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 ALABAMA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the President can lawfully exclude illegal aliens from the apportionment base.

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INTEREST OF *AMICUS CURIAE*

Alabama and Alabamians have an interest in equal representation.

Thus, in 2018, the State of Alabama and U.S. Representative Morris "Mo" Brooks, Jr., brought suit against the Secretary of Commerce, the Department of Commerce, the Census Bureau, and the Bureau's Acting Director. *See* Complaint, *Alabama v. U.S. Dep't of Commerce*, 2:18-cv-772-RDP (N.D. Ala. May 21, 2018), Doc. # 1; Am. Complaint, *id.* (N.D. Ala. Sept. 19, 2019), Doc. # 112.

In many ways, the lawsuit—which is still pending in the Northern District of Alabama—is the inverse of the appeal before this Court. Instead of challenging the President's Memorandum to exclude illegal aliens[1] from the apportionment base, *see* 85 Fed. Reg. 44,679 (July 23, 2020), Alabama and Rep. Brooks contend that both the Constitution and the Administrative Procedure Act *require* such aliens to be excluded. And they allege that if illegal aliens are included in the 2020 census apportionment base, Alabama is substantially likely to lose a congressional seat and Electoral College vote that the State would maintain if the apportionment base included only citizens and lawfully present aliens.

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[1] As used in this brief, "illegal aliens" refers to persons who are present in the United States by virtue of either illegal entry in violation of federal immigration statutes or who have entered the United States legally but have remained present in the country beyond the period of time permitted by federal law. *See* 8 U.S.C. § 1227(a)(1).

In their lawsuit, Alabama and Rep. Brooks seek declaratory and injunctive relief that would prevent this representational harm. Specifically, they request that the district court declare that an apportionment that "does not use the best available methods to exclude illegal aliens from the apportionment base used to apportion congressional seats and Electoral College votes among the states would be unconstitutional." Am. Complaint, *supra*, ¶ 144(b), Doc. # 112.

Because the outcome of this case could directly impact Alabama's case, as well as the rights of the State and its citizens in our federal system, Alabama submits this brief.

SUMMARY OF THE ARGUMENT

The Court should reverse the judgment below and hold that the President's Memorandum was a permissible exercise of Executive discretion. Under the Constitution, illegal aliens cannot be included in the apportionment base. The decennial census exists primarily so that seats in the House of Representatives and Electors in the Electoral College may be apportioned among the States. *See* U.S. Const. amend. XIV, § 2. In other words, it determines political representation for the body politic—"the People." For that reason, the Framers initially chose the word "inhabitants" for Article I's Apportionment Clause, requiring a deeper and more lasting connection with a State than presence alone. When the particular wording was changed by the Committee of Style, the public understood that the meaning had not changed. It was that understanding that was incorporated in the Fourteenth Amendment and still governs today.

Illegal aliens are not "inhabitants" of the States in which they unlawfully reside. They stand outside the body politic, having neither affirmed allegiance to this country nor been recognized by it as lawfully residing here. They are accordingly not due representation, and including their number in the apportionment dilutes the representation afforded to citizens and lawfully present resident aliens who *do* form "the People." Any apportionment that does not use the best available means to exclude illegal aliens thus violates the Constitution's promise of equal representation and its Apportionment Clauses.

Because the Constitution requires that illegal aliens be excluded from the apportionment base, the Memorandum gives effect to the "supreme Law of the Land" (U.S. Const. art. VI) by interpreting the relevant census statutes in concert with the Apportionment Clauses. Moreover, because 2 U.S.C. § 2a—the statute on which the court below hung its analysis, App. 87a-90a—borrows directly from the language of the Constitution, there is no daylight between the constitutional and statutory questions. Constitutional analysis should guide the Court's statutory analysis and lead to the conclusion that the President's Memorandum should be upheld.

ARGUMENT

I. The Court Should Confront The Constitutional Question.

The constitutional issue in this case is unavoidable: Does the Constitution allow the President to exclude illegal aliens from the apportionment base?

Although the court below tried to skirt the issue, *see* App. 6a, the question cannot and should not be avoided.

First, one of the ways the lower court erred was by short-circuiting its analysis of the 1929 census legislation. *See* App. 87a-90a. So set was the court on avoiding the constitutional issue that it viewed the 1929 Act in isolation—even as it recognized that "[t]he drafters of Section 2a used the same words as those in the Constitution," App. 87a, when requiring that the "whole number of persons in each State" be counted in the census, *see* Act of June 18, 1929, Pub. L. No. 71-13 § 22, 46 Stat. 21, 26. The court reasoned that what mattered was not the *Constitution*'s meaning, but the 1929 Congress's "*understanding* of the constitutional language." App. 87a. Thus, the court said, it "need not … delve into the meaning of the terms 'inhabitant' and 'usual residence' at the time of the Founding or of the Reconstruction Amendments." App. 88a n.17.

This is a strange way to interpret a statute when its words intentionally mirror the words of the Constitution—just as it would be a strange way to interpret a constitutional provision whose words mirror well-established common law terms. *E.g.*, *Calder v. Bull*, 3 Dall. 386, 390-91 (1798) (Chase, J.) (explaining that "[t]he expressions 'ex post facto laws'" in the Constitution "are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning" in the common law). Absent an explicit indication in the text that the new meaning has broken from the old, the presumption is that a word "obviously transplanted from another legal source … brings the old soil with it." *Hall v. Hall*, 138

S. Ct. 1118, 1128 (2018) (citation omitted). Given that law must be publicly discernable—the reason we have canons of interpretation in the first place—that principle holds true even if a legislator believes in her heart of hearts that the old soil has been left behind, and even if she is mistaken about just what that old soil is. Imagine (contra history to be sure) if Gouverneur Morris had thought that the common law would not deem as an *ex post facto* law a new rule lessening the evidence needed to convict someone of a crime that had already occurred. *Cf. Carmell v. Texas*, 529 U.S. 513, 521-26 (2000) (explaining that changing the rules of evidence would constitute an *ex post facto* violation at common law). That mistaken belief would not change the meaning of the provision in the Constitution; unless the text said otherwise, the imported soil—the common law—would still provide the public meaning of the term.

So it is that determining the meaning of the "old soil" forms at least part—and probably a large part—of the judicial task when it comes to interpreting the new soil. Yet the court below abdicated this responsibility, wrongly confining itself to the legislative history, floor speeches, and opinions of the legislative counsel of the 1929 Congress. App. 88a-89a. It should have looked instead to the words that Congress *incorporated* in the 1929 Act and the soil those words carried with them. If the court had done that, it would have—or at least should have—ended up in a very different place.

Second, in reading the 1929 Act, the Court should not strain to avoid the question whether the Constitution *allows* an enumeration that excludes illegal

aliens because the lower court's reading of the statute raises the question whether the Constitution *requires* that result. Thus, invoking the avoidance canon "would merely ping-pong [the Court] from one constitutional issue to another." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (plurality op.).

Finally, the constitutional issue has now been decided by another court. *See City of San Jose v. Trump*, No. 20-CV-05167-RRC-LHK-EMC, -- F. Supp. 3d --, 2020 WL 6253433, at *25-26 (N.D. Cal. Oct. 22, 2020) ("conclud[ing] that the Presidential Memorandum is unconstitutional," and explaining that the statutory language can only be understood based on the "constitutional context"). As the United States notes in urging the Court to hold its jurisdictional statement in that case pending the Court's decision in this one, the constitutional claims that the *City of San Jose* court resolved "are fairly encompassed within the questions presented in th[is] appeal." J.S., *Trump v. City of San Jose*, No. 20-561 (filed Oct. 29, 2020). Thus, there is no reason to avoid the constitutional question in this case, for the question would simply be waiting in the wings.

II. The Constitution Requires That Illegal Aliens Be Excluded From The Apportionment Base.

Under the Constitution, an "actual Enumeration"—the census—occurs every ten years so that seats in the House of Representatives and Electors in the Electoral College may be apportioned among the States. *See* U.S. Const. art. I, § 2, cl. 3 (Census and Apportionment Clauses); *id.* art. II, § 1 (Electoral

Appointment Clause); *id.* amend. XIV, § 2 (Apportionment Clause). The Constitution's mandate is simple enough: "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." *Id.* amend. XIV, § 2. Yet the apportionment count does not include every person found within a State's borders during the enumeration, just as it does not exclude every person found outside a State's borders during the enumeration. Tourists visiting New York City are not counted; American servicemen stationed in Stuttgart are. *See Franklin v. Massachusetts*, 505 U.S. 788, 805-06 (1992).

What squares the circle? The concept of political community. Apportionment determines representation for members of the body politic—"the People of the several States," U.S. Const. art. I, § 2, cl. 2—and so excludes persons standing outside that body and can include persons who owe allegiance but are temporarily away. *See Franklin*, 505 U.S. at 806. For this reason, the Framers initially chose the word "inhabitants" for Article I's Apportionment Clause; that word was understood to require a deeper and more lasting connection with a State than mere physical presence. *See id.* at 804-05. When the Committee of Style changed the language to its current form, the public understood that the alteration affected style, not substance. *See Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). That understanding was later incorporated in the Fourteenth Amendment's Apportionment Clause.

Illegal aliens are not—and absent an adjustment in status do not become—"inhabitants" of the States

in which they reside. Like "Indians not taxed," they stand outside the body politic, their allegiance with another sovereign. Because their exit is sure—by law, at least, if not by practice—they cannot lawfully establish domicile in a State. *See Elkins v. Moreno*, 435 U.S. 647, 665-66 (1978). Including their number in the apportionment base used to determine political representation thus contradicts the original meanings of the Apportionment Clauses. It also undermines the Constitution's promise of equal protection and equal representation. Because apportionment is a zero-sum game, and because of the large and uneven distribution of illegal aliens among the States, votes in States like Alabama are not "worth as much," *Wesberry*, 376 U.S. at 8, as votes in States like California.

A. Under the Constitution, Only "Inhabitants"—Legal Residents Who Have Their "Usual Residence" in a State—Form the Base for Apportionment.

1. Apportionment Determines Representation of "the People."

From its beginning, the Constitution uses the word "People" to refer to members of this particular body politic. It is "We the People of the United States" who "ordain[ed] and establish[ed]" the Constitution. U.S. Const., pmbl. When it came to representation, Article I required that Members of the House of Representatives be chosen "by the People of the Several States," *id.* art. I, § 2, cl. 1, and that representation be apportioned "among the Several States … according to their respective Numbers," *id.*, art. I, § 2, cl. 3. These clauses recognize that States exist as preexisting

political communities and that representation is based on membership in those communities.

This reading is bolstered by the Fourteenth Amendment's alteration to Article I's Apportionment Clause. First, while removing the infamous three-fifths compromise in the original Clause, Section 2 of the Fourteenth Amendment maintained that representation is to be based on "the whole number of persons in each State, *excluding Indians not taxed*." *Id.* amend. XIV, § 2 (emphasis added). Why the exclusion? Because Indians not taxed were part of their *own* political communities, and thus were not part of "the People" guaranteed representation. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884) ("Indians not taxed are … excluded from the count, for the reason that they are not citizens."); *cf. Cherokee Nation v. Georgia*, 30 U.S. 1, 42-43 (1831) ("If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers."); 2 Joseph Story, *Commentaries on the Constitution* § 635 (1833) (noting that Indians not taxed were excluded from the apportionment base because they "were not treated as citizens"). Indians who "were taxed to support the government," and thus who did form part of "the People," *were* "counted for representation." *United States v. Kagama*, 118 U.S. 375, 378 (1886).

Second, the very next part of Section 2 confirms the link between the body politic and apportionment. By reducing a State's apportionment population in proportion to the percentage of its male citizens 21 or older who were denied the franchise, the drafters and ratifiers of the Fourteenth Amendment confirmed

that the purpose of apportionment was representation and that representation was linked to membership in the political community. In fact, that was the entire point of the provision—to prevent former slave States from counting newly freed slaves as part of their apportionment base while simultaneously denying those citizens the right to vote. *See generally Evenwel v. Abbott*, 136 S. Ct. 1120, 1147-49 (2016) (Alito, J., concurring in the judgment). The Civil War Amendments made clear that former slaves are part of the political community and that, for that reason, they are guaranteed both representation and the right to vote.

Moreover, as this Court has noted, there is usually[2] little distinction between the terms "persons" and "the People" in the Constitution. The words are typically interchangeable. The Second Amendment, for instance, provides that "the right of *the people* to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. But there the word "people" refers to "persons" as individuals—"members of the political community." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). The inverse is true in the Apportionment Clauses. Though they refer to "persons," because that word is interchangeable with "the people," it also refers to "members of the political community." In other words, "[t]he House of Representatives … represent[s] the people as individuals, and on a basis of complete equality for each voter." *Wesberry*, 376 U.S. at 14. Again, this recognition indicates that a State's number of representatives should reflect "the People"

[2] Those times where the general rule doesn't apply are explored further below.

of the State—not the total number of natural persons who happen to be present during the enumeration. Were it otherwise, the system of interstate apportionment would undercut the Constitution's textual commitment to a House of Representatives that is representative of "the people" by unlawfully broadening the apportionment base to include persons who aren't members of the political community.

2. "The People" Are the "Inhabitants" of Each State.

This political underpinning aligns with the historical record and the original public meanings of the Apportionment Clauses both at the Founding and during Reconstruction.

1. As to the first, "[t]he 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 the State's *inhabitants*." *Wesberry*, 376 U.S. at 13 (emphasis added) (footnote omitted). That word—"inhabitants"—comes from Edmund Randolph's Virginia Plan, which formed the basis for the "Great Compromise" that established the House of Representatives. *See* 1 *The Records of the Federal Convention of 1787* 31 (Max Farrand ed., 1911). The Committee of the Whole then resolved "that the right of suffrage in the first branch of the national Legislature ought … [to be] in proportion to the whole number of … citizens and inhabitants of every age, sex, and condition…." *Id.* at 229. The Committee of Detail changed the wording

slightly, providing that "the Legislature shall … regulate the number of representatives by the number of inhabitants" of the States, "[p]rovided that every State shall have at least one representative." 2 *The Records of the Federal Convention of 1787* 164 (Max Farrand ed., 1911). That wording was sent to the Committee of Style, *id.* at 566, which "'had no authority from the Convention to alter the meaning' of the draft Constitution submitted for its review and revision," *Utah v. Evans*, 536 U.S. 452, 476 (2002) (quoting *Powell v. McCormack*, 395 U.S. 486, 538-39 (1969)); *see also Franklin*, 505 U.S. at 804-05 (noting that "the first draft" of the Apportionment Clause "used the word 'inhabitant,' which was omitted by the Committee of Style in the final provision"). The Committee of Style thus produced the final iteration: "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." U.S. Const. art. I, § 2, cl. 3. The change was adopted without comment or debate. 2 Farrand, *supra*, at 590 *et seq*.

The Committee of Style's alteration was not intended, and was not viewed, as a substantive amendment. The charge given the Committee was merely to "revise the stile of and arrange the articles agreed to by" the Convention. *Id.* at 547; *see Powell*, 395 U.S. at 538-39. And the debates surrounding ratification confirm that the public understood that the meaning of

the phrase had not changed. In *Federalist 54*, for example, James Madison explained that it was a "fundamental principle of the proposed Constitution" that 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*." *The Federalist* No. 54, at 284 (George W. Carey & James McClellan, eds., 2001) (emphasis added). Likewise, in *Federalist 58*, Madison responded to the concern that "the number of members" in the House would "not be augmented from time to time, as the progress of population may demand." *The Federalist* No. 58, *id.*, at 300. He allayed that concern by explaining that the census would provide new numbers every 10 years for reapportioning representation:

> Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust, from time to time, the apportionment of representatives *to the number of inhabitants*, under the single exception that each State shall have one representative at least; secondly, to augment the number of representatives at the same periods, under the sole limitation that the whole number shall not exceed one for every thirty thousand inhabitants.

Id. at 301 (emphasis added). Soon after ratification, the First Congress also put its gloss on the phrase when it passed the first Census Act. *See* An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, § 1, 1 Stat. 101 (1790). It duly directed officials to count "the number of the

inhabitants within their respective districts." *Id.* (emphasis added).

This history is important because the word "inhabitant" had a particular connotation that residency did not: membership in the political community. *See generally* Charles Wood, *The Census, Birthright Citizenship, and Illegal Aliens*, 22 Harv. J. L. & Pub. Pol'y 465, 477-79 (1999). Thus, when the Framers debated whether to replace the word "resident" with "inhabitant" in the clause setting forth the residence qualifications for House members, Madison noted that both terms were "vague," but that "inhabitant" was "least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business." 2 Farrand, *supra*, 216-17; *see Franklin*, 505 U.S. at 805. The same could not be said for the word "resident."

On the other hand, the term "inhabitant" also required *more* than mere residency; it demanded lawful and permanent residence, an intent to remain indefinitely. *See, e.g.*, Thomas Dyche & William Pardon, *A New General Dictionary* (1760) (defining "inhabitant" as "a person that resides or ordinarily dwells or lives in a place or house; but in Parish Law, they only who pay the several taxes, and are liable to serve offices, are called inhabitants"); 1 Noah Webster, *American Dictionary of the English Language* (1828) (defining "inhabitant" 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"); *see also Franklin*, 505 U.S. at 804 (noting that "'[u]sual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration

Act," as well as the words "'usual place of abode,' 'inhabitant,' 'usual reside[nt]'").

These twin components of "inhabitant" were put to the test in 1824 when the House of Representatives was confronted with multiple challenges to the qualifications of would-be Representatives. First was the case of John Bailey, who had been elected to represent his home State of Massachusetts. *See Cases of Contested Elections in Congress* 412 (M. Clarke & D. Hall, eds., 1834). The problem was that Bailey had not lived in Massachusetts for six years before his election because he had moved to Washington, D.C., to work as a clerk for the State Department. In reviewing the case, the House Committee of Elections explained that the Framers, "by striking out 'resident,' and inserting 'inhabitant,' as a stronger term, intended more clearly to express their intention that the persons to be elected should be *completely identified* with the State in which they were to be chosen." *Id.* (emphasis added). The use of "inhabitant," the Committee recognized, meant that House members must be "*bona fide* members of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer." *Id.* The Framers had required such allegiance so that "the distinctive character of the several States as component parts of the General Government" would be sustained. *Id.* at 413. Applying this definition to the case before it, the Committee determined that Bailey had abandoned his domicile in Massachusetts by moving to Washington, D.C., and thus could not be seated in the House. *See id.* at 419-20 (noting that "[t]he domicil acquired is

that where we settle by our choice" (quoting 1 Emmerich de Vattel, *The Law of Nations* § 218 (1787)).

The second case confronting the Committee was that of John Forsyth, whose qualifications Bailey challenged in a failed attempt to bolster his own. *See id.* at 497. Like Bailey, Forsyth was not present in the State when he was elected. *Id.* Unlike Bailey, Forsyth had not moved to another State indefinitely, but rather was serving as a foreign minister to Spain when he was elected to represent his home State of Georgia in the House of Representatives. *Id.* Also unlike Bailey, Forsyth was allowed to keep his seat. There was "nothing in Mr. Forsyth's case which disqualifies him from holding a seat," the Committee concluded, because "[t]he capacity in which he acted, excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States." *Id.* Accordingly, "as he had no inhabitancy in any other part of the Union than Georgia, he must be considered as in the same situation as before the acceptance of the appointment"—i.e., a *bona fide* member of the political community of Georgia. *Id.* at 498; *see also Franklin*, 505 U.S. at 805.

2. This distinction between residency and inhabitancy was retained in the Apportionment Clause of the Fourteenth Amendment. As noted above, the main dispute over Section 2 concerned how to repeal the infamous three-fifths compromise while preventing the former slave States from counting their freedmen as inhabitants—thus wrenching political power in the House away from loyal States—while simultaneously denying those freedmen the rights guaranteed them as citizens. *See generally Evenwel*, 136 S. Ct. at 1147-

49 (Alito, J., concurring in the judgment). "After much debate, Congress eventually settled on the compromise that now appears in § 2 of the Fourteenth Amendment," *id*. at 1148: directly tying representation in Congress to the political rights of citizens, *see* U.S. Const. amend. XIV, § 2 ("But when the right to vote at any election … is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged … 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.").

Importantly, that compromise did not otherwise amend the meaning of the Apportionment Clause. Indeed, the 1870 census used the same procedures as had the 1850 census—including its requirement that "all [States'] inhabitants … be enumerated." *See* Act of May 6, 1870, ch. 87, § 1, 16 Stat. 118, 118; Act of May 23, 1850, ch. 11, § 1, 9 Stat. 428, 428. As Judge Timothy Farrar reported in his influential 1867 treatise, "'[t]he whole number of persons in each State'" still did not "mean everybody on the soil at the particular time," nor did it "exclude everybody who may happen not to be on it at the same time." Timothy Farrar, *Manual of the Constitution of the United States of America* § 450, at 403 (1867).

3. Illegal Aliens Are Not "Inhabitants."

If the Constitution limits the apportionment base to the number of "inhabitants" in each State, the next question is whether aliens who are unlawfully residing in a State qualify as inhabitants of that State. The

answer is no. To be sure, "[u]ntil 1875 alien migration to the United States was unrestricted," *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972), so foreigners settling in America in the Founding and Reconstruction periods *were* generally counted in the apportionment base. But that was because immigrants were entitled to become members of the body politic, not because illegal aliens were included in the apportionment under the original public meaning of the Clauses. The Framers were well aware of the law of nations, which formed the background for much of what happened at the Constitutional Convention. *See, e.g.*, *U.S. Steel Corp v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978). And as Chief Justice Marshall recognized, quoting from Emmerich de Vattel's influential treatise on international law,[3] "inhabitants, as distinguished from citizens, are strangers who are *permitted* to settle and stay in the country." *The Venus*, 12 U.S. (8 Cranch.) 253, 289 (1814) (Marshall, C.J., concurring in part and dissenting in part) (emphasis added) (quoting 1 Emmerich de Vattel, *The Law of Nations* § 213 (1787)). In other words: No lawful admittance, no inhabitancy.

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[3] Vattel was "the founding era's foremost expert on the law of nations." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019). His "influence on the Founders in framing the Constitution is immeasurable. His influence would have included the Founders' understanding of the rules of naturalization (such as who may obtain a country's rights, privileges, and immunities), the laws of war, foreign affairs, and immigration." Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. Pub. L. 35, 77 (2011) (footnotes omitted).

The general understanding during the Founding period was thus that unsettled alien inhabitants were not entitled to representation and so presumptively would be excluded from the apportionment base, too. *See The Federalist* No. 54, *supra*, at 282 (noting that the purpose of the Apportionment Clause is to establish "the standard for regulating the proportion of those who are to represent the people of each State"); Hugo Grotius, *The Law of War and Peace*, XVI (1625) (noting that "permanent residence" is available to foreigners "only upon condition that they submit to the established laws of the place," and "settlers of this description have no right to demand a share in the government"). Thus, while *lawfully* admitted aliens may be entitled to "virtual representation" by citizens entitled to vote, this right flows from the fact that such aliens owe allegiance to the laws of the admitting State. "Bound by their residence to the society," Vattel explained, lawful strangers "permitted to settle" are "subject to the laws of the state … and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens." 1 Vattel, *supra*, § 213. Of course, illegal aliens violate this duty from the beginning by settling where they are not "permitted." *See* 8 U.S.C. § 1227(a)(1).

Moreover, in Vattel's conception, the act of settlement presupposed by inhabitancy itself required not just the establishment of a "fixed residence in any place, with an intention of always staying there," but also that one "make[] sufficiently known his intention of fixing there, either tacitly, or by an express declaration." 1 Vattel, *supra*, § 218. "To be precise, eighteenth century precedent required aliens to announce

their intent to settle," and to "announc[e] one's self *to the government*." Charles*, supra*, at 77 (emphasis added) (footnotes omitted). "To dispense with [the declaration of intent to settle]," the Committee of the Judiciary explained in 1822, "is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission" to the United States. *Id.* (quoting Report of the Committee on the Judiciary Upon the Subject of Admitting Aliens to the Rights of Citizenship Who Resided Within the United States One Year Preceding the Declaration of the War With Great Britain (1818, 1822) (alterations in original)).

That is another reason illegal aliens are excluded from the class of legitimate "inhabitants": they do not publicly declare—to the government at least—their intention to permanently remain within the territorial jurisdiction of the United States. The law of nations would have treated them as persons "who have no settlement," and thus who have no inhabitancy. 1 Vattel, *supra*, § 219; *see United States v. Laverty*, 26 F. Cas. 875, 877 (D. La. 1812) (No. 15,569A) ("An inhabitant is one whose domicile is here, and settled here, with an intention to become a citizen of the country.").

And again, this Founding-era public understanding carried through Reconstruction and the ratification of the Fourteenth Amendment. By that time, it was clear that the apportionment base included *settled*—i.e., lawful—foreigners. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 353 (1866) (Rep. Rodgers) ("Every man in this House knows perfectly well in the several States … unnaturalized citizens cannot vote

… yet for these persons the States are entitled to representation"). But the country's lenient immigration laws at the time "should not distract from the fact that the drafters of the Fourteenth Amendment were familiar with the law of nations concerning settlement and allegiance to laws." Charles, *supra*, at 61. Indeed, the statutory law of naturalization incorporated Vattel's standard for settlement, requiring foreigners to announce their presence and give an oath of allegiance in addition to residing in the United States for five years. *See* An Act to Establish An Uniform Rule of Naturalization, 2 Stat. 153 (1802). For that reason, the drafters of the Fourteenth Amendment could assume that emigrating foreigners intended to settle and apply for citizenship quickly and so would be included in the apportionment. Such foreigners, one Congressman noted, could "acquire [the vote] in the current decade," before the next enumeration happened. Cong. Globe, 39th Cong., 1st Sess. 354 (Rep. Kelley); *see also id.* at 2400 (Sen. Johnson) (justifying inclusion of "a foreigner" who "reside[s] peacefully among us with the intention of becoming a citizen"); *id.* at 356 (Rep. Conkling) ("The political disability of aliens was not for this purpose counted against them, because it was certain to be temporary, and they were admitted at once into the basis of apportionment."); *id.* at 3035 (Sen. Henderson) ("The road to the ballot is open to the foreigner; it is not permanently barred.").

Thus, the prevailing assumption in the congressional debates over the Fourteenth Amendment was that the status quo regarding lawfully settled foreigners would be preserved, and that apportionment

included lawful resident aliens because "the people, or all the members of a State or community, are equally entitled to protection [because] they are all subject to its laws [and] they must all share in its burdens, and they are all interested in its legislation and government." *Id.* at 2962 (Sen. Poland). But this logic cannot encompass illegal aliens. They are not members of the political community, they are here in violation of its laws, and they do not share equally in the burdens of membership. So it is unsurprising that the most important treatises from the Reconstruction period set forth interpretations of the Apportionment Clause that compel exclusion of illegal aliens from the apportionment base. Judge Farrar's 1867 treatise, for instance, recognized that "[t]he whole number of persons in each State cannot mean everybody on the soil at the particular time, nor exclude everybody who may happen to not be on it at the same time." Farrar, *supra*, § 450, at 403. Nor, he said, did the term "persons" encompass everybody, "without regard to anything but their humanity and personality." *Id.* § 240, at 237. Settling foreigners' status as "inhabitants" could change with the nation's immigration laws.

Which is what happened. Under current immigration law, illegal aliens cannot become "inhabitants" absent a change in immigration status. *See* 8 U.S.C. § 1227. Like "Indians not taxed," they stand outside the body politic; because their exit is sure—legally speaking—they cannot establish legal domicile in a State. *See Elkins*, 435 U.S. at 665-66 (noting that "nonimmigrant aliens can generally be viewed as temporary visitors to the United States"); *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) ("Illegal

aliens are not … members of the political community….").

True, the Constitution affords illegal aliens certain protections when they are within the United States. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that illegal aliens are entitled to protection under the Equal Protection Clause). And yes, this Court has recognized that those protections derive from the Constitution's use of the term "persons" in the Equal Protection and Due Process Clauses. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

But this recognition does not mean that the Apportionment Clauses' use of the term "person" also applies to illegal aliens. Such an application would be inconsistent with the original public meaning of the term. And there is nothing anomalous about applying a different meaning when the text demands it. Visiting foreign tourists are protected by the Due Process and Equal Protection Clauses; they are not counted in a State's apportionment. Likewise, the Due Process and Equal Protection Clauses include corporations and other artificial persons within their use of the term "persons." *See Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1888). No one would suggest that such entities be included in the apportionment base. That's because the Due Process and Equal Protection Clauses preserve individual interests in life, liberty, property, and equal treatment, while the

Apportionment Clauses protect a distinctively political interest in representation. Illegal aliens do not share in that interest. And there is nothing incongruous with conditioning political representation on *legal* presence; "[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or, indeed, to the conclusion that all aliens must be placed in a single homogenous legal classification." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (noting that "once an alien *lawfully* enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." (emphasis added)).

4. Counting Only "Inhabitants" Furthers the Goal of Equal Representation.

Excluding illegal aliens from the apportionment base also conforms with the Constitution's other guarantees of equal representation, with which the Apportionment Clauses must be read *in pari materia*. This Court has repeatedly recognized that the Constitution requires that "the vote of any citizen [be] approximately equal in weight to that of any other citizen," *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), and that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Wesberry*, 376 U.S. at 7-8. A "basic principle of representative government," the Court explained, is that "the weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds*, 377 U.S. at 567; *see also Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004)

("The object of districting is to establish 'fair and effective representation for all citizens.'" (quoting *Reynolds*, 377 U.S. at 565-66)); *Lockport v. Citizens for Cmty. 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.").

This one-person, one-vote principle protects "groups constitutionally entitled to participate in the electoral process." *Burns v. Richardson*, 384 U.S. 73, 92 (1966). It does *not* protect those *not* entitled to such participation. For example, at issue in *Burns* was Hawaii's districting plan, which did not use total population as its redistricting base. *See id.* at 96-97. Instead, the State used the number of registered voters as a proxy for the eligible voter/citizen population. This was because the State had determined that the large numbers of out-of-state tourists and military personnel concentrated on Oahu would unfairly skew representation and dilute the weight of Hawaiians' votes in other districts. *See id.* In upholding the plan, *id.*, the Court confirmed that the population base that matters for representation is the number of *constituents* in each district, not the total number of persons who happen to reside there. "While *Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so." *Garza v. City of Los Angeles*, 918 F.2d 763, 784 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

Of course, the one-person, one-vote principle applies most readily in the context of intrastate districting, where something akin to "mathematical equality" can be achieved. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 460 (1992) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)); *see generally Wisconsin v. City of New York*, 571 U.S. 1 (1996); *Franklin*, 505 U.S. 788. "The constitutional guarantee of a minimum of one Representative for each State" hinders that application in interstate apportionment, and "the need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States." *Montana*, 503 U.S. at 463.

Still, such practical limitations do not mean that the *goal* of equal representation has no foothold in the interstate context; otherwise, the debates in the Reconstruction Congress over Southern States' ability to count former slaves would have been over nothing. And it would be strange indeed if the Apportionment Clauses themselves were used to *undercut* the very reason for their existence—that "fundamental principle" that the "aggregate number of representatives" be "founded on the aggregate number of inhabitants" of each State. *The Federalist* No. 54, *supra*, at 284. Apportionment is still zero-sum, and the large and uneven distribution of illegal aliens makes some citizens' votes not "worth as much" as other citizens' votes. *Wesberry*, 376 U.S. at 8. To the extent possible, equalization of voting rights remains the constitutional goal. *Cf. Franklin*, 505 U.S. at 804 (noting that apportionment decisions are lawful only if they are

"consistent with … the constitutional goal of equal representation").[4]

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[4] Nor does the Court's recent decision in *Evenwel* mean that illegal aliens must be counted. *See* 136 S. Ct. 1123 (holding that "a state may draw its legislative districts based on total population"). In fact, there the Court cited with approval the Government's position that "the principle of representational equality" embodied in the Constitution requires "that the voters in each district have the power to elect a representative who represents the same number of *constituents* as all other representatives." *Id.* at 1126 (emphasis added) (citation omitted). But including illegal aliens in the apportionment base violates that principle, because illegal aliens are not "constituents" of congressional representatives. A constituent is "[s]omeone who is represented by a legislator or other elected official." *Constituent*, Black's Law Dictionary (10th ed. 2014). Illegal aliens are not "constituents" because they are not entitled to representation in Congress. *Cf. Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) ("The legislative power … is not personal to the legislator but belongs to the people"); *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (noting that a Congressional Representative acts as a "trustee for his constituents," who make up the fraction of "the people" who reside in the district he represents). Thus, properly understood, the equal representation principle endorsed in *Evenwel* does not require apportionment based on total population *per se*, but apportionment based on the total number of persons *entitled to representation*. That is, the question presented in *Evenwel* was whether intrastate districting must be "based on citizen-voting-age-population," not whether total population *per se* is a permissible population base always and everywhere. Again, failure to exclude illegal aliens from the apportionment base results in districts that are equal in total population, but imbalanced with respect to the number of *constituents* each Representative serves. *Cf. Burns*, 384 U.S. at 92; *Wesberry*, 376 U.S. at 17 (noting that "[e]lections are equal" when "the proportion of the representatives and of the constituents … remain invariably the same" (quoting 2 *The Works of James Wilson* 15 (Andrews, ed., 1896))).

B. Any Apportionment That Does Not Use Best Available Means to Exclude Illegal Aliens Is Unconstitutional.

If the Constitution requires that illegal aliens be excluded from the apportionment base—which it does—then it follows that any apportionment that does not use the best available means to exclude illegal aliens violates the Constitution. Without the Presidential Memorandum, that would include the Census Bureau's usual Residence Rule, which counts such aliens in the census's tabulation that determines apportionment. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018).

Congress requires the Secretary of Commerce to use the census data to prepare a "tabulation of total population by States … as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). That tabulation is then used by the President to calculate the number of representatives and electoral votes to which each State is entitled. *See* 2 U.S.C. § 2a(a). The problem, of course, is that the Census Bureau normally includes illegal aliens in its population tabulation that then serves as the basis for the apportionment. Pursuant to the Census Bureau's Residence Rule, "[c]itizens of foreign countries living in the United States" are "[c]ounted at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. 5525, 5533. But as explained above, the Constitution does not allow for such numbers to be used to determine the representation of States' constituents. Instead, it requires that the "inhabitants" of each State form the

apportionment base. Because that mandate is unambiguous and leaves no room for Congressional or Executive discretion, the Census Bureau's Residence Rule is unconstitutional to the extent it alone forms the apportionment base.

It is true, of course, that aliens have been included in the apportionment base before. But, first, the Bureau's historical practice has not been as consistent as one might think. "The fact that the census was administered in person meant that the field enumerators, ultimately, were responsible for explaining and deciding who should be counted on a 'usual residence' standard." National Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 30 (2006). As instructions to enumerators in 1880 detailed, "[m]uch [was] left to the judgment of the enumerator, who can, if he will take the pains, in the great majority of instances satisfy himself as to the propriety of including or not including doubtful cases in his enumeration of any given family." *Id.* (footnote omitted). Not until 1970 did the Census Bureau begin using mailed questionnaires that respondents could fill out and return. *Id.* at 31.

Second, and in any event, the practice is not revealing of the original meaning of the Constitution's mandate because it arose as a matter of historical happenstance. Not until 1875 did the United States impose any immigration restrictions at all—and then it was mainly to prohibit the immigration of persons for purposes of slavery or prostitution and those who had been convicted of certain crimes. *See* An Act Supplementary to the Acts in Relation to Immigration, Pub. L. No. 43-141, 18 Stat. 477 (1875). Before then,

and certainly at the Founding, the country's stance was to *encourage* immigration to the New World. *See Kleindienst*, 408 U.S. at 761. That policy of open immigration didn't come to an end until 1921, when Congress passed the Emergency Quota Act. *See* An Act to Limit the Immigration of Aliens into the United States, Pub. L. No. 67-5, 42 Stat. 5 (1921). And it wasn't until well into the 20th century that the unequal distribution of illegal aliens among the States has been large enough to have a marked effect on apportionment figures. *See generally Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?*: Hearing Before the H. Comm. on Gov't Reform, 109th Cong. 28-42 (2005) (statement of Clark Bensen).

Regardless, that the Census Bureau has been violating the Constitution for many years does not mean that it hasn't been violating the Constitution for many years, much less that such violations should continue. The Court is "not persuaded by arguments that explain the debasement of citizens' constitutional right to equal franchise based on exigencies of history or convenience." *Bd. of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989); *see Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 260-61 (2011) (noting that "the apparent novelty" of a suit "does not at all suggest its" invalidity).

The Presidential Memorandum solves—or least takes a substantial step in resolving—this problem. By excluding illegal aliens from the apportionment base "to the maximum extent feasible," 85 Fed. Reg. 44,680, the Memorandum implements the Constitution's demand that only "inhabitants" form the basis

for apportionment. And the statues governing the census and apportionment are consistent with this demand. The Presidential Memorandum, therefore, should be upheld.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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