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 *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

The U.S. Constitution provides that "[r]epresentatives 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. To effectuate this provision, Congress has provided that "the President shall transmit to Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and the total number of Representatives to which each State would be entitled" according to a Congressionally designated method of apportionment. 2 U.S.C. § 2a(a).

The President has issued a Memorandum declaring "the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44679, 44680 § 2 (July 23, 2020). The Memorandum further directs the Secretary of Commerce to "take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum." *Id.* at § 3.

QUESTIONS PRESENTED—Continued

The questions presented are:

1. Whether the relief entered satisfies the requirements of Article III of the Constitution;* and

2. Whether the Memorandum is a permissible exercise of the President's discretion under the provisions of law governing Congressional apportionment.

* *Amicus* does not address this question in this Brief.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National Congress of American Indians ("NCAI") is the Nation's oldest and largest organization of American Indian and Alaska Native Tribal governments and their members. Since 1944, NCAI has served to educate the public, and Tribal, Federal, and State governments, about Tribal self-government, treaty rights, and policy issues affecting Indian Tribes and their members. *Amicus* has a substantial interest in ensuring that the unique political and legal status of Indian Tribes and their members is not mischaracterized for political gain. In addition, American Indians once were forced to defend their very personhood against a Federal Government that argued they were not persons; *amicus* cannot stand idly by while others argue that unauthorized immigrants—actual, living, breathing *persons*—are not "persons" under the law.

[1] All parties have given consent to the filing of this brief. In accordance with Rule 37.6 of the Rules of the Supreme Court, *amicus* certifies that its counsel authored this brief; no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT[2]

First, *amici* Congressmen Brooks, et al. and *amicus* Alabama note that "Indians not taxed" are expressly excluded from the apportionment count, and argue that unauthorized immigrants likewise should be excluded. Of course, unauthorized immigrants are not "Indians not taxed," and so do not fall within the text of the exclusion. In addition, *amici* Congressmen Brooks, et al. and Alabama show a profound misunderstanding of the reasons that "Indians not taxed" were excluded from the apportionment count, and their analogy is inapt.

Second, multiple *amici* argue that unauthorized immigrants are not "persons"[3] as that word is used in the Apportionment Clauses. These arguments are impossible to square with the Constitution's text and history. *Amicus* Alabama, *amicus* Eagle Forum, and *amici* Congressmen Brooks, et al. argue that the word "persons" in the Apportionment Clauses encompasses only citizens and other members of the nation's body politic.

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[2] *Amicus* agrees with the Government Plaintiffs and Organization Plaintiffs on the statutory arguments, and limits this Brief to responding to certain constitutional arguments raised by *amici* in support of the Federal Government Defendants.

[3] For all of its genius, the Constitution also is maddeningly inconsistent when it comes to capitalization. For example, the original Apportionment Clause refers to "Persons," while the subsequent Apportionment Clause refers to "persons." *Compare* U.S. CONST. art. I, § 2, cl. 3, *with* U.S. CONST. amend. XIV, § 2. Privileges and immunities are extended to "Citizens" at the Founding, and later to "citizens." *Compare* U.S. CONST. art. IV, *with* U.S. CONST. amend. XIV, § 1. With the exception of this footnote, this Brief capitalizes or lower cases according to contemporary norms.

This argument cannot be squared with the Constitution's text, which consistently differentiates between the expansive category of "persons" and the more limited category of "citizens." Even those held in slavery—who were by no means members of the body politic—were consistently referred to as "persons" in the Constitution. In addition, *amici* Congressmen Brooks, et al. and *amicus* Alabama argue that because "corporate persons" are not counted for apportionment, unauthorized immigrants can also be excluded. The law frequently distinguishes between corporate persons—which are legal fictions born of convenience—and actual persons. Unauthorized immigrants are actual—living, breathing—persons, and cannot be excluded from the count.

ARGUMENT

I. The exclusion from apportionment of "Indians not taxed" does not warrant the exclusion of unauthorized immigrants.

Amici Congressmen Brooks, et al. and *amicus* Alabama argue that the Framers excluded from apportionment Indians not taxed because such Indians "were not part of the body politic of the United States, instead owing their allegiance to their particular tribal governments." Congressmen Brooks, et al. Br. at 15; Alabama Br. at 8. They then infer that the Indian exclusion "should be understood as an expression of a broader principle that restricts representation in the House of Representatives to members of the political

community." Congressmen Brooks, et al. Br. at 16; Alabama Br. at 8. In the words of Congressmen Brooks, et al., "those who are not lawfully present in the United States . . . stand in the same position with respect to representation in government as those 'Indians not taxed' did at the time of the Founding," and should not be counted for purposes of apportionment. Congressman Brooks, et al. Br. at 17.[4]

This argument is inconsistent with the Constitution's text, relies upon cherry-picked authority that actually says the opposite of what the *amici* argue, and misapprehends the status of "Indians not taxed" at the Founding and at ratification of the Fourteenth Amendment.

A. The Constitution's text does not support excluding unauthorized immigrants from the apportionment count.

As originally drafted, the Constitution contemplated two types of persons for purposes of apportionment. First were "free persons," which included "those bound to service for a term of years," the whole number of whom was counted for apportionment. U.S. CONST. art. I, § 2, cl. 3. "Indians not taxed" also were free persons,[5] but their numbers were expressly excluded from

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[4] *See also* Alabama Br. at 9 ("Indians not taxed were part of their *own* political communities, and thus were not part of 'the People' guaranteed representation.") (emphasis in original).

[5] *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 42-43 (1831) ("If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole *free Indian*

apportionment calculations. U.S. CONST. art. I, § 2, cl. 3. The second category was "all other persons," of whom only three-fifths were included for apportionment. The Fourteenth Amendment repealed the odious three-fifths provision, providing for apportionment based on "the whole number of persons in each State," but preserving the exclusion of "Indians not taxed." U.S. CONST. amend. XIV, § 2.[6]

This Court "interpret[s] the Constitution in light of its text, purposes, and 'our whole experience' as a nation." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 557 (2014) (internal quotation and citation omitted). In this case, the Constitution's text cannot bear the argument that *amici* Congressmen Brooks, et al. and *amicus* Alabama advance.

The Constitution's plain text excludes from apportionment only "Indians not taxed." The Constitution does not define "Indians not taxed," and that language was not debated at the Convention; however, the phrase is understood to mean "tribal Indians living on reservations." AKHIL REED AMAR, AMERICA'S

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population of all the states would be included in the federal numbers, coextensively with the boundaries of all the states, included in this union.") (Baldwin, J., concurring) (emphasis added).

[6] The Civil Rights Act of 1866, enacted just months before the Fourteenth Amendment was proposed, likewise excluded "Indians not taxed" from birthright citizenship, which otherwise extended to "all persons born in the United States and not subject to any foreign power." An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27 (1866).

CONSTITUTION: A BIOGRAPHY 439 fn. (2005).[7] At the risk of stating the obvious, unauthorized immigrants are not "Indians not taxed."

Because "Indians not taxed" are the only "persons" that the Constitution excludes from apportionment, and unauthorized immigrants are not "Indians not taxed," the President's attempt to exclude unauthorized immigrants from apportionment is inconsistent with the Constitution's text and history and, therefore, *ultra vires*.

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[7] Amar's use of the word "reservations" is an anachronism, at least with respect to the Founding era, as "that word had not yet acquired such distinctive significance in federal Indian law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461 (2020).

However, his distinction between "tribal Indians" and assimilated Indians is accurate. After the Fourteenth Amendment extended citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof," U.S. CONST. amend. XIV, § 1, Indians "who did not belong to a tribe were now all citizens and had the same rights as everyone else." GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 119 (2007).

The "Indians not taxed" exclusion ultimately was rendered moot when Congress conferred birthright citizenship on all Indians born within the United States. An Act to authorize the Secretary of the Interior to issue certificates of citizenship to Indians, Pub. L. 68-175, 43 Stat. 253 (1924).

B. The authority cited by *amici* Congressmen Brooks, et al. and *amicus* Alabama actually supports including unauthorized immigrants in the apportionment count.

The only support that *amici* Congressmen Brooks, et al. and *amicus* Alabama can muster for their argument is a cherry-picked quotation from *Elk v. Wilkins*, 112 U.S. 94 (1884), a case that goes on to entirely defeat the *amici*'s argument. This Court in *Elk*, discussing the Fourteenth Amendment's change in the apportionment base, wrote that "Indians not taxed are still excluded from the count, for the reason that they are not citizens." *Id.* at 102. Both *amici* Congressmen Brooks, et al. and *amicus* Alabama point to this passage to build their argument that persons who are not part of the body politic should be excluded from the apportionment count. Congressman Brooks, et al. Br. at 15; Alabama Br. at 9. But the very next sentence in *Elk* wholly refutes their attempt to sweep unauthorized immigrants – or anyone else, for that matter—within the "Indians not taxed" exclusion. The Court noted the "absolute exclusion" of Indians "from the basis of representation, *in which all other persons are now included*. . . ." *Elk*, 112 U.S. at 102 (emphasis added). Because unauthorized immigrants are not "Indians not taxed," they are among "all other persons [who] are now included" in the apportionment count.

Thus, the Congressmen's argument is inconsistent not only with the Constitution's text, which excludes from apportionment only "Indians not taxed" and no

other persons, but also with this Court's understanding of that text.

C. Attempts to compare unauthorized immigrants to "Indians not taxed" misapprehend Indian law and are inapt.

Congressmen Brooks, et al. argue that unauthorized immigrants "stand in the same position with respect to representation in government as those 'Indians not taxed' did at the time of the Founding," Congressmen Brooks, et al. Br. at 17. However, their argument fails to account for the unique status of Indians and Indian Tribes, both at the Founding, and when the Fourteenth Amendment was ratified.

Neither unauthorized immigrants, nor any other persons, "stand in the same position" as do Indians. This Court has, for almost 200 years, recognized that

> the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the supreme court of the United States: and yet, having the right of self government, they, in some sense, form a state. In the management of their internal concerns, they are dependent on no power. They punish offences under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers, gives to them a distinct character as a people. . . .

Worcester v. Georgia, 31 U.S. 515 (6 Pet.), 581 (1832); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) (recognizing "the unique status of Indians as a separate people with their own political institutions") (internal quotation omitted). An important aspect of Indians' unique relationship with the United States is the lengthy history of treaties and statutes by which Congress "manifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Worcester*, 31 U.S. at 557; *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . .").

Thus, the status of "Indians not taxed"—at Founding, when the Fourteenth Amendment was ratified, and today—has always been entirely distinct from that of other foreign nationals (authorized or not) in the United States. "Indians not taxed," or "tribal Indians living on reservations," AMAR, *supra*, at 439 fn., were *both* non-citizens *and* living within their Tribes' sovereign territories, where "[i]n the management of their internal concerns, they are dependent on no power. They punish offences under their own laws, and, in doing so, they are responsible to no earthly tribunal." *Worcester*, 31 U.S. at 581. The States had no authority within the Tribes' lands. *See generally id.* The United States' criminal jurisdiction in Indian country at that time was limited to "offences committed by Indians against white persons and by white persons

against Indians . . . and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs." *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883). In contrast, other non-citizens in the United States, both those authorized to be here and those not so authorized, both historically and in the present, have always been subject to all of the laws of the Federal Government and the States.

The Fourteenth Amendment was drafted with Indians' unique status in mind. Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 518 (2008) ("Reconstruction Republicans also used *Worcester* as an interpretive guide for the Fourteenth Amendment."). Representative John Bingham, a fervent advocate of birthright citizenship, nevertheless excluded tribal Indians "not because they were unfit for citizenship, but because tribes had been 'recognized at the organization of this Government as independent sovereignties. They were treated as such; and they have been dealt with by the Government ever since as separate sovereignties.' " Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1175 (2010) (quoting CONG. GLOBE, 37th Cong., 2d Sess. 1640 (1862)). By the time the Fourteenth Amendment was drafted, this Court's decision in *Worcester* had been effectively nullified by Jacksonian politics and the removal of the Cherokee and other Eastern Tribes. MAGLIOCCA at 69-73, 94-96. The Fourteenth Amendment's Framers wanted not only to extend citizenship

to newly freed African-Americans, but also to "restore the authority of *Worcester*." Magliocca at 521.

This understanding of the Fourteenth Amendment belies the characterization of the "Indians not taxed" language put forward by *amici* Congressmen Brooks, et al. and *amicus* Alabama. The Fourteenth Amendment did not exclude "Indians not taxed" from apportionment merely because such Indians were not citizens. *See* Congressmen Brooks, et al. Br. at 15; Alabama Br. at 9. Rather, "the drafters excluded the Tribes because they felt that this was the best way to maximize Native American rights." Magliocca at 521; *see also* Berger at 1171-79.

In the end, any attempt at "comparing illegal immigrants with original native-born inhabitants is conceptually incoherent and leads to an interpretive dead-end." Magliocca at 502.

II. Unauthorized immigrants are "persons" for purposes of the Apportionment Clauses.

Multiple *amici* argue, in effect, that unauthorized immigrants are not "persons" to be counted for purposes of apportionment. Because the United States once tried to argue that American Indians were not "persons" under the law, *amicus* NCAI is compelled to refute these arguments.

Multiple *amici* argue that the word "persons" in the Apportionment Clauses is a reference to "the people" who constitute the body politic and, because

unauthorized immigrants are not part of that body politic, they are not a part of "the people" and, therefore, not "persons." Louisiana, et al. Br. at 8-9; Congressmen Brooks, et al. Br. at 12-13; Immigration Reform Law Institute Br. at 4; Dr. John S. Baker, Jr., Br. at 20-31; Alabama Br. at 8-11; Eagle Forum Br. at 4-5; Citizens United Br. at 6-8. Separately, *amici* Louisiana, et al. argue that "in no census have the terms 'numbers' and 'whole persons' been construed to apply to *all* persons," noting by example that "corporate persons have never been counted, even if they happen to be physically present within a State at the time the census data are collected." Louisiana, et al. Br. at 8-9 (emphasis in original).

These arguments are inconsistent with the Constitution's text and history. Worse still, in a nation where "all persons are created equal," *Matthews v. Lucas*, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting), *see also* Declaration of Independence ¶ 2 ("We hold these truths to be self-evident, that all men are created equal. . . ."), these attempts to deny the very personhood of unauthorized immigrants are morally bankrupt.

A. American Indians know all too well the sting of being told that they are not "persons."

In 1879, the United States tried to deny Standing Bear and 25 of his fellow Ponca Indians the right to petition for a writ of habeas corpus on the basis that

Indians were not "persons" under the law. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879).

The Ponca had lived in what is now northeastern Nebraska since at least the mid-1700s, claiming a territory along the western bank of the Missouri River, bounded on the north by the White River, on the South by the Platte River, and extending west to the Black Hills and beyond. DAVID J. WISHART, AN UNSPEAKABLE SADNESS: THE DISPOSSESSION OF THE NEBRASKA INDIANS 6, 13 (1994); *see also* STEPHEN DANDO-COLLINS, STANDING BEAR IS A PERSON: THE TRUE STORY OF A NATIVE AMERICAN'S QUEST FOR JUSTICE 11 (2004). By treaty ratified in 1858, the Ponca ceded most of their territory in exchange for cash, a reservation between the Niobrara River and the Ponca River, and other consideration. Treaty between the United States and the Ponca Indians, 12 Stat. 997 (1858). A few years later, the Ponca exchanged the western reaches of their reservation for additional lands to the east. Supplemental Treaty between the United States of America and the Ponca Tribe of Indians, 14 Stat. 675 (1865). They hoped that this would be their permanent homeland, but it was not to be.

By the mid-1870s, federal officials began to consider moving the Ponca to Indian Territory, in what is now Oklahoma. WISHART at 207. The Ponca initially expressed willingness to consider the move, but ultimately resolved to stay on their reservation. *Id*. In 1876, Congress appropriated $25,000.00 "for the removal of the Poncas to the Indian Territory," with

removal contingent upon "the consent of said band." An Act making appropriations for the current and contingent expenses of the Indian Department, and fulfilling treaty-stipulations with various Indian tribes, for the year ending June thirteenth, eighteen hundred and seventy-seven, and for other purposes, Pub. L. 44-289, 19 Stat. 176, 192 (1876). The Indian Office, however, had no intention of seeking, much less obtaining, the Poncas' consent. WISHART at 208. Ultimately, the Poncas "were forced to leave . . . because the government decreed it." *Id.* at 202.

The Poncas' march was brutal, and their new homeland inhospitable. "Entire families were wiped out; children would become ill and die within a day; they died so fast that there was not time to bury them, and they were taken out into the prairie and left." *Id.* at 211. Of approximately 581 Poncas who removed to Indian Territory, 158—more than one in four—died either on the march or within a year of their arrival, "and a great proportion of the others were sick and disabled." *Standing Bear*, 25 F. Cas. at 698; JOE STARITA, "I AM A MAN": CHIEF STANDING BEAR'S JOURNEY FOR JUSTICE 111 (2008). Standing Bear's son, daughter, mother-in-law, and grandmother-in-law were among the dead. WISHART at 210-11; STARITA at 95, 103-04.

As 1878 drew to a close, Standing Bear and 30 others resolved to return to their homeland in Nebraska. WISHART at 211. In the opening days of 1879, they left the Indian Territory, "living on one dollar a day and the kindness of settlers," Standing Bear bearing the bones of his son so that he could be buried in his homeland.

Id. at 211-12; *see also* STARITA at 106; DANDO-COLLINS at 44-45. On their journey, they avoided other Indian reservations, so as not to draw the attention of Indian Office agents. STARITA at 109; DANDO-COLLINS at 45. In March, after more than two months on the road, the Poncas arrived at the reservation of their friends the Omahas. WISHART at 212; DANDO-COLLINS at 46.

Federal officials found the Poncas' return unacceptable. Indian Commissioner Ezra Hayt wrote to Interior Secretary Carl Schurz that "discontented and restless or mischievous Indians cannot be permitted to leave their reservation at will and go where they please." STARITA at 127. Interior sent General George Crook to arrest the Poncas and return them to the Indian Territory. WISHART at 212. But Crook himself saw his arrest of the Poncas as unjust, DANDO-COLLINS at 53, and the general recommended that Standing Bear petition the courts to order his release. STARITA at 158. Standing Bear petitioned for a writ of habeas corpus. *Standing Bear*, 25 F. Cas. at 695.

At the time, federal law provided that "the several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." An Act to amend "An Act to establish the judicial Courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine, 14 Stat. 385 (1867).

Whether Indians detained by the Army for return to their reservation could seek a writ of habeas corpus was a question of first impression. *Standing Bear*, 25 F. Cas. at 697 ("this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court"); STARITA at 126 ("In the 103-year-history of the United States, no writ of habeas corpus had ever been filed on behalf of an American Indian.").

The United States challenged the jurisdiction of the court to grant the writ. DANDO-COLLINS at 117. Why? Because "whatever the precise wording of the act, . . . only American citizens were entitled by law to be granted a writ of habeas corpus in a federal court. . . . And so, Indians had no more rights in a court of law than beasts of the field." *Id.*

> [A]gain and again, [District Attorney Genio Lambertson's] arguments circled back to one central theme, the foundation of his case: The Indian—as far as the law was concerned—was neither a citizen nor a person, and so he could not bring a suit of any kind against the government of the United States.

STARITA at 145; *see also Standing Bear*, 25 F. Cas. at 696 (the United States argued that "none but American citizens are entitled to sue out this high prerogative writ in any of the federal courts"). In other words, "persons" meant "citizens." And because Indians were not "citizens," *see* Part I.B, *supra*, Indians were not "persons."

It was then—as it is now—an outrageous proposition.[8] "That man is not a human being?" asked Standing Bear's attorney, Andrew Jackson Poppleton, calling the argument "a libel upon religion." STARITA at 150. But the most persuasive rebuttal came from Standing Bear himself, who stood to address the court, his words translated by Bright Eyes (who also was known as *In-shta-the-amba* and Susette La Flesche, and was the sister of Susan La Flesche), his hand extended toward Judge Elmer Scipio Dundy on the bench:

> "That hand is not the color of yours." He paused, allowing Bright Eyes, to render his words in English, then resumed. "But if I pierce it, I shall feel pain." Again he waited for the translation. "If you pierce your hand, you also feel pain," the Ponca chief went on. "The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both."

DANDO-COLLINS at 128; *see also* STARITA at 151.[9]

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[8] Susan La Flesche (she was Omaha, Ponca, Oto, and Iowa), who later would become the first American Indian woman to earn a medical degree, expressed shock and outrage at the United States' argument that Indians were not even persons. "Then what *are* we?" she is said to have exclaimed. MARION MARSH BROWN, HOMEWARD THE ARROW'S FLIGHT: THE STORY OF SUSAN LA FLESCHE [DR. SUSAN LA FLESCHE PICOTTE] 7 (Rev. ed. 1995).

[9] *Compare* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE Act III, Scene 1 ("I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you

Judge Dundy was utterly unpersuaded by the United States' argument, and his thoughtful opinion bears quoting at length:

> Now, it must be borne in mind that the habeas corpus act describes applicants for the writ as 'persons,' or 'parties,' who may be entitled thereto. It nowhere describes them as 'citizens,' nor is citizenship in any way or place made a qualification of suing out the writ, and, in the absence of express provision or necessary implication which would require the interpretation contended for by the district attorney, I should not feel justified giving the words 'person' and 'party' such narrow construction. The most natural, and therefore most reasonable, way to attach the same meaning to words and phrases when found in a statute that is attached to them when and where found in general use. If we do so in this instance, then the question cannot be open to serious doubt. Webster describes a person as 'a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race.' This is comprehensive enough, it would seem to include even an Indian. . . . I must hold, then that Indians, and consequently the

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prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die?"). Historian Stephan Dando-Collins reports that Standing Bear "had never heard of Williams Shakespeare, never read or witnessed a performance of *The Merchant of Venice*," and that his speech was "all of his own creation, without any contribution from his white friends." DANDO-COLLINS at 128.

relators, are 'persons,' such as are described by and included within the laws before quoted. . . .

Every 'person' who comes within our jurisdiction, whether he be European, Asiatic, African, or 'native to the manor born,' must obey the laws of the United States. Every one who violates them incurs the penalty provided thereby. When a 'person' is charged, in a proper way, with the commission of a crime, we do not inquire upon the trial in what country the accused was born, nor to what sovereign government allegiance is due, nor to what race he belongs. The questions of guilt and innocence only form the subjects of inquiry. An Indian, then, especially off from his reservation, is amenable to the criminal laws of the United States, the same as all other persons. They being subject to arrest for the violation of our criminal laws, and being 'persons' such as the law contemplates and includes in the description of parties who may sue out the writ, it would indeed be a sad commentary on the justice and partiality of our laws to hold that Indians, though natives of our own country, cannot test the validity of an alleged imprisonment in this manner, as well as a subject of a foreign government who may happen to be sojourning in this country, but owing it no sort of allegiance. I cannot doubt that congress intended to give every person who might be unlawfully restrained of liberty under color of authority of the United States, the right to the writ and a discharge thereon. I conclude, then, that, so far as the issuing of

> the writ is concerned, it was properly issued, and that the relators are within the jurisdiction conferred by the habeas corpus act.

Standing Bear, 25 F. Cas. at 697. "With a stroke of his pen, Judge Dundy had done something unprecedented: He had not only granted the hearing, but had declared for the first time in the nation's history that an Indian was a person within the meaning of U.S. law." STARITA at 157.

Journalist and professor Joe Starita writes that Standing Bear's victory resonates with the Ponca still today: "Even now, more than a century and a quarter later, it is a story the people have never forgotten, one they continue to think about, and to celebrate, a story they have passed down from one Ponca generation to the next." STARITA at 161. Ponca elder Deborah Robinette told Starita that Standing Bear's victory gives Ponca children the strength to stand up for themselves:

> "Because of him, they can say: 'I'm somebody, too. I'm a person. I'm a human being, just like everyone else.' He was the first one who gave us a right to say that. It's the most powerful legacy we have. And it's one that I want my little great-grandson to know all about."

Id.

It is this legacy that animates *Amicus* NCAI, which cannot stand idly by while *amici* in support of the President seek to resurrect the notion that some

disfavored class of persons—this time, unauthorized immigrants—are not persons.

B. Simplistic attempts to limit the enumeration of "Persons" to members of the body politic are wholly inconsistent with the Constitution's text.

Here is how *amicus* Alabama explains the argument: The Constitution sometimes uses the phrase "the people" to define an individual right, as in the Second Amendment. Alabama Br. at 10 (citing *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)). The Apportionment Clauses do the inverse, using the word "Persons" to refer only to "members of the political community." *Id.* Thus, the only "Persons" to be counted are members of the political community. *See also* Congressmen Brooks, et al. Br. at 28-30; Eagle Forum Br. at 4-5.

Judge Dundy would not have accepted such sophistry, which is impossible to square with the Constitution's text. The Constitution consistently distinguishes between "persons," which is used inclusively and expansively, and "citizens," which is used more narrowly.

The Fourteenth Amendment, which contains the Apportionment Clause, illustrates this well, by providing that all "persons" count for apportionment, and that States will be punished for denying "citizens" the right to vote. The first Section provides that: "All *persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the

United States and the State wherein they reside." U.S. CONST. amend. XIV, § 1 (emphasis added). In other words, there is an expansive category of "persons," only some of whom will qualify by birth as "citizens." The next section provides both that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of *persons* in each State, excluding Indians not taxed," and also that "when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, *and citizens of the United States*," such State's representation shall be reduced proportionately. U.S. CONST. amend. XIV, § 2 (emphasis added). This pattern repeats throughout the Constitution.[10]

Equally telling is that every time the Constitution refers to an individual's right to vote, it uses the term "citizen" and not "person." Thus, a State that denies the right to vote to its "citizens" shall have its representation proportionately reduced. U.S. CONST. amend. XIV, § 2. Neither the Federal Government nor any State may deny or abridge the right of "citizens" to vote on the basis of race, or sex, or the failure to pay a poll tax, or age (so long as that citizen is at least 18 years of age). U.S. CONST. amends. XV, XIX, XXIV, XXVI. If, as

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[10] *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (a "person" may be a Representative only if that person has been "seven years a citizen"); U.S. CONST. art. I, § 3, cl. 3 (a "person" may be a Senator only if that person has been "nine years a citizen"); U.S. CONST. art. II, § 1, cl. 6 (a "person" may be president only if that person is "a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution").

amici urge, the use of the word "persons" in the Apportionment Clauses refers only to members of the body politic, then one might reasonably expect that some other section of the Constitution would use the word "person" in the same way. None do.

In fact, the Constitution frequently uses the word "person" in ways that none would expect to be limited to "citizens" or members of the body politic. An arrest warrant must describe with particularity "the persons . . . to be seized." U.S. CONST. amend. IV. Generally speaking, no "person" may be charged with a major crime "unless on a presentment or indictment of a grand jury"; nor may a "person" be subjected "for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. States must provide to "any person" both due process and equal protection. U.S. CONST. amend. XIV, § 1. *Amici* supporting the President offer no reason to believe the Framers intended the word "person" to mean one thing in some sections, and something else in other sections. Yet under their reasoning, unauthorized immigrants may be denied these fundamental rights because they are not members of the body politic and, therefore, not "persons."

Most fatal to this argument are the Constitution's most odious sections—those that refer to chattel slavery. Of course, the Constitution spoke in euphemisms: distinguishing "free persons" from "other persons" in the original Apportionment Clause, U.S. CONST. art. I,

§ 2, cl. 3; barring Congress from prohibiting, but allowing Congress to tax, the "migration or importation of such persons as any of the States now existing shall think proper to admit," U.S. CONST. art. I, § 9, cl. 1; and providing a remedy should a "person held to service or labour in one State, under the laws thereof, escap[e] into another." U.S. CONST. art. IV, § 2, cl. 3. Surely even *amici* supporting the President would not argue that persons held in chattel slavery were members of the body politic—and yet, the Constitution consistently included those held in chattel slavery within the category of "persons." So how can that category fail to include unauthorized immigrants?

Judge Dundy knew the answer. Interpreting a statute that was enacted in 1867—between the proposal (1866) and the ratification (1868) of the Fourteenth Amendment, he held that the word "person" was not limited to "citizens," but rather extended to all living human beings. *Standing Bear*, 25 F. Cas. at 697.

C. The exclusion from the apportionment count of "corporate persons" and other legal fictions cannot justify the exclusion of unauthorized immigrants, who are actual, living, breathing persons.

As Judge Dundy observed, scarcely a decade after the Fourteenth Amendment was ratified, "Webster describes a person as 'a living soul, a self-conscious being, a moral agent, especially a living human being; a man, woman or child; an individual of the human race.'" *Standing Bear*, 25 F. Cas. at 697. Judge Dundy also

recognized that federal law sometimes "declares that the word 'person' includes copartnerships and corporations." *Id.* True enough. "That corporations are, in law, for civil purposes, deemed persons, is unquestionable." *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826). But as well-established as this truism is, it also is a "legal fiction." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 706 (2014). At the risk, once again, of stating the obvious: corporate persons *are not actual persons*. Our Nation merely finds it convenient to treat them as persons for some circumstances; in other circumstances, we do not. *Clinton v. City of New York*, 524 U.S. 417, 454 (1998) (Scalia, J., concurring in part) ("Congress treats individuals more favorably than corporations and other associations all the time.").

Amici Louisiana, et al. are most certainly correct that "corporate persons have never been counted, even if they happen to be physically present within a State at the time the census data are collected." Louisiana, et al. Br. at 9. But *amici* Louisiana, et al. offer no reason to think that this nation's 230-year history of refusing to base apportionment on legal fictions offers any justification for omitting any actual persons.

Because unauthorized immigrants are actual persons, and because they do not fall into the only category of actual persons expressly excluded from the apportionment count ("Indians not taxed"), the Constitution commands that unauthorized immigrants be enumerated for apportionment.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Congress of American Indians joins the Plaintiffs in respectfully urging the Court to affirm the decision of the District Court.

Respectfully submitted,

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