 of the Constitution establishes that the "House of Representatives shall be composed of Members chosen every second Year by *the People of the several States*." U.S. Const. Art. I, § 2, cl. 1 (emphasis added). This language establishes that the House represents the people of the several States. And those people are to be represented equally. As this Court stated in *Wesberry v. Sanders*, "The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of *complete equality for each voter*." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (emphasis added).

In *Reynolds v. Sims*, this Court held "that the Equal Protection Clause guarantees the opportunity for equal participation by all *voters* in the election of state legislators," "[s]ince the achieving of fair and effective representation for all *citizens* is concededly the basic aim of legislative apportionment." 377 U.S. 533, 565-66 (1964) (emphasis added). Repeatedly throughout the opinion, this Court focused on the equal rights of *voters* and *citizens*. "Undeniably the Constitution of the United States protects the right of *all qualified citizens* to *vote*," it stated. *Id.*, at 554 (emphasis added). It spoke of the "right to vote freely" as "the essence of a democratic society. *Id.* at 555. And it reaffirmed its holding in *Baker v. Carr*, 369 U.S. 186 (1962), that a claim "that the right to vote of certain

citizens was effectively impaired since debased and diluted" "presented a justiciable controversy." *Id.* at 556 (emphasis added).

Additionally, relying on its prior decision in *Gray v. Sanders*, the *Reynolds* Court referred to the constitutional command that, when exercising "the voting power," "all who participate in the election are to have an equal vote...." *Reynolds*, 377 U.S. at 557-58 (quoting *Gray v. Sanders*, 372 U.S. 368, 379 (1963). It repeated the passage from *Gray* noting that the "concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications," again focusing on voters. *Id.* at 557-58.

Similarly, relying on its prior decision in *Wesberry v. Sanders*, the *Reynolds* Court stated that "the Federal Constitution intends that when qualified voters elect members of Congress *each vote be given as much weight as any other vote*…." *Id.*, at 559 (quoting *Wesberry,* 376 U.S. at 14 (1964)) (emphasis added). "[T]he constitutional prescription for election of members of the House of Representatives 'by the People,'" it added, "'means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.'" *Id.*, at 559.

This emphasis on equality in the number of "voters" or "citizens" in each district has been reiterated time and again in subsequent decisions by this Court. For example, when "calculating the deviation among districts," this Court noted in *Board of Estimate v. Morris* that "the relevant inquiry is whether 'the *vote of any citizen* is approximately equal in weight to that

of any other citizen.'" 489 U.S. 688, 701 (1989) (emphasis added, quoting *Reynolds,* 377 U.S., at 579). "The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds*, 377 U.S. at 565-68). "[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that *equal numbers of voters* can vote for proportionally equal numbers of officials." *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970) (emphasis added). "[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and ... the concept of equal protection therefore requires that their votes be given equal weight." *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977); *see also Bush v. Gore*, 531 U.S. 98, 105 (2000) ("It must be remembered that 'the right of suffrage can be denied by a debasement or *dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise'") (emphasis added, quoting *Reynolds*, 377 U.S., at 555). In sum, this Court has repeatedly recognized that the protection afforded by the "one-person, one-vote" principle is for "groups constitutionally entitled to participate in the electoral process." *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

To be sure, elsewhere in the *Reynolds* opinion, this Court spoke of "equal numbers of people." *Reynolds*, 377 U.S. at 561. "Legislators represent people, not trees or acres," it famously said. *Id*. at 562. It described the constitutional mandate as "one of substantial equality of population," noting that districts should be "apportioned substantially on a population

basis" and that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.* at 559, 577.

But with these references, the Court was treating "people" synonymously with "citizens," "voters," and "constituents." *See id.* at 577 ("We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or *citizens*, or *voters*") (emphasis added); *id.* at 562-63 ("the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of *constituents* is identical" to a scheme which gives some voters more votes than others); *see also Burns*, 384 U.S. at 91 ("At several points [in *Reynolds*], we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population"). This was undoubtedly due to the fact that, at the time, there was not a significant variation across districts between total population, citizen population, and voter population. *See*, *e.g.*, *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y. 1965) (noting that "a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State"), *aff'd*, 382 U.S. 4 (1965); *cf. Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa").

That is no longer true today. The total population is no longer distributed similarly to the population of illegal aliens. As explained above, DHS has estimated that the nearly 12 million illegal aliens have disproportionately traveled to a small number of states. As a result, the counting of illegal aliens in the apportionment base would result in severe inequalities in the number of U.S. citizens in each congressional district. The constitutional requirement of "one-person, one-vote" would be violated if illegal aliens were included in the apportionment base.

This Court in *Reynolds* described "equality of population" as a means to the end of equal voting power of citizens, not an end in and of itself. "[T]he overriding objective must be substantial equality of population among the various districts," the Court held, "*so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579 (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 744 (1973); *Mahan v. Howell*, 410 U.S. 315, 322 (1973); *Burns*, 384 U.S., at 91 n. 20; *Connor v. Finch*, 431 U.S. 407, 416 (1977). It described "population" as "*the starting point* . . . in legislative apportionment controversies." *Reynolds*, 377 U.S., at 568 (emphasis added). Although it also said that "population" was "the controlling criterion," it immediately thereafter referred again to "[a] citizen, a qualified voter," *id.*, and subsequently noted that its "discussion [in *Reynolds*] carefully left open the question what population was being referred to," *Burns*, 384 U.S. at 91. Moreover, the *Reynolds* Court explicitly held that "The Equal Protection Clause demands no less than substantially equal state legislative representation for *all citizens*." *Reynolds*, 377 U.S. at

568. "Weighting the votes of *citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable," the Court added. *Id.*, at 563.

Indeed, the *Reynolds* Court found it hard to imagine that the Founders would have countenanced a districting system that afforded differential weight to the votes of some citizens at the expense of others:

> We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would ... run counter to our fundamental ideas of democratic government….

Id. at 563-64 (quoting *Wesberry*, 376 U.S. at 8). And lest there be any confusion that by the word "inhabitants" the Court meant anything other than "citizens," it included a quotation from James Wilson's Lectures on the Constitution, in which Wilson described what was required for an election to be "equal":

> [A]ll elections ought to be equal. Elections are equal, when a given number of *citizens*, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

Reynolds, 377 U.S. at 564 n.41 (quoting *Wesberry*, 376

U.S. at 17, in turn quoting 2 The Works of James Wilson 15 (Andrews ed. 1896)).

In sum, by repeatedly focusing on "citizens" and "voters" as the object of the "one-person, one-vote" principle this Court has derived from the Equal Protection Clause, *Wesberry* and its progeny require that congressional apportionment be based on the number of citizen-voters, not the total "population" that includes aliens who are not lawfully present in the United States. That is why, in *Burns*—the only case in which this Court was presented with factual circumstances where the distribution of total population and voting population differed significantly from one district to the next—this Court upheld a districting plan with wide divergence in total population across districts, because the districts were approximately equal in the number of registered voters (which, in that case, was a close proxy for the eligible voter/citizen population). As Judge Kozinski has correctly noted, although "*Burns* does not, by its terms, purport to *require* that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so." *Garza*, 918 F.2d, at 784 (Kozinski, J., concurring and dissenting in part).

By exercising his discretion to direct the agency to exclude illegal aliens from the apportionment base, the President acted to ensure that the constitutional principle of "one-person, one-vote" is followed. It would be a strange outcome if this Court were to adopt the reasoning of Appellees and conclude that the President is *required* to violate this core constitutional principle.

II. The Inclusion of Illegal Aliens in Congressional Apportionment is Not Supported by the Constitution.

A. The Phrase "Whole Number of Persons" in the Apportionment Clause.

The Apportionment Clause found in the first sentence of Section 2 of the Fourteenth Amendment states: "Representation shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. Amend. XIV, § 2. Appellees may try to draw support from the phrase "whole number of persons," arguing that the "whole number" wording suggests using the largest possible count of total population existing at any moment in a State, including illegal aliens.

However, such a reading ignores the history of the Constitution. The phrase "whole number of persons" was used in express contrast to the "three-fifths of … Persons" phrase explaining how slaves were to be counted in the original text of Article I, Section 2. *See* U.S. Const. Art. I, § 2, cl. 3 (apportioning "Representatives and direct Taxes" "among the several States" based on "their respective Numbers . . . by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons").

The term "persons" in the Apportionment Clause does not refer to the total population of individuals who are physically present in the United States at any given time, but rather to members of "the people,"

meaning those "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Only members of the political community are "persons" for apportionment purposes. Although reasonable people may disagree as to whether or not a lawful permanent resident alien (or "green card" holder), who is entitled to live permanently in the United States, is a member of the political community, it is clear that the political community does not include those whose presence is expressly prohibited by federal law. They are foreign nationals whose presence is in defiance of federal law and who are subject to removal from the United States. The Executive Branch therefore not only has the discretion to exclude illegal aliens from the apportionment base, it also has the duty to do so.

Illegal aliens clearly do not form a part of "the people." *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (excludable alien "does not become one of the people ... by an attempt to enter forbidden by law"). Although illegal aliens may *desire* to remain in the United States, gain legal status through a future hypothetical amnesty, and become part of the political community established by the Constitution, membership in "the people" cannot rest simply an alien's subjective intent—it requires reciprocal agreement on the part of the people to accept an alien as a member of the political community. The people have a "broad power to define [the] political community." *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973). Congress has exercised this power on behalf

of the people by determining that aliens who are unlawfully present in the United States should be subject to removal.

This question of whether illegal aliens can be considered members of "the people" of the United States has been addressed directly in the Second Amendment context. This court explored the meaning of the phrase "the people" in the Second Amendment: "[I]n all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset. ... We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

The Fifth Circuit would later apply this Court's definition of "the people" to a case posing the question of whether illegal aliens could be considered members of the people, and therefore could enjoy the protections of the Second Amendment. The Fifth Circuit concluded correctly that they could not: "Illegal aliens are not 'law-abiding, responsible citizens' or 'members of the political community,' and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood." *United State v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (quoting *Heller*, 554 U.S. at 581); *see also United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("[I]llegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given.") If illegal aliens are not members of "the people" with respect to bearing arms, it

follows that the apportionment base should be similarly limited to members of the political community and should exclude illegal aliens. Indeed, the principle applies even more strongly with respect to the apportionment of representatives of the political community.

In the first section of Section 2 of the Fourteenth Amendment, "persons" is used in this more limited sense, referring to the "people" of the political community, rather than referring to all human beings present in a geographical area at any given time. It is also used interchangeably with the term "inhabitants," in the second sentence of Section 2. The term "inhabitants" is discussed more fully in subsection C., below.

B. The "Indians not Taxed" Exclusion.

The text of the Apportionment Clause excludes "Indians not taxed." U.S. Const. amend. XIV, § 2. "Indians not taxed" were excluded from the apportionment of representation (and of taxes) because they were not part of the body politic of the United States, instead owing their allegiance to their particular tribal governments. As this Court noted in *Elk v. Wilkins*, "Indians not taxed are ... excluded from the count, for the reason that they are not citizens." 112 U.S. 94, 102 (1884); *see also Cherokee Nation v. State of Ga.*, 30 U.S. 1, 42-43 (1831) ("If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers"). By contrast, Indians who "were taxed to support the government"—that is, were part of the body politic—

"should be counted for representation." *United States v. Kagama*, 118 U.S. 375, 378 (1886).

Thomas Jefferson used similar language in his proposal for Articles of Confederation, in the clause apportioning "All charges of war & all other expenses that shall be incurred for the common defense and general welfare," to the "several colonies in proportion to the number of inhabitants of every age, sex & quality, except Indians not paying taxes." Thomas Jefferson, Autobiography (1821), in Paul Leicester Ford, ed., THE WORKS OF THOMAS JEFFERSON, Vol. I:43-57 (1904), *reprinted in* Philip B. Kurland & Ralph Lerner, THE FOUNDERS' CONSTITUTION, Vol. 2, p. 87 (1987).

The exclusion of "Indians not taxed" would make no sense if the Apportionment Clause were intended to incorporate into the apportionment base all other persons who owe loyalty to another sovereign, since this was the ground on which Indians were excluded from the count in the first place. Thus, the constitutional text's exclusion of "Indians not taxed" should be understood as an expression of a broader principle that restricts representation in the House of Representatives to members of the political community. Illegal aliens similarly owe loyalty to another sovereign and should be excluded from the apportionment base.

What this demonstrates is that representation in the national government was not apportioned among the states based on total population, but only on that part of the population which comprises or becomes part of the body politic. *Cf. Foley v. Connelie*, 435 U.S. 291, 295 (1978) ("A new citizen has become a member

of a Nation, part of a people distinct from others" (citing *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 559 (1832)). Today, temporary sojourners, particularly those who are not lawfully present in the United States at all, stand in the same position with respect to representation in government as those "Indians not taxed" did at the time of the Founding. They owe allegiance to another sovereign, and are therefore no part of *this* body politic, no part of the "groups constitutionally entitled to participate in the electoral process" here. *Burns*, 384 U.S., at 92. To count them in the apportionment process, at least when they are unevenly distributed across districts, would dilute the votes of some portion of the body politic—of the citizenry—at the expense of another portion. That would violate the principle of *Reynolds*, the same principle to which the Framers of the Fourteenth Amendment gave effect by including in their reapportionment calculus only members of the body politic.

C. The Penalty for Disenfranchising Citizens and the Term "Inhabitants."

The Apportionment Clause is the first sentence of Section 2 of the Fourteenth Amendment. The second sentence runs to the end of the section. It contains a penalty that would be imposed upon any state that might attempt to disenfranchise certain groups of people otherwise entitled to vote:

> But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial

> officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, *the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State*.

U.S. Const. Amend. XIV, § 2 (emphasis added). The penalty imposed upon such a state was one that would occur through the apportionment process. Importantly, it would be imposed on the basis of the number of its *citizens*. This wording of the text suggest strongly that the Framers of the Fourteenth Amendment intended that aliens were to be excluded from the apportionment base. The idea was to penalize a state in proportion to the size of the state's disenfranchisement of its citizens.

Using round numbers to illustrate the point, suppose a state contains 10 million individuals, all of whom are citizens, and 40 percent of whom are nonwhite. That state enacts a law prohibiting all nonwhite citizens from voting. The penalty for doing so would be that state loses 40 percent of its representation in Congress. Now suppose that a different state contains 10 million individuals, of which half are aliens. Like the first state, 40 percent of the citizens are nonwhite. The second state enacts the same law, disenfranchising its nonwhite citizens. But if we were to count total population instead of citizen population,

the penalty would only be the loss of 20 percent of its representation in Congress, if aliens were counted in the apportionment of congressional districts.

It is highly unlikely that the Framers of the Fourteenth Amendment intended such an ironic result—that the presence of large numbers of aliens in a state would reduce the penalty to be imposed for disenfranchising its citizens. They were evidently intending that only citizens would be counted in the apportionment base. Otherwise this unreasonable result would occur. This fact lends further credence to a reading of the Apportionment Clause that not only *permits* the exclusion of illegal aliens in apportionment, but *requires* the exclusion of illegal aliens.

This section of the Fourteenth Amendment also offers important guidance as to the meaning of the terms "persons" and "inhabitants." Because the first sentence speaks of "persons," and the second sentence switches to "inhabitants" without any evident change in intended meaning, the implication is that the "persons" to be counted in apportionment are the same as the "inhabitants" of a state. As explained above, the use of the term "persons" in the first sentence was intended so that the phrase "whole number of persons" could be used to in contradistinction to the "three-fifths of ... persons" counting of slaves in the original Constitution. The use of the term "persons" in the first sentence was therefore not a reference to a total population beyond the "inhabitants" of a state.

The term "inhabitant" excludes those who do not reside, legally and permanently, in the country. At a

minimum, an inhabitant must have his or her primary residence in the United States and the legal right to reside here. In addition, the term "inhabitant" suggests permanence of residency in the United States, not a merely temporary period of stay. As this Court has held for nearly a century, an illegal alien who has been paroled into the country pending removal proceedings "never has been dwelling in the United States," in the eyes of the law. *Kaplan v. Tod* 267 US 228, 230 (1925). Nor can any other illegal alien claim to be a resident of the United States. "[A]n alien who tries to enter the country illegally is treated as an 'applicant for admission,' [8 U.S.C.] §1225(a)(1), and an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry,' *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982-83 (2020) (quoting *Zadvydas* v. *Davis*, 533 U. S. 678, 693 (2001)). For these reasons, an illegal alien—who has no legal right to remain in the United States—cannot plausibly be regarded as a resident or an "inhabitant" of the United States.

III. An Interpretation of the Apportionment Clause Compelling the Inclusion of Illegal Aliens Would Lead to Unreasonable Results.

A. Congressional Apportionment Would Include Individuals Whose Very Presence is Prohibited by Federal law

The text of the Apportionment Clause cannot be read in a way that is manifestly illogical or unreasonable. But that is precisely what Appellees ask this Court to do when they claim that the President must deem illegal aliens to be inhabitants of the United States and count them in the apportionment base.

Illegal aliens are, by definition, individuals whose very presence in the United States is a violation of federal law. They cannot possibly establish a legal habitation or residence in the United States when they are residing in the country in ongoing defiance of its laws. There is a "continuing violation of the law engendered by the alien's very presence in this country." *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 726 (9th Cir. 1986). Illegal aliens are under a legal obligation to depart the United States unless they fall into one of several small categories of illegal aliens granted a temporary reprieve before they must return to their country of origin.[3]

Federal law makes clear that illegal aliens are deportable, regardless of which specific law they violate. "Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) [8 USCS § 1201(i)], is deportable." 8

[3] For example, illegal aliens from a country granted Temporary Protected Status (TPS) because of a war or natural disaster in their country of origin are temporarily deemed lawfully present in the United States, under 8 U.S.C. § 1254a. They are also granted employment authorization, under 8 U.S.C. §§ 1254a(a)(1)(B) and (2). Their lawful presence lasts until the TPS is cancelled by the Secretary of Homeland Security pursuant to 8 U.S.C. § 1254a(b)(3)(B). Similarly, asylum applicants who enter the United States illegally may be granted temporary lawful presence and employment authorization in the United States until their applications are denied. 8 U.S.C. § 1158(d)(2). If their applications are granted, they retain their lawful presence and employment authorization.

U.S.C. § 1227(a)(1)(B). In addition, a nonimmigrant alien on a temporary visa has a legal duty to depart the United States at the end of his or her authorized period of stay. "Pursuant to 8 C.F.R. § 214.1(a)(3): At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay, or upon abandonment of his or her authorized nonimmigrant status." *LeClerc v. Webb*, 419 F.3d 405, 419 n.42 (5th Cir. 2005).

Moreover, the fact that an illegal alien has not yet been detained or removed by Immigration and Customs Enforcement (ICE) officers cannot be treated as tacit permission for the alien to reside in the United States. That is because *immigration officers are under an express legal obligation to place any illegal alien they encounter into removal proceedings*. In 1996, Congress acted to drastically limit the discretion that immigration officers might otherwise have with respect to the initiation of removal proceedings. Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (IIRIRA). "[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 483-84 (1999). Congress responded by statutorily restricting the discretion available to the executive branch. As a conference committee report in 1996 succinctly stated: "[I]mmigration law enforcement is

as high a priority as other aspects of Federal law enforcement, and *illegal aliens do not have the right to remain in the United States undetected and unapprehended*." H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.) (emphasis added).

To achieve its objective of maximizing the removal efforts of the executive branch, Congress enacted several interlocking provisions of law to *require removal when immigration officers encounter illegal aliens*. 8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a of this title." *Id.* (emphasis added). The proceedings under 8 U.S.C. § 1229a are the removal proceedings in United States Immigration Courts. "Congress's use of the word 'shall' in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.'" *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788, at *28 (N.D. Tex. Apr. 23, 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) ("Congress's use of the word 'shall' ... imposes a mandatory obligation"). Thus, ICE officers are statutorily bound

to initiate removal proceedings against those illegal aliens that they encounter.

An illegal alien's presence in the country constitutes ongoing defiance of federal law. He is not permitted to remain in the United States, unless it is during the pendency of his removal proceedings, under Temporary Protected Status, or under another narrow temporary status. And ICE officers are statutorily required to place illegal aliens into removal proceedings. Consequently, it would be legally incoherent to conclude that the President is required to deem illegal aliens to be legal residents (or inhabitants) of the United States.

In addition, it would be unreasonable to conclude that the President is required to deem illegal aliens to be inhabitants for a second reason—because the illegal aliens' very presence in the United States *is likely to end*. Whether by their own decision to comply with federal law and return to their country of origin, or by their arrest and removal by ICE, illegal aliens may very well be gone from the United States shortly after a census is taken. Indeed, in recent years, more than 400,000 illegal aliens left the country on their own volition annually,[4] and more than 250,000 illegal aliens

[4] An estimated 466,000 illegal aliens left voluntarily between 2016 and 2017; and an estimated 423,000 illegal aliens left voluntarily between 2015 and 2016. Robert Warren, "Sharp Multiyear Decline in Undocumented Immigration Suggests Progress at US-Mexico Border, Not a National Emergency," Table 1, Center for Migration Studies, available at https://cmsny.org/publications/essay-warren-022719/. An estimated 975,000 aliens total (illegal and legal combined) left the United States annually during 2017-2019. This number also includes removals. Steven A.

were removed by ICE.[5] The President certainly should not be compelled to count in the apportionment base those who are likely to depart the United States, whether it be voluntarily or involuntarily. Counting such aliens as inhabitants of the United States makes no more sense than counting as inhabitants tourists who are briefly in the United States or foreign diplomats who are stationed in the United States for a finite period of time.

B. The Inclusion of Illegal Aliens in Apportionment Would Give States an Incentive to Undermine Federal Law.

The reading of the Constitution urged by Appellees would also create perverse incentives for states (and local jurisdictions within those states) to undermine federal law. This is because the inclusion of illegal aliens in the apportionment base rewards those states with the greatest number of illegal aliens. Those states gain a greater number of representatives in Congress and a greater number of votes in the Electoral College. Because the number of members of the House of Representatives is fixed by statute at 435, it is a zero-sum game. *See* 2 U.S.C. § 2a(a). The states

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Camarota and Karen Zeigler, "New Census Bureau Data Indicates There Was a Large Increase in Out-Migration in the First Part of the Trump Administration," Center for Immigration Studies, n.1 (Oct. 22, 2020), available at https://cis.org/Camarota/New-Census-Bureau-Data-Indicates-There-Was-Large-Increase-OutMigration-First-Part-Trump.

[5] ICE removed 267,258 aliens in FY 2019 and 256,085 aliens in FY 2018. Immigration and Customs Enforcement, "ERO FY 2019 Achievements," (Feb. 24, 2020) available at https://www.ice.gov/features/ERO-2019.

that encourage illegal immigration gain at the expense of states that do not do so.

Unfortunately, many states, counties, and cities have decided that it is in their political interest to encourage illegal aliens to enter and remain within their boundaries, in violation of federal law. They have adopted so-called "sanctuary policies" that shelter illegal aliens from immigration enforcement officers. Sanctuary policies come in three forms: (1) policies prohibiting law enforcement officers from informing ICE of an alien's immigration status; (2) policies prohibiting law enforcement officers from asking an alien about his or her immigration status; and (3) policies prohibit law enforcement agencies from honoring ICE requests to detaining specific illegal aliens already arrested by the agencies so that ICE may take custody of such illegal aliens. In total, more than 300 state and local jurisdictions have adopted such sanctuary policies; and those policies have resulted in the release of approximately 1,000 illegal alien criminals per month onto the streets of American cities.[6] More generally, sanctuary policies make it more difficult for the federal government to enforce federal immigration laws.

In addition to encouraging lawlessness, many of the sanctuary policies *themselves* violate federal law. Sanctuary policies in the first category violate 8

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[6] Jessica M. Vaughan, "Number of Sanctuaries and Criminal Releases Still Growing: 340 sanctuaries release 9,295 criminals," Center for Immigration Studies (October 30, 2015), at https://cis.org/Report/Number-Sanctuaries-and-Criminal-Releases-Still-Growing.

U.S.C. § 1373, which Congress enacted in 1996. That statute bars state and local jurisdictions from "prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). The statute also requires the federal government to respond to any inquiry from a state or local jurisdiction about any alien's legal status. 8 U.S.C. § 1373(c). In 1996, the congressional authors of the statute evidently thought that state and local jurisdictions would obey federal law; they did not include any penalty to be imposed on jurisdictions that violated the law.

Neglecting to punish sanctuary jurisdictions is one thing. *Rewarding* sanctuary jurisdictions with additional seats in Congress and additional Electoral College votes is another thing altogether. But that is exactly what Appellees urge this Court to do. The President exercised his discretion to direct the Secretary of Commerce to exclude illegal aliens from the apportionment base. In so doing, his memorandum specifically pointed to the fact that sanctuary jurisdictions should not be rewarded with additional political power: "States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." 85 Fed. Reg. 44679, 44680 (July 23, 2020).

Rewarding such states would be a particularly bitter pill for *amici* to swallow. *Amici* each represent

the State of Alabama in the U.S. House of Representatives. Unlike such states that encourage the violation of federal immigration laws, Alabama is one of the states that has sought to bolster the federal government's efforts to enforce immigration laws. Alabama law prohibits its counties and cities from adopting sanctuary ordinances. Code of Ala. § 31-13-5. Alabama denies certain public benefits to illegal aliens, Code of Ala. § 31-13-7, which all states are required to do under 8 U.S.C. § 1621, but many states fail to do. And Alabama is one of only seven states that require all or almost all private companies to use the federal E-Verify system to verify the employment authorization of their employees. Code of Ala. § 31-13-15(b).[7] In short, Alabama has been a helpful partner of the federal government in its efforts to enforce federal immigration law. Indeed, Alabama has been one of the most supportive states in the Union in that regard. For Alabama to lose a congressional seat to a state that has defied federal law and impeded federal law enforcement, precisely *because* that state has defied federal law, would be shocking and unjust.

IV. The Political Theory of the Founding Fully Supports the Exclusion of Illegal Aliens from Congressional Apportionment.

Finally, it should be noted that documents of the Founding period also support the reading of the Constitution permitting the President to exclude illegal aliens from the apportionment base. At the very beginning of the Declaration of Independence, the

[7] The seven states are Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee.

Founders announced to the world that "one people"—the American people—were "dissolv[ing] the political bands" that had previously "connected them with another" people. Decl. of Ind. ¶ 1. They then articulated a set of principles that, though universal in their reach, provided the rationale for that particular "one people" legitimately to declare independence and to institute a new Government that they believed would be more conducive to their safety and happiness. The key to their philosophic claim was the self-evident truth of human equality, and the corollary truth which flows from it, namely, that governments derive "their just powers from the consent of the governed." *Id.*, ¶ 2.

Combining those two basic ideas—that earthly governments are not universal in their reach but rather are created by particular subsets of people, and that in order to be legitimate, they must be based on the consent of those they would govern—it becomes evident that the "one-person, one-vote" principle articulated by this Court must necessarily be tied to "the people" who form the body politic, not to some undifferentiated total population that includes those who are not part of the body politic. Citizens are "the people" who give the government legitimacy by their consent. They are the people who are the ultimate sovereign in *this* county and whose votes should not be diluted when compared to other citizen-voters who happen to live in districts with a significantly larger number of aliens living illegally in their midst. The opening language in the Constitution further demonstrates that the "one-person, one-vote" rule should be based on the population of citizens, not a total popu-

lation that includes illegal aliens. The preamble begins with "We the People of the United States," for example, not the people of the world, or any foreign nationals who happen to be in the United States when a census is taken. U.S. Const., Preamble.

During the Constitutional Convention of 1787, this conception of "the people" as the citizenry was prominent, as seen in the comments of James Wilson, who would later sit on this Court. "Mr. Wilson contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. ... No government could long subsist without the confidence of the people." Max Farrand, The Records of the Federal Convention of 1787, Vol. 1, 37 (1911). The "people" from which legislators would be drawn were the body politic, namely the citizens. After the Convention, James Madison wrote in the Federalist Papers that, "The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people." James Madison, Federalist No. 39. The "great body of the people" was the voters who would be electing members of the House of Representatives. The Framers of the Constitution undoubtedly would have considered the notion that illegal aliens should be considered part of "the people" and therefore counted in the apportionment base completely untenable.

CONCLUSION

For all of the above-stated reasons, the district court's judgment compelling the Executive Branch to count illegal aliens in the congressional apportionment base is inconsistent with the Constitution and should be set aside.

Respectfully submitted,

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