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 AMICI CURIAE ILYA SOMIN AND SANFORD LEVINSON IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, Statutes, and Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici curiae, whose biographies are listed in the Appendix to this brief, are legal scholars who have extensively studied and written about constitutional law. Amici have a profound interest in the outcome of this case. The Constitution's text and original public meaning dictate that undocumented persons must be counted for congressional apportionment. Appellants' alternative interpretation of the Constitution is without foundation.

SUMMARY OF ARGUMENT

The Constitution requires the federal government to apportion congressional seats "among the several States" based on the number of "Persons" in each State. U.S. Const. art. I, § 2; *see id.* amend. XIV. In an unprecedented decision, the President has made it "the policy of the United States to exclude from the apportionment base aliens who are not in lawful immigration status." 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). Because that policy flouts the Constitution's text and original public meaning, any effort to enforce that policy by excluding undocumented people from congressional apportionment is unconstitutional. And because Appellants—the President and other Executive Branch officials and agencies responsible for conducting the decennial census—concede that their statutory and constitutional arguments rise and fall together (Br. 46), excluding undocumented people also

[1] All parties consent to the filing of this brief. Pursuant to Rule 37.6, counsel for amici authored this brief. No counsel for a party in this case authored this brief in whole or in part. Only amici and their counsel contributed monetarily to the preparation and submission of this brief.

violates the Census Act. This Court should therefore affirm the judgment below.

I. Neither of the two constitutional provisions governing congressional apportionment allows the federal government to exclude undocumented immigrants from the apportionment count. Appellants' contrary reading of these provisions distorts their plain meaning.

A. To begin with, excluding undocumented immigrants is at odds with the Apportionment Clause's command that the government base congressional apportionment on the number of "Persons" living in each State. U.S. Const. art. I, § 2. "Persons" is a broad term and was equally broad at the founding. Then, as now, it referred to human beings.

While that plain language is broad enough on its face to include undocumented immigrants living in a State, surrounding words and text from elsewhere in the Constitution reinforce that the Framers understood "Persons" as a broad and general term. For instance, the Apportionment Clause excludes "Indians not taxed" from the apportionment count. Because Indians were considered noncitizens with allegiance to their tribes, the Framers would have had no reason to expressly exclude them from the apportionment base if "Persons" excluded foreigners or those with an allegiance to a sovereign other than the United States. The Constitution's use of "Citizens" in other provisions also underscores that the Framers distinguished between "Persons" and "Citizens"—a subset of "Persons." This Court's decisions dispel any doubt about the breadth of "Persons." Interpreting other constitutional provisions that apply to "Persons," this Court

has held those provisions protect undocumented immigrants.

Appellants' contrary arguments cannot overcome these points. Appellants never address the ordinary meaning of "Persons" or the "Indians not taxed" provision, which would be superfluous if the Framers understood "Persons" to exclude foreigners. Instead, Appellants rely on the Apportionment Clause's language before it underwent stylistic changes in the Committee of Style. Because that language-based apportionment on the number of "inhabitants," not "Persons," Appellants contend that the Framers intended to exclude foreigners. Appellants distort the meaning of "inhabitants." According to the founding-era sources Appellants cite, inhabitants are those people who intend to stay somewhere indefinitely. Undocumented immigrants, by and large, intend to stay in the United States indefinitely. Appellants' conjecture that some of these immigrants may be removed at some point cannot alter those persons' intention to remain here. That intention is what matters.

B. The Fourteenth Amendment, which changed apportionment by undoing the infamous Three-Fifths Compromise, carried forward the Framers' plan to count all "persons" living in each State. As at the founding, "persons" had a broad meaning during Reconstruction, when the Fourteenth Amendment was ratified. Like the Apportionment Clause, the Fourteenth Amendment excluded "Indians not taxed" from the apportionment, a signal that "persons" was broad enough to include those considered foreigners at the time. The Fourteenth Amendment also used the term "citizen" in other sections, again highlighting that "persons" meant something different.

What is more, the debates over the Fourteenth Amendment's language showed that its drafters specifically considered whether to—and decided to—include immigrants in the apportionment count. The Amendment's drafters believed that the Constitution required apportionment based on each State's "total population." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). And the drafters made clear when they crafted the Amendment that "total population" included immigrants.

II. Including undocumented immigrants in the apportionment base also aligns with founding ideals about immigration and representation, for two main reasons.

First, most of the Framers did not believe that the federal government had the power to exclude immigrants at all. Indeed, the federal government did not restrict immigration until a century after the founding. A federal policy that classified a category of immigrants as "illegal" and that excluded them from the apportionment would have thus come as a surprise to the Framers, most of whom welcomed immigrants and saw them as vital to the Nation's success.

Second, the Framers expected that the congressional apportionment count would include large swaths of nonvoters. At the founding, more than half of the adult population could not vote. The Framers believed that the enfranchised population—mainly adult white men—would vote in a way that accounted for the interests of those around them. This commitment to "virtual representation" undercuts Appellants' argument that including undocumented immigrants in the apportionment will distort representative democracy in this country. Quite the contrary,

members of Congress have always been thought to represent the interests of many groups of people—including at the founding women, children, and freed slaves—to whom they were not directly accountable at the ballot box. Undocumented immigrants fall neatly within that group. Modern Americans—for good reason—reject many aspects of the founding-era conception of virtual representation. But that conception still informs the original meaning.

ARGUMENT

I. The text and original public meaning of the Constitution require counting undocumented persons for congressional apportionment.

A. The Apportionment Clause requires apportionment based on "the whole number of free Persons."

The original understanding of the Apportionment Clause, U.S. Const. art. I, § 2, is that "Persons" living in a State be counted for congressional apportionment, with a sole exception: "Indians not taxed." That Clause's broad language, along with other textual indicators throughout the Constitution, require including undocumented immigrants in the apportionment count.

1. The Apportionment Clause's plain language reflects the Framers intent to include in the apportionment count immigrants living in each State. The Clause provides that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, 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.

By its plain terms, that language includes undocumented immigrants, who, as even Appellants admit, are "persons." *See* J.S. App. 71a, *Trump v. City of San Jose* (No. 20-561) (filed Oct. 29, 2020). Indeed, the ordinary meaning of "person" at the founding was a "general loose term for human being." Samuel Johnson, *A Dictionary of the English Language* s.v. person (3d. ed. 1766). That "general loose term" is not limited by country of origin or anything similar. *See id.* And legal sources from that era also consistently defined "aliens" as a subset of "persons." *See* 1 William Blackstone, *Commentaries* ch. 10 (1765); 2 James Kent, *Commentaries on American Law* 33–63 (1826).

The exclusion of "Indians not taxed" from the apportionment total further underscores the Framers' intent to define "Persons" broadly enough to include foreigners. At the founding, Indian tribes "were alien nations, distinct political communities, with whom the United States might and habitually did deal." *Elk v. Wilkins*, 112 U.S. 94, 99 (1884). Although Indians who belonged to these tribes were considered "alien[s]," with no right, "beyond other foreigners, to become [U.S.] citizens," *id.* at 100–01, the Framers still saw fit to carve them out from "Persons" included in the apportionment.

Had the Framers not considered "Indians not taxed" to be "Persons," they would not have needed to single them out for exemption. That conclusion follows from a cardinal precept of constitutional interpretation—that courts decline to "presume[] that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Indeed, to "erase" words from a constitutional

provision is to commit "a judicial error of the most basic order." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 842 (2015) (Roberts, C.J., dissenting). In line with that principle, Chief Justice Marshall, writing for this Court, acknowledged that that "the clause excluding Indians not taxed" was no mere surplusage: "If the clause . . . had not been inserted," he observed, "the whole free Indian population of all the states would be included in the federal [apportionment] numbers." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 42–43 (1831). The Framers thus believed that "Persons" included Indians under tribal jurisdiction, who were themselves considered aliens at the time.

In short, the framers deliberately used broad language because they intended the apportionment to include each State's "respective numbers," not just its citizens or voters. And creating new exceptions to this language outside the sole exclusion the Framers specified—"Indians not taxed"—would thwart that understanding.

2. Other constitutional provisions likewise show the breadth of the word "Persons" in the Apportionment Clause.

The Fifth Amendment is perhaps the best exemplar. Under that Amendment, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." As this Court has repeatedly stressed, the "person[s]" the Due Process Clause protects include "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903). More recently, the Court has reiterated that "[t]he Fifth Amendment . . . protects every one of" the

"literally millions of aliens within the jurisdiction of the United States" from "deprivation of life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). That protection covers "[e]ven one whose presence in this country is unlawful." *Id.*

"Persons" also appears in the Extradition Clause, U.S. Const. art. IV, § 2, under which "[a] Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Limiting "Persons" to exclude undocumented immigrants would make no sense in the extradition context: the citizenship of the accused is irrelevant to whether a state has jurisdiction to prosecute a crime. Unsurprisingly (though odiously), early jurisprudence shows that the Clause was used to require extradition of noncitizen fugitive slaves. *See, e.g.*, *Kentucky v. Dennison*, 65 U.S. 66 (1860), *overruled on other grounds by Puerto Rico v. Branstad*, 483 U.S. 219 (1987). That application would have been unconstitutional had the Clause applied only to citizens.

The broad reading of "persons" in these clauses rests on founding-era definitions. As this Court has recognized, "person" was a term with "relatively universal" coverage. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). It "contrasts with" the term "the people"—a founding-era "term of art" that "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." *Id.* at 265. The Apportionment Clause's use of the "universal" term thus reflects the

Framers' understanding that the Clause apply broadly.

The breadth of the term "Persons" in the Constitution stands in distinction to the narrower term "Citizens," which is used throughout the Constitution to limit rights to a subset of persons.

Article III, § 2, for instance, allows federal courts to hear suits "between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The Framers chose citizenship, rather than mere usual residence or abode, to allay "apprehensions" that state courts could not "impartially" dispense justice to citizens of other States. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844). Indeed, courts have construed Article III's reference to "Citizens" to exclude Indians, *see Paul v. Chilsoquie*, 70 F. 401, 402 (C.C.D. Ind. 1895); 13E Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3622 (Westlaw ed. Oct. 2020), who were not considered citizens at the founding, *see Cherokee Nation*, 30 U.S. at 17; *see also* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (granting citizenship to Indians born within territorial limits of the United States). That exclusion highlights that the Framers viewed Article III's "Citizens" as distinct from the Apportionment Clause's "Persons." *See supra* p. 6.

Other clauses reflect the same distinction. The Privileges and Immunities Clause, for example, grants "the Citizens of each State . . . all Privileges

and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. Although at least some freed slaves arguably did not originally qualify as "Citizens" under that Clause, *see* Charles Pinckney in the House of Representatives (Feb. 13, 1821), *in* 3 *Records of the Constitutional Convention* 446 (Max Farrand ed., 1911) (*Records of Convention*), they counted as "Persons" under the Apportionment Clause, *see* Nat'l Archives & Records Admin., *African Americans and the Federal Census, 1790–1930* (2012) (explaining that, in the censuses between 1790 and 1840, "Free African Americans" were "enumerated with the remainder of the free population"), http://tiny.cc/irt3tz.

This distinction between "Persons" and "Citizens" was no accident. On the contrary, the Framers sought to avoid the "remarkable" "confusion of language" in the fourth Article of Confederation. *The Federalist No. 42*, at 207–08 (Madison) (Terence Ball ed., 2003). The Articles, James Madison observed, used "the terms *free inhabitants* . . . in one part of the article; *free citizens* in another, and *people* in another," yet the Framers could not "easily . . . determine[]" any reason for doing so. *Id.* Thus, in contrast to the Articles of Confederation, the Constitution reflects the Framers' goal of distinguishing between "Persons" and "Citizens," avoiding the absurd and embarrassing possibilities that Madison feared.

3. a. As against all this—and ignoring entirely the exclusion of "Indians not taxed"—Appellants rest the bulk of their originalist argument on the draft wording of the Apportionment Clause. In draft, the Clause used the phrase "citizens and inhabitants" instead of "Persons." 2 *Records of Convention* 566, 571. From that point, Appellants reason (Br. 35–39) that eight-

eenth-century thinkers would have considered undocumented immigrants not to be "inhabitants" of the States in which they lived.

But the Framers' supposed secret intention that "Persons" mean "inhabitants" cannot trump the plain meaning of the text actually written into the Constitution. *See, e.g.*, Randy E. Barnett, *Restoring the Lost Constitution* ch. 4 (rev. ed. 2004) (discussing crucial distinction between original intent of drafters and original public meaning); Ilya Somin, *Originalism and Political Ignorance*, 97 Minn. L. Rev. 625, 627–28 (2012) (same). As Judge Robert Bork put it, the original meaning of the Constitution "must be taken to be what the public of the time would have understood the words to mean." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144 (1990). Although the Framers' "[s]tatements" may "assist in th[e] process" of ascertaining original meaning if "there is evidence that these statements were disseminated to the public" or if "they demonstrate the manner in which the public used or understood a particular word or phrase," they cannot substitute for "what the public most likely thought" a constitutional provision "to mean." *McDonald v. City of Chicago*, 561 U.S. 742, 828–29, 835 (2010) (Thomas, J., concurring). A secret draft that the public of the time never got to see could not possibly alter the public meaning of a clear term such as "persons."[2]

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[2] The notes of the Constitutional Convention of 1787 were not available to the public until decades after the Convention took place. The secretary of the Convention delivered his notes to George Washington, who turned them over to the Department of State in 1796. The records "remained untouched" and were not printed until 1819. *See* 1 *Records of Convention* xi–xiv.

Regardless, Appellants' cited sources do not support the argument. The sources show that people at the founding were considered "inhabitants" of the States where they "usually reside[d]" or had their "usual place of abode." Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103, *cited in* Appellants' Br. 32. As John Adams put it, to qualify as an "Inhabitant," a person must have "the animus habitandi"—an intent to stay in a place indefinitely. Letter from John Adams to the President of Congress (Nov. 3, 1784), *in* 16 *Papers of John Adams* 362 (Gregg L. Lint et al. eds., 2012), *cited in* Appellants' Br. 34.

Under that rubric, undocumented immigrants are "inhabitants" of the States where they live. Undocumented immigrants who have settled in a State make it their "usual residence." As of 2017, undocumented immigrant adults had lived in the United States for a median period of fifteen years. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, Pew Rsch. Ctr. (June 12, 2019), http://tiny.cc/4l13tz. Their usual place of abode, and where they intend to stay indefinitely, is thus the United States—not their country of origin.

This fact renders inapt Appellants' comparison (Br. 34) of undocumented immigrants to foreign diplomats or tourists. As the Census Bureau has explained, the exclusion of such tourists and diplomats from the apportionment base is based not on their legal status but on the fact that the United States is not their "usual residence." Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018) (defining people's "usual residence" as "the place where they live and sleep most of the time"); *accord* J.S. App. 85a. And in all events, foreign diplomats are exempt from the jurisdiction of the State

where they are physically present. *See* U.S. Dep't of State, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities* 7–8 (2019), http://tiny.cc/wk13tz. Diplomats and tourists thus stand in contrast with undocumented immigrants, who intend to reside in the United States indefinitely and who are subject to its laws, *see*, *e.g.*, *Kansas v. Garcia*, 140 S. Ct. 791, 798–800 (2020) (discussing criminal prosecution of undocumented immigrants for identity theft).

True enough, some immigrants who are paroled or detained may eventually be removed. *See* Appellants' Br. 36–37. But those people, who account for just a portion of the undocumented population,[3] want to stay in the United States indefinitely—and they may yet be allowed to do so. Not every removal proceeding ends in removal. "[D]eciding whether an alien should be admitted or removed is not [always] easy," including because some immigrants subject to removal proceedings may be granted asylum, *Jennings v. Rodriguez*, 138 S. Ct. 830, 836–37 (2018), or may otherwise be found not to be removable, *see, e.g.*, *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020) (Barrett, J.) (remanding removal decision for determination of whether removal proceedings should be continued or administratively closed). So it is hardly a foregone conclusion that all detained and paroled im-

[3] In 2019, just 510,854 of the estimated 14.3 million undocumented immigrants in the united states were detained. *See* Fed'n for Am. Immigr. Reform, *How Many Illegal Aliens Live in the United States?*, http://tiny.cc/jyt3tz (last visited Nov. 15, 2020); U.S. Immigr. & Customs Enf't, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* 5 (2019), http://tiny.cc/but3tz.

migrants will end up in their countries of origin. Indeed, we would not need removal proceedings at all if detained aliens did not intend to stay here.

Nor is it certain—or even likely—that undocumented immigrants who are neither paroled nor detained will be removed. The federal government, which ultimately decides which immigrants may remain here, enjoys "broad discretion" in the enforcement of immigration law. *Arizona v. United States*, 567 U.S. 387, 396 (2012). In wielding that discretion, the government considers "human concerns" and "policy choices that bear on this Nation's international relations." *Id.*

Thus, the possibility that undocumented immigrants "may be subject to removal from the country" (Appellants' Br. 38) does not change the fact that those immigrants intend to stay here permanently. And although it may be "uncertain whether all [undocumented immigrants] will remain here indefinitely" (*id.*), it is certain that most *intend* to stay here indefinitely. Under Appellants' own theory, that intent to remain is what defines an inhabitant. *See id.* at 34.

Also unavailing is Appellants' related assertion that undocumented immigrants lack "allegiance" to the United States such that they should not qualify as "inhabitants." *See id.* at 37–38 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992)). "Allegiance" is not the test the Framers set out. As explained above (at 6–7), the Apportionment Clause excludes "Indians not taxed" from "Persons" counted in the apportionment. And such Indians were thought to owe their "immediate allegiance to" their own tribes, not to the United States. *Elk*, 112 U.S. at 102. If this "allegiance" would have automatically disqualified Indians from

being "inhabitants" (and thus "Persons"), the exclusion of "Indians not taxed" would be superfluous.

b. Shifting their focus, Appellants argue (Br. 35–36) that "inhabitants" should have the same definition as in the eighteenth-century law of nations. Under that legal definition, Appellants maintain that undocumented immigrants are not inhabitants because the United States has not allowed them to remain. This argument fares no better.

For starters, Appellants have not shown that the Framers understood themselves to have incorporated a technical legal definition of "persons" or "inhabitants" into the Constitution. Because "[t]he Constitution was written to be understood by the voters," *United States v. Sprague*, 282 U.S. 716, 731 (1931), "the enlightened patriots who framed [it], and the people who adopted it, must be understood to have employed words in their natural sense," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). And "ordinary citizens in the founding generation," *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008), would not have understood "Persons" or "inhabitants" to carry a technical definition. In contrast to "[p]hrases such as 'Bill of Attainder,' 'privileges or immunities,' and 'Habeas Corpus,'" the terms "Persons" would be understood by "voters lacking in legal training," and so need not be interpreted "using professional interpretive tools" on which "legal experts" often rely. Somin, 97 Minn. L. Rev. at 651–52 (footnotes omitted). This Court should therefore reject Appellants' proffered legal definition of "Persons" in favor of the word's ordinary meaning: a broad term encompassing both citizens and immigrants. *See supra* pp. 5–6.

Even if Appellants' technical definition applied, it would not exclude undocumented immigrants from

the apportionment count. Appellants rest their law-of-nations argument (Br. 35–36) on the work of Emmerich de Vattel, an eighteenth-century scholar of international law. Vattel defined "inhabitants, as distinguished from citizens" as "foreigners, who are permitted to settle and stay in the country." 1 Emer de Vattel, *The Law of Nations* § 213, at 218 (Knud Haakonssen ed., Thomas Nugent tr., 2008) (Vattel). But Appellants misconceive (Br. 35) Vattel's reference to "permi[ssion]" as "the sovereign's permission." Vattel does not refer to permission of a sovereign. The English translation uses the passive voice without a subject agent—referring to "foreigners, who are permitted to stay." *Id.* That language says only that they are permitted to stay, not that the sovereign permits them.

The original French is even clearer that the permission of "foreigners" to stay comes not from a sovereign but from the community. The French text refers to inhabitants as "Etrangers, auxquels on permet de s'établir," or "foreigners that *one* permits to stay." 1 Emer de Vattel, *Le Droit des Gens* § 213, at 198 (1758).[4] That the indefinite pronoun "one" refers to the community, though clear on its face, is made even clearer through context. "If [a father] has fixed his abode in a foreign country," Vattel explained, "he [has] become a member of another society, at least as a perpetual inhabitant; and his children will be members of

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[4] *See, e.g.*, Randle Cotgrave, *A French and English Dictionary* (1673) ("On. *(Such a Particle as our One, or somewhat more general, and the sign of a Verb Impersonal, or impersonally used; whence;)* On dit, *men say, people talk, its reported* [sic]"); Louis Chambaud, *The Treasure of the French and English Languages* 223 (1786) (translating "De quoi parle-t-on en ville?" as "*What do they say abroad?* or *about town?*").

it also." 1 Vattel § 215, at 219. Vattel also noted that when a vagrant "settle[s] for ever in a nation," she "become[s] a member of it, at least as a perpetual inhabitant, if not with all the privileges of a citizen." 1 *id.* § 219, at 220. Vattel thus conceived of "inhabitants" as those that society had accepted, not those to which a sovereign had granted authority to stay.

Appellants also misplace reliance (Br. 36) on early-American jurists' references to Vattel. For instance, they cite Chief Justice Marshall's dissent in *The Venus*, 12 U.S. (8 Cranch) 253 (1814), but ignore that the majority in that case likewise relied on Vattel, and did so in a way that contradicts Appellants' theory. The majority explained that Vattel considered a person to have made her "domicil" where she takes up "residence accompanied by an intention to make it a place of abode." *Id.* at 278. And the majority elaborated that, according to Vattel, "[s]uch a person . . . becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages." *Id.*

Chief Justice Marshall's dissent agreed on this point. Citing Vattel, Chief Justice Marshall wrote that "[a] domicil . . . requires not only actual residence in a foreign country, but 'an intention of always staying there.'" *Id.* at 289. His statement that "[t]he right of the citizens or subjects of one country to remain in another, depends on the will of the sovereign," *id.* at 290, comes in the context of the question presented in the case: whether a naturalized American citizen living in England was still considered an American once the War of 1812 broke out. Because the "will of the sover-

eign" to welcome foreigners from another country "terminate[s]" once the countries go to war, anyone intending to remain an American after that time would have returned home. *Id.* at 290–91. American citizens in England who did not return home had thus, in Chief Justice Marshall's view, manifested an "intention of always staying" in England and could not be considered Americans. In the end, both opinions focused on intent to remain as the hallmark of inhabitance. And if intent to remain is the focus, then undocumented immigrants qualify as inhabitants.

In sum, neither Vattel's work itself nor its appearance across the Atlantic in early American jurisprudence supports Appellants' view that only legally authorized immigrants "inhabit" the United States. Those sources instead reinforce the conclusion that undocumented immigrants must be included in the apportionment count.

B. The text and original public meaning of the Fourteenth Amendment require counting undocumented immigrants.

The original meaning of "persons" in Article I, § 2, was not changed by adoption of the Fourteenth Amendment. Rather, the text and historical circumstances of the Reconstruction Amendments demonstrate that the Amendment Framers understood its text as requiring that the total population should be counted. The Fourteenth Amendment incorporates the same differentiation between "citizens" and "persons" that was included in the original Constitution. In addition to that plain language, the drafting history of the Fourteenth Amendment shows that the Framers considered and explicitly rejected proposals to limit apportionment to voting eligibility or citizenship. Finally, an inclusive reading of the Fourteenth

Amendment aligns with this Court's prior interpretation of "persons" as referring to the "total population," *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016), including immigrants, "whatever [their] status under the immigration laws," *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

1. The Fourteenth Amendment continued to require that "persons" be included in the apportionment count. At the time of the Amendment's passage, "persons" enjoyed the same broad meaning that it had at the founding. *See An American Dictionary of the English Language* 734 (1848) ("1. An individual human being consisting of body and soul"), https://catalog.hathitrust.org/Record/011640803.

Like the Apportionment Clause, moreover, the Fourteenth Amendment "exclud[es] Indians not taxed" from the apportionment total. U.S. Const. amend. XIV, § 2. That exclusion is further evidence that "persons" included even those considered to be foreign. *See supra* pp. 6–7.

The Fourteenth Amendment also continued the Framers' practice of carefully delineating between "persons" and "citizens." The Amendment was designed to encourage southern States to extend the franchise to newly freed slaves. To accomplish this goal, the Amendment removed the infamous Three-Fifths Compromise so that apportionment would include "the whole number of persons in each State" but reduced the apportionment in proportion to the number of male "inhabitant . . . citizens" who were denied the right to vote. U.S. Const. amend. XIV, § 2.

The Framers thus distinguished "persons" from "inhabitant . . . citizens," a pattern that was repeated throughout the Amendment. Section 1, for example,

provides special protections for the "privileges or immunities of citizens of the United States" while extending to all persons the protections of "life, liberty, or property." This clear differentiation shows that the Framers intended to cast "persons" as a broad category encompassing the total population of the States—the same category as that used for apportionment.

2. The Framers of the Fourteenth Amendment considered and rejected proposals to limit apportionment to some category less than total population. Representative Thaddeus Stevens, for example, proposed allocating House seats to States according to "respective legal voters" rather than population, Cong. Globe, 39th Cong., 1st Sess. 10 (1866) (Cong. Globe), and the Joint Committee of Fifteen on Reconstruction initially voted to apportion seats based on "the whole number of citizens . . . in each state," Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867, at 49–52.

But the Framers rejected these attempts to change § 2, favoring instead the "whole number of persons" language. *Evenwel*, 136 S. Ct. at 1128. The proponents of the "persons" language argued fiercely that "persons" meant total population.[5] For instance, Senator Jacob Howard, who "[i]ntroduc[ed] the final version of the Amendment on the Senate floor," *id.*, explained that "representation" would be based on "numbers"—"that is, the whole population except untaxed Indians

[5] Unlike the records of the Constitutional Convention of 1787—which were not published for decades, *see supra* p. 11 n.2—the deliberations of the Reconstruction-era Congress were published shortly after the Fourteenth Amendment was ratified. The Framer's commonsense understanding of the word "Persons" was no secret.

and persons excluded by State laws for rebellion or other crime," Cong. Globe 2766. That approach, Senator Howard explained, accorded with "the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers . . . , not voters; numbers, not property." *Id.* at 2767. Other supporters agreed. Senator William Fessenden, for example, explained that "[t]he principle of the Constitution, with regard to representation, is . . . that the whole population is represented." *Id.* at 705. "[A]ll do not vote," he recognized, "yet all are heard." *Id.*

The Fourteenth Amendment's drafters also expressly considered whether "persons" included immigrants, and they decided that it would. "[F]oreigners not naturalized," Senator Henry Williams explained, were included in the "population" on which "[r]epresentation is now based." *Id.* at 2944. Representative Roscoe Conkling, whose proposal to use "persons" instead of "citizens" was ultimately adopted, argued that using only "citizens" would "cause considerable inequalities" "because the number of aliens in some States is very large, and growing larger now." *Id.* at 359. Indeed, the drafters believed that "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation." *Id.* at 432 (statement of Representative John Bingham). Appellants' argument (Br. 30) that the Constitution was "never understood to cover all persons physically in the country . . . such as foreign tourists" thus misses the point. Tourists were excluded because they were not considered part of the "population of this country." Immigrants, by contrast, were. *See, e.g.*, Cong. Globe 2987.

The lone Reconstruction-era source Appellants cite to the contrary, Timothy Farrar's *Manual of the Constitution of the United States of America* (1867) (Farrar), is unavailing. *See* Br. 30. Farrar played no significant role in the drafting or ratification of the Fourteenth Amendment. And his "inference" that the "Indians not taxed" exclusion requires immigrants to be excluded as well, Farrar § 450, at 403, makes no sense. To the contrary, the fact that it was thought necessary to explicitly exclude "Indians not taxed" is a strong indication that exclusion of noncitizen immigrants would also require an explicit statement to that effect.

The "Indians not taxed" exclusion shows that the Framers knew how to exclude groups of foreigners when they wanted to do so. *See supra* pp. 6–7. And the Framers' distinction between "persons" and "citizens" throughout the Constitution, including in the Fourteenth Amendment, shows that they had an easy tool to exclude foreigners had they wished to. Their decision not to exclude immigrants thus reflects a deliberate choice to include them in the apportionment count.

3. This historical backdrop frames how this Court has interpreted the word "persons" in the Fourteenth Amendment. Indeed, the Court has stressed that "persons" includes noncitizens—and even undocumented aliens.

Soon after the Fourteenth Amendment's passage, this Court held that the Amendment's Due Process Clause—which forbids States to "deprive any *person* of life, liberty, or property without due process of law" U.S. Const. amend. XIV, § 1 (emphasis added)—applies to immigrants and citizens alike. In *Yick Wo v. Hopkins*, the Court explained that Chinese immigrants were entitled to due process in a state criminal proceeding. 118 U.S. 356 (1886). The Court rejected

the argument that the immigrants' "rights" were "less because they [we]re aliens and subjects of the emperor of China." *Id.* at 368. In doing so, the Court explained that the Fourteenth Amendment's Due Process and Equal Protection Clauses "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Id.* at 369.

The Court has likewise concluded that the Fourteenth Amendment's Equal Protection Clause protects undocumented people. That Clause forbids States to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Court addressed the meaning of "person" in the Clause in *Plyler*, where Texas argued that undocumented immigrants were not "persons within [Texas's] jurisdiction," and so could not bring an equal-protection challenge. 457 U.S. at 210. The Court rebuffed that argument. "Whatever his status under the immigration laws," the Court observed, "an alien is surely a 'person' in any ordinary sense of that term." *Id*. For that reason, the Court explained, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* The Court found "no support" for the suggestion that the "persons" the Due Process Clauses protect differ from the "persons" the Equal Protection Clause protects. *Id.* at 213.

In the apportionment context specifically, the Court has given "persons" a similarly expansive reading. As the Court recognized in *Evenwel*, "persons" in § 2 of the Fourteenth Amendment captures the "total population" of each State—not just its citizens or voters. 136 S. Ct. at 1128; *accord id.* at 1148 (Alito, J.,

concurring in the judgment). There is no reason to go against those holdings here.[6]

II. The Framers did not intend to exclude undocumented immigrants from state apportionment.

A. The Founders did not conceive of a category of "illegal" migrants under federal law—much less believe that undocumented people would be excluded from "Persons."

The Constitution also cannot be read to exclude undocumented aliens from the definition of "persons" because, contrary to Appellants' claims (Br. 35), the Framers did not conceive of a class of "illegal" migrants. On the contrary, many of the Framers believed that the federal government lacked the power to exclude aliens.

The Constitution, as understood by most of the Framers, did not give the federal government the power to exclude aliens—a fact exemplified by their response to the perceived federal overreach in this area. In response to an ongoing military conflict with France, in 1798 Congress passed the Alien and Sedition Acts, which allowed the President to imprison or deport aliens considered "dangerous to the peace and safety of the United States" and created criminal penalties for speech critical of the federal government. *See* Ch. 58, § 1, 1 Stat. 570, 571 (1798); Ch. 74, § 1, 1 Stat.

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[6] Reaffirming that "persons" means "total population" would not require the Court to decide whether state redistricting must be based on total population. *See Evenwel*, 136 S. Ct. at 1142–49 (Alito, J., concurring in the judgment). That question is beyond the scope of this appeal, which concerns only congressional apportionment. *See* J.S. i.

596 (1798). In response, James Madison argued that the Alien Act "subverts the general principles of free government" and "exercises a power no where delegated to the federal government." Virginia Resolutions of 1798, Va. Gen. Assemb. Thomas Jefferson agreed, writing that "no power over [aliens] has been delegated to the United States." *See* Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 540, 541 (Jonathan Elliot ed., 1907). These statements underscore that the Framers, most of whom believed that the federal government had no general power to render immigrants "illegal," would not have understood undocumented immigrants to be excluded from the definition of "persons."

Appellants effectively concede this point. *See* Br. at 47. Indeed, they point out that the first significant federal immigration restriction was not adopted until 1875, a century after the founding, when Congress barred convicts and prostitutes from entering the United States. *See Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). It was not until 1889 that this Court recognized a general power of Congress to restrict immigration, finding a power to "exclude aliens." *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

Appellants' argument (Br. 35) that the Framers would have considered undocumented immigrants not to be "inhabitants" or "persons" thus lacks a historical basis. Most of the Framers would have rejected any notion that a category of immigrants could be "illegal" under federal law in the first place. Indeed, any rejection of immigrants would have been foreign to most Framers, who declared that "[t]he bosom of America is open to receive . . . the oppressed and persecuted of all Nations and Religions; whom we shall welcome to

a participation of all our rights and privileges." George Washington, Address to the Members of the Volunteer Assn. and Other Inhabitants, Dec. 2, 1783, *in* 27 *The Writings of George Washington* 253, 254 (John C. Fitzpatrick ed., 1938). The promise of America was for everyone. Thomas Jefferson, in opposing the Alien Act, made this point clear, urging "revisal of the laws on the subject of naturalization," lest the United States "refuse the unhappy fugitives from distress that hospitality which [Indians] extended to our fathers arriving in this land." Thomas Jefferson, First Annual Address to Congress, Dec. 8, 1801. Jefferson thus envisioned this Nation as one where "oppressed humanity [could] find . . . asylum." *Id.*

B. Virtual representation of nonvoters has always been a feature of the Constitution.

Although considerable numbers of nonvoters have always been included in apportionment counts, Appellants contend (Br. 38) that the inclusion of undocumented immigrants in this base "would be at odds with the Constitution's structure." They maintain that "sovereignty is vested in the people" and confers on them "the right to choose freely their representatives." *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995)).

Yet that argument ignores that the constitutional structure requires counting broad segments of the population who cannot "choose freely their representatives." From the founding onward—and by specific design of the Framers—many who lacked the franchise have been "virtually" represented through voters, and voters have since that time considered the interests of nonvoters with whom their interests intertwine. The inclusion of undocumented immigrants within the swath of people who cannot vote but who

count as constituents comports with the concept of virtual representation as it existed in the eighteenth century.

Leading up to the founding, virtual representation was an inevitable component of the American political system. For decades before the Constitutional Convention, States and colonies had their own individual suffrage laws. These were modeled on English suffrage regulations, which restricted voting to adult men who owned property. *See* Alexander Keyssar, *The Right to Vote* 4 (rev. ed. 2009). Seven colonies restricted the franchise to men who owned at least a minimum amount of land. *Id.* And several States in the early days of the Republic conditioned the franchise on the ownership of personal property of a specified value or the payment of taxes. *Id.* These laws were rooted in the then-widespread belief that citizens who depended on the government should be denied the ballot because their lack of wealth reflected a lack of competence and susceptibility to external control. *Id.* at 5.

In addition to property requirements, the colonies' suffrage laws tended to include several common categories of additional restrictions. In many colonies, servants or "paupers" were excluded from the polls. *Id.* at 5. Women were expressly barred from voting in several colonies, including Virginia. *Id.* And freed slaves of African descent were largely disenfranchised in the South. *Id.* These laws often disenfranchised the majority. In some areas, only forty to fifty percent of white men were enfranchised. *Id.* at 6.

Following debates over the desirability of federal voting requirements, the Constitution ultimately left to the States the power to define the right to vote. *Id.*

at 18–20. Thus, the Framers knew that the States' individual suffrage restrictions would determine the overall franchise. Although several colonies had broadened the franchise for adult men over the course of the Revolutionary era, either loosening or abolishing property requirements for suffrage, *id.* at 13–15, other limitations on the franchise persisted. So "[b]y 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote." *Id.* at 21.

After the Constitution was ratified, large groups of people, such as free women, free children, and, in several states, freed blacks, *see id.* at 5, thus remained unable to cast ballots. Yet the newly adopted Apportionment Clause still counted these people when calculating representation for the House of Representatives. *See Evenwel*, 136 S. Ct. at 1127 & n.8.

This was by design. At the Constitutional Convention, James Wilson of Pennsylvania suggested language to clarify that representation in the House would be "in proportion to the whole number of white & other free Citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each state." 1 *Records of Convention* 201. This language—slightly modified but preserving the phrase "of every age, sex, and condition"—was included in the resolutions referred to the Committee of Style. 2 *id.* at 571. The Committee of Style then shortened Wilson's wording into the text that ultimately appeared in the Constitution: "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. Dropping the phrase "every age, sex, and condition" was considered stylistic rather than substantive. *See* Jan Lewis, *"Of Every Age Sex & Condition": The Representation of Women in the Constitution*, 15 J. Early Republic 359, 362–63 (1995). The "of every age, sex, and condition" language reinforces that the Framers, when debating this clause, assumed that "Persons" means what is says—and thus includes women and children. *Id.*

The effect of including "free Persons" who lacked the franchise was that these individuals were virtually (rather than actually) represented by those who did have the right to vote. Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 Wm. & Mary L. Rev. 1681, 1694–95 (2018); *accord* Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 51 (1986). Voters would cast their ballots keeping in mind the interests of nonvoters whose interests aligned with theirs.

For example, proponents of virtual representation believed that enfranchised adult men had common interests with their own families and could reasonably be expected to vote in a manner that reflected the interests of their children and, until the Nineteenth Amendment secured the franchise for women, their wives. *See* Fishkin, 59 Wm. & Mary L. Rev. at 1693, 1707–08. Policies that applied equally to voters and nonvoters in the same geographic location also made a degree of effective virtual representation possible. *See id.* at 1693–94.

Given the Framers' provision for virtual representation of nonvoters, the inclusion of undocumented immigrants in the count for apportionment—far from being a "distortion of the people's allocation of their

sovereign power" (Appellants' Br. 39)—aligns with founding-era conceptions of representation.

Whether virtual representation is a desirable system of government is debatable. Today, we reject the idea that women should have to depend on virtual representation by male voters or that non-property owners are represented by the affluent. But the inclusion of nonvoters in the population basis for apportionment comports with Founding-era understandings of virtual representation.

And despite the changes in the franchise since the eighteenth century, virtual representation persists to this day. Most States still deny the vote to children under the age of 18,[7] to many convicted felons,[8] and to people with certain mental disabilities.[9] Yet these groups count in congressional apportionment. So too should undocumented immigrants.

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[7] *See* U.S. Gov't, *Voter Registration Age Requirements by State*, http://tiny.cc/cxt3tz (last visited Nov. 13, 2020).

[8] *See* Nat'l Conf. of State Legislatures, *Felon Voting Rights* (Oct. 1, 2020), http://tiny.cc/ext3tz.

[9] *See* Bazelon Ctr. for Mental Health L., *A Guide to the Voting Rights of People with Mental Disabilities* 28–52 (2016), http://www.bazelon.org/wp-content/uploads/2017/01/voting-rights-guide-2016.pdf.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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APPENDIX

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