NO. 20-366

IN THE

Supreme Court of the United States

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

Appellants,

v.

NEW YORK, *et al.*,

Appellees.

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

BRIEF OF *AMICUS CURIAE* DR. JOHN S. BAKER, JR. IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the President not only has the discretion, under the applicable statutes, to exclude illegal aliens from apportionment of the House of Representatives, but whether *the Constitution obligates the President to exclude all foreign nationals from apportionment* of the House of Representatives.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

Dr. John S. Baker has taught the structure of the Constitution, Federalism and Separation of Powers, for decades. At the time of the last Census, he co-authored (with Elliott Stonecipher) a *Wall St. Journal* opinion piece (Aug. 9, 2009), entitled "Our Unconstitutional Census." He also served as co-counsel representing Louisiana, which filed an unsuccessful motion in this Court requesting to proceed with a direct action against the Commerce Department challenging the State's loss of a congressional seat due to the inclusion of illegal aliens in the apportionment of seats in the U.S. House of Representatives. In the decade since, Dr. Baker has attempted to awaken law students, lawyers, and the general public to the dilution of the representation right of voters and states caused by the inclusion of foreign nationals in apportionment. Most recently, he co-authored (with David R. Rivkin) another opinion in the *Wall St. Journal* (Aug. 2, 2020), "Madison Warned About 'Sanctuary' States," supporting the President's Executive Order challenged in this case.

SUMMARY OF ARGUMENT

Individuals who are not United States nationals (citizens or lawful permanent residents), and who consequently cannot establish permanent legal residency within one of the several States, cannot be counted in the Census for apportionment purposes

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

consistent with the Constitution. They are not "inhabitants," the term used in the Constitutional Convention, *The Federalist Papers*, and Census instructions for much of our history to identify those to be counted in the Decennial Census. The issue is of obvious importance because, to the extent that foreign nationals (whether lawfully or unlawfully present) in the United States are counted for apportionment purposes, States with large populations of such individuals are awarded a larger number of seats in the House of Representatives to the disadvantage of States with fewer such persons. This is inconsistent with the Constitution's original meaning and design. In addition, including foreign nationals unlawfully in the United States dilutes the votes and representation of the people of disadvantaged States, fundamentally undercutting the "one person, one vote" principle.

ARGUMENT

The Census currently counts all foreign nationals living legally or illegally in the United States. The Census Bureau's website states the following under "Who (sic) to Count:"

> Citizens of foreign countries who are living in the United States, including members of the diplomatic community, should be counted in the U.S. residence where they live and sleep most of the time.

U.S. Census Bureau, "Who to Count," "Special Circumstances," "Foreign Citizens in the United States," available at https://2020census.gov/en/conducting-the-count/who-to-count.html (last visited 10/29/20).

It may well be that the Census Bureau—based in the D.C. Metropolitan area—wants to assure that Washington, D.C. and New York get federal funds to compensate for the use of city services by, as well as for all the unpaid parking tickets of, foreign diplomats. The inclusion of diplomatic staff illustrates, however, that the Census Bureau has lost sight of the purpose of the Constitution's Apportionment Clause (as opposed, *e.g.*, to the Spending Clause) in requiring the Decennial Census. Congress is free to use the Census to allocate federal funding, but that is not the constitutional purpose of the Census.

That there has not been more attention to the constitutional purpose of the Census is due in part to the fact that changes in a State's representation in the House of Representatives and, derivatively, the Electoral College, affect only a relatively few states after each Census. But virtually every city and state is terribly concerned about the distribution of federal funding to the states, much of which is tied to numbers from the Census. The statutory purpose of allocating federal funding must remain secondary to the Constitutional purpose of the Census: allocating each state's number of representatives in the House of Representatives and, derivatively, votes in the Electoral College.

Including foreign nationals, whether legally or illegally in the United States, among those entitled to be represented in the House of Representatives and, derivatively, in the Electoral College makes no constitutional sense. Contrary to what the Census Bureau claims, the understanding of the constitutional text at the Founding and at least until sometime in the twentieth century was that only "inhabitants" should be

counted in the Census. It is certainly easier for the Census Bureau to use the same set of numbers for allocating House seats as it uses for allocating federal funds. What the statisticians at the Census Bureau have done, however, is to allow the federal-funding tail to wag the Constitutional dog.

I. The Constitution's Original Meaning in the Apportionment Context.

Article I, Section 2, Clause 3 of the Constitution establishes the original requirements for apportioning seats in the House of Representatives as follows:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three–fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative.

U.S. Const., Art. I, § 2, cl. 3 ("Apportionment Clause"). The "three-fifths clause" was, of course, eliminated by the Fourteenth Amendment, which provides 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." U.S. Const. Amend. XIV, § 2. Although both the text adopted in 1787, and that of the Fourteenth Amendment in 1868, use the phrase "whole number of persons," context strongly indicates that the framers of these provisions meant only to include individuals lawfully present in a State with a stable residence or domicile there—individuals referred to as "inhabitants" in early drafts of the Constitution.

Both the original Apportionment Clause and that of Section 2 of the Fourteenth Amendment establish proportional representation in the House of Representatives among the States "according to their respective numbers." In 1787, this figure was to be determined based upon the "whole number of free persons" (including indentured servants) and "three–fifths of all other persons" (slaves), excluding Indians not subject to taxation in the State. Under the Fourteenth Amendment, the calculation is revised simply to include the "whole number of persons," but again excluding "Indians not taxed." U.S. Const. Amend. XIV, § 2.

Without context, this language may seem to suggest that, with the exception of Indians not subject to state taxation, every human being present within the borders of a State must be counted towards apportionment. *See, e.g.*, U.S. Census Bureau, Supporting the 2010 Census: A Toolkit for Reaching Immigrants, at 25, http://2010.census.gov/partners/pdf/Immigrant_Overview.pdf ("As mandated by the Constitution, every person living in the United States must be

counted – both citizens and noncitizens").[2] This construction, however, leads to absurd and contradictory results. It would, for example, necessarily require the inclusion of travelers and transients in each State where they happen to be present during the Census, even if this means that they are counted more than once. *Cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (construction of text "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Dolan v. United States Postal Serv.*,

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[2] The Census Bureau's maintenance of such an extreme position may, at least in part, be attributable to the fact that the Census is used for many purposes other than apportionment. In particular, federal spending is very substantially distributed in accordance with the Census. As the Brookings Institution found at the time of the last Census in 2010: "In FY 2008, 215 federal domestic assistance programs used census-related data to guide the distribution of $446.7 billion, 31 percent of all federal assistance. Census-guided grants accounted for $419.8 billion, 75 percent of all federal grant funding." Brookings Institution, Counting for Dollars: The Role of the Decennial Census in the Geographic Distribution of Federal Funds 1 (Mar. 2010), available at https://www.brookings.edu/wp-content/uploads/ 2016/06/0309_census_report.pdf. It also noted that "[t]o illustrate the fiscal impact of decennial census accuracy, each additional person included in the Census 2000 resulted in an annual additional Medicaid reimbursement to most states of between several hundred and several thousand dollars, depending on the state." *Id.* Although the Constitution does not prohibit Congress from using the Census for purposes other than apportionment, the incentive for inflating the number of a State's inhabitants is evident. Such possibilities were, in fact, of concern the Constitution's Framers. *See infra* p. 7.

546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"); *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Indeed, such an interpretation would create incentives to artificially inflate the number of a State's residents by moving people from one place to another for Census purposes, a result the Framer's in 1787 sought to avoid. *See* Federalist No. 54 (Madison) at 371 (Cooke ed., 1961) (noting that "the establishment of a common measure for representation and taxation, will have a very salutatory effect.... [I]t is of great importance that the states should feel as little bias as possible to swell or to reduce the amount of their numbers").

Similarly, a construction of "persons" as every human being present would require inclusion within a State's population of individuals who are not—and in the ordinary course will never be—able to establish themselves as part of a State's political community or vote. Thus, during the debates over enactment of the current apportionment statue, 2 U.S.C. § 2a (as amended), the question was asked whether the constitutional language—carried forward into the statute, § 2a(a)—meant that the soldiers of an invading army would have to be counted and included in the totals for apportionment purposes. The answer was "[a]bsolutely not. If a strict construction is to be placed on the Constitution and we are compelled to enumerate every person in the country, then we

would have to enumerate the … soldiers that had invaded our territory and that were making war on us." 71 Cong. Rec. 2276 (Jun. 3, 1929) (Statement of Rep. Lozier). In this respect, a "rule of reason must be written into the statute.… [Y]ou must take into account the object and purpose the framers had in view. The terms 'persons' and 'numbers' were only intended to refer to those who are parts of our national family, by birth or naturalization." *Id.* This view is consistent with the understanding and intent of the Constitution's Framers.

During the 1787 Constitutional Convention, the common understanding of the population to be counted towards apportionment was that it would include a State's "inhabitants." Thus, the "Virginia Plan" proposed a "National Legislature" proportioned on "the number of free inhabitants." 1 The Records of the Federal Convention of 1787 20 (Max Farrand ed., 1937) ("Farrand"). The Virginia Plan, of course, ultimately led to the "Great Compromise" under which the States would be represented equally in the Senate while the House of Representatives would proportionally represent the people. Significantly, the Committee of the Whole and the Committee of Detail also used the word "inhabitant" as the Constitution was refined and finalized. *Id.* at 178, 236, 566. Only in the Committee of Style was "inhabitants" replaced by "numbers" and "the whole number of free persons."

This was not, however, intended as a substantive change in the provision's meaning. *See*, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 538-39 (1969) (explaining that the Committee of Style had no authority to make substantive changes). Thus, as James Madison noted when explaining the Apportionment Clause in *The*

Federalist, "the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants" and, that first among the "unequivocal objects" of the Census was "to readjust, from time to time, the apportionment of representatives to the number of inhabitants." Federalist Nos. 54, 58, at 369, 391.[3]

The First Congress agreed. The act authorizing the first Census in 1790 was entitled "An Act providing for the enumeration of the Inhabitants of the United States," and directed officials "to cause the number of the inhabitants of their respective districts to be taken; omitting in such enumeration Indians not taxed." Act of March 1, 1790, ch. 2, § 1, 1 Stat. 101 (Mar. 1, 1790). Each statute authorizing the census over the next 80 years began with the directive to enumerate the "inhabitants" of each district. *See* 2 Stat. 11 (Feb. 28, 1800); 2 Stat. 564 (Mar. 26, 1810); 3 Stat. 548 (Mar. 13, 1820); 4 Stat. 383 (Mar. 23, 1830); 5 Stat. 331 (Mar. 3, 1839); and 9 Stat. 428 (May 23, 1850) (effective through the 1870 census). Even after

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[3] In Federalist No. 54, Madison acknowledges that not all "inhabitants" counted in the Census for purposes of apportionment will be voting citizens: "In every state, a certain proportion of *inhabitants* are deprived of this right by the Constitution of the State, who will be included in the census by which the Federal Constitution apportions the representatives." Federalist No. 54 (emphasis added). Here, as noted above, Madison also explained one clear benefit of linking both direct taxation and apportionment to the Census enumeration, it would help the States to feel "as little bias as possible to swell or to reduce the amount of their numbers." *Id.* at 371.

the 1879 census act changed the statutory wording to provide for "a census of the population," every authorizing statute until 1929 continued to require enumerators hired by the census to take an oath stating that "I will make a true and exact enumeration of all the inhabitants within the subdivision assigned to me," 20 Stat. 473, § 7 (Mar. 3, 1879) (effective through the 1890 census), or to conduct the enumeration using schedules that specified certain information to be recorded "for each inhabitant." 30 Stat. 1014, § 7 (Mar. 3, 1899); 36 Stat. 1, § 8 (June 29, 1909); 40 Stat. 1291, § 8 (Mar. 3, 1919).

The Fourteenth Amendment's drafters followed the 1787 Framers' lead. They restated the original Apportionment Clause's language, except the language referring to indentured servants and creating the infamous "three-fifth's" compromise.[4] Significantly, in the next sentence the Amendment references a State's "inhabitants" in creating a penalty for an State trying to deny the vote to former slaves, and uses the term interchangeably with "citizens":

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one

[4] Further, the act authorizing the 1870 Census (conducted like that of 1860 pursuant to the Census Act of 1850) and the 1880 Census, continued to identify "inhabitants" as the population to be counted. *See* Census Act of 1850, 9 Stat. 428 (1850); Census Act of 1879, 20 Stat. 473, 475 (1879).

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

U.S. Const. Amend. XIV, § 2. In this manner, the amendment's drafters confirmed that apportionment was to be based on a State's inhabitants, those who are attached to it with greater permanence and force, rather than individuals merely present during the Census.[5] Moreover, henceforth, if any "male inhabitants of such State," being of age, were excluded from voting, the result would be an entirely consistent reduction in the State's apportionment. At least in these circumstances, there was to be a direct connection between the number of representatives a State was entitled to in the House and the number of its voters.[6]

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[5] Representative Roscoe Conkling, one of the Amendment's drafters, stated that the drafting committee "adhered to the Constitution as it is, proposing to add to it only as much as is necessary to meet the point aimed at," the eradication of Article I's references to servitude. Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

[6] Construing the Fourteenth Amendment to require enumeration for apportionment of all "persons" would also have the absurd result that corporations would be counted for these purposes as, "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.15 (1978) (citing

The precise issue of how foreign nationals unlawfully present in the United States should be treated for Census purposes did not arise when the Constitution and Fourteenth Amendment were adopted. The concept of an unlawful or "undocumented" alien did not exist at this time, as the flow of immigration was largely unregulated. The right of persons to establish homes in the United States was governed by treaties. Thus, for example, the "Jay Treaty," establishing commercial relations with England after the War for Independence, provided:

> The people and Inhabitants of the Two Countries respectively, shall have the liberty, freely and securely, and without hindrance and molestation, to come with their Ships and Cargoes to the Lands, Countries, Cities, Ports, Places and Rivers within the Dominions and Territories aforesaid, to enter into same, to resort there, and to remain and reside there, without limitation of Time ….

Treaty of Amity Commerce and Navigation, G.B.-U.S., Nov. 19, 1794, 8 Stat. 116, Art. 14. Except for

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Santa Clara County v. *Southern Pacific R. Co.*, 118 U.S. 394 (1886), and *Covington & Lexington Turnpike R. Co.* v. *Sandford*, 164 U.S. 578 (1896)).. Such an interpretation would, today at least, add more than one million inhabitants to Delaware's apportionment numbers, more than doubling that State's population and representation in the House of Representatives. *See* Delaware Division of Corporations, "About the Division of Corporations," at http://www.corp.delaware.gov/aboutagency.shtml (indicating that more than one million companies, including 66% of the Fortune 500, are incorporated in Delaware).

the Chinese Exclusion Act of 1882, 22 Stat. 58, which excluded individuals from China from immigrating to the United States, and the Act to Regulate Immigration of 1882, the laws significantly restricting immigration into the United States date from the 1920s.

For the same reason, the history of the Census is of limited relevance in resolving the question. In the Republic's first century, the enumeration for apportionment purposes included both citizens and un-naturalized aliens, provided that they were "inhabitants." *See* 3 Stat. 548 (Mar. 13, 1820); 4 Stat. 383 (Mar. 23, 1830); 20 Stat. 473 (Mar. 3, 1879). As noted above, *supra*, at page 2-3, the Census Bureau now takes the position that every person—except tourists—present in a State when the Census is taken must be counted for apportionment purposes. Over the years, however, this position has varied. Thus, between 1900 and 1930, the forms used to conduct the census indicated that only "immigrant" non-citizens were to be counted. No provision was made for counting non-immigrant foreign nationals or those who might be in the United States unlawfully.[7] The law currently governing conduct of the census was enacted in 1929, and was much less detailed as to who was to be counted than previous census statutes. *See* Reapportionment Act of 1929, 46 Stat. 21, 2 U.S.C. § 2a.

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[7]*See* Bureau of the Census census forms for 1900, 1910, 1920, and 1930, available at https://www.census.gov/history/pdf/1900_questionnaire.pdf; https://www.census.gov/history/pdf/1910_questionnaire.pdf; https://www.census.gov/history/pdf/1920_questionnaire.pdf; and http://www.census.gov/history/pdf/1930_questionnaire.pdf.

There had been much discussion about how to treat non-citizens and aliens in the years leading up to enactment of the 1929 law—mostly involving arguments regarding the constitutionality of excluding all aliens, since the records of the 1787 Convention clearly indicated that both citizens and "inhabitants" were to be counted. *See*, *e.g.*, 71 Cong. Rec. 747-52 (May 1, 1929); 71 Cong. Rec. 1821-22 (May 23, 1929) (opinion of C.E. Turney, legal counsel to the Senate). Although the law no longer required that information on immigration/naturalization be collected, the 1930 census forms still contained the column labeled "year of immigration to the United States" and another labeled "naturalized or alien." *See* Bureau of the Census, 1930 Form, at https://c.mfcreative.com/pdf/trees/charts/1930.pdf. Thus, it appears that persons who were not "immigrants"—*i.e.* persons admitted under non-immigrant visas or unlawfully present—would not have been included in the reapportionment enumeration.[8] Beginning in 1940, however, the Census Bureau eliminated the category

[8] Today, "alien" is defined by law as "any person not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3). Those who are lawfully present in the United States generally fall into one of two categories: (1) aliens "lawfully admitted for permanent residence," which "means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws;" and (2) aliens who hold a "nonimmigrant visa," which "means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter." 8 U.S.C. § 1102(20). The first category may reasonably be classified as "inhabitants" based on their right and intent to reside

"year of immigration," replacing it instead with questions about when or whether foreign-born individuals were naturalized, had their first papers, were an alien, or an American citizen born abroad. *See* Bureau of the Census, 1940 Form, https://www.archives.gov/files/research/census/1940/1940.pdf. The 1950 census reduced these categories for foreign born persons to naturalized, yes or no, or born of American parents overseas. *See* Bureau of the Census, 1950 Form, at https://usa.ipums.org/usa/voliii/form1950.shtml.

Finally, although this Court has not opined on the question whether the Constitution requires apportionment to be based on the number of a State's "inhabitants," it has examined the meaning and history of Art. I, § 2 and concluded that members of the House of Representatives must be chosen "by the People of the several States" and that:

> The debates at the Convention make at least one fact abundantly clear: that, when the delegates agreed that the House should represent "people," they intended that, in allocating Congressmen, the number assigned to each State should be determined solely by the number of

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permanently "as an immigrant" in the United States. Individuals in the second category have a legal right to be present in the United States, but that right is limited by time or purpose constraints. They are not inhabitants and must voluntarily depart once their visa has expired, or apply for an "adjustment of status" to an immigrant visa as may be permitted by statute. *See generally*, 8 U.S.C. § 1255.

> the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.

Wesberry v. Sanders, 376 U.S. 1, 13-14 (1964) (emphasis added, footnote omitted). It was, of course, in *Wesberry* that the Court made clear that the fundamental principle of "one person, one vote" applied to drawing congressional districts.

More recently, when this Court considered whether, like federal congressional districts, state legislative districts must be drawn "as close as perfect equality [of population] as possible," it assumed that the proper basis of representation in the federal Congress was a state's inhabitants and citizens. *See Evenwel v. Abbott*, 136 S.Ct. 1120, 1124 (2016). In examining the text and history of Art. I, § 2, cl. 3, the Court explained that: "In other words, the basis of representation in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives." *Id*. at 1127. On this point, the Court went on to note that, at the time of the Founding, "[r]estrictions on the franchise left large groups of citizens, including women and many males who did not own land, unable to cast ballots, yet the Framers understood that these citizens were nonetheless entitled to representation in government." *Id*. at 1127 n.8.

II. Foreign nationals are not "Inhabitants" and Cannot be Included in a State's Population for Apportionment Purposes.

At the time of the Founding, the word "inhabitant" was understood to require a more permanent relationship to a State than mere presence or residence. Thus, during the debate over establishing residency qualifications for members of the House of Representatives, Madison supported a change from the word "resident" to "inhabitant." He explained that, "both were vague, but the latter ["inhabitant"] least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business." 2 Farrand, *supra*, at 217. See U.S. Const., Art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen"). By contrast, the fear was that "resident" would exclude legislators away serving in the nation's capital. *Id*. at 218.[9]

Thus, when the 1787 Framers used the word "inhabitant" in the Constitution's original drafts, they

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[9] This understanding of "inhabitant" also is supported by contemporary usage. *See* 1 N. Webster, *An American Dictionary of the English Language* (1828) (inhabitant defined as: "A dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor." To "dwell" is to "abide as a permanent resident" or "to have habitation for some time or permanence." *Id*.

intended a degree of permanence and stability of residence within a State, a status corresponding to membership within a State's political community; *i.e.*, the "People" of a State." *See generally* Charles Wood, "The Census, Birthright Citizenship, and Illegal Aliens," 22 Harv. J. L. & Pub. Pol. 465, 477-79 (1999). This focus on the States as pre-existing political communities also is supported by early commentaries on the Constitution, in particular those of Justice Joseph Story. Justice Story explained the point with respect to those Indians who were to be explicitly excluded from the enumeration because they were not subject to taxation by the relevant State:

> There were Indians, also, in several and probably in most, of the states at that period, who were not treated as citizens, and yet, who did not form a part of individual communities or tribes, exercising general sovereignty and powers of government within the boundaries of the states. It was necessary, therefore, to provide for these cases, though they were attended with no practical difficulty. There seems not to have been any objection to including, in the ration of representation, persons bound to service for a term of years, and to excluding Indians not taxed.

2 Joseph Story, Commentaries on the Constitution § 635 (1833). The intent was that apportionment would be limited to citizens and others with a permanent—or at least durable—habitation in the relevant State sufficient to be considered a part of the "political community."

Accordingly, foreign nationals lawfully or unlawfully present in the United States cannot be counted for apportionment purposes because they are not "inhabitants" of any State. They cannot, by definition, establish a stable and durable residence or domicile in any State because they are at all times subject to a time-limited stay or to deportation. *See* 8 U.S.C. §§ 1182(6)(A)(i), 1227(a)(1)(A). Individuals unlawfully present cannot lawfully be employed in the United States. *See* 8 U.S.C. § 1324a(a) (making it unlawful to hire or continue employing an unauthorized alien). This is a matter of federal law, and is grounded in Congress's power to establish rules of naturalization. *See* U.S. Const. art. I, § 8, cl. 4. Under this provision, Congress may make rules "covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Elkins v. Moreno*, 435 U.S. 647, 664 (1978). Restrictions can also be imposed to prevent foreign nationals from establishing domicile within the United States. *Id*. at 666.

In reaching this conclusion, the Court in *Elkins v. Moreno* drew a useful distinction among aliens legally present in the United States on non-immigrant visas. At issue was the ability of certain, foreign national college students to establish sufficient domicile in a State (Maryland) to become entitled to "in-state" tuition. The complainants were dependents of "G-4 Visa" holders, *i.e.*, individuals employed by certain international organizations who are permitted to remain in the United States indefinitely as non-immigrants. Most non-immigrant visa holders, by contrast, are restricted in the time they may remain in the United States.

This Court framed the federal issue as whether the complaining students could form the intent to remain indefinitely in a State, which is normally required to establish domicile under state law. It concluded that this was, indeed, legally possible because Congress had not limited the time G-4 Visa holders could remain in the United States, nor subjected them to deportation after their visa status ended: "Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile." *Id*. at 666-67. As a result, the Court concluded, the question whether these students could establish domicile in Maryland for these purposes became one of state law, which it duly certified to that State's courts for resolution. *Id*. at 668. Of course, Congress did not extend this benefit to foreign nationals unlawfully present in the United States whose exit, being subject to deportation, is legally certain. Like foreign travelers, such individuals cannot be inhabitants for apportionment purposes.

III. Counting Foreign Nationals, legally or illegally present in the US, for Apportionment Purposes Violates the "One Person, One Vote" and Equal Protection Principles.

As noted above, this Court held in *Wesberry v. Sanders* that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. Similarly, the Court has repeatedly held that

districting plans which give unequal voting power to voters in different districts violate the Equal Protection Clause. *See, e.g.*, *Bartlett v. Strickland*, 129, S.Ct. 1231, 1239 (2009) (acknowledging "the one-person, one vote principle of the Equal Protection Clause" as established in *Reynolds*); *Board of Estimate v. Morris*, 489 U.S. 688, 701 (1989) ("relevant inquiry" in redistricting cases under the Equal Protection Clause "is whether the vote of any citizen is approximately equal in weight to that of any other citizen"); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and … the concept of equal protection therefore requires that their votes be given equal weight"); *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group"); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote … is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State").

A similar analysis is suggested for federal actions under the "equal protection" component of the Fifth Amendment's Due Process Clause. *See Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981) ("This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment"). Counting

unlawfully present foreign nationals for apportionment purposes violates this equal protection mandate. This is true regardless of whether the "one person, one vote" principle is interpreted as applying to the dilution of the value of an individual citizen's vote or in accordance with the requirement of "equality of representation." *See Evenwel v. Abbott*, 136 S.Ct. 1120, 1131 (2016).

Wesberry involved claims by residents of Georgia's Fifth Congressional District, which includes the city of Atlanta and had more than twice the number of residents as the average in other Georgia districts. The Court had no trouble concluding that this violated the one person, one vote principle, explaining that:

> We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention.

Wesberry, 376 U.S. at 8. Accordingly, the Court required that congressional districts contain as near as possible an equal number of inhabitants. *Id*. at 18.

Including foreign nationals in the Census totals used for apportionment purposes dilutes the value of votes in districts with relatively few such persons.

This practice artificially expands the population especially in districts with many illegal aliens. The result is that fewer voters choose a House member in those privileged districts. As in *Wesberry,* there are more voters in non-privileged districts who—like the people of Georgia's 5th District—are entitled to elect the same, single Representative. This Court succinctly explained the problem thus:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.

Bd. of Estimate, 489 U.S. at 698.

More recently, in *Evenwel v. Abbott*, this Court revisited the one person, one vote question, although, in the context of state rather than federal electoral districts. There, voters in Texas claimed that the State's practice of drawing state legislative districts based on total population, rather than number of actual voters, resulted in impermissible voter dilution. Although this Court rejected the claim, concluding that there was no "voter-equality mandate in the *Equal Protection Clause*," 136 S.Ct. at 1126, it also noted that "it remains beyond doubt that the principle of representational equality figured prominently in the [Framers'] decision to count people, whether or not they qualify as voters." *Id.* at 1129. By "representational

equality," the Court meant that "the basis of *representation* in the House was to include all *inhabitants*." *Id.* at 1127 (first emphasis in original, second emphasis added).

In addition to foreign students and other lawfully present foreign nationals, there are an estimated 11 million illegal aliens present in the United States. See Pew Research Center, "5 Facts about illegal immigration in the U.S." (June 12, 2019), at http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/.[10] These individuals are not evenly distributed throughout the nation, but are concentrated in six states: California, Texas, Florida, New York, New Jersey and Illinois. *Id*. California has, by far, the largest populations of unlawfully present foreign nationals (2,350,000). It is followed by Texas (1,650,000), Florida (850,000), New York (775,000), New Jersey (500,000), and Illinois (450,000). *See* Pew Research Center, "Hispanic Trends," at http://www.pewhispanic.org/interactives/unauthorized-immigrants. Counting unlawfully present aliens—as well as a far lower number of lawfully present foreign nationals—for apportionment purposes dilutes the equality of representation of the inhabitants of States with fewer of these individuals.[11] Conversely, maintaining a Census count

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[10] Other estimates put the figure at 12.5 million. *See* FAIR, "Fiscal Burden of Illegal Immigration," at https://fairus.org/issue/publications-resources/fiscal-burden-illegal-immigration-united-states-taxpayers.

[11] Although, because of their overall numbers, counting unlawfully present foreign nationals for apportionment purposes presents the greatest problem in terms of distorting

based on district inhabitants maintains equality of representation among all "constituents" across district lines.

The cases in which this Court has recognized the discretion of Congress and/or the Census Bureau to establish the method of counting do not suggest a contrary conclusion. *See Wisconsin v. City of New York*, 517 U.S. 1, 15, 20 (1996) (Secretary of Commerce had discretion to select a statistical adjustment method where, "in light of the constitutional purpose of the census, its distributive accuracy was more important than its numerical accuracy"); *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (upholding Secretary of Commerce's discretion over the method to be used in allocating military personnel serving abroad to states for census purposes); *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992) (upholding Congress' discretion to choose among the "method of equal proportions," the "method of the harmonic mean," the "method of smallest divisors," the "method of major fractions," and the "method of greatest divisors" in apportioning seats in Congress). These cases involved the means by which the population is counted for apportionment

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the allocation of Representatives among the States, counting lawfully present foreign nationals is equally unconstitutional, even if perhaps less damaging in practice. That said, the Census Bureau's insistence on counting each person where they are found when the Census is conducted certainly has the potential to cause distortions even among lawful residents—as when the "population" of a college town is swelled during the school year with students actually domiciled elsewhere, most likely where their parents' home is located.

purposes among the states. With respect to counting foreign nationals, it is the outcome rather than the method of the count that creates constitutional concerns. In *Wisconsin*, *Franklin*, and *Montana*, the status of the persons counted never entered into the Court's analysis.

By contrast, including foreign nationals in the Census for apportionment purposes does not represent only one of several methodologically valid choices within the Secretary of Commerce's discretion; it violates the Constitution's command that *the People of the United States* choose their representatives and have as equal a say as possible in doing so. Congress and the Census Bureau have discretion over how to count individuals, but for apportionment purposes they cannot constitutionally count individuals who are not permanent members of the American political community.[12]

It has been argued that the "one person, one vote" requirement of *Wesberry* does not apply to conduct of the federal census or apportionment among the States, based on this Court's decisions in *Montana*, 503 U.S. 442. and *Wisconsin*, 517 U.S. 1. *See* CRS, "Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes," 6 (Apr. 13, 2012), at https://www.everycrsreport.com/files/20120413_R41048_e4eb1c369b633cea52b254c5a305e6111eb5d795.pdf. In fact, the Court did

[12] It is true, of course, that the Census counts many non-voters for apportionment purposes. But these individuals, such as legally-present children, are inhabitants of their states and may, in time, become voters. Unlawfully present foreign nationals are not and cannot.

not hold in these cases that the "one person, one vote" principle was inapplicable, but that the very strict, mathematically precise test articulated in *Wesberry*, as required in drawing congressional districts, did not apply to the apportionment of representatives among the States.

In *Montana*, the State claimed that the method of "equal proportions" used by the Census Bureau, and approved by Congress, failed the *Wesberry* test because it "resulted in an unjustified deviation from the ideal of equal representation." *Id.* at 444. Rather, it argued for use of formulas that would have more closely approximated the result under *Wesberry*, and have given Montana an additional seat in the House of Representatives. This Court concluded, however, that *Wesberry's* standard of mathematical precision—requiring that the "only population variances that are acceptable are those that 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown,'" *id.* at 446 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969))—simply could not be applied in the apportionment context.

In reaching this conclusion, the Court reasoned that

> There is some force to the argument that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might

> well find that the requirement that Representatives be apportioned among the several States "according to their respective numbers" would also embody the same principle of equality.

Id. at 461. However, the Court went on to explain that the Constitution's other requirements governing representation in the House of Representatives "constrained" its "general admonition in Article 2, § 2 that Representatives shall be apportioned among the several States 'according to their respective Numbers.'" *Id.* at 447. These include the requirements that "Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *Id.* at 448. As a consequence, the "precise mathematical equality" of *Wesberry* is inapposite to apportionment. If it were applied, the very process of achieving the mathematical "ideal" in one state, pushes others "away from that ideal." *Id.* at 462. This is not true of drawing district lines within a state, and these are therefore "capable of being reviewed under a relatively rigid mathematical standard." *Id.* at 464.

This Court reached the same result in *Wisconsin*, which upheld the Census Bureau's decision not to use a statistical method to adjust for a claimed undercount of the population, especially among minority groups. It similarly concluded that this decision was not subject to the strict scrutiny standard applied under *Wesberry* to state redistricting. Among other things, this Court noted that none of the (then) twenty decennial censuses had achieved a perfect count of the U.S. population, noting that:

> Persons who should have been counted are not counted at all or are counted at the wrong location; "persons who should not have been counted (whether because they died before or were born after the decennial census date, because there was not a resident of the country, or because they did not exist) are counted; and persons who should have been counted only once are counted twice.

517 U.S. at 6. It went on to explain, as in the Montana case, that the Constitution itself made application of the strict *Wesberry* standard to apportionment impossible: "We further found [in *Montana*] that the Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the standard imposed in *Wesberry*." *Id*. at 14-15. As a result, the Constitution did not require Congress to choose "numerical accuracy" under *Wesberry* as opposed to "distributive accuracy," *i.e.*, a choice between "absolute equality and relative equality." *Id*. at 18. "Hence, so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation, [citation omitted] it is within the limits of the Constitution." *Id*. at 20.

Thus, in neither *Montana* nor *Wisconsin* did this Court deviate from the fundamental principle that one vote must equal another in the apportionment process. Indeed, it made clear that—within the constraints imposed by the Constitution itself—the goal remained one of equal representation. And, of course, neither case addressed the issue whether counting

millions of people who are not, and cannot be, inhabitants of a State, and fundamentally distorting the allocation of House seats, was constitutionally sustainable.

An individual inhabitant's equal participation in representational government is constitutionally compromised no less because the counting of foreign nationals in another State proportionately overstates the proportional representation of that States' inhabitants by more than is constitutionally permitted. Moreover, just as unlawfully present foreign nationals are unevenly distributed among the States, they also are unevenly distributed within individual States. As an example, the population in certain areas of California is estimated to be up to 15% unlawfully present foreign nationals, while other areas have as few as 1%. See Public Policy Institute of California, "Undocumented Immigrants by Zip Code," at http://www.ppic.org/map/undocumented-immigrants-by-zip-code/. Therefore, drawing congressional districts taking such persons into account directly increases the voting power of districts with large illegal populations at the expense of intrastate districts with fewer. This result is, of course, directly forbidden by *Wesberry*.

There is, therefore, every reason not to allow the counting either lawfully or unlawfully present foreign nationals for apportionment purposes as some anomaly or exception to the basic principle of equality. While *Wesberry*, *Reynolds v. Sims*, and other cases have recognized the right of qualified voters "to vote and to have their votes counted," *Wesberry,* 376 U.S. at 17, the Apportionment Clauses cannot be construed to dilute this fundamental right by inventing

a new-found tolerance for counting, for apportionment purposes, individuals who are in fact not inhabitants, but illegal -- or time-limited legal-- residents. *See*, *e.g.*, U.S. Census Bureau, "Supporting the 2010 Census: A Toolkit for Reaching Immigrants," *supra*, p. 2.[13] The Constitution's two Apportionment Clauses (Article I, § 2 and section 2 of the Fourteenth Amendment) can and must be read *in pari materia,* so as to give full effect to each. These provisions guarantee equality of representation—a principle expressly addressed nowhere else in the constitutional text—even more directly than the Equal Protection Clause and the Article I requirement that Representatives be chosen "by the people of the several States." It would be anomalous in the extreme if these clauses were interpreted to undercut the protections of voting equality arising from other, less specific constitutional provisions.

CONCLUSION

Foreign nationals cannot be counted for purposes of the decennial reapportionment of seats in the

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[13] Section 2 of the Fourteenth Amendment does not require a different result. As noted above, the Framers of that amendment stripped away the text dealing with unfree persons, but otherwise left the Apportionment Clause's original language and purpose intact. It cannot be, however, that the "uppermost principle" of the delegates to the Constitutional Convention, "that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress," *Wesberry*, 376 U.S. at 10, should be undermined by a provision that, on its face, guarantees that very right.

House of Representatives among the States. The language of both Apportionment Clauses was understood at the time they were adopted as requiring a count of all *inhabitants* of the States, which today would translate into all citizens and lawful permanent residents. In addition, counting foreign nationals for apportionment purposes impermissibly results in the dilution of votes both among the States and within States, and a loss of the equal representation which the Constitution also demands. Foreign nationals living in the United States, whether lawfully or unlawfully, should be excluded from the population numbers used in apportionment.

The district court's judgment preventing the President from excluding non-citizens from the apportionment of House seats among the States should be reversed.

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