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* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Immigration Law Reform Institute ("IRLI") is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia.[1] IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

SUMMARY OF THE ARGUMENT

This case challenges the President's policy of not including illegal aliens in the apportionment count of the census. As a matter of constitutional interpretation, however, the President is on very solid footing. Counting people for apportionment purposes, after all, confers representation on them in our national government. But, according to both common sense and the understanding of the Framers, only members of our national political community, broadly defined as

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[1] *Amicus* files this brief with all parties' written consent. Counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

coterminous with "the people" as used several times in the U.S. Constitution, should be given such representation, or are given it in the Constitution. And illegal aliens, who are foreign citizens subject to a national policy of removal from this country, are not members of the people according to the precedents of this Court, nor members of our national political community. It follows that they should not be given representation in our national government by being included in the apportionment count. *A fortiori*, the President's policy of not including them in that count rests on a permissible interpretation of the Constitution.

Secondly, because the purpose of the census is to provide fair and equal representation of the people, and illegal aliens are not part of the people, if these aliens are counted for apportionment, their clustering in some states more than others, to the degree alleged by Appellees to show standing, means that the people in the former states have substantially greater representation *per capita* in the national government than those in the latter. Also, this inequality in representation entails that votes in the latter states are diluted, in violation of the Constitution. Thus, in the factual circumstances alleged by Appellees, subtracting illegal aliens from the apportionment count is consistent with, and indeed necessary to protect, both equal representation and equality in voting.

ARGUMENT

This Court reviews census decisions for consistency both with "the constitutional language [of the Enumeration and Apportionment Clauses] and the constitutional goal of equal representation." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

The President's policy of not counting illegal aliens for apportionment purposes easily survives both inquiries. Not only should the Constitution not be interpreted to give illegal aliens representation in our national government, but, assuming the truth of the factual allegations that Appellees make in this case to show standing, according illegal aliens that representation is at variance with the constitutional goal of equal representation of the people, and hence with the constitutional requirement of equality in voting.

I. THE PRESIDENT'S POLICY IS CONSISTENT WITH THE CONSTITUTION.

The Constitution apportions political representation in our national government based on an "actual Enumeration" of "the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. This enumeration determines the number of seats in the House of Representatives allocated to each state, and a state's number of representatives, added to its two senators, determines its number of electoral votes. *Id.* art. II, § 1, cl. 2.

Despite Appellees' assertions that the language of these provisions provides a clear answer to the

question of whether illegal aliens should be counted for purposes of apportionment, ACLU Br. 17, the phrase "whole number of persons in each State" does not mean "the whole number of persons physically present in each State." If it did, foreign tourists, for example, who were in a state would be counted for apportionment and given representation in our national government. Also, military personnel stationed abroad, and thus not physically present in a state, could not be counted for apportionment, though this Court has held that they may be. *Franklin*, 505 U.S. at 806 ("The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality.").

Whatever else "the whole number of persons in each State" may mean, a simple, two-step argument shows that it should not be read to imply that illegal aliens are to be counted for apportionment: 1) the Constitution confers representation in our national government only on the people of the United States, defined as all members of our national political community, and 2) illegal aliens are not part of the people of the United States, or members of our national political community. It follows, by the force of logical necessity, that illegal aliens should not be accorded representation in our national government by being counted for apportionment purposes.

A. Only Members Of Our National Political Community Should Be Represented In Our National Government.

To begin with, it seems a mere matter of definition that representation in our national government should not be given, and cannot be thought to be given in the Constitution, to those outside of our national political community. As a three-judge panel of the U.S. District Court for the District of Columbia, in an opinion by then-Circuit Judge Kavanaugh, held while upholding a provision of federal law prohibiting foreign nationals from participating in election speech, "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." *Blumen v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd mem.* 565 U.S. 1104 (2012). *See id.* at 284 (defining "foreign nationals" as all foreign citizens who are not U.S. lawful permanent residents). From the holding in *Blumen* that lack of membership in the national political community justifies exclusion even from the right to political speech, it is but a short step to the conclusion that the same lack, also by definition, is ground for exclusion from any right to political representation in our national government.

The claim that the Constitution, in the Enumeration and Apportionment Clauses, gives representation to those outside the national political community is not in accord with other provisions of the Constitution. *See, a fortiori, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[I]n expounding a

statute, we . . . look to the provisions of the whole law, and to its object and policy."); *see also, e.g., Nat'l Prohibition Cases*, 253 U.S. 350, 384 (1920) ("The Ninth and Tenth Amendments must be read[] with the whole Constitution"); *NLRB v. Canning*, 573 U.S. 513, 536 (2014) ("[W]e think it most consistent with our *constitutional structure* to presume that the Framers would have allowed intra-session recess appointments") (emphasis added). Indeed, to make that claim is to embrace the absurdity that "the People," when they ordained and established the Constitution, U.S. Const. preamble, and when they gave "the People of the several States" the power to choose members of Congress, U.S. CONST. art. I, § 2, cl. 1, nevertheless conferred political representation in that Congress not just on themselves—"the people"—but on others, as well. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (analyzing the application of the Second Amendment and noting that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community"); *McCulloch v. Maryland*, 17 U.S. 316, 435 (1819) ("The people of all the States, and the States themselves, are represented in Congress").

As might be expected, the Framers themselves believed that the people were the ones to be counted in the census and accorded representation. *See Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) ("The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of *the people'*") (quoting 3 *The Records of the Federal Convention of 1787* (Farrand ed. 1911) 580) (emphasis added). As Appellees pointed out below, Doc. 77 at 25,

Alexander Hamilton argued that "an actual Census or enumeration of *the people* must furnish the rule" for apportionment of direct taxes. THE FEDERALIST NO. 36, at 216 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis added). As Appellees also pointed out below, Doc. 77 at 28, 34, Congress has echoed this commonsense understanding when passing census legislation. "[T]here is but one basic constitutional function served by the census. It is to provide an enumeration of the people for the purpose of redistributing congressional representatives proportioned thereto." S. REP. NO. 71-2, at 2 (1929) (Pls.' Ex. 53). "The Department of Commerce counts the people (as it always has done)." *Id.* at 4-5 (Pls.' Ex. 53).

As these examples show, it is neither a remarkable nor a controversial proposition that the Constitution confers representation in our national government on the people, understood broadly as "all members of the political community." *Heller, supra.* At the very least, there is nothing to bar the President from arriving at this sensible interpretation.

B. Illegal Aliens Are Not Members Of Our National Political Community.

It is equally clear that illegal aliens are not members of our national political community. *See Blumen*, 800 F. Supp. 2d at 288 (holding that the lack of a right of "foreign citizens" to participate in activities of democratic self-government flows from the very "definition of our national political community"). As this Court explained in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), aliens who lack permission to be

in the country are outside the allegiance and protection, and the jurisdiction, of the United States:

> Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, *so long as they are permitted by the United States to reside here*; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States.

Id. at 694 (emphasis added); *see also The Concise Oxford Dictionary of Current English* 825 (7th ed. 1919) (defining "so long as" as "with the proviso, on the condition, that"); *Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001) ("[W]e have rejected the argument that a person who enters the United States illegally, lives in this country for a lengthy period, and maintains a subjective allegiance to the United States qualifies as a national."); *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) ("Illegal aliens are not law-abiding, responsible citizens or members of the political community, and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood."); *United States v. Atienzo*, No. 2:04-CR-00534 PGC, 2005 U.S. Dist. LEXIS 31652, at *11 (D. Utah Dec. 6, 2005) ("[T]he use of the term 'the People' is not a mere rhetorical flourish, but rather was a term used to connote the political community who made a compact to govern themselves. The drafters of the Constitution would not have understood this political community to

have included alien felons.") (internal citations omitted).

Indeed, if illegal aliens were members of our national political community—a part of our people—and counted in the census for apportionment, the official national policy, reflected in our immigration laws, of detecting, detaining, and removing them from the country, and thus removing them from that political community, would be both paradoxical and unconscionable. But, of course, our immigration laws, and their enforcement, are neither of these things, but flow from the nation's sovereign right to control its borders. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty … inherent in [both Congress and] the executive department of the sovereign").

Nor are illegal aliens a part of "the people," when that term is used in the Constitution to refer to "all members of the political community." *Heller*, 554 U.S. at 580. For example, illegal aliens lack a Second Amendment right to bear arms because the Constitution gives that right to "the people." *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("[I]llegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given."); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (leaving open the question of whether the Fourth Amendment, which protects rights of "the people," applies to illegal aliens); *City of El Cenizo v. Texas*, 890 F.3d 164, 186 n.20 (5th Cir. 2018)

(questioning whether the Fourth Amendment applies to illegal aliens).

The closest this Court came, before *Heller*, to defining "the people" as used in these constitutional provisions was when it

> suggest[ed] that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Verdugo-Urquidez, 494 U.S. at 265. But, apparently to guard against any conclusion that a "sufficient connection" test can be used to include *some* illegal aliens among the people (surely an unworkable test for census purposes, in any event), this Court immediately cited a decision holding that illegal aliens are not so included:

> See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (Excludable alien is not entitled to First Amendment rights, because "he does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law").

Id. Of course, all illegal aliens are *excludable* in the sense in which this Court used that term in *Verdugo-Urquidez*.

Contrary to Appellees' claims, ACLU Br. 17, an entitlement of illegal aliens to the equal protection of the laws under the Fourteenth Amendment does not make them part of the people. The Fourteenth Amendment may give the right to equal protection to all persons physically present in a state, *Plyler v. Doe*, 457 U.S. 202, 212 (1982)—but that category includes, for example, foreign visitors, and obviously is broader than those to whom representation is afforded in the Constitution. The same is true for the right of due process, which the Fourteenth Amendment's text gives to "any person" regardless of location. U.S. CONST. amend. XIV, § 1.

In sum, the Constitution gives political representation in our national government only to members of our national political community, and illegal aliens are not in our national political community. It follows that illegal aliens should not be counted for purposes of apportionment. *A fortiori*, the President's policy of not counting them for apportionment rests on a completely permissible interpretation of the Constitution.

II. THE PRESIDENT'S POLICY IS NECESSARY TO PROTECT BOTH EQUAL REPRESENTATION OF THE PEOPLE AND EQUALITY IN VOTING.

Not counting illegal aliens for apportionment is consistent with, and indeed is necessary for, equal representation. The purpose of the census is fair and equal representation of the people. *See, e.g., Wesberry*, 376 U.S. at 13 ("The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of *the people*'") (quoting 3 *The Records*

of the Federal Convention of 1787 (Farrand ed. 1911) 580) (emphasis added); S. REP. NO. 71-2, at 2 (1929) ("[T]here is but one basic constitutional function served by the census. It is to provide an enumeration of the people for the purpose of redistributing congressional representatives proportioned thereto."); *Wisconsin v. City of N.Y.*, 517 U.S. 1, 19-20 (1996) (internal citations omitted) (requiring "the Secretary's conduct of the census [to be] consistent with the constitutional language and the constitutional goal of equal representation").

As shown in Part IB, *supra*, illegal aliens are not part of the people. Therefore, their clustering in certain states, to the degree alleged by Appellees to show standing, N.Y. Br. 17, substantially increases the representation *per capita* of the people in those states in the national government, and substantially decreases that of the people in other states. Not counting illegal aliens for apportionment is necessary to redress that inequality.

A pernicious corollary of this inequality in representation is that it unconstitutionally dilutes the votes of people in states in which there are relatively few illegal aliens. *See, e.g., Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 55 (1970) ("If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired"); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *Reynolds v. Sims*, 377 U.S. 533, 559

(1964) (internal citations omitted) (explaining that this Court has "concluded that the constitutional prescription for election of members of the House of Representatives 'by the People,' construed in its historical context, means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."); *Abate v. Mundt*, 403 U.S. 182, 189 (1971) (recognizing "the constitutional command to make a good-faith effort to achieve equality of voting power"); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 733 (1973) ("[E]quality of voting power may not be evaded"). Because counting illegal aliens for apportionment purposes, given the facts alleged by Appellees, has this starkly unconstitutional result, the President's policy of not counting them for those purposes is essential to protect the voting rights of Americans.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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