No. 20-366

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Appellants,

v.

STATE OF NEW YORK, ET AL.,
Appellees.

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

BRIEF OF *AMICUS CURIAE* MICHAEL L. ROSIN IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Legislative Materials

Published Authorities

INTEREST OF AMICUS

Amicus curiae **Michael L. Rosin** is an independent scholar who has conducted extensive historical research and analysis about the interstate apportionment of the United States House of Representatives and the Electoral College.[1] His published scholarship includes:

- *A History of Elector Discretion*, 41 Northern Illinois University Law Review ___, (forthcoming).
- *Did Berkeley County and Jefferson County Constitutionally Vexit in the 1860s?*, 20 Appalachian Journal of Law ___, (forthcoming).
- *The Three-Fifths Rule and the Presidential Elections of 1800 and 1824*, 15(1) University of St. Thomas Law Journal 159 (2018).
- *Elbridge Gerry's Suspicions and the Presidential Election of 2012,* 46(3) PS: Politics Science and Politics 587 (2013).
- *The Five-Fifths Rule and the Unconstitutional Presidential Election of 1916*, 46(2) Historical Methods 57 (2013).

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[1] All parties have filed written consents to the filing of briefs by amici curiae with the Clerk of the Court. No party nor party's counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than amicus or his counsel made a monetary contribution to its preparation or submission.

Mr. Rosin's research on the Electoral College also formed the basis of petition-stage and merits-stage amicus briefs in *Chiafalo et al. v. Washington* and *Colorado Department of State v. Baca et al. See* Brief of *Amici Curiae* Michael L. Rosin et al., *Chiafalo et al. v. Washington,* No. 19-465 & *Colo. Dept. of State v. Baca et al.*, No. 19-518 (Mar. 6, 2020); Brief of *Amici Curiae* Michael L. Rosin & David G. Post in Support of Petition for Certiorari, *Chiafalo et al. v. Washington,* No. 19-465 & *Colo. Dept. of State v. Baca et al.*, No. 19-518 (Nov. 6, 2019). He also submitted amicus briefs in *Chiafalo* and *Baca* to the Washington Supreme Court and Tenth Circuit Court of Appeals, respectively.

Drawing on his detailed research on interstate apportionment, and in particular his careful review of the deliberations of the Thirty-Ninth Congress, Mr. Rosin seeks to assist the Court by marshaling key historical evidence and analysis concerning the proper interpretation and application of Section 2 of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The proceedings of the Thirty-Ninth Congress make it crystal clear that "Indians not taxed" are the only group excluded from "the whole number of persons in each state"—the basis of the interstate apportionment of the House of Representatives. U.S. Const. amend. XIV, § 2. Any attempt to read "persons" as excluding anyone other than "Indians not taxed" must be rejected in light of the historical evidence. This brief explains essential historical context for the drafting of Section 2 of the Fourteenth Amendment and responds directly to incorrect, ahistorical arguments advanced by amici

Representatives Brooks, Byrne, and Aderholt ("Brooks Amici") and the State of Alabama (collectively, "Amici").

In the wake of the Civil War, lawmakers realized that, under the Constitution's existing apportionment process, *see* U.S. Const. art. I, § 2, cl. 3, the abolition of slavery would increase the political power of states formerly in rebellion whether or not they continued to disenfranchise persons of color. Congress decided to reward states that gave the franchise to their black populations and penalize those that did not, while also taking account of numerous factors that affected the apportionment calculus for different states. Leveraging amicus Rosin's exhaustive review of historical sources, Section I traces how Congress chose to define the apportionment basis as broadly as possible, and address disenfranchisement through a separate "penalty" provision. Along the way, Congress considered and rejected multiple proposals for alternative, less-expansive definitions for apportionment.

Section II deconstructs Amici's attempts to argue that the President can (or must) exclude illegal aliens from the apportionment basis. First, the historical evidence contradicts Amici's effort to conflate the terms "persons" and "inhabitants." *See* § II.A. Next, Section II.B reveals the flaws in Amici's attempts to misread "persons" as referring to a subset defined by political participation, like "citizens" or "voters." Amici overlook the text and history of the Section 2 of the Fourteenth Amendment in claiming that the usage of "citizens" in the Penalty Clause somehow redefines the usage of "persons" in Section 2's first sentence. Finally, Section II.C clarifies how the Penalty Clause's math works and thereby shows that the Brooks Amici in particular rest their theories on an incorrect application of the Clause. For these reasons,

the Court should reject any attempt to exclude illegal aliens from "the whole number of persons" comprising each state's apportionment basis under Section 2 of the Fourteenth Amendment.

The Court should affirm the judgment below.

ARGUMENT

I. Congress Intended The Apportionment Basis To Include All Persons In Each State, Including Undocumented Persons.

The Thirty-Ninth Congress determined that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. Amici misread Congress's use of the inclusive term "person." They would limit apportionment to a narrower group than all persons, namely "citizens" or "members of the body politic" (as they understand the latter). *See* Alabama Br. at 7; Brooks Br. at 17. But the historical record shows that Congress chose—deliberately and advisedly—not to limit apportionment in that way.

As explained below, the Thirty-Ninth Congress considered and rejected a series of proposals that would have limited the apportionment basis to citizens or even just to persons eligible to vote. Instead, it arrived at the inclusive solution evident in the plain text of Section 2 of the Fourteenth Amendment. Amici's interpretations cannot be reconciled with the record of Congress's deliberations. Yet Amici do not even mention, let alone explain or account for, the Thirty-Ninth Congress's process for defining the group whose "whole number" would serve as the apportionment base.

A. The Historical Context: Congress Began to Grapple with Post-Abolition Apportionment.

Momentous changes marked the interval between the expiration of the Thirty-Eighth Congress on March 3, 1865 and the convening of its successor nine months later: The Civil War had ended. Abraham Lincoln had been assassinated and succeeded by Andrew Johnson. The constitutional abolition of slavery was nearing fruition with the impending ratification of the Thirteenth Amendment.[2] The states formerly in rebellion were on a path leading to full integration into the national government. Their new state constitutions abolished slavery but continued to disenfranchise their entire black populations.[3]

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[2] Proclaimed by Secretary of State William H. Seward on December 18, 1865. 13 Stat. 774. Seward made sure to affirm the necessity of ratifications by three-fourths of the thirty-six states in the Union, thereby affirming the position of the Johnson (and Lincoln) administration that the states formerly in rebellion had never left the Union. *Id.* at 775.

[3] By December 1865 seven of the states formerly in rebellion had adopted new state constitutions. All of them contained provisions that limited suffrage to adult white males. Ala. Const. of 1865, art. VIII, § 1, 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 131 (Francis Newton Thorpe, ed., Government Printing Office 1909) [hereinafter Thorpe]; Ark. Const. of 1864, art. IV, § 2, *id.* at 291; Fla. Const. of 1865, art. VI, § 1, 2 *id.* at 695; Ga. Const. of 1865, art. V, § 1, *id.* at 821; La. Const. of 1864, art. III, § 14, 3 *id.* at 1433; S.C. Const. of

Members of the Thirty-Eighth Congress recognized the need to adjust the constitutional rules for apportionment. Without change, the newly emancipated slave populations of the eleven states previously in rebellion would be counted as whole persons rather than just three-fifths[4] even though their states denied them the right to vote. Based on the 1860 census, these states would see their share of the nation's apportionment basis grow by a bit more than one-tenth, from 26.04 percent to 29.23 percent.[5] Put another way: Before abolition the enslaved population secured eighteen seats in the House and eighteen votes in the Electoral College. Post-abolition, counting the former enslaved population as whole persons would increase those numbers from eighteen to thirty. It

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1865, art. IV, § 6, 6 *id.* at 3276; Va. Const. of 1864, art. III, § 1, 7 *id.* at 3854–55. The other four former states of the Confederacy retained their constitutional bans on black suffrage. Miss. Const. of 1832, art. III, § 1, 4 *id.* at 2051; N.C. Const. of 1835, amend. I, § 2, 5 *id.* at 2796; Tenn. Const. of 1834, art. IV, § 1, 6 *id.* at 3433; Tex. Const. of 1845, art. III, § 1, *id.* at 3549.

[4] *See* U.S. Const. art. I, § 2, cl. 3.

[5] For the state by state count of slaves and free persons in the 1860 *see* Preliminary Report of the Eighth Census 134–135 (Government Printing Office 1862). Available at http://www2.census.gov/prod2/decennial/documents/1860e-01.pdf through http://www2.census.gov/prod2/decennial/documents/1860e-07.pdf. The percentages given have not deducted West Virginia's population from Virginia's.

was generally understood that ten of these twelve seats would be in the states formerly in rebellion.[6]

Lawmakers were thus well aware that, absent constitutional amendment, abolition would increase the political power of the states formerly in rebellion even as those states denied former slaves the fundamental right to vote. As Ohio Republican Representative William Lawrence noted:

> If this injustice can be tolerated and perpetuated, and the late rebel States shall soon be admitted to representation, *they will enjoy as the reward of their perfidy and treason increased political power. This will reward traitors with a liberal premium for treason.*

Cong. Globe, 39th Cong., 1st Sess. 404 (Jan. 24, 1866).

To align the apportionment of the House of Representatives and the Electoral College with the new constitutional order created by the abolition of slavery Congress needed to replace the Constitution's original rule for the interstate apportionment of the House of Representatives (and direct taxes):

> 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

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[6] *See, e.g.*, for example, the remarks of Roscoe Conkling and William Lawrence. Cong. Globe, 39th Cong., 1st Sess. 357 (Jan. 22, 1866); *Id.* at 403 (Jan. 24, 1866).

> years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. Const. art. 1, § 2, cl. 3.

Congress decided to achieve that goal by rewarding the former slave states that gave the franchise to their black population and penalizing those that did not. That process began during the Thirty-Eighth Congress, when the House narrowly approved a resolution submitted by Wisconsin Republican Ithamar Sloan based on "qualified electors":

> That the Judiciary Committee be instructed to inquire into the expediency of so amending section 2 of article 1 of the Constitution of the United States that representatives in Congress shall be apportioned among the several States which may be included within the Union according to their respective numbers of qualified electors, and to report by bill or otherwise.

Cong. Globe, 38th Cong., 2nd Sess. 6 (Dec. 7, 1864).

In the Senate, Charles Sumner introduced a proposal based on "male citizens" qualified to vote:

> Representatives shall be apportioned among the several States which may be included within this Union, according to the number of male citizens of age having in each State the qualifications of electors of the most numerous branch of the State legislature.

Id. at 604 (Feb. 6, 1865). The Senate committed it to the Judiciary Committee. *Id.* Neither proposal went any further in the Thirty-Eighth Congress.

B. The Thirty-Ninth Congress Considered—And Rejected—Language That Would Have Limited The Basis of Apportionment To Voters or Citizens.

Congress returned to the pressing problem of apportionment on the opening day of the Thirty-Ninth Congress. For the next six months, lawmakers deliberated proposals in committee and on the House and Senate floors, searching for a solution that would balance competing interests in the manner of apportionment and the penalty for disenfranchising persons of color. The specifics of those deliberations are highly relevant, because the record unequivocally confirms that Congress (1) chose "whole persons" as the basis for apportionment instead of narrower categories such as voters or citizens; and (2) did so knowing—indeed, because—the term "persons" included aliens. At the time, aliens formed a significant part of the population of northern states but not of the states formerly in rebellion.

1. Competing Approaches Emerged Early In The Thirty-Ninth Congress.

On the opening day of the Thirty-Ninth Congress, Representative Thaddeus Stevens proposed an amendment that continued the early trend of pegging the apportionment basis to each state's population of voters. His goal was to deny additional representation to states that disenfranchised persons formerly enslaved. His language used "legal voters" as the basis for apportionment:

> Representatives shall be apportioned among the States which may be within this Union *according to their respective legal voters*; and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized

> foreigners. Congress shall provide for ascertaining the number of said voters. A true census of the legal voters shall be taken at the same time with the regular census.

Cong. Globe, 39th Cong., 1st Sess. 10 (Dec. 4, 1865) (emphasis added).

Stevens's proposal touched off immediate debate. Maine Republican James Blaine led the attack, arguing "As an abstract proposition no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id.* at 141. Blaine recognized a key distinction between the interests of voters (to select representatives and thereby shape the government) and the interests of the general population (to be fairly represented and governed).

Blaine lodged two additional critiques of Stevens's suffrage-based proposal. He first zeroed in on the impact of Stevens's proposal on individual states, observing that "[t]he ratio of voters to population differs very widely in different sections, varying in the States referred to from a minimum of *nineteen per cent.* to a maximum of *fifty-eight per cent.*, and the changes which this fact would work in the relative representation of certain States would be monstrous." *Id.* Blaine pointed out that California, with a population not quite fifteen percent larger than Vermont's, would have nearly three times the representation and Indiana, with a population not even ten percent greater than Massachusetts, would have fifty percent more representation.[7] *Id.*

[7] The following table summarizes Blaine's data.

Although Blaine did not provide the source for his census data, voter numbers, or projected apportionments,[8] his point holds, specific numbers aside: The ratio of voter population among the states can vary significantly from the ratio of total population among the states. Using voter population as the apportionment basis would add to some states' representation in the House relative to their populations while reducing that of others.

Blaine also argued that using voter population as the apportionment basis would touch off "an unseemly scramble in all the States . . . to increase by every means the number of voters," including that "[f]oreigners would be invited to vote on a mere preliminary 'declaration of intention.'" *Id.* He presented an alternative approach, with a more expansive definition of the apportionment basis:

> Representatives and direct taxes shall be apportioned among the several States which may

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	Population	Ratio	Voters	Ratio	Projected Reps.	Ratio
Cal.	358,110	1.14	207,000	2.38	8	2.67
Vt.	314,369		87,000		3	
Ind.	1,328,710	1.09	316,824	1.39	15	1.50
Mass.	1,221,432		227,429		10	

[8] Nor did he in his memoirs. *See* James G. Blaine, 2 Twenty Years of Congress 194 (Henry Hill Publishing Co. 1886).

> be included within this Union according to their respective numbers, which shall be determined by *(taking the whole number of persons except those to whom civil rights or political rights or privileges are denied or abridged by the laws of any State on account of race or color.)*

Id. at 141-42 (emphasis in original).

Critically, the early Stevens and Blaine proposals embodied two potential, competing approaches to apportionment: (1) define the relevant *subset* of the population, count it, and apportion based on that count (Stevens); or (2) count the entire population, calculate a penalty reflecting the extent of voter disenfranchisement, apply the penalty to the entire population, and apportion based on the result (Blaine). The Thirty-Ninth Congress cycled through permutations of these two approaches for months. Ultimately, Congress adopted a variant of Blaine's penalty-based approach.

2. The Joint Committee On Reconstruction Proposed A Penalty-Based Approach.

When the Joint Committee on Reconstruction took up the issue, a day after Blaine's remarks, Thaddeus Stevens and Roscoe Conkling immediately offered variants of Stevens's suffrage-based proposal that restricted the apportionment basis to adult male citizens. The Journal of the Joint Committee of Fifteen on Reconstruction 39th Congress, 1865-1867 41 (Benjamin B. Kendrick ed., Columbia University Press 1914), *available at* https://babel.hathitrust.org/cgi/pt?id=pst.000012035441&view=1up&seq=1 (last visited Nov. 12, 2020) [hereinafter Journal of the Joint Committee]. Three days later the Joint Committee heard proposals from Justin Morrill, George Williams, and Roscoe Conkling that were

variations of the indirect penalty-based approach suggested by Blaine. *Id.* The following table compares those proposals:

Author	Basis	Exclusion
Rep. Morrill (Vermont)	Persons	"All of any race or color, whose members or any of them are denied any of the civil or political rights or privileges"
Sen. Williams (Oregon)	Persons	"Negroes, Indians, Chinese, and all persons, not white, who are not allowed the elective franchise by the Constitutions of the State"
Rep. Conkling (New York)	United States citizens	"Whenever in any State civil or political rights or privileges shall be denied or abridged on account of race or color, all persons of such race or color"

Massachusetts Representative George Boutwell then made a more radical proposal. It would have based apportionment (of representatives and direct taxes) on the number of United States citizens while prohibiting "distinction in the exercise of the elective franchise on account of race or color." *Id.* at 44. Maryland Democratic Senator Reverdy Johnson also made a proposal to apportion representatives (but not direct taxes) according to the number of legal voters. It was rejected by a vote of 6–8. *Id.* at 45.

The Committee finished the first phase of its work on the revised basis of apportionment on January 16, 1866. It started by considering two candidate texts: the Boutwell-inspired Article A and the Conkling-inspired Article B, each of which excluded aliens from the apportionment basis.

> Article A
>
> Representatives and direct taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State; and all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.
>
> Article B
>
> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.

Id. at 50-51. By a vote of 11–3, the Committee chose Article B amended to make the deduction against the basis of representation but not direct taxation. *Id.* at 51-52. Conkling immediately moved to change the initial basis of apportionment from United States citizens to "persons in each state, excluding Indians not taxed," which the Committee also approved 11–3. *Id.* at 52. The

Committee then approved, by a 13–1 vote, the resulting text, defining the apportionment basis with the broad term "persons" rather than the narrower "citizens":

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation.

Id. at 53.

3. The House Approved The Joint Committee's Penalty-Based Approach.

On January 22, the House began ten days of deliberations on the Committee's proposal that saw numerous objections and proposed revisions. Cong. Globe, 39th Cong., 1st Sess. 351 (Jan. 22, 1866). On the first day of debate, Wisconsin Republican Ithamar Sloan offered a Stevens-esque alternative, apportioning House representation among the states "according to their respective number of qualified electors" as determined by decennial enumeration. *Id.* at 352. Two days later Ohio Republican Robert Schenck[9] introduced a proposal that

[9] That advocacy for suffrage-based apportionment came from the somewhat less immigrant-populated states west of the Ohio-Pennsylvania boundary (and north of the Ohio River) is no coincidence; many of these states enfranchised their declarant aliens. Seven states granted suffrage to their declarant alien residents. Ind. Const. of 1851, art. II, § 2, 2 Thorpe *supra* note 3, at 1076; Kan.

limited the apportionment basis to adult male *citizens* eligible to vote for the most numerous branch of their state legislature. *Id.* at 407. Fellow Ohioan William Lawrence articulated the link between the suffrage-based definitions of the apportionment basis and the exclusion of large population segments from *representation*, arguing that the Committee's proposal "disregards the fundamental idea of all just representation, that every voter should be equal in political power" because it "gives representation to women, children, and unnaturalized foreigners." *Id.* at 404. But John Bingham, another Ohio Republican, pointed out the real-world implications of excluding Lawrence's "unnaturalized foreigners" from the apportionment base: "Every man knows that the great body of the immigrant population of America always has been and now is confined to the free loyal States. There is no considerable portion of it found anywhere within the limits of the eleven Rebel States." *Id.* at 432.

The House then moved on to operationalizing the Joint Committee's proposal to penalize states for denying or abridging the franchise "on account of race or color." Specifically, House members grappled with how to define "race or color" and how to define when denial or abridgment of the franchise occurs "on account of" a

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Const. of 1859, art. 5, § 1, cl. 2, *id.* at 1251; Mich. Const. of 1850, art. VII, § 1, 4 *Id.* at 1956; Minn. Const. of 1857, art. VII, § 1, 4 *Id.* at 2007; Mo. Const. of 1865, art. II, § 18, *id.* at 2198; Or. Const. of 1857, art. II, § 2, 5 *Id.* at 3000; Wis. Const. of 1848, art. III, § 1, 7 *Id.* at 4080. Michigan also granted suffrage to any alien resident on June 24, 1835 or January 1, 1850, the dates its first two constitutions were adopted.

prohibited category. *See, e.g., id.* at 433 (Jan. 25, 1866) (Pennsylvania Republican John Broomall noting that "there is a great deal of indefiniteness in both these terms 'race' and 'color' . . . the term 'color' is nowhere defined in the Constitution or the law"); *id.* at 380, 385-86, 409, 456 (various representatives discussing existing and potential measures like property qualifications, literacy and intelligence tests, and tax-paying status).

Early proposed solutions to these questions included Rhode Island Republican Thomas Jenckes's proposal to amend the Constitution to specify the qualifications necessary to vote for House members and presidential electors. *Id.* at 386. Illinois Republican Ebon Ingersoll offered a more limited amendment that would have banned property qualifications. *Id.* at 385. New York Republican Hamilton Ward proposed grandfathering all voter qualifications in effect as of January 1, 1866 and penalizing all new qualifications on "the elective franchise." *Id.* at 434.

This exchange yielded the first proportional, non-race-based penalty proposal. It did not use citizenship or suffrage to define the apportionment base. Rather, the proposal, offered by Illinois Republican Henry Bromwell, provided:

> Representatives in the House of Representatives shall be apportioned among the different States in the same proportion to the *whole number of inhabitants* in each State respectively (excluding Indians not taxed) as the number of male citizens qualified by the laws of such States to vote for representatives in the most numerous branch of the Legislature thereof is to the whole number of such citizens in such States, the enumeration and

> apportionment thereof to be made in such manner as Congress shall by law direct.

Id. at 409 (emphasis added). Representative Broomall refined Bromwell's language the next day, expanding the apportionment basis definition from "inhabitants" to "persons":

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the *whole number of persons* in each State, excluding Indians not taxed: Provided. That whenever the elective franchise shall be denied by the constitution or laws of any State to any proportion of its male citizens over the age of twenty-one years, the same proportion of its population shall be excluded from its basis of representation.

Id. at 433 (emphasis added).

On January 29, Thaddeus Stevens had the Joint Committee's proposed amendment recommitted to the Committee. The Committee struck the reference to "direct taxes" but otherwise left it intact. Journal of the Joint Committee 58. Stevens then reintroduced it in the House, as follows:

> Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed: Provided. That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.

Cong. Globe, 39th Cong., 1st Sess. at 535. That language passed the House 120–46. *Id.* at 538. The penalty-based approach, with the expansive "whole number of persons" apportionment base, seemed to be on its way.

4. The Senate Rejected The Committee Proposal, But Laid The Groundwork For Resolution.

The House's decision to retain the Joint Committee's race-based penalty definition (rather than adopt the Broomall/Bromwell definition) did not sit well with the Senate. After several weeks of debate in February and March 1866, the Senate could not muster the two-thirds majority needed to ratify the amendment. The debate cycled through familiar concerns: For example, Massachusetts Republican Charles Sumner lamented that the penalty-based amendment would "admit in the Constitution the twin idea of Inequality in Rights . . . while you blot out a whole race politically." *Id.* at 673; *see also id.* at 1183 (Kansas Republican Samuel Pomeroy stating concern that under the penalty-based approach "colored men may fight for the Government, be taxed for the Government, but shall go unrepresented and disfranchised forever"). Maine Republican William Pitt Fessenden responded to the Sumner/Pomeroy view with the simple observation that the penalty-based approach no more condoned disenfranchisement than a thirty-day prison sentence condoned theft. *Id.* at 1279.

But the Sumner/Pomeroy camp was unconvinced, and saw only two possible solutions to the potential disenfranchisement of black voters: a direct constitutional bar or suffrage-based apportionment. Sumner, Pomeroy, and others offered proto-Fifteenth Amendment proposals, but none carried. *See, e.g., id.* at 702, 1182, 1288.

That left suffrage-based apportionment. On March 1, 1866, Nevada Republican William Stewart stated that at the proper time he would offer the following replacement for the Joint Committee's penalty-based proposal:

> Representatives shall be apportioned among the several States which may be included within this Union according to the number of male citizens of the United States in each State over twenty-one years of age qualified by the laws thereof to choose members of the most numerous branch of its Legislature. And direct taxes shall be levied in each State according to the value of real and personal property situated therein not belonging to the State nor the United States.

Id. at 1103. On March 8, Massachusetts Republican Henry Wilson observed that Clark's proposal, and indeed any suffrage-based approach, "throws out of the basis at least two and half millions[10] of unnaturalized foreign-born men and women, and by this we lose at least fifteen Representatives in the other house and fifteen presidential electors; and they do not go from the East to the West, but from the North to the South." *Id.* at 1256. Highlighting the cyclical nature of the debate, Wilson's point echoed the argument John Bingham made in the House on January 25. *Id.* at 432 (observing that "the

[10] It is unclear how Wilson derived this figure. Mr. Rosin has conducted his own analyses using 1860 census data. Those analyses indicate that Wilson's points are directionally correct: Suffrage-based schemes which excluded aliens from the apportionment base would have shifted political power to the South.

immigrant population of America always has been and is now confined to the free loyal States").

Despite a flurry of proposed amendments, on March 9 the Senate fell seven votes short of the 32 (out of 47) needed to ratify the Joint Committee's proposal. *Id.* at 1289. The Senate did not, however, approve a suffrage-based replacement.

Iowa Republican James Grimes—also a Joint Committee member—laid the groundwork for an eventual resolution by proposing language similar to the Broomall/Bromwell text:

> Representatives shall be apportioned among the several States which may be included in this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; but whenever in any State the elective franchise shall be denied to any portion of its male citizens above the age of twenty-one years, *except for crime or disloyalty,* the basis of representation shall be reduced in the proportion to which the number of male citizens so excluded shall bear to the whole number of male citizens over twenty-one years of age.

Id. at 1320 (emphasis added to show Grimes's alteration to Broomall's text). Presaging the Grimes/Broomall approach's potential to garner wide support, Charles Sumner, who had vehemently opposed the Joint Committee's race-based penalty approach, proposed language very similar to Grimes's text on the same day. *Id.* at 1321.

5. The Joint Committee Embraced The Grimes/Broomall Approach, Leading To Ratification By Congress.

When the Joint Committee resumed its deliberations in April 1866, Thaddeus Stevens moved to adopt the Committee's original proposal—with the race-based penalty definition—as Section 2 of the Fourteenth Amendment. Journal of the Joint Committee 84-85. Oregon Senator George Williams immediately proposed the following replacement language (substantively identical to Grimes's proposal in the Senate):

> Representatives shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Id. at 84-85.

On April 30, 1866, Thaddeus Stevens reported the Joint Committee's proposed Fourteenth Amendment, including Williams's language above as Section 2, to the House. After two days of debate, the House approved it 128-37, without voting on a single potential alteration. Cong. Globe, 39th Cong., 1st Sess. 2545 (May 10, 1866).

The Senate began its deliberations on May 23, and, true to form, was not so quick to reach resolution. First, some opponents tried to resurrect the suffrage-based apportionment approach. *See id.* at 2942 (proposals by

Representative Doolittle), 2986 & 2991 (recording votes defeating proposals).

The Senate also considered whether, in the absence of a race-based penalty, there were any impartial suffrage limitations or qualifications that would not trigger the penalty. Indeed, Senator Wade offered a version of Section 2 that would have added "alienage" to "participation in rebellion or other crime" as exclusions from the penalty for denial or abridgement of the franchise. *Id.* at 2768. That proposal did not gain traction.

On June 6, George Williams proposed a replacement for the version approved by the Joint Committee and the House:

> Representatives shall be apportioned among the several States ~~which may be included within this Union,~~ according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the ~~elective franchise~~ right to vote at any election held under the Constitution and laws of the United States, or of any State, is ~~shall be~~ denied to any ~~portion of its~~ of the male inhabitants, being twenty-one years of age and citizens of the United States, ~~not less than twenty-one years of age~~, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein ~~in such State~~ shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Id. at 2991 (altered to show Williams's additions (underlined) and deletions (strike-through)).

On the final day of Senate debate, Democrat Reverdy Johnson, a recurring antagonist of Section 2 during its travels through the Senate, pointed out the need to distinguish between statewide and municipal elections. *Id.* at 3027. In response, Williams proposed changing "the right to vote at any election held under the Constitution and laws of the United States, or of any State" to "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 members of the Legislature thereof." *Id.* at 3029. With that, the Senate's proposed replacement for the text approved by the House became Section 2 as we now know it. The Senate then approved the entire Fourteenth Amendment 33-11, *id.* at 3042, and the House followed suit, 120-32, after less than a day's debate, *id.* at 3149.

II. The Deliberations Of The Thirty-Ninth Congress Confirm That The President Cannot Unilaterally Exclude Illegal Aliens From The Apportionment Basis.

The historical record shows that the Thirty-Ninth Congress chose every key word and phrase of Section 2 advisedly, after multiple rounds of debate and revision. Critically, Congress employed great care in its use of the three plural nouns used to denote the relevant population sets. The most expansive term, "persons," defines the apportionment basis in the absence of a penalty. The term "citizens" only appears in the calculation of the penalty. The term "inhabitants" also only appears in the penalty calculation, to clarify that the penalty does not apply to the denial of the franchise to a United States citizen who is not an inhabitant of the state but happens to be in the state on an election day. *See* Cong. Globe, 39th Cong., 1st

Sess. 2869 (May 29, 1866) (comment of Senator Howard). Section 2 thus directs that apportionment be based on each state's entire population, not a subset defined as citizens or voters.

The contrary interpretations offered by Amici conflict with Section 2's plain language and the Thirty-Ninth Congress's drafting choices. Their claims that undocumented aliens can or must be excluded from the apportionment basis fall apart under scrutiny.

1. Amici conflate the terms "persons" and "inhabitants" even though Congress chose to use them for different purposes in Section 2. *See* Ala. Br. at 2, 20-22; Brooks Br. at 15, 19. Their mistaken conclusion requires four steps, laid out in Alabama's brief: (1) The Framers initially used the word "inhabitants" in Article I's Apportionment Clause, Ala. Br. at 2; (2) The Framers supposedly understood "inhabitants" to denote "a deeper and more lasting connection with a State than presence alone," *id.* at 2; *see also id.* at 14-16; (3) When the Committee of Style changed "inhabitants" to "persons" prior to ratification, it did not change the meaning of the Clause, *id.* at 2, 12; and (4) The Thirty-Ninth Congress meant "inhabitants" when it used "persons" in drafting and ratifying Section 2. *Id.* at 2 ("It was that understanding that was incorporated in the Fourteenth Amendment and still governs today."), 20-22.

Whatever the historical merit of steps (2) and (3), amici's logic collapses at step (4). First, it ignores the plain language and usage of Section 2. The Thirty-Ninth Congress used the words "persons" and "inhabitants" not interchangeably, but to perform qualitatively different functions. It chose "the whole number of *persons* in each state" as the base quantity by which "Representatives shall be apportioned among the several states." U.S.

Const. amend. XIV, § 2 (emphasis added). It selected "the adult male *citizens* of such state" as the starting point for figuring out the numerator and denominator of the penalty percentage imposed against a state that denied or abridged "the right to vote." *Id.* (emphasis added). And then it used "inhabitants" to qualify adult male citizens and thereby ensure that a state's penalty numerator would not include an adult, male, United States citizen who could not vote in that state because he was merely visiting on election day. Simple logic shows that Congress understood "persons" and "inhabitants" to have different meanings and employed those words for very different purposes in Section 2. This alone dooms Amici's position.

So does the historical record. As discussed above, Representative Bromwell offered the first penalty-based proposal that did not define the penalty in terms of race. His proposal used "inhabitants" to define the apportionment basis. Cong. Globe, 39th Cong., 1st Sess. 409 (Jan. 24, 1886) ("Representatives in the House of Representatives shall be apportioned among the different States in proportion to the whole number of *inhabitants* in each State. . . ." (emphasis added)). The next day, Representative Broomall refined Bromwell's proposal by incorporating proportionality into the penalty definition. In so doing, he reverted back to "persons" for his definition of the apportionment basis. *Id.* at 433 ("Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers, counting the whole number of *persons* in each State. . . ." (emphasis added)). As the discussion above makes clear, Broomall's proposal was the conceptual framework for the eventual language of Section 2, via a circuitous path through both houses and the Joint Committee. Indeed, after Broomall's proposal, "the whole number of persons" remained stable as the definition of

the apportionment basis through the rest of Congress's deliberations.

In other words, the historical evidence shows that Congress specifically decided to use "persons" and *not* to use "inhabitants" to specify the default, penalty-free apportionment basis. Amici cannot rewrite Section 2 to substitute "inhabitants" (let alone, their preferred definitions of that term) for the word that Congress chose to define the apportionment basis.

2. The Thirty-Ninth Congress's deliberations also undermine Amici's efforts to equate "persons" with "members of the body politic" (in their restricted sense). *See* Ala. Br. at 8; Brooks Br. at 16. Congress's deliberations make clear that Amici are incorrect. Congress employed different groups for analytically distinct tasks in Section 2.

First, the Thirty-Ninth Congress chose to define the apportionment basis broadly, without reference to political participation or membership in the body politic beyond an obligation to pay taxes. Following a robust political debate, Congress decided to use "the whole number of persons" in a state (excluding Indians not taxed[11]) as the base quantity that would be used to

[11] "Indians not taxed" were excluded from the body politic precisely because they were not taxed. As Representative Bingham observed, they "are not part of the body-politic of the United States until they are subject to taxation"). Cong. Globe, 39th Cong., 1st Sess. 431. *See also id.* at 498 (Representative Trumbull, addressing the Civil Rights Bill of 1866, stating that "We deal with them by treaty, and not by law, except in reference to those who are incorporated into the United States as some are, and are taxable and become citizens"). By implication, Native

apportion representatives to that state. U.S. Const. amend. XIV, § 2. Lawmakers did not merely carry forward existing language without regard to its meaning. The exact opposite is true: as explained above, Congress considered and ultimately rejected using "inhabitants" or subsets of the body politic for that purpose. For example, the first proposal made in the House used the states' "respective legal voters." Cong. Globe, 39th Cong., 1st Sess. 10 (Dec. 4, 1865) (proposal by Representative Stevens); *see also* Journal of the Joint Committee at 45 (proposal by Representative Johnson). Representative Blaine's response to Stevens's proposal used "*the whole number of persons except those to whom civil rights of political rights or privileges are denied or abridged . . . on account of race or color*." Cong. Globe, 39th Cong., 1st Sess. 141-42 (emphasis in original). Other rejected proposals used "citizens of the United States in each State." *See* Journal of the Joint Committee at 44 (Representative Boutwell's proposal); 50-51 (proposals by Representatives Boutwell and Conkling).

By contrast, Congress used the concept of political participation to define the penalty. In the second sentence (the "Penalty Clause") of Section 2, Congress defined a fraction, as follows:

> Male citizens twenty-one or older to whom the right to vote has been denied or abridged (except for participation in rebellion or other crime)
>
> divided by
>
> Male citizens twenty-one or older

Americans became part of the body politic as soon as they became subject to taxation, and, if native born outside of tribal relations, citizens of the United States.

U.S. Const. amend. XIV, § 2.

The Penalty Clause then instructs that "the basis of representation," i.e. the entire population, "shall be reduced" in that proportion. *Id.* The purpose of the Penalty Clause is to disincentivize each state from withholding the franchise from adult male citizens of the United States who are inhabitants of the state. It therefore made perfect sense to peg the penalty to the extent to which the state as a single, entire political community denied or abridged political participation.

The fact that aliens could be denied the right to vote without penalty does not mean that Congress intended to exclude aliens from the apportionment basis. The Brooks Amici wrongly argue that the "wording of the [Penalty Clause's] text suggest[s] strongly that the Framers of the Fourteenth Amendment intended that aliens were to be excluded from the apportionment base." Brooks Br. at 18. In fact, the apportionment basis and the penalty provision serve different purposes. Apportionment, as Congress designed the system, is based on population, and included numerous persons who had no right to vote. House seats "'serve all residents, not just those eligible or registered to vote.'" *Useche v. Trump*, No. 8:20-cv-02225-PX-PAH-ELH, slip op. at 26 (D. Md. Nov. 6, 2020) (per curiam) (quoting *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016)). The Penalty Clause sought to deter a particular evil: disenfranchising voting-eligible citizens. It is not an interpretative constraint on the definition of the apportionment basis, which Congress chose advisedly to define as broadly as it could.

3. The Brooks Amici not only seek to re-write the plain language of Section 2, they also premise their arguments on a serious misunderstanding of how the

Penalty Clause works. *See* Brooks Br. at 18-19 (giving two-state numerical example).

Here is how the Penalty Clause actually works, based on Section 2's plain language. Consider a state with a total population of ten million, and voting-age citizen population of six and a half million. Assume that the voting rights of two million six hundred of its voting-age citizenry are adjudged to have been denied or abridged. The following table shows the Penalty Clause calculations.

Total Population (Apportionment Basis)	10,000,000	
Adult Citizens	6,500,000	
Adult Citizens Disenfranchised	2,600,000	
Penalty Rate		40%
Penalty Amount (Penalty Rate times Total Population)	4,000,000[12]	
Apportionment Basis (Total Population minus Penalty Amount)	6,000,000	

The Brooks Amici's calculation does not follow Section 2's instructions. To begin with, they draw a distinction—between citizens and aliens—that is not relevant under Section 2. Section 2 distinguishes between voting-age citizens and everyone else, not between citizens and aliens. Then, Amici simply ignore the

[12] Supposing the 2,600,000 disenfranchised adult citizens were *themselves* removed from the apportionment basis, who would be the other 1,400,000 making up the penalty amount?

proportional calculation that Section 2 requires, calculating the "penalty" as if only those adult citizens who are denied the right to vote are removed from the apportionment basis. In other words, they read the Clause as directing that "the basis of representation therein shall be reduced" by the *number* of such citizens whose right to vote has been denied or abridged, not "in the *proportion* which" that number "shall bear to the whole number of" voting-age citizens. U.S. Const. amend. XIV, § 2. With that faulty logic they conclude that the impact of the penalty on a state with no aliens (state A) is twice as great as the impact on a state with as many aliens as citizens.

A proper application of the Clause reduces a state's apportionment basis because the state has denied of abridged the right to vote of its voter population, in direct proportion to the extent of the denial or abridgment among its adult citizenry. The Clause does not remove from the apportionment basis the actual group of voters whose voting rights were curtailed. Amici, and at least one commentator, *see* Thomas A. Berry, *The New Federal Analogy: Evenwel v. Abbott and the History of Congressional Apportionment*, 10 New York University Journal of Law & Liberty 208, 249 (2016), are thus incorrect to claim that *because* adult citizens whose voting rights have been denied or abridged *are themselves* excluded from the apportionment basis, *therefore* aliens should be excluded because they have no right to vote. Section 2 imposes the apportionment penalty across a state's entire population based on the proportion of adult citizens who are denied the right to vote, over all adult citizens, not by deducting a specific group of disenfranchised persons.

As the ten million person example above shows, the calculation required by Section 2 has nothing to do with the State's alien population, and does not leave a state better or worse off because its population includes aliens. The Brooks amici, on the other hand, make the math "work" only because they begin where they try to conclude: by eliminating aliens from the apportionment basis altogether, something the Thirty-Ninth Congress considered and roundly rejected.

* * *

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted.

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