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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA;**
11 **SAN JOSE DIVISION**

12 CITY OF SAN JOSE, et al.,

13 Plaintiffs,

14 v.

15 DONALD J. TRUMP, in his official capacity
16 as President of the United States, et al.,

17 Defendants.

Case No. 5:20-cv-05167-LHK-RRC-EMC
Case No. 5:20-cv-05169-LHK-RRC-EMC

**BRIEF OF AMICI CURIAE HISTORIANS
IN SUPPORT OF PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

18 STATE OF CALIFORNIA, et al.,

19 Plaintiffs,

20 v.

21 DONALD J. TRUMP, in his official capacity
22 as President of the United States, et al.,

23 Defendants.

Date: October 8, 2020
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Place: Courtroom 8, 4th Floor
Judges: Honorable Richard R. Clifton
Honorable Lucy H. Koh
Honorable Edward M. Chen

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1 **INTEREST OF *AMICI CURIAE*¹**

2 *Amici curiae* are eight historians and social scientists who seek to assist the Court by
3 providing relevant information about the history of the census and the Apportionment and
4 Enumeration Clauses of the Constitution. They are: Margo Anderson, Distinguished Professor
5 Emerita in History and Urban Studies at the University of Wisconsin, Milwaukee; Andrew
6 Beveridge, Professor of Sociology at Queens College and the CUNY Graduate Center and the
7 CEO of Social Explorer; Rachel Buff, Professor of History and Director of the Cultures and
8 Communities Program at the University of Wisconsin, Milwaukee; Libby Garland, Associate
9 Professor of History at Kingsborough Community College, The City University of New York;
10 J. Morgan Kousser, Professor Emeritus of History and Social Science at the California Institute
11 of Technology; Erika Lee, Rudolph J. Vecoli Chair in Immigration History and Director of the
12 Immigration History Research Center at the University of Minnesota; Natalia Molina, Professor
13 of American Studies and Ethnicity at the University of Southern California; and Steven Ruggles,
14 Regents Professor of History and Population Studies and the Director of the Institute for Social
15 Research and Data Innovation at the University of Minnesota.
16
17

18 *Amici* have studied and written extensively on issues relating to the census and
19 immigration, and are uniquely positioned to explain the historical underpinnings of the inclusive
20 apportionment scheme envisioned by the Framers. *Amici* believe this brief will be helpful to the
21 Court's understanding of the original and long-affirmed meaning of the Constitution: that all
22 persons residing in the United States, regardless of citizenship or immigration status, must be
23 included in the apportionment base.
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27 ¹ *Amici* certify that no person or entity other than *amici* and their counsel assisted in or made a
28 monetary contribution to the preparation or submission of this brief.

PRELIMINARY STATEMENT

1
2 On July 21, 2020, the President issued a memorandum (the “July 21 Memorandum”)
3 declaring that it is the policy of the United States to exclude “aliens who are not in lawful
4 immigration status” from the “actual Enumeration” required for congressional apportionment
5 following the 2020 census. This policy violates the Constitution and contravenes the Framers’
6 intent—and the unbroken historical practice—of an inclusive apportionment base of all persons,
7 without regard to citizenship or immigration status.
8

9 The historical record shows that our nation’s Framers adopted the census as the only
10 reliable mechanism for ensuring nonpartisan, uniform reapportionment of congressional
11 representation and curbing attempts to manipulate the balance of power among the states. To this
12 end, the Framers decided to use the total number of persons as the apportionment base. They
13 adopted explicit language defining the scope of the census to include “the whole Number of free
14 Persons” with only two specific exceptions, neither of which relates to citizenship or
15 immigration status (and neither of which survives today). This principle of an inclusive
16 apportionment base has repeatedly been reaffirmed throughout the 230-year history of the
17 census—including most notably through the adoption of Section 2 of the Fourteenth Amendment
18 following the Civil War. Congress and the courts have uniformly rejected efforts to exclude
19 noncitizens, or those without lawful immigration status, from the apportionment base. The
20 July 21 Memorandum represents only the latest in a series of failed attempts to circumvent the
21 Constitution and the Framers’ clear intent, and the uniform history of administration of the
22 census. Accordingly, it should be rejected.
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ARGUMENT

I. The Plain Text of the Constitution and the Record of the Constitutional Convention Evidence the Framers’ Intent That Congressional Apportionment Should Include All Persons, Unrelated to Citizenship or Immigration Status.

Faced with tensions between large and small states, a growing population and the prospect of people moving between established and new states, the Framers had to develop a system of representation that could reliably accommodate shifts in power and the allocation of resources among states of different and changing sizes.² Thus, the Great Compromise was born: the Framers created a bicameral legislature consisting of the Senate, designed to accommodate the interests of the smaller states, and the House of Representatives, in which representation would be apportioned based on each state’s population. To bring the latter to fruition, the Framers crafted two clauses: (i) the Apportionment Clause, which provided that “Representatives and direct taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the *whole Number* of free *Persons* . . . and excluding Indians not taxed, three fifths of all other Persons”, and (ii) the Enumeration Clause, which facilitated reapportionment and provided that “[t]he actual Enumeration shall be made . . . within every subsequent Term of ten Years”.³

A. The Plain Text of the Constitution Commands That Congressional Apportionment Include All Persons, Without Regard to Citizenship or Immigration Status.

The plain language of the Apportionment and Enumeration Clauses confirms that the Framers intended representation for *all* inhabitants of the new nation with only two exceptions, unrelated to citizenship or immigration status. The Apportionment Clause excluded “Indians not

² For accounts of the Constitutional Convention, see Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (2009); Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (1966).

³ U.S. Const. art. I, § 2, cl. 3 (emphasis added).

1 taxed” because Indian tribes were considered separate sovereigns, not subject to any state’s
2 jurisdiction for taxation purposes.⁴ If, however, a Native American left his or her tribe, he or she
3 fell within a state’s jurisdiction and was included in the census count. Additionally, the so-called
4 Three-Fifths Compromise provided that, for apportionment purposes, enslaved people counted as
5 three-fifths of a person. While the three-fifths ratio has become notorious for its indifference to
6 the humanity of enslaved people, the approach dates back to 1783, four years before the
7 Constitutional Convention, when the Continental Congress debated the size of the financial
8 contribution each state should make to the new continental government. The Continental
9 Congress decided that population, not land, should form the basis of each state’s tax obligation;
10 however, Southerners opposed including enslaved people in their population base to lower their
11 tax burden, whereas Northerners advocated including enslaved people on a one-to-one basis.⁵
12
13 The Three-Fifths Compromise was borne out of this conflict and was later adopted in the
14 Apportionment Clause; it reflected the Framers’ effort to achieve the “closest approximation . . .
15 to the principle of one person, one vote” and equal representation for *all inhabitants* of the new
16 nation.⁶

17
18 But for these two heavily debated, carefully circumscribed and specific exceptions, the
19 plain language of the Apportionment and Enumeration Clauses commands that representatives
20 be apportioned based on an “actual Enumeration” consisting of “the whole Number of free
21 *Persons*”, without further qualification.⁷ There is no basis in the historical record to “engraft[] an
22

23
24 ⁴ U.S. Const. art. I, § 2, cl. 3; *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 43 (1831).
The Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253, which declared Native
Americans to be citizens of the United States, rendered the “Indians not taxed” exclusion moot.

25 ⁵ Margo J. Anderson, *The American Census: A Social History* 11-13 (2d ed. 2015); Beeman,
26 *supra* note 2, at 152-55; Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-*
Fifths Clause in the United States Constitution, 28 Wm. & Mary Q. 563-64 (1971).

27 ⁶ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 74
(2006).

28 ⁷ U.S. Const. art. I, § 2, cl. 3 (emphasis added).

1 additional exception” to that plain language based on citizenship or immigration status.⁸

2 **B. The Record of the Constitutional Convention Further Demonstrates the**
 3 **Framers’ Intent That Congressional Apportionment Include All Persons**
 4 **Without Regard to Citizenship or Immigration Status.**

5 Earlier versions of the Apportionment and Enumeration Clauses confirm the Framers’
 6 expansive approach to representation by consistently including all “free inhabitants” in the
 7 baseline measure of apportionment, regardless of immigration status or eligibility to vote. In an
 8 initial proposal for the Apportionment Clause, a leading member of the Convention, James
 9 Wilson of Pennsylvania, suggested language from the 1783 amendments to the Articles of
 10 Confederation, which provided that “the common treasury” would be

11 supplied by the several states in proportion to the whole number of white and other
 12 *free citizens and inhabitants, of every age, sex and condition*, including those bound
 13 to servitude for a term of years, and three-fifths of all other persons not
 14 comprehended in the foregoing description, except Indians, not paying taxes[.]⁹

15 A subsequent draft of the Apportionment Clause similarly referred to a census of “the free
 16 *inhabitants* of each State, and three fifths of the *inhabitants* of other description”, which later
 17 became a census of “*all the inhabitants* of the United States in the manner and according to the
 18 ratio recommended by Congress in their resolution of April 18, 1783 [the three-fifths ratio]”, and
 19 then an apportionment “upon the principle of their number of *inhabitants*; according to the
 20 provisions hereafter mentioned” (namely, the three-fifths ratio).¹⁰

21
 22 ⁸ *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 294 (S.D.N.Y. 2015) (Furman, J.)
 23 (noting that “the ancient maxim *expressio unius est exclusio alterius* . . . cautions the Court
 24 against engrafting an additional exception”); *see also Andrus v. Glover Constr. Co.*, 446 U.S.
 25 608, 616-17 (1980).

26 ⁹ 1 *The Records of the Federal Convention of 1787*, at 201 (Max Farrand ed., 1911) (June 11)
 27 [hereinafter *Records of the Federal Convention*]; 24 *Journals of the Continental Congress, 1774-*
 28 *1789*, at 260-61 (Worthington C. Ford et al. eds., 1922) (adopting amendment to Articles of
 Confederation, Art. VIII); *see also* sources cited *supra* note 5.

¹⁰ 1 *Records of the Federal Convention* 575-76 (July 11); *id.* at 590-91 (July 12); *id.* at 599 (July
 13) (emphases added); *see also* 2 *Records of the Federal Convention* 178 (Aug. 6 report from the
 Committee of Detail); *id.* at 219-23 (Aug. 8 debate).

1 By the time the Constitutional Convention completed its substantive deliberations, the
 2 operative document had an Apportionment Clause directing that Congress would “regulate the
 3 number of representatives by *the number of inhabitants*, according to the rule hereinafter made
 4 for direct taxation”, and a Direct Taxation Clause, which mirrored the language from the 1783
 5 revisions to the Articles of Confederation and provided that
 6

7 [t]he proportions of direct taxation shall be regulated by *the whole number* of free
 8 *citizens and inhabitants of every age, sex, and condition*, including those bound to
 9 servitude for a term of years, and three fifths of all other persons not comprehended
 in the foregoing description, (except Indians not paying taxes)[.]¹¹

10 This document was referred to a Committee of Style, which was tasked with preparing a
 11 cohesive document without substantive change. That committee reported back with the language
 12 of Article I, Section 2 that was ultimately adopted:

13 Representatives and direct taxes shall be apportioned among the several states
 14 which may be included within this Union, *according to their respective numbers*,
 15 which shall be determined by adding to *the whole number* of free *persons*, including
 16 those bound to servitude for a term of years, and excluding Indians not taxed, three
 fifths of all other *persons*.¹²

17 Notably, the Framers ultimately chose to use the inclusive term “Persons” instead of the
 18 phrase “citizens and inhabitants of every age, sex, and condition” without comment or debate,
 19 reflecting that “Persons” includes *both* citizens *and* inhabitants who were not citizens.¹³

20 Population tabulations used at the Constitutional Convention reinforce the Framers’ intent to
 21 count the total “number of inhabitants” in the United States, irrespective of citizenship.¹⁴
 22

23 During the Constitutional Convention, the delegates considered both population and
 24 wealth as bases for apportionment, but decided that it was better to use population as the sole
 25

26 ¹¹ 2 *Records of the Federal Convention* 566, 571 (emphasis added).

27 ¹² *Id.* at 590 (emphases added); *see also id.* at 607-08 (approval of Article I, § 2 on Sept. 13).

28 ¹³ *Id.* at 570, 590-91.

¹⁴ 1 *Records of the Federal Convention* 572-74; *see also Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

1 basis, as the Continental Congress had already done in the revision to the Articles of
 2 Confederation. William Johnson of Connecticut, who was chairman of the Committee on Style,
 3 spoke for many delegates in expressing the view “that wealth and population were the true,
 4 equitable rule of representation; but he conceived that these two principles resolved themselves
 5 into one; population being the best measure of wealth”.¹⁵ James Wilson agreed that “the rule of
 6 numbers, does not differ much from the combined rule of numbers & wealth”, but also believed
 7 that as a matter of principle “numbers were surely the natural & precise measure of
 8 Representation”.¹⁶ In *The Federalist*, James Madison summarized the prevailing view when he
 9 wrote that “[i]t is agreed on all sides, that numbers are the best scale of wealth and taxation, as
 10 they are the only proper scale of representation”.¹⁷

11
 12 These debates help to explain the linkage in the Constitution between apportionment of
 13 the House of Representatives and direct taxation. The Revolution made clear that
 14 “Representation & taxation were to go together” and thus “direct Taxation ought to be
 15 proportioned according to representation”.¹⁸ For this reason, Article I, Section 9 of the
 16 Constitution provides that “[n]o Capitation, or other direct, Tax shall be laid, unless in
 17 Proportion to the Census or enumeration herein before directed to be taken”.¹⁹ This constitutional
 18 linkage reinforces that the census is an enumeration of the total population.²⁰ As Madison
 19 pointed out:
 20
 21

22 ¹⁵ 1 *Records of the Federal Convention* 593.

23 ¹⁶ *Id.* at 605.

24 ¹⁷ *The Federalist* No. 54 (James Madison).

25 ¹⁸ 1 *Records of the Federal Convention* 585, 589.

26 ¹⁹ U.S. Const. art. I, § 9, cl. 4.

27 ²⁰ Today, undocumented immigrants pay an estimated \$3.6 billion a year in property taxes,
 28 which are “direct taxes” under the Constitution. *See* Inst. on Taxation & Econ. Policy, *Undocumented Immigrants’ State & Local Tax Contributions* 3 (2017), <https://itep.sfo2.digitaloceanspaces.com/immigration2017.pdf>; *see also Pollock v. Farmers’ Loan & Tr. Co.*, 157 U.S. 429 (1895) (holding that “taxes on real estate” are “indisputably direct taxes” under the Constitution).

1 the establishment of a common measure for representation and taxation will have a
 2 very salutary effect. . . . Were their share of representation alone to be governed by
 3 this rule, they would have an interest in exaggerating their inhabitants. Were the
 4 rule to decide their share of taxation alone, a contrary temptation would prevail. By
 extending the rule to both objects, the States will have opposite interests, which will
 control and balance each other, and produce the requisite impartiality.²¹

5 Another reason that the Framers decided on overall population, not eligible voters, as the
 6 basis for apportionment is that the suffrage differed so widely among the states. All thirteen
 7 states had property ownership or tax payment restrictions on white male suffrage, but differed
 8 greatly in the proportion of the population that qualified for the right to vote.²² The delegates to
 9 the Constitutional Convention were well aware of the significant differences among the states in
 10 how widespread the suffrage was and intended the apportionment to remain agnostic to these
 11 differences by including *all* “inhabitants”, even those denied the right to vote.²³ The Framers left
 12 these differences intact, and consequently specified that overall population was the basis for
 13 apportionment, so as not to penalize states with more restrictive franchises.²⁴ Moreover, at the
 14 time of the founding, noncitizens had the right to vote in many states; it was not until the 1920s
 15 that the last group of states restricted suffrage to citizens.²⁵ Thus, the linkage we take for granted
 16 between citizenship and the right to vote did not exist at the time of the founding, providing yet
 17 another reason why the Framers decided that apportionment would be based on overall
 18
 19

20 _____
 21 ²¹ *The Federalist* No. 54 (James Madison).

22 ²² See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 3-21 (rev. ed. 2009); see also *id.* at 330-31 (tables specifying suffrage restrictions by state).

23 ²³ See 2 *Records of the Federal Convention* 57 (July 19) (James Madison noting that “the right of suffrage was much more diffusive in the Northern than the Southern States”); *id.* at 201-06 (Aug. 7); *The Federalist* No. 54 (James Madison) (“In every state, a certain proportion of inhabitants are deprived of this right [to vote] by the constitution of the State, who will be included in the census by which the Federal Constitution apportions the representatives.”).

24 ²⁴ This changed only with the enactment of the Fourteenth Amendment. See *infra* Section III.

25 ²⁵ See Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 15-40 (2006); see also *Minor v. Happersett*, 88 U.S. 162, 177 (1874) (noting that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage”) (listing states that permitted noncitizens to vote in 1875).

1 population, without regard to citizenship or eligibility to vote.

2 **II. The Census Act of 1790 and the Early Administrations of the Census Make Clear**
 3 **That All Residents Must Be Counted for Apportionment Purposes, Regardless of**
 4 **Citizenship or Immigration Status.**

5 Three years after the Constitutional Convention, the First Congress was tasked with
 6 carrying out the Constitution’s census requirement. To do so, Congress enacted the first Census
 7 Act on March 1, 1790.²⁶ Because “the interpretations of the Constitution by the First Congress
 8 are persuasive”, the Supreme Court has looked to the historical practice under the Census Act of
 9 1790 as a guide to the meaning of the Enumeration Clause.²⁷

10 The Census Act of 1790 established what is referred to as the “usual residence rule”. The
 11 Act adopted the basic rule of enumeration that “every person” should be counted at his or her
 12 “usual place of abode”; that a person “without a settled place of residence” should be reported at
 13 the location “where he or she shall be on” the census day; and that “every person occasionally
 14 absent at the time of the enumeration” should be reported at “that place in which he usually
 15 resides in the United States”.²⁸ This “usual residence rule” is consistent with the Framers’
 16 repeated emphasis on counting “inhabitants” on United States soil—regardless of citizenship,
 17 voter eligibility, stability of residence or property ownership—and has remained the guiding
 18 principle for census-taking for 230 years.

19 Congress instructed the United States marshals who were tasked with conducting the
 20 census to pose six questions, which confirm the focus on residence above all else. Each
 21 household was asked to report (i) the name of the head of the family, (ii) the number of free
 22
 23
 24
 25

26 ²⁶ Census Act of 1790, ch. 2, 1 Stat. 101 (providing for the enumeration of the Inhabitants of the
 United States).

27 ²⁷ *Franklin v. Massachusetts*, 505 U.S. 788, 803-04 (1992) (citing *Bowsher v. Synar*, 478 U.S.
 714, 723-24 (1986)).

28 ²⁸ Census Act of 1790 § 5, 101 Stat. at 103.

1 white males sixteen and over, (iii) the number of free white males under sixteen, (iv) the number
2 of free white females, (v) the number of other free persons and (vi) the number of enslaved
3 people.²⁹ The original census did not inquire how long any person in the household had resided
4 there, how long the person intended to stay, or whether that person was a citizen.³⁰ Unlike state
5 voting requirements at the time, which limited access to the franchise based on length of
6 residence in the state, there was no requirement to show “stability of residence” (as shown by the
7 fact that persons “without a settled place of residence” were counted); what mattered was
8 whether the person was in his or her “usual place of abode” on the designated counting date.³¹

10 The census evolved and Congress eventually added new questions in 1820, including a
11 question concerning “foreigners not naturalized”.³² This was part of a growing interest in using
12 the census as an opportunity to gather ancillary demographic information.³³ Notably, that
13 information did not matter for apportionment purposes because “foreigners not naturalized” were
14 *already* included as free persons and were therefore already included in the count. Indeed,
15 consistent with the Framers’ original intent that all residents, regardless of citizenship, would be
16 included in the apportionment base, the census instructions to the marshals noted that the data
17

19 ²⁹ *Id.* § 1, 101 Stat. at 101-02; *see also* Anderson, *supra* note 5, at 15.

20 ³⁰ Less than a month after passing the Census Act of 1790, Congress passed its first
21 naturalization law. *See* Nationality Act of 1790, ch. 3, 1 Stat. 103. Thus at the time of the first
22 census, a white immigrant could become naturalized by proving residence in the United States
23 for two years. *Id.* at 103-04. There was no requirement that immigrants become citizens and, as
24 discussed *infra* in Section IV, the concept of an unlawfully present immigrant did not exist.

25 ³¹ Keyssar, *supra* note 22, at 330-31 (table specifying the residency requirements by state, which
26 were mostly from six months to two years).

27 ³² Act of Mar. 14, 1820, ch. 24, 3 Stat. 548, 548-50 (to provide for taking the fourth census, or
28 enumeration of the inhabitants of the United States, and for other purposes). By 1820,
naturalization—still limited to white immigrants—required five years’ residency in the United
States, Naturalization Law of 1802, ch. 28, 2 Stat. 153; there was still no requirement for any
immigrant to become a citizen. This naturalization process remained operative through
Reconstruction. *See* Dorothee Schneider, *Naturalization and United States Citizenship in Two
Periods of Mass Migration: 1894-1930, 1965-2000*, 21 J. Am. Ethnic Hist. 50, 52-53 (2001).

³³ *See* Anderson, *supra* note 5, at 23-32.

1 from the “foreigners not naturalized” subcategory should *not* be added to the total number of free
 2 persons (which would have resulted in double counting).³⁴ These instructions confirm that earlier
 3 censuses *already included* free foreigners, and the new question did not add people to the census
 4 who had not previously been counted. In any event, this question was short-lived and appeared
 5 only in the 1820 and 1830 censuses before Reconstruction.³⁵

7 The only exceptions to including “foreigners not naturalized” in the “actual
 8 Enumeration” have been with respect to noncitizens who do not reside in the United States.
 9 Thus, in the instructions for enumerators, crews of foreign vessels in harbor have been explicitly
 10 excluded from enumeration since 1920, transient foreign tourists since 1930, and diplomatic
 11 personnel since 1940.³⁶ The rationale for excluding these limited categories of noncitizens is
 12 clear and entirely consistent with the Framers’ intent, and longstanding census practice, to count
 13 all persons *residing* in the United States, regardless of citizenship or immigration status: foreign
 14 diplomatic personnel live on embassy grounds, or on “foreign soil and thus not in a state”, and
 15 foreign tourists and crews of foreign vessels in harbor “do not *reside* here”.³⁷

18
 19 ³⁴ See U.S. Census Bureau, 1820 Instructions to Marshals, in *Measuring America: The Decennial*
Censuses from 1790 to 2000, at 6 (2002),

20 https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf.

21 ³⁵ Carroll Wright & William C. Hunt, *History and Growth of the U.S. Census* 90, 92 (1900),
www.census.gov/history/pdf/wright-hunt.pdf.

22 ³⁶ U.S. Dep’t of Commerce, *Fourteenth Decennial Census of the United States: Instructions to*
Enumerators 19 (1920), <https://www.census.gov/history/pdf/1920instructions.pdf>; U.S. Dep’t of
 23 Commerce, *Fifteenth Decennial Census of the United States: Instructions to Enumerators* 11
 24 (1930), [https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-](https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-documentation/questionnaires/1930instructions.pdf)
[documentation/questionnaires/1930instructions.pdf](https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-documentation/questionnaires/1930instructions.pdf); U.S. Dep’t of Commerce, *Sixteenth*
 25 *Decennial Census of the United States: Instructions to Enumerators* 16, 20 (1940),
 26 <https://www.census.gov/history/pdf/1940instructions.pdf>; *see also* H.R. Rep. No. 91-1314, at 24
 27 (1970) (providing that individuals “temporarily traveling or visiting in the United States” or
 “living on the premises of an embassy, ministry, legation, chancellery, or consulate” should not
 be enumerated).

28 ³⁷ *Enumeration of Undocumented Aliens in the Decennial Census: Hearing on S. 99-314 Before*
the S. Comm. on Governmental Affairs, 99th Cong. 24 (1985) (emphasis added).

1 **III. The Fourteenth Amendment and Its Legislative History Reaffirm an Inclusive**
 2 **Apportionment Base, Unrelated to Citizenship or Immigration Status.**

3 The abolition of slavery and the end of the Civil War prompted Congress to reconsider
 4 the basis for apportionment. Absent a constitutional amendment, the Southern states could have
 5 increased their political power by counting formerly enslaved people as whole persons (rather
 6 than as three-fifths of a person) for apportionment, while simultaneously excluding them from
 7 any meaningful political participation.³⁸ The solution to this problem was codified in Section 2
 8 of the new Fourteenth Amendment, which repeated the general rule of the Apportionment
 9 Clause—that “representation shall be apportioned . . . counting the *whole number of persons* . . .
 10 excluding Indians not taxed”³⁹—while providing that states would lose some of their
 11 representation for denying “male inhabitants . . . twenty-one of years of age” the ability to vote.⁴⁰
 12 The decision to repeat the original apportionment formulation, while maintaining the express
 13 exclusion of Native Americans living on tribal lands, demonstrates the framers’ intention that,
 14 with that sole exception, the census enumeration would be truly all-inclusive.
 15

16 This principle of a broad and inclusive apportionment base permeates the drafting history
 17 of the Fourteenth Amendment. Indeed, before settling on the final language, the framers of the
 18 Fourteenth Amendment considered proposals to change the apportionment base from a
 19 population-based count to one based on voting eligibility or citizenship.⁴¹ One resolution
 20

21
 22 ³⁸ H.R. Rep. No. 39-30, at xiii (1866) (“The increase of representation necessarily resulting from
 23 the abolition of slavery was considered the most important element in the questions arising out of
 24 the changed condition of affairs, and the necessity for some fundamental action in this regard
 25 seemed imperative.”). *See generally* Anderson, *supra* note 5, at 76-79; Eric Foner,
Reconstruction: America’s Unfinished Revolution, 1863-77, at 251-61 (1988).

26 ³⁹ U.S. Const. amend. XIV, § 2 (emphasis added).

27 ⁴⁰ *Id.*

28 ⁴¹ *See* Cong. Globe, 39th Cong., 1st Sess. 357-59, 2986-87 (1866). For accounts of the drafting
 history, see George David Zuckerman, *A Consideration of the History and Present Status of*
Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93, 94-107 (1961); George P.

1 proposed allocating House seats to states “according to their respective [number of] legal voters”
 2 and specified that “for this purpose none may be named as legal voters who are not either
 3 natural-born citizens or naturalized foreigners”.⁴² This proposal was met with fierce resistance
 4 and was rejected. As one leading critic, Representative James G. Blaine of Maine, explained:
 5 “As an abstract proposition no one will deny that population is the true basis of representation;
 6 for women, children, and other non-voting classes may have as vital an interest in the legislation
 7 of the country as those who actually deposit the ballot.”⁴³ Representative Blaine observed that a
 8 change to voter-based representation would be “an abandonment of one of the oldest and safest
 9 landmarks of the Constitution” and would “introduce[] a new principle in our Government,
 10 whose evil tendency and results no man can measure today”.⁴⁴ Other representatives expressed
 11 similar concerns about representational equality.⁴⁵

12
 13
 14 A later draft of the Fourteenth Amendment proposed using “citizens” rather than
 15 “persons” for the apportionment base. This proposal was likewise rejected as inconsistent with
 16 the original Constitution and because it would have penalized states with sizable populations of
 17 unnaturalized immigrants.⁴⁶ Representative Roscoe Conkling of New York, who was responsible
 18 for the language of Section 2 of the Fourteenth Amendment as enacted, explained that basing
 19

20
 21 Smith, *Republican Reconstruction and Section 2 of the Fourteenth Amendment*, 23 W. Pol. Q. 829, 839-52 (1970).

22 ⁴² Cong. Globe, 39th Cong., 1st Sess. 10 (1866); see *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016).

23 ⁴³ Cong. Globe, 39th Cong., 1st Sess. 141 (1866).

24 ⁴⁴ *Id.* at 377; see David H. Gans, *The Cornerstone of Our Democracy: The Census Clause and the Constitutional Obligation to Count All Persons* 7-8, Const. Accountability Ctr. (Mar. 19, 2018), <https://www.theconstitution.org/wp-content/uploads/2018/03/Cornerstone-of-our-Democracy.pdf>.

25 ⁴⁵ Cong. Globe, 39th Cong., 1st Sess. 434 (1866) (remarks of Rep. Ward).

26 ⁴⁶ *Id.* at 359 (remarks of Rep. Conkling); see also *id.* at 411 (remarks of Rep. Cook) (arguing in
 27 favor of “persons”, as a census of voters would be impracticable, would be unjust toward
 28 northeastern states, which had more women and children than western states, and would “take[]
 from the basis of representation all unnaturalized foreigners”).

1 apportionment on “persons” rather than “citizens” was the only constitutionally appropriate
 2 approach: “‘Persons,’ and not ‘citizens,’ have always constituted the basis” and the “present
 3 Constitution is, and always was opposed to [using ‘citizens’ rather than ‘persons’].”⁴⁷ Although
 4 at some points in the debates Representative Conkling and others noted that some noncitizen
 5 residents might become naturalized citizens,⁴⁸ that suggestion did not narrow the broad language
 6 of “persons”, and there was no requirement that an immigrant intend to become naturalized in
 7 order to be counted.⁴⁹ At the time, only white immigrants were eligible to become naturalized,⁵⁰
 8 leaving other immigrants as “persons” who would be counted in the census but might never
 9 become citizens.
 10

11 The framers of the Fourteenth Amendment reaffirmed the decision to “leave the primary
 12 basis of representation where it was placed by our fathers, the whole body of the people”.⁵¹ The
 13 Joint Committee on Reconstruction, where the Fourteenth Amendment was drafted, adopted
 14 Representative Conkling’s motion to strike the words “citizens of the United States in each
 15 State” in the draft and replace them with “persons in each State, excluding Indians not taxed”.⁵²
 16 On the Senate floor, Jacob Howard of Michigan, the floor manager for the Fourteenth
 17 Amendment, explained that “numbers”, *i.e.*, total population, is
 18

19 the most just and satisfactory basis, and this is the principle upon which the
 20 Constitution itself was originally framed, that the basis of representation should
 21 depend upon numbers; and such . . . is the safest and most secure principle upon
 22 which the Government can rest. Numbers, not voters; numbers, not property; this
 is the theory of the Constitution.⁵³

23 ⁴⁷ *Id.* at 359; *see also id.* (remarks of Rep. Conkling) (further noting that “many of the large
 24 States held their representation [in the House] in part by reason of their aliens”).

25 ⁴⁸ *See, e.g., id.* at 354, 356, 2987, 3035.

26 ⁴⁹ *See supra* notes 30, 32 and accompanying text.

27 ⁵⁰ Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

28 ⁵¹ *Id.* at 385 (remarks of Rep. Baker).

⁵² Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867*, at 52 (1914).

⁵³ Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

1 Senator George Edmunds of Vermont further noted that “[t]he fathers who founded this
 2 Government acted upon the idea . . . that the representation, as a principle, in general was to be
 3 based upon population, independent of the franchise, independent of citizenship”, and refused to
 4 “discard the original principle that all society in some form is to be represented in a Republican
 5 Government”, calling apportionment by population an “impregnable principle”.⁵⁴
 6

7 In the debate over the Fourteenth Amendment, the framers consistently and explicitly
 8 rejected proposals to exclude noncitizens from the apportionment base. For example:

- 9
- 10 • Representative John Bingham of Ohio dismissed the idea of striking “from the basis of
 11 representation the entire immigrant population not naturalized”, observing that “[u]nder the
 12 Constitution as it now is and as it always has been, the entire immigrant population of this
 13 country is included in the basis of representation.”⁵⁵ He urged that the “whole immigrant
 14 population should be numbered with the people and counted as part of them”.⁵⁶
 - 15 • Representative Burton Cook of Illinois noted that representation based on voting improperly
 “takes from the basis of representation all unnaturalized foreigners”.⁵⁷
 - 16 • Senator Henry Wilson of Massachusetts firmly opposed any amendment that would “strike
 17 from the basis of representation two million one hundred thousand unnaturalized foreigners”
 18 who were then counted.⁵⁸

19 Section 2 of the Fourteenth Amendment reflects the agreement that apportionment is
 20 based “on the largest basis of population, counting every man, woman, and child”, and that “the
 21 whole population is represented; that although all do not vote, yet all are heard. That is the idea
 22 of the Constitution.”⁵⁹ As political scientist George Smith summarized the history: “The section
 23 does not base representation on voters Section Two *bases representation on numbers*, all
 24 inhabitants of the State”⁶⁰ The instructions to the 1880 Census enumerators—disseminated

24 ⁵⁴ *Id.* at 2944.

25 ⁵⁵ *Id.* at 432.

26 ⁵⁶ *Id.*

27 ⁵⁷ *Id.* at 411.

28 ⁵⁸ *Id.* at 2986-87. Senator Wilson believed that this number of noncitizens provided the northern
 states with seventeen representatives. *Id.* at 2987.

⁵⁹ *Id.* at 705, 1280 (remarks of Sen. Fessenden).

⁶⁰ Smith, *supra* note 41, at 851.

1 in the wake of the Fourteenth Amendment’s ratification—confirm this understanding:

2 It is the prime object of the enumeration to obtain the name, and the requisite
 3 particulars as to personal description, of every person in the United States, of
 4 whatever age, sex, color, race, or condition, with this single exception, viz.: that
 ‘Indians not taxed’ shall be omitted from the enumeration.⁶¹

5 **IV. Since Reconstruction, It Has Remained Clear That All Residents Must Be Counted**
 6 **for Apportionment Purposes, Regardless of Citizenship or Immigration Status.**

7 The Supreme Court has instructed that constitutional interpretation is guided by
 8 government practices that have “been open, widespread, and unchallenged since the early days
 9 of the Republic”.⁶² The inclusion of undocumented immigrants within the meaning of “persons”
 10 as used in Article I of the Constitution and Section 2 of the Fourteenth Amendment meets that
 11 standard. The historical practice in the early Republic (*see supra* Section II) has continued since.

12 **A. The Administration of the Census During the Immigration Boom of the Late**
 13 **19th and Early 20th Centuries Confirms the Historical Practice.**

14 Following Reconstruction, the United States experienced unprecedented population
 15 growth fueled by immigration.⁶³ Most of these new arrivals went to live in urban centers, and
 16 many were from countries other than those that had previously formed the base of immigration
 17 to the United States.⁶⁴ This immigration boom, and the resulting changes in immigration law,
 18

19 ⁶¹ Dep’t of Interior, Census Office, *Enumerator Instructions* (1880), <https://www.census.gov/history/pdf/1880enumerator-instructions.pdf>. The 1870 census is the only one in which the
 20 Census Office attempted to separately enumerate adult men over the age of 21 who were denied
 21 the right to vote. *See* Anderson, *supra* note 5, at 82-85. Once the Fifteenth Amendment was
 22 ratified, census officials interpreted the new provision to mean that any state law denying the
 23 right to vote to freedmen was legally void and thus did not “come within the view of Marshals
 and their Assistants in respect to the Census”. Dep’t of Interior, Census Office, *Instructions to*
Assistant Marshals 12 (1870), <https://www.census.gov/history/pdf/1870instructions-2.pdf>.

24 ⁶² *NLRB. v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment); *see*
 25 *also Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019); *Wisconsin v. City of New*
York, 517 U.S. 1, 21 (1996) (noting “importance of historical practice” in census context).

26 ⁶³ Anderson, *supra* note 5, at 138.

27 ⁶⁴ *See* Raymond L. Cohn, *Immigration to the United States*, EH.net (“After 1881, immigrant
 28 volume from central, eastern, and southern Europe began to increase rapidly. Between 1894 and
 1914, immigrants from southern, central, and eastern Europe accounted for 69% of the total.”),

1 shaped the political discourse regarding the census and apportionment in the late nineteenth and
2 early twentieth centuries. By the 1920s, immigration restriction was the subject of intense public
3 attention and debate. The Census Bureau (and its predecessor, the Census Office) continued to
4 count all persons, without regard to immigration status, and Congress consistently rejected
5 proposals to exclude either noncitizens or the subset of undocumented immigrants from the
6 apportionment for the House of Representatives. This history demonstrates powerfully that
7 excluding undocumented immigrants from the apportionment base is inconsistent with the
8 Constitution and historical practice.

10 At the start of the immigration boom, the concept of an unlawfully present or illegal alien
11 did not exist.⁶⁵ From the Founding to the nineteenth century, immigration to the United States
12 “was encouraged and virtually unfettered.”⁶⁶ In 1875, however, Congress passed the first modern
13 restrictions on entry to the United States, the Page Act, which banned the entry of “women
14 imported for the purposes of prostitution” and persons convicted of felonies other than political
15 offenses.⁶⁷ Soon thereafter, the Chinese Exclusion Act and the Immigration Act of 1882
16 expanded the list of persons excludable from the United States to include Chinese laborers,⁶⁸
17 “lunatics”, “idiots” and persons who would be public charges.⁶⁹ Chinese immigrants were the
18 first immigrants required to obtain documents establishing their lawful presence in the United
19
20
21

22 <https://eh.net/encyclopedia/immigration-to-the-united-states/> (last visited Aug. 24, 2020); Erika
23 Lee, *At America’s Gates: Chinese Immigration During the Exclusion Era, 1882-1943*, at 32
(2003) (ebook) (from 1870 to 1880, 4.3 percent of immigrants were Chinese).

24 ⁶⁵ Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 44-47,
82-84 (2004) (ebook).

25 ⁶⁶ *Id.* at 44.

26 ⁶⁷ Page Act, ch. 141, § 5, 18 Stat. 477, 477-78 (1875).

27 ⁶⁸ Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 57, 58 (1882). In 1888, the prohibition on
Chinese laborers was extended to all Chinese, except “teachers, students, merchants, or travelers
for pleasure or curiosity.” Act of Sept. 18, 1888, ch. 1015, § 1, 25 Stat. 476, 476.

28 ⁶⁹ Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214.

1 States.⁷⁰ These new restrictions gave rise to reports that Chinese immigrants were arriving in the
2 United States by crossing the border from Mexico or Canada without inspection by the
3 authorities.⁷¹

4 Against this backdrop, Congress considered using—but did not use—the 1890 census as
5 an immigration enforcement mechanism by requiring census officials to enumerate and register
6 Chinese laborers with the goal of deporting those unlawfully present.⁷² Ultimately, the census
7 included questions designed to gather data on the assimilation of immigrants to the United
8 States, including where they were born, where their parents were born, whether they could speak
9 English, and whether they had been naturalized as citizens or taken out naturalization papers.⁷³
10 However, *no* questions were asked to determine the lawfulness of any person’s presence as an
11 alien, and all persons counted were included in the base for apportionment in the 1890 census,
12 regardless of citizenship or immigration status.⁷⁴ The same was true for the 1900 and 1910
13 censuses.⁷⁵

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16 _____
17 ⁷⁰ Chinese Exclusion Act, § 4, 22 Stat. at 59; *see also* Lee, *supra* note 64, at 45-46.

18 ⁷¹ *Message from the President of the United States to the Two Houses of Congress at the*
19 *Beginning of the First Session of the Fifty-First Congress, with the Reports of the Heads of*
20 *Departments* 109 (1890) (report of the Secretary of the Treasury); *see also* Lee, *supra* note 64, at
21 137-48 (describing illegal border crossings following the Chinese Exclusion Act); Dorothee
22 Schneider, *Crossing Borders: Migration and Citizenship in the Twentieth-Century United States*
23 88-100 (2011) (ebook) (describing the weak points at the Canadian and Mexican borders).

24 ⁷² H.R. Rep. No. 51-486 (1890); 21 Cong. Rec. 2309 (1890) (H.R. 6420) (introduction of an
25 amendment to the census enabling legislation that would have enumerated Chinese persons in
26 the United States and provided them with certificates documenting their lawful presence for later
27 immigration enforcement); *id.* at 2313 (passage, with amendment, by the House); *id.* at 3430
28 (tabled by the Senate); *see also* Paul Schor, *Counting Americans: How the U.S. Census*
Classified the Nation 196-99 (2017) (ebook).

⁷³ Census Office, *Compendium of the Eleventh Census: 1890, pt. I*, at cxxviii-cxxix (1892); *see*
also *1890 Index of Questions*, U.S. Census Bureau (Dec. 17, 2019),
https://www.census.gov/history/www/through_the_decades/index_of_questions/1890_1.html.

⁷⁴ H.R. Rep. No. 51-3280 (1890); Act of Feb. 7, 1891, ch. 116, § 1, 26 Stat. 735, 735.

⁷⁵ *1900 Index of Questions*, U.S. Census Bureau (Dec. 17, 2019), https://www.census.gov/history/www/through_the_decades/index_of_questions/1900_1.html; *1910 Index of Questions*, U.S. Census Bureau (Dec. 17, 2019), https://www.census.gov/history/www/through_the_

1 In 1920, as with past practice, all residents of the United States were counted in the
 2 census without any inquiry into whether they were lawfully present in the United States.⁷⁶ But
 3 the impact of immigrant-fueled population growth in urban centers sparked tensions among
 4 legislators, who could not agree on the terms of reapportionment.⁷⁷ Between 1910 and 1920, the
 5 nation's population had grown by 14 million people, but the urban population had grown by
 6 19 million while the rural population had declined by five million.⁷⁸ Representatives from states
 7 that would have lost seats blocked reapportionment following the 1920 census.⁷⁹ It was not until
 8 1929 that Congress passed another reapportionment bill, specifying a formula to be used
 9 following the 1930 census and each subsequent census.⁸⁰

11 Following the 1920 census, Congress further restricted immigration. The Immigration
 12 Act of 1924 (also known as the Johnson-Reed Act) created quotas for immigration based on
 13 national origin, eliminated any statute of limitations on removal for nearly all types of unlawful
 14 entry, and provided that any person who entered the United States without a valid visa or without
 15 inspection could be deported at any time.⁸¹ By this time, the concept of the undocumented or
 16 illegal alien was firmly entrenched, as legal immigration became nearly impossible for many
 17 people.⁸² Estimates placed the number of persons entering the United States illegally after
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 19
 20
 21

22 decades/index_of_questions/1910_1.html; Act of Jan. 16, 1901, ch. 93, 31 Stat. 733; Act of Aug.
 23 3, 1911, Pub. L. No. 62-5, 37 Stat. 13.

24 ⁷⁶ *1920 Index of Questions*, U.S. Census Bureau (Dec. 17, 2019),

https://www.census.gov/history/www/through_the_decades/index_of_questions/1920_1.html.

25 ⁷⁷ Anderson, *supra* note 5, at 134-40.

26 ⁷⁸ *Id.* at 135-36.

27 ⁷⁹ *Id.* at 140-41, 149-54.

28 ⁸⁰ Act of June 18, 1929, Pub. L. No. 71-13, § 22, 46 Stat. 21, 26-27.

⁸¹ Immigration Act of 1924, Pub. L. No. 68-139, §§ 13, 14, 43 Stat. 153, 161-62.

⁸² Ngai, *supra* note 65, at 83 (“[N]umerical restriction created a new class of persons within the national body—illegal aliens—whose inclusion was at once a social reality and a legal impossibility.”); *see also id.* at 82-115; Schneider, *supra* note 71, at 118-20.

1 implementation of the quotas at 175,000 per year.⁸³ Congress responded by creating a well-
2 funded border patrol at the Canadian and Mexican borders, and off the coast of Florida.⁸⁴ In
3 1929, Congress made unlawful entry a misdemeanor and a second unlawful entry a felony.⁸⁵

4 Despite the changing political landscape around immigration, proposals to exclude
5 noncitizens from the apportionment for the House of Representatives failed. Senator Frederic
6 Sackett of Kentucky introduced an amendment to the Census Act of 1929 to base the
7 apportionment on “the whole number of persons in each State, exclusive of aliens and excluding
8 Indians not taxed”.⁸⁶ The Senate legislative counsel opined that, based on the text of Article I,
9 Section 2 and the Fourteenth Amendment and the uniform practices of Congress, “there is no
10 constitutional authority for the enactment of legislation excluding aliens from enumeration for
11 the purposes of apportionment of Representatives among the States”.⁸⁷ Opponents of the Sackett
12 amendment emphasized its unconstitutionality based on the word “person” in the Constitution⁸⁸
13 and maintained the principle that “a Member of Congress represents every single human being
14 residing within the State of which he is a Representative, and every class”.⁸⁹ The amendment
15 was defeated by a vote of 29 to 48.⁹⁰

16 The very same day, attempts to separately identify noncitizens in the census count
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20 ⁸³ Maurice R. Davie, *World Immigration: With Special Reference to the United States* 400
21 (1936).

22 ⁸⁴ *Id.* at 401.

23 ⁸⁵ Act of Mar. 4, 1929, Pub. L. No. 70-1018, §§ 1, 2, 45 Stat. 1551, 1551. There is ample
24 historical evidence of the presence of undocumented immigrants in the country. *See generally*
25 Libby Garland, *After They Closed the Gates: Jewish Illegal Immigration to the United*
26 *States* (2014); Adam Goodman, *The Deportation Machine: America's Long History of Expelling*
27 *Immigrants* (2020); Torrie Hester, *Deportation: The Origins of U.S. Policy* (2017); Ngai, *supra*
28 note 65; Schneider, *supra* note 71.

⁸⁶ 71 Cong. Rec. 2065 (1929) (S. 312).

⁸⁷ *Id.* at 1822.

⁸⁸ *See, e.g., id.* at 1962 (Sen. Wagner of New York); *id.* at 1970 (Sen. Borah of Idaho).

⁸⁹ *Id.* at 1971 (Sen. Blaine of Wisconsin).

⁹⁰ *Id.* at 2065.

1 likewise failed. Senator Pat Harrison of Mississippi proposed an amendment to conduct the
 2 census enumeration both with and without noncitizens, such that “upon the ratification of any
 3 amendment to the Constitution excluding aliens from the persons to be counted in making an
 4 apportionment of Representatives”, apportionment could take place on that basis.⁹¹ This proposal
 5 was defeated by a vote of 24 to 55.⁹² Later the same day, then-Senator Hugo Black of Alabama
 6 introduced an amendment to the same bill to require the Census Bureau to “include an
 7 enumeration of aliens lawfully in the United States and of aliens unlawfully in the United
 8 States.”⁹³ That amendment was also defeated, by a vote of 24 to 56.⁹⁴

10 Acknowledging the constitutional barrier to excluding noncitizens from the count for
 11 apportionment, proponents of exclusion over the next several years introduced a series of
 12 resolutions to “amend the Constitution of the United States to exclude aliens in counting the
 13 whole number of persons in each State for apportionment of Representatives among the several
 14 States”.⁹⁵ None of these resolutions was voted on after referral to committee.⁹⁶ In 1940, the
 16 House considered a bill which, among other things, “provid[ed] for the exclusion of aliens from
 17 the population totals in making the apportionment”.⁹⁷ A supporter, Representative John Rankin
 18 of Mississippi, asked whether “aliens who are in this country in violation of law have the right to
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20 ⁹¹ *Id.*

21 ⁹² *Id.* at 2068.

22 ⁹³ *Id.* at 2078 (S. 312).

23 ⁹⁴ *Id.* at 2083. Similar debates took place in the House. *See id.* at 747-52, 2361-63.

24 ⁹⁵ *See, e.g.*, 71 Cong. Rec. 33 (1929) (H.J. Res. 20); 74 Cong. Rec. 5454 (1931) (H.J. Res. 356);
 25 75 Cong. Rec. 2453 (1932) (H.J. Res. 97); 78 Cong. Rec. 6637-41 (1934) (H.J. Res. 10); 87
 26 Cong. Rec. 465 (1941) (S.J. Res. 34); 93 Cong. Rec. 718 (1947) (S.J. Res. 50) (in introducing the
 27 joint resolution, Representative Capper noted that he had “been attempting to have Congress
 28 submit such an amendment to the States” for “25 years”).

⁹⁶ *See Note, A Territorial Approach to Representation for Illegal Aliens*, 80 Mich. L. Rev. 1342,
 1342 n.4 (1982); *see also 1990 Census Procedures and Demographic Impact on the State of*
Michigan: Hearing before the H. Comm. on Post Off. and Civ. Serv., 100th Cong. 142 (1988)
 (report by the Congressional Research Service).

⁹⁷ 86 Cong. Rec. 4367 (1940) (S. 2505).

1 be counted and be represented” in Congress.⁹⁸ Representative Emmanuel Celler of New York,
 2 who believed the proposed bill was unconstitutional,⁹⁹ responded that “[t]he Constitution says
 3 that all persons shall be counted”, including “aliens here illegally”.¹⁰⁰ Representative Celler’s
 4 arguments carried the day.¹⁰¹

5
 6 **B. More Recent Efforts To Exclude Undocumented Immigrants from the
 Apportionment Have Been Consistently Rejected.**

7
 8 Efforts targeting the specific exclusion from apportionment of undocumented immigrants
 9 (as opposed to all noncitizens) became more prominent surrounding the 1980 census. In 1979, a
 10 group of plaintiffs, including the Federation for American Immigration Reform (FAIR) and
 11 Representative Joseph M. McDade of Pennsylvania, brought suit to exclude undocumented
 12 immigrants from the apportionment count, arguing that their inclusion would distort the
 13 allocation of representatives among the states.¹⁰² The three-judge court held that plaintiffs lacked
 14 standing to assert their claims, but also noted that plaintiffs’ case was “very weak on the merits”
 15 because “immigrants, legal and illegal alike, are clearly ‘persons’” under any reading of the
 16 Constitution.¹⁰³ Moreover, the court observed that the “Census Bureau has always attempted to
 17 count every person residing in a state on census day, and the population base for purposes of
 18 apportionment has always included all persons, including aliens both lawfully and unlawfully
 19 within our borders”.¹⁰⁴

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 23 ⁹⁸ *Id.* at 4372.

24 ⁹⁹ Representative Charles Gifford of Massachusetts stated that he was “amazed” to see the
 25 proposal to exclude aliens from the apportionment, given that it was “too plainly
 unconstitutional”. *Id.* at 4378. Representative John Cochran of Missouri labeled the proposal a
 “direct violation of the Constitution”. *Id.*

26 ¹⁰⁰ *Id.* at 4372.

27 ¹⁰¹ *Id.* at 4386, 4401.

28 ¹⁰² *See generally FAIR v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge panel).

¹⁰³ *Id.* at 569-73, 576.

¹⁰⁴ *Id.* at 576.

1 In the wake of the *FAIR* decision, some members of Congress introduced a flurry of bills
 2 in an effort to achieve through legislation that which could not be achieved through the courts.¹⁰⁵
 3 None of these bills made it far enough even to be voted on; they were all rejected out of hand as
 4 unconstitutional. The Office of Legal Counsel in the Department of Justice (DOJ) opined that the
 5 term “whole number of persons” in the Fourteenth Amendment means all persons and “it is
 6 unconstitutional for so-called illegal aliens to be excluded from the figures that are used to allot
 7 Representatives among the States”.¹⁰⁶

9 In the fall of 1980, Representative McDade proposed an amendment that sought to block
 10 the funding to certify the 1980 census figures.¹⁰⁷ The stated reason for this proposed amendment
 11 was “the problem” of including illegal aliens in the count.¹⁰⁸ Opponents of the McDade
 12 amendment made clear that the proposal was “a legislative ploy to sanction a policy” that
 13 violates the Constitution.¹⁰⁹ The director of the Census Bureau similarly opined that the
 14 underlying purpose of the McDade amendment “would violate Article I, Sec. 2 of the
 15 Constitution as well as the 14th Amendment”.¹¹⁰ The McDade amendment was rejected.¹¹¹

17 History repeated itself in the lead-up to the 1990 census.¹¹² Certain members of Congress
 18 introduced bills requiring the Secretary of Commerce to make adjustments to the census count to
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20 ¹⁰⁵ See 126 Cong. Rec. 3578 (1980) (H.R. 6577); *id.* at 4202 (S. 2366); *id.* at 4528 (H. Res. 594);
 21 *id.* at 5266 (H.R. 6769); *id.* at 5522 (H.R. 6812).

22 ¹⁰⁶ *Census: Counting Illegal Aliens, Hearing on S. 2366 of the Subcomm. on Energy, Nuclear*
Proliferation and Fed. Servs. of the S. Comm. on Governmental Affairs, 96th Cong. 95 (1980)
 (analysis of S. 2366).

23 ¹⁰⁷ 126 Cong. Rec. 22,140 (H. Amdt. to H.R. 7583).

24 ¹⁰⁸ *Id.*

25 ¹⁰⁹ *Id.* at 22,142 (remarks of Rep. Garcia).

26 ¹¹⁰ *Undercount and the 1980 Decennial Census: Hearing before the Subcomm. on Energy,*
Nuclear Proliferation and Fed. Servs. of the S. Comm. on Governmental Affairs, 96th Cong. 44
 (1980) (statement of Vincent Barabba, director of the Census Bureau).

27 ¹¹¹ See 126 Cong. Rec. 31,899 (1980). For an earlier vote, see *id.* at 22,149.

28 ¹¹² See generally Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the*
Reapportionment Base: A Question of Representation, 41 Case W. Res. L. Rev. 969, 970 n.12
 (1991).

1 exclude undocumented immigrants from the apportionment.¹¹³ The Congressional Research
2 Service (CRS) analyzed the term “whole number of persons” in the Fourteenth Amendment and
3 concluded that “the phrase . . . is to be the basis for congressional apportionment as determined
4 by the census and would include aliens, both legal and illegal”.¹¹⁴ The DOJ Office of Legislative
5 Affairs similarly concluded that excluding undocumented immigrants from the apportionment is
6 unconstitutional and stated that it “would recommend that the President veto” the bill if it were
7 passed.¹¹⁵ Once again, a few members of Congress and groups such as FAIR sued to challenge
8 the inclusion of undocumented immigrants for purposes of congressional apportionment. As in
9 *FAIR*, the court held that the plaintiffs lacked standing.¹¹⁶

11 In 2005, Representative Candice Miller of Michigan introduced a resolution to amend the
12 Constitution to provide that “congressional representation shall be apportioned based on the
13 number of citizens, not persons”.¹¹⁷ Representative Miller explained that she proposed a
14 constitutional amendment rather than legislation because “if we tried to do this by statute, even if
15 we were successful in passing it, we would be facing endless litigation, and so I thought a
16 constitutional amendment would be the more prudent course”.¹¹⁸ Congress did not put the
17 proposed amendment to a vote. Leading up to the 2010 census, certain members of Congress
18 renewed their efforts to identify undocumented immigrants in the census count or exclude them
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21 ¹¹³ See, e.g., 133 Cong. Rec. 31,634 (1987) (H.R. 3639); *id.* at 36,481 (H.R. 3814); 135 Cong.
22 Rec. 1204 (1989) (H.R. 744); *id.* at 4112 (H.J. Res. 199); *id.* at 4488 (H.R. 1468); *id.* at 12,179
23 (H.R. 2661); *id.* at 14,529 (S. Amdt. 255 to S. 358); *id.* at 22,518 (S. Amdt. 900 to H.R. 2991).

24 ¹¹⁴ *1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing before
the H. Comm. on Post Off. and Civ. Serv.*, 100th Cong. 148 (1988) (report by the Congressional
Research Service).

25 ¹¹⁵ *Id.* at 240.

26 ¹¹⁶ *Ridge v. Verity*, 715 F. Supp. 1308, 1322 (W.D. Pa. 1989).

27 ¹¹⁷ *Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected
Representatives?*, *Hearing Before the Subcomm. on Federalism and the Census of the H. Comm.
on Gov't Reform*, 109th Cong. 12 (2005) [hereinafter *Counting the Vote*, 109th Cong.]; see also
151 Cong. Rec. 12,063 (2005) (H.J. Res. 53).

28 ¹¹⁸ *Counting the Vote*, 109th Cong. 27.

1 from apportionment.¹¹⁹ Each of these proposals failed. The CRS again concluded that the
2 Constitution requires that “all individuals, regardless of citizenship status be included in the
3 population count for legislative apportionment”.¹²⁰

4 The historical practice is thus longstanding and unbroken. The census has always counted
5 all persons in the United States, regardless of citizenship or immigration status, and included
6 them in the congressional apportionment. All proposals to the contrary have been properly
7 rejected as unconstitutional.
8

9 CONCLUSION

10 Based on the plain language of the Constitution, the history of that language’s enactment,
11 and the consistent practice over the past 230 years interpreting and applying that language, the
12 July 21 Memorandum is unconstitutional.
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26 ¹¹⁹ See 155 Cong. Rec. 280 (2009) (H.J. Res. 11); *id.* at 22,088 (S. 1688); *id.* at 23,684 (S. Amdt.
27 2644 to H.R. 2847); *id.* at 24,724 (H.R. 3797).

28 ¹²⁰ Cong. Research Serv., R41048, *Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes* 10 (2012).

1 Dated: September 1, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with Civil L.R. 3-4 and Civil L.R. 7-4 and does not exceed 25 pages.

Dated: September 1, 2020

/s/ Richard W. Clary
Richard W. Clary

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2020, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court’s CM/ECF system.

Dated: September 1, 2020

/s/ Richard W. Clary
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