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* HISTORIANS OF THE CENSUS IN SUPPORT OF APPELLEES

MARK TRACHTENBERG
HAYNES AND BOONE LLP
1221 McKinney Street,
Suite 4000
Houston, TX 77010
(713) 547-2000

RICHARD W. CLARY
Counsel of Record
ANTONY L. RYAN
HELAM GEBREMARIAM
NATHALIE BAKER
ALLISON DAVIDO
DEBORAH L. FOX
ADAM F. MINCHEW
CRAVATH, SWAINE &
MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
rclary@cravath.com

Counsel for *Amici Curiae*

November 16, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.....2

ARGUMENT 3

I. THE PLAIN TEXT OF THE CONSTITUTION AND THE RECORD OF THE CONSTITUTIONAL CONVENTION EVIDENCE THE FRAMERS' INTENT THAT CONGRESSIONAL APPORTIONMENT SHOULD INCLUDE ALL PERSONS, UNRELATED TO CITIZENSHIP OR IMMIGRATION STATUS. 3

A. The Plain Text of the Constitution Commands That Congressional Apportionment Include All Persons, Without Regard to Citizenship or Immigration Status. 4

B. The Record of the Constitutional Convention Further Demonstrates the Framers' Intent That Congressional Apportionment Include All Persons Without Regard to Citizenship or Immigration Status. 6

Page

II. THE CENSUS ACT OF 1790 AND THE EARLY ADMINISTRATIONS OF THE CENSUS MAKE CLEAR THAT ALL RESIDENTS MUST BE COUNTED FOR APPORTIONMENT PURPOSES, REGARDLESS OF CITIZENSHIP OR IMMIGRATION STATUS. 12

III. THE FOURTEENTH AMENDMENT AND ITS LEGISLATIVE HISTORY REAFFIRM AN INCLUSIVE APPORTIONMENT BASE, UNRELATED TO CITIZENSHIP OR IMMIGRATION STATUS. 16

IV. SINCE RECONSTRUCTION, IT HAS REMAINED CLEAR THAT ALL RESIDENTS MUST BE COUNTED FOR APPORTIONMENT PURPOSES, REGARDLESS OF CITIZENSHIP OR IMMIGRATION STATUS. 23

A. The 1929 Census Act and Accompanying Debates Confirm Congress's Long-Held Understanding That Unlawful Immigrants Would Be Included in the Census Enumeration.....26

B. History Since the 1929 Census Act Confirms the Historical Understanding that All Persons, Regardless of Citizenship or Immigration Status, Are Included in the Apportionment Count. 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

Andrus v. Glover Const. Co.,
446 U.S. 608 (1980) 6

Cherokee Nation v. Georgia,
30 U.S. (5 Pet.) 1 (1831) 4

Evenwel v. Abbott,
136 S. Ct. 1120 (2016) 18

FAIR v. Klutznick,
486 F. Supp. 564 (D.D.C. 1980) 34

Franklin v. Massachusetts,
505 U.S. 788 (1992) 12, 27, 28

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88 U.S. 162 (1874) 11

Wesberry v. Sanders,
376 U.S. 1 (1964) 9

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2 U.S.C. § 2a 27, 28

13 U.S.C. § 141 27

Act of Mar. 14, 1820, ch. 24, 3 Stat. 548 14

Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45
Stat. 1551 25

Page(s)

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Chinese Exclusion Act, Pub. L. No. 47-26, 22 Stat. 57 (1882) 23

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Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 24

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Page Act, ch. 141, 18 Stat. 477 (1875) 23

U.S. Const. amend. XIV 17

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Page(s)

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Page(s)

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H.R. Rep. No. 91-1314 (1970).....15

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Dorothee Schneider, *Naturalization and United States Citizenship in Two Periods of Mass Migration: 1894-1930, 1965-2000*, 21 J. Am. Ethnic Hist. 50 (2001) 14, 25

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are eleven historians and social scientists who seek to assist the Court by providing relevant information about the history of the census and the Apportionment and Enumeration Clauses of the Constitution. They are listed, with their professional backgrounds, in the Appendix.

Amici have studied and written extensively on issues relating to the census and immigration, and are uniquely positioned to explain the historical underpinnings of the inclusive apportionment scheme envisioned by the Framers. One of the *Amici* is the author of a leading history of the census,[2] and other *Amici* are well-known historians of immigration and social scientists who analyze census data in their work. *Amici* believe this brief will be helpful to the Court's understanding of the original and long-affirmed meaning of the Constitution: that all persons residing in the United States, regardless of citizenship or immigration status, must be included in the apportionment base.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certify that *Amici* and their counsel authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amici* or their counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

[2] Margo J. Anderson, *The American Census: A Social History* (2d ed. 2015).

SUMMARY OF ARGUMENT

On July 21, 2020, the President issued a memorandum (the "July 21 Memorandum") declaring it the policy of the United States to exclude "aliens who are not in lawful immigration status" from the "actual Enumeration" required for congressional apportionment following the 2020 census. This policy violates the Constitution, as well as the census and reapportionment statutes, and contravenes the unbroken historical practice of an inclusive apportionment base of all persons, without regard to citizenship or immigration status.

The historical record shows that our nation's Framers adopted the census as the most reliable mechanism for ensuring nonpartisan, uniform reapportionment of congressional representation and curbing attempts to manipulate the balance of power among the states. To this end, the Framers decided to use the total number of persons as the apportionment base. They adopted explicit language defining the scope of the census to include "the whole Number of free Persons" with only two specific exceptions, neither of which relates to citizenship or immigration status (and neither of which survives today). This principle of an inclusive apportionment base has been reaffirmed repeatedly throughout the 230-year history of the census—constitutionally in Section 2 of the Fourteenth Amendment, by statute in the Reapportionment and Census Act of 1929, and in the consistent administration of the census. Throughout its history, the census has been a measure of population, not political membership.

Congress and the courts have uniformly rejected efforts to exclude noncitizens, or those without lawful immigration status, from the apportionment base. The July 21 Memorandum represents the latest in a series of failed attempts to circumvent the Constitution and the Framers' clear intent. Accordingly, the district court's judgment should be affirmed.

ARGUMENT

I. THE PLAIN TEXT OF THE CONSTITUTION AND THE RECORD OF THE CONSTITUTIONAL CONVENTION EVIDENCE THE FRAMERS' INTENT THAT CONGRESSIONAL APPORTIONMENT SHOULD INCLUDE ALL PERSONS, UNRELATED TO CITIZENSHIP OR IMMIGRATION STATUS.

Faced with tensions between large and small states, a growing population and the prospect of people moving between established and new states, the Framers had to develop a system of representation that could reliably accommodate shifts in power and the allocation of resources among states of different and changing sizes.[3] Thus, the Great Compromise was born: a bicameral legislature consisting of the Senate, designed to accommodate the interests of the smaller states, and the House of Representatives, in

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[3] For accounts of the Constitutional Convention, see Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (2009); Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (1966).

which representation would be apportioned based on each state's population. To bring the latter to fruition, the Framers crafted two clauses: (i) the Apportionment Clause, which provided 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* . . . and excluding Indians not taxed, three fifths of all other Persons", and (ii) the Enumeration Clause, which facilitated reapportionment and provided that "[t]he actual Enumeration shall be made . . . within every subsequent Term of ten Years".[4]

A. The Plain Text of the Constitution Commands That Congressional Apportionment Include All Persons, Without Regard to Citizenship or Immigration Status.

The plain language of the Apportionment and Enumeration Clauses confirms that the Framers intended representation for *all* inhabitants of the new nation with only two exceptions, unrelated to citizenship or immigration status. The Apportionment Clause excluded "Indians not taxed" because Indian tribes were considered separate sovereigns, not subject to any state's jurisdiction for taxation purposes.[5] Native Americans who left their tribes fell within a state's jurisdiction and were

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[4] U.S. Const. art. I, § 2, cl. 3 (emphasis added).

[5] *Id.*; *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 43 (1831). The Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253, which declared Native Americans to be U.S. citizens, rendered the "Indians not taxed" exclusion moot.

included in the census count. Additionally, the so-called Three-Fifths Compromise provided that, for apportionment purposes, enslaved people counted as three-fifths of a person. That approach dates back to 1783, before the Constitutional Convention, when in determining the financial contribution each state should make to the new continental government, the Continental Congress decided that population, not land, should form the basis of each state's tax obligation. However, in order to lower their tax burden, Southerners opposed including enslaved people in their population base, whereas Northerners advocated including enslaved people on a one-to-one basis.[6] The Three-Fifths Compromise was borne out of this conflict and was later adopted in the Apportionment Clause; it reflected the Framers' effort to achieve the "closest approximation" to equal representation for all inhabitants of the new nation.[7]

But for these two heavily debated and carefully circumscribed exceptions, the plain language of the Apportionment and Enumeration Clauses commands that representatives be apportioned based on an "actual Enumeration" consisting of "the whole Number of free *Persons*", without further qualification.[8] There is no basis in the historical

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[6] Anderson, *supra* note 2, at 11-13; Beeman, *supra* note 3, at 152-55; Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution*, 28 Wm. & Mary Q. 563-64 (1971).

[7] Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 74 (1996).

[8] U.S. Const. art. I, § 2, cl. 3 (emphasis added).

record to engraft an additional exception to that plain language based on citizenship or immigration status.[9]

B. The Record of the Constitutional Convention Further Demonstrates the Framers' Intent That Congressional Apportionment Include All Persons Without Regard to Citizenship or Immigration Status.

Earlier versions of the Apportionment and Enumeration Clauses confirm the Framers' expansive approach to representation by consistently including all "free inhabitants" in the baseline measure of apportionment, regardless of immigration status or eligibility to vote. In an initial proposal for the Apportionment Clause, James Wilson (Pennsylvania) suggested language from the 1783 proposed amendments to the Articles of Confederation, which provided that "the common treasury" would be

> supplied by the several states in proportion to the whole number of white and other *free citizens and inhabitants, of every age, sex and 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[.][10]

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[9] *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[10] 1 *The Records of the Federal Convention of 1787*, at 201 (Max Farrand ed., 1911) (June 11) [hereinafter *Records of the*

A later draft of the Apportionment Clause similarly referred to a census of "the free *inhabitants* of each State, and three fifths of the *inhabitants* of other description", which later became a census of "*all the inhabitants* of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783 [the three-fifths ratio]", and then an apportionment "upon the principle of their number of *inhabitants*; according to the provisions hereafter mentioned" (namely, the three-fifths ratio).[11]

By the time the Constitutional Convention completed its substantive deliberations, the operative document had an Apportionment Clause directing that Congress would "regulate the number of representatives by *the number of inhabitants*, according to the rule hereinafter made for direct taxation", and a Direct Taxation Clause, which mirrored the language from the 1783 proposed revisions to the Articles of Confederation and provided that

> [t]he proportions of direct taxation shall be regulated by *the whole number* of free *citizens and inhabitants of every age, sex, and condition*, including those bound to servitude

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Federal Convention]; 24 *Journals of the Continental Congress, 1774-1789*, at 260-61 (Worthington C. Ford et al. eds., 1922) (proposing amendment to Articles of Confederation, Art. VIII); *see also* sources cited *supra* note 6.

[11] 1 *Records of the Federal Convention* 575-76 (July 11); *id.* at 590-91 (July 12); *id.* at 599 (July 13) (emphases added); *see also* 2 *Records of the Federal Convention* 178 (Aug. 6 report from the Committee of Detail); *id.* at 219-23 (Aug. 8 debate).

> for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes)[.][12]

This document was referred to a Committee of Style, which was tasked with preparing a cohesive document without substantive change. That committee reported back with the language of Article I, Section 2 that was ultimately adopted:

> 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 servitude for a term of years, and excluding Indians not taxed, three fifths of all other *persons*.[13]

Notably, the Framers ultimately chose to use the inclusive term "Persons" instead of the phrase "citizens and inhabitants of every age, sex, and condition" without comment or debate, reflecting that "Persons" includes *both* citizens *and* inhabitants who were not citizens.[14] Population tabulations used at the Constitutional Convention reinforce the Framers'

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[12] 2 *Records of the Federal Convention* 566, 571 (emphases added).

[13] *Id.* at 590 (emphases added); *see also id.* at 607-08 (approval of Article I, § 2 on Sept. 13).

[14] *Id.* at 571, 590-91.

intent to count the total "number of inhabitants", irrespective of citizenship.[15]

During the Constitutional Convention, the delegates considered both population and wealth as bases for apportionment of representation and taxes, but decided that it was better to use population as the sole basis. William Johnson (Connecticut), chairman of the Committee on Style, expressed the view "that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth".[16] James Wilson agreed, but also believed that as a matter of principle "numbers were surely the natural & precise measure of Representation".[17] In *The Federalist*, James Madison summarized the prevailing view: "It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation."[18]

These debates help to explain the Constitution's linkage of direct taxation and apportionment of the House of Representatives. The Revolution made clear that "Representation & taxation were to go together" and thus "direct Taxation ought to be proportioned according to representation".[19] For this reason,

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[15] 1 *Records of the Federal Convention* 572-74; *see also Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

[16] 1 *Records of the Federal Convention* 593.

[17] *Id.* at 605.

[18] *The Federalist* No. 54 (James Madison).

[19] 1 *Records of the Federal Convention* 585, 589.

Article I, Section 9 of the Constitution provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken".[20] This constitutional linkage reinforces that the census is an enumeration of the total population. As Madison pointed out:

> the establishment of a common measure for representation and taxation will have a very salutary effect. . . . Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.[21]

Another reason that the Framers decided on overall population, not eligible voters, as the basis for apportionment is that the suffrage differed so widely among the states.[22] Thus, a uniform apportionment, for representation and direct taxation, could not be based upon eligible voters. All thirteen states had property ownership or tax payment restrictions on white male suffrage, but differed greatly in the

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[20] U.S. Const. art. I, § 9, cl. 4.

[21] *The Federalist* No. 54 (James Madison).

[22] Voting qualifications were reserved to the states. U.S. Const. art. I, § 2, cl. 1. This changed only with the Reconstruction Amendments. *See infra* Section III.

proportion of the population that was qualified to vote.[23] The delegates to the Constitutional Convention were aware of the significant differences among the states regarding suffrage and intended the apportionment to remain agnostic to these differences by including *all* "inhabitants", even those denied the right to vote.[24] Moreover, at the time of the founding, noncitizens had the right to vote in many states; it was not until the 1920s that the last group of states restricted suffrage to citizens.[25] Thus, the linkage we take for granted between citizenship and the right to vote did not exist at the time of the founding, providing yet another reason why the Framers decided that apportionment would be based on overall population, without regard to citizenship or eligibility to vote.

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[23] *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 3-21 (rev. ed. 2009).

[24] *See* 2 *Records of the Federal Convention* 57 (July 19) (Madison noting that "the right of suffrage was much more diffusive in the Northern than the Southern States"); *id.* at 201-06 (Aug. 7); *The Federalist* No. 54 (James Madison) ("In every state, a certain proportion of inhabitants are deprived of this right [to vote] by the constitution of the State, who will be included in the census by which the federal Constitution apportions the representatives.").

[25] *See* Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 15-40 (2006); *see also Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1874) (noting that "citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage") (listing states that permitted noncitizens to vote in 1875).

II. THE CENSUS ACT OF 1790 AND THE EARLY ADMINISTRATIONS OF THE CENSUS MAKE CLEAR THAT ALL RESIDENTS MUST BE COUNTED FOR APPORTIONMENT PURPOSES, REGARDLESS OF CITIZENSHIP OR IMMIGRATION STATUS.

The First Congress carried out the Constitution's census requirement by enacting the first Census Act on March 1, 1790.[26] Because "the interpretations of the Constitution by the First Congress are persuasive", this Court has looked to the historical practice under the Census Act of 1790 as a guide to the meaning of the Enumeration Clause.[27]

The Census Act of 1790 established the "usual residence rule". The Act adopted the basic rule of enumeration that "every person" should be counted at his or her "usual place of abode"; that a person "without a settled place of residence" should be reported at the location "where he or she shall be on" the census day; and that "every person occasionally absent at the time of the enumeration" should be reported at "that place in which he usually resides in the United States".[28] Thus, Americans who are temporarily overseas have always been counted in the

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[26] Census Act of 1790, ch. 2, 1 Stat. 101 (providing for the enumeration of the Inhabitants of the United States).

[27] *Franklin v. Massachusetts*, 505 U.S. 788, 803-04 (1992) (citing *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986)).

[28] Census Act of 1790 § 5, 1 Stat. at 103.

census.[29] This "usual residence rule" is consistent with the Framers' repeated emphasis on counting "inhabitants" on United States soil—regardless of citizenship, voter eligibility, stability of residence or property ownership—and has remained the guiding principle for census-taking for 230 years.

Contrary to Appellants' contentions (Br. 33-39), there is no basis whatsoever in the history of census administration to require noncitizen residents to have an intent to remain indefinitely or permission to remain in the country. Congress instructed the United States marshals tasked with conducting the first census to pose six questions, which confirm the focus on residence above all else. Each household was asked to report (i) the name of the head of the family, (ii) the number of free white males sixteen and over, (iii) the number of free white males under sixteen, (iv) the number of free white females, (v) the number of other free persons and (vi) the number of enslaved people.[30] The original census did not inquire how long any person in the household had resided there, how long the person intended to stay, or whether that person was a citizen.[31] Unlike state voting

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[29] The only change in practice between different censuses has been *where* Americans temporarily overseas are counted (enumerated separately or allocated to the states). *See* David McMillen, "Americans Overseas", *in Encyclopedia of the U.S. Census* 47-49 (Anderson et al. eds., 2012).

[30] Census Act of 1790 § 5, 1 Stat. at 103; *see also* Anderson, *supra* note 2, at 15.

[31] Congress was well aware of the presence of noncitizens. Less than a month after passing the Census Act of 1790, Congress passed its first naturalization law. *See* Nationality Act

requirements at the time, which limited access to the franchise based on length of residence in the state,[32] there was no requirement for the census to show "stability of residence", as shown by the fact that persons "without a settled place of residence" were counted. What mattered was whether the person was in his or her "usual place of abode" on the designated counting date.

The census evolved and Congress eventually added new questions, including, in 1820, a question concerning "foreigners not naturalized".[33] This was part of a growing interest in using the census as an opportunity to gather ancillary demographic information.[34] Notably, that information did not matter for apportionment purposes because "foreigners not naturalized" were *already* included as free persons and were therefore already included in the count. Indeed, consistent with the Framers' original intent that all residents, regardless of

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of 1790, ch. 3, 1 Stat. 103. A white immigrant could become naturalized by proving residence in the United States for two years, but there was no requirement that immigrants become citizens. *Id.* at 103-04.

[32] Keyssar, *supra* note 23, at 330-31.

[33] Act of Mar. 14, 1820, ch. 24, 3 Stat. 548, 548-50 (to provide for taking the fourth census, or enumeration of the inhabitants of the United States, and for other purposes). By 1820, naturalization—still limited to white immigrants—required five years' residency in the United States, Naturalization Law of 1802, ch. 28, 2 Stat. 153; there was still no requirement for any immigrant to become a citizen. *See* Dorothee Schneider, *Naturalization and United States Citizenship in Two Periods of Mass Migration: 1894-1930, 1965-2000*, 21 J. Am. Ethnic Hist. 50, 52-53 (2001).

[34] *See* Anderson, *supra* note 2, at 23-32.

citizenship, would be included in the apportionment base, the census instructions to the marshals noted that the data from the "foreigners not naturalized" subcategory should *not* be added to the total number of free persons (to avoid double counting).[35] These instructions confirm that earlier censuses *already included* free foreigners, and the new question did not add people to the census who had not previously been counted. This question was short-lived and appeared before Reconstruction only in the 1820 and 1830 censuses.[36]

Consistent with the practice of counting all residents, the only exceptions to including "foreigners not naturalized" in the "actual Enumeration" have been with respect to noncitizens who do not *reside* in the United States. Thus, in the instructions for enumerators, crews of foreign vessels in harbor have been explicitly excluded from enumeration since 1920, transient foreign tourists since 1930, and diplomatic personnel since 1940.[37] Foreign diplomatic personnel

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[35] *See* U.S. Census Bureau, 1820 Instructions to Marshals, *in Measuring America: The Decennial Censuses from 1790 to 2000*, at 6 (2002), https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf.

[36] Carroll Wright & William O. Hunt, *History and Growth of the U.S. Census* 90, 92 (1900), https://www.census.gov/history/pdf/wright-hunt.pdf.

[37] U.S. Dep't of Commerce, *Fourteenth Decennial Census of the United States: Instructions to Enumerators* 19 (1920), https://www.census.gov/history/pdf/1920instructions.pdf; U.S. Dep't of Commerce, *Fifteenth Decennial Census of the United States: Instructions to Enumerators* 11 (1930), https://www.census.gov/history/pdf/1930instructions.pdf; U.S.

live on embassy grounds, or on "foreign soil and thus not in a state", and foreign tourists and crews of foreign vessels in harbor "do not *reside* here".[38] The rationale for excluding these limited categories of noncitizens is clear and entirely consistent with the Framers' intent, and longstanding census practice, to count all persons *residing* in the United States, regardless of citizenship or immigration status.

III. THE FOURTEENTH AMENDMENT AND ITS LEGISLATIVE HISTORY REAFFIRM AN INCLUSIVE APPORTIONMENT BASE, UNRELATED TO CITIZENSHIP OR IMMIGRATION STATUS.

The abolition of slavery and the end of the Civil War prompted Congress to reconsider the basis for apportionment. Absent a constitutional amendment, the Southern states would have increased their political power by counting formerly enslaved people as whole persons (rather than three-fifths of a person) for apportionment, while simultaneously excluding

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Dep't of Commerce, *Sixteenth Decennial Census of the United States: Instructions to Enumerators* 16, 20 (1940), https://www.census.gov/history/pdf/1940instructions.pdf; *see also* H.R. Rep. No. 91-1314, at 24 (1970) (individuals "temporarily traveling or visiting in the United States" or "living on the premises of an embassy, ministry, legation, chancellery, or consulate" should not be enumerated).

[38] *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, and Gov't Processes of the S. Comm. on Governmental Affairs*, 99th Cong. 24 (1985) (emphasis added).

them from any meaningful political participation.[39] The solution to this problem became Section 2 of the new Fourteenth Amendment, which repeated the general rule of the Apportionment Clause—that "representation shall be apportioned . . . counting the w*hole number of persons* . . . excluding Indians not taxed"[40]—while providing that states would lose some of their representation for denying "male inhabitants . . . twenty-one years of age" the ability to vote.[41] The decision to repeat the original apportionment formulation, while maintaining the express exclusion of Native Americans living on tribal lands, reaffirmed the intention that, with that sole exception, the census enumeration would be all-inclusive.

This principle of a broad and inclusive apportionment base permeates the drafting history of the Fourteenth Amendment. Before settling on the final language, the framers of the Fourteenth Amendment considered proposals to change the apportionment base from a population-based count to one based on voting eligibility or citizenship.[42] One

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[39] H.R. Rep. No. 39-30, at xiii (1866) ("The increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative."). *See generally* Anderson, *supra* note 2, at 76-79; Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-77*, at 251-61 (1988).

[40] U.S. Const. amend. XIV, § 2 (emphasis added).

[41] *Id.*

[42] *See* Cong. Globe, 39th Cong., 1st Sess. 357-59, 2986-87 (1866). For accounts of the drafting history, see George David

resolution proposed allocating House seats to states "according to their respective [number of] legal voters" and specified that "for this purpose none may be named as legal voters who are not either natural-born citizens or naturalized foreigners".[43] This proposal met with fierce resistance and was rejected. As Representative Blaine (Maine) explained: "As an abstract proposition no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot."[44] Representative Blaine observed that a change to voter-based representation would be "an abandonment of one of the oldest and safest landmarks of the Constitution" and would "introduce[] a new principle in our Government, whose evil tendency and results no man can measure to-day".[45] Other representatives expressed similar concerns.[46]

A later draft of the Fourteenth Amendment proposed using "citizens" rather than "persons" for the apportionment base. This proposal was likewise

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Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93, 94-107 (1961); George P. Smith, *Republican Reconstruction and Section 2 of the Fourteenth Amendment*, 23 W. Pol. Q. 829, 839-52 (1970).

[43] Cong. Globe, 39th Cong., 1st Sess. 10 (1866); *see Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-28 (2016).

[44] Cong. Globe, 39th Cong., 1st Sess. 141 (1866).

[45] *Id.* at 377.

[46] *Id.* at 434 (remarks of Rep. Ward).

rejected as inconsistent with the original Constitution and because it would have penalized states with sizable populations of unnaturalized immigrants.[47] Representative Conkling (New York), who was responsible for the language of Section 2 of the Fourteenth Amendment as enacted, explained that basing apportionment on "persons" rather than "citizens" was the only constitutionally appropriate approach: "'Persons,' and not 'citizens,' have always constituted the basis" and the "present Constitution is, and always was opposed to [using 'citizens' rather than 'persons']."[48] Although at some points in the debates Representative Conkling and others noted that some noncitizen residents might become naturalized citizens,[49] that suggestion did not narrow the broad language of "persons", and there was no requirement that an immigrant intend to become naturalized in order to be counted. At the time, only white immigrants were eligible to become naturalized,[50] leaving other immigrants as "persons" who would be counted in the census but might never become citizens.

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[47] *Id.* at 359 (remarks of Rep. Conkling); *see also id.* at 411 (remarks of Rep. Cook) (arguing in favor of "persons", as a census of voters would be impracticable, would be unjust toward northeastern states, which had more women and children than western states, and would "take[] from the basis of representation all unnaturalized foreigners").

[48] *Id.* at 359; *see also id.* (remarks of Rep. Conkling) (noting that "many of the large States held their representation [in the House] in part by reason of their aliens").

[49] *See, e.g.*, *id.* at 354, 356, 2987, 3035.

[50] *See id.* at 359.

The framers of the Fourteenth Amendment reaffirmed the decision to "leave the primary basis of representation where it was placed by our fathers, the whole body of the people".[51] The Joint Committee on Reconstruction, where the Fourteenth Amendment was drafted, adopted Representative Conkling's motion to strike the words "citizens of the United States in each State" in the draft and replace them with "persons in each State, excluding Indians not taxed".[52] Senator Howard (Michigan), the floor manager for the Fourteenth Amendment, explained that "numbers", *i.e.*, total population, is

> the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.[53]

Senator Edmunds (Vermont) noted that "[t]he fathers who founded this Government acted upon the idea . . . that the representation, as a principle, in general was to be based upon population, independent of the franchise, independent of citizenship", and refused to "discard the original principle that all society in some

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[51] *Id.* at 385 (remarks of Rep. Baker).

[52] Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867*, at 52 (1914).

[53] Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

form is to be represented in a republican Government", calling apportionment by population an "impregnable" principle.[54]

In the debate over the Fourteenth Amendment, Congress consistently rejected proposals to exclude noncitizens from the apportionment base. For example:

- Representative Bingham (Ohio) dismissed the idea of striking "from the basis of representation the entire immigrant population not naturalized", observing 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."[55] He urged that the "whole immigrant population should be numbered with the people and counted as part of them".[56]
- Representative Cook (Illinois) noted that representation based on voting improperly "takes from the basis of representation all unnaturalized foreigners".[57]
- Senator Wilson (Massachusetts) opposed any amendment that would "strike from the basis of representation two million one hundred

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[54] *Id.* at 2944.

[55] *Id.* at 432.

[56] *Id.*

[57] *Id.* at 411.

> thousand unnaturalized foreigners" who were then counted.[58]

Section 2 of the Fourteenth Amendment reflects the agreement that apportionment is based "on the largest basis of population, counting every man, woman, and child", and that "the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution."[59] As political scientist George Smith summarized the history: "The section does not base representation on voters . . . . Section Two *bases representation on numbers*, all inhabitants of the State . . . ."[60] The instructions to the 1880 Census enumerators—disseminated in the wake of ratification of the Fourteenth Amendment—confirm this understanding:

> It is the prime object of the enumeration to obtain the name, and the requisite particulars as to personal description, of every person in the United States, of whatever age, sex, color, race, or condition, with this single exception, viz.: that 'Indians not taxed' shall be omitted from the enumeration.[61]

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[58] *Id.* at 2986-87. Senator Wilson believed that this number of noncitizens provided the northern states with seventeen representatives. *Id.* at 2987.

[59] *Id.* at 705, 1280 (remarks of Sen. Fessenden).

[60] Smith, *supra* note 42, at 851.

[61] Dep't of Interior, Census Office, *Enumerator Instructions* (1880), https://www.census.gov/history/pdf/1880enumerator-

IV. SINCE RECONSTRUCTION, IT HAS REMAINED CLEAR THAT ALL RESIDENTS MUST BE COUNTED FOR APPORTIONMENT PURPOSES, REGARDLESS OF CITIZENSHIP OR IMMIGRATION STATUS.

Following Reconstruction, the United States continued to experience rapid population growth, much of it fueled by immigration, leading to the first efforts to control immigration processes.[62] The first modern restrictions on entry to the United States were directed at Chinese immigrants.[63] Congress added further measures barring entry based on various grounds.[64] Nonetheless, more than 14.5

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instructions.pdf. The 1870 census is the only one in which the Census Office attempted to separately enumerate adult men over the age of 21 who were denied the right to vote. *See* Anderson, *supra* note 2, at 82-85. Once the Fifteenth Amendment was ratified, census officials construed any state law denying the right to vote to freedmen as legally void and thus irrelevant to the administration of the census. Dep't of Interior, Census Office, *Instructions to Assistant Marshals* 12 (1870), https://www.census.gov/history/pdf/1870instructions-2.pdf.

[62] Anderson, *supra* note 2, at 138.

[63] Page Act, Pub. L. No. 43-141, 18 Stat. 477 (1875); Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882); *see also* Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (2003).

[64] Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214 (barring lunatics and idiots); Foran Act, ch. 164, § 1, 23 Stat. 332, 332 (1885) (barring contract labor); Immigration Act of 1917, ch. 29, §§ 3, 9, 39 Stat. 874, 875-78, 880-81 (barring illiterates and diseased persons).

million people immigrated to the United States between 1900 and 1920.[65]

Congress considered using the 1890 census as an immigration enforcement mechanism by requiring census officials to enumerate and register Chinese laborers with the goal of deporting those unlawfully present.[66] But Congress rejected the proposal, and the 1890 and each subsequent census was conducted with *no* questions about the lawfulness of any immigrant's presence, and all persons counted were included in the base for apportionment.[67]

Only with the Immigration Act of 1924 (also known as the Johnson-Reed Act) did Congress find a method to stanch the flow of immigrants, imposing a limit of 150,000 visas a year. Congress created quotas for immigration based on national origin, eliminated any statute of limitations on removal for nearly all types of unlawful entry, and provided that any person who entered the United States without a valid visa or without inspection could be deported at any time.[68]

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[65] *Mass Immigration and WWI*, USCIS (July 30, 2020), https://www.uscis.gov/about-us/our-history/mass-immigration-and-wwi.

[66] 21 Cong Rec. 2309 (1890) (H.R. 6420); *id.* at 2313 (passage, with amendment, by the House); *id.* at 3430 (tabled by the Senate); *see also* Paul Schor, *Counting Americans*: *How the U.S. Census Classified the Nation* 196-99 (2017).

[67] See the questions for the censuses from 1890 to 2010 at https://www.census.gov/history/www/through_the_decades/index_of_questions/.

[68] Immigration Act of 1924, Pub. L. No. 68-139, §§ 13, 14, 43 Stat. 153, 161-62. *See generally* Adam Goodman, *The*

Thus, by the 1920s, the concept of the undocumented immigrant (or illegal resident in the country) became entrenched in law.[69]

By 1929, it was estimated that the number of persons entering the United States illegally after implementation of the quotas was 175,000 to 200,000 per year, and the total number unlawfully present in the country was 1 to 3 million.[70] Congress took the first step to criminalize unauthorized border crossings in the Undesirable Aliens Act of 1929, but did not provide for a system to measure the "undocumented" population.[71] It is against this backdrop that debates took place in Congress over what would become the Reapportionment and Census Act of 1929 (the "1929 Census Act").

Deportation Machine: America's Long History of Expelling Immigrants (2020); Torrie Hester, *Deportation: The Origins of U.S. Policy* (2017).

[69] Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 44-47, 82-115 (2004); *see also* Schneider, *supra* note 33, at 58-59.

[70] 71 Cong. Rec. 1976 (1929) (statement of Sen. Barkley); *id.* at 2339 (statement of Rep. Bankhead); *Suspension for Two Years of General Immigration into the United States: Hearings Before the S. Comm. on Immigration On S.J. Res. 207*, 71st Cong., 127-30 (1930).

[71] Pub. L. No. 70-1018, 45 Stat. 1551; *see* Benjamin Gonzalez O'Brien, *Handcuffs and Chain Link: Criminalizing the Undocumented in America* (2018).

A. The 1929 Census Act and Accompanying Debates Confirm Congress's Long-Held Understanding That Unlawful Immigrants Would Be Included in the Census Enumeration.

Following the 1920 census, congressional leadership vowed to maintain the 435-member House, even as the U.S. population, particularly the urban population, continued to grow.[72] For nine years, states set to lose representatives battled to save their seats, blocking a series of apportionment bills.[73] Immigrants in urban centers fueled much of the growth in these years and became central to arguments among legislators about how to fairly divide a fixed number of House seats. A constitutional crisis loomed.[74]

The solution came from Representative Fenn (Connecticut). In 1927, he proposed an automatic apportionment based on applying a prescribed formula to the decennial census.[75] His bill tracked the language of Section 2 of the Fourteenth Amendment and required apportionment based on "the whole number of persons in each State, excluding Indians

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[72] Anderson, *supra* note 2, at 134-40.

[73] *Id.* at 135-36.

[74] *Id.* at 140-41, 149-54; Charles W. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s*, at 32-84 (1990).

[75] *See Apportionment of Representatives in Congress Amongst the Several States: Hearing Before the Comm. on the Census*, 69th Cong. 9-12 (1927) (Legislative Reference Service report).

not taxed, as ascertained in [the] census".[76] This bill passed the House in January 1929, but not the Senate.[77]

In April 1929, the deadlock was broken by a proposal offered by Senator Vandenberg (Michigan) to combine a bill for the upcoming 1930 census with Representative Fenn's apportionment bill.[78] This proposal, which became the 1929 Census Act, used an interlocking system of census and reapportionment. The innovation was that the reapportionment process would operate automatically every ten years (unless overridden by Congress), without discretion to depart from the census result.[79] Specifically, the resulting compromise provided that the Secretary of Commerce would report the census enumeration to the President, whereupon the President would report the apportionment of seats in the House of Representatives using a prescribed formula.[80] Critically, the 1929 Census Act uses the language "the whole number of persons in each State, excluding

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[76] *See* S. Rep. 70-1446, at 4 (1929) (quoting 69th Cong., H.R. 11725 (1929)).

[77] *See* 70 Cong. Rec. 1605 (1929) (H.R. 11725).

[78] *See* 71 Cong. Rec. 254 (1929) (S. 312).

[79] *See Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (describing the "automatic reapportionment" scheme, which is "virtually self-executing"). The reapportionment provisions of the 1929 Census Act are codified as amended at 2 U.S.C. § 2a, while the census provisions are codified as amended at 13 U.S.C. § 141.

[80] *See* 2 U.S.C. § 2a.

Indians not taxed", which is drawn directly from Section 2 of the Fourteenth Amendment.[81]

Far from providing the President with discretion in reporting apportionment (Br. 12, 24), *Franklin v. Massachusetts*[82] confirms that any discretion exercised under the 1929 Census Act and the Fourteenth Amendment must be "consonant with . . . the text and history of the Constitution".[83] In *Franklin*, the Secretary of Commerce decided to *include* in the census (and thus the apportionment) overseas American servicemembers who were not physically present in the United States but nevertheless maintained "ties to their home States".[84] That is a far cry from the July 21 Memorandum, which purports to *exclude* from the apportionment undocumented immigrants who are included in the census, are physically present in the United States and similarly have ties to their home states.

Importantly, in enacting the 1929 Census Act, Congress rejected proposals to exclude noncitizens, including undocumented immigrants, from apportionment. Contrary to Appellants' contentions

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[81] 1929 Census Act, Pub. L. No. 71-13, 46 Stat. 21, 26 (codified as amended at 2 U.S.C. § 2a and 13 U.S.C. § 141). This language was used throughout Congress's consideration of the bills that ultimately became the 1929 Census Act. *See* S. Rep. 70-1446 (1929) (explaining H.R. 11725); 71 Cong. Rec. 2065 (1929) (S. 312).

[82] 505 U.S. 788 (1992).

[83] *Id.* at 806.

[84] *Id.*

(Br. 43-44), the debates show that Congress clearly had *unlawful* immigrants in mind:

- Senator Sackett (Kentucky) proposed apportionment on "the whole number of persons in each State, *exclusive of aliens and* excluding Indians not taxed".[85]
- Senator Barkley (Kentucky) spoke of "unlawful immigrants" who were being "smuggled" or "bootlegged" into the country, "who have no legal status, who can not become citizens, . . . yet . . . are to be used as a basis for the selection and apportionment" of the House.[86]
- Senator Heflin (Alabama) supported the amendment, noting: "They are not citizens of the United States. They violated our laws to get here. They have no right to be here, but . . . you permit them to count their numbers and obtain Members of Congress upon alien population".[87]

The Senate legislative counsel opined that "there is no constitutional authority for the enactment of legislation excluding aliens from enumeration for the purposes of apportionment of Representatives among the States".[88] Opponents of the Sackett amendment emphasized its unconstitutionality based on the word

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[85] 71 Cong. Rec. 2065 (1929) (S. 312) (proposed modification in italics).

[86] *Id.* at 1976.

[87] *Id.* at 2054.

[88] *Id.* at 1822.

"person" in the Constitution[89] and maintained the principle that "a Member of Congress represents every single human being residing within the State of which he is a Representative, and every class", including "[e]very alien", "whatever their status may be".[90] The amendment was defeated by a vote of 29 to 48.[91]

The same day, attempts to separately identify noncitizens in the census count likewise failed. Senator Harrison (Mississippi) proposed an amendment to conduct the census enumeration both with and without noncitizens, such that "upon the ratification of any amendment to the Constitution excluding aliens from the persons to be counted in making an apportionment of Representatives", apportionment could take place on that basis.[92] This proposal was defeated by a vote of 24 to 55.[93] Later the same day, Senator Black (Alabama) introduced an amendment to the same bill to require the Census Bureau to "include an enumeration of aliens lawfully in the United States and of aliens unlawfully in the United States."[94] That amendment was also defeated, by a vote of 24 to 56.[95]

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[89] *See, e.g.*, *id.* at 1962 (Sen. Wagner (New York)); *id.* at 1970 (Sen. Borah (Idaho)).

[90] *Id.* at 1971 (Sen. Blaine (Wisconsin)).

[91] *Id.* at 2065.

[92] *Id.*

[93] *Id.* at 2068.

[94] *Id.* at 2078 (S. 312).

[95] *Id.* at 2083.

The House rejected similar amendments to the combined census and apportionment bill. Representative Hoch (Kansas) introduced an amendment parallel to the Sackett amendment in the Senate.[96] Opponents emphasized that representative government required that "all persons should be counted in the enumeration" and that the drafters of the Fourteenth Amendment decided to include noncitizens in Section 2 even though there were "as many aliens then as we have to-day proportionate to our population".[97] Representative Bankhead (Alabama) introduced an amendment parallel to the Black amendment in the Senate.[98] In support of his amendment, Representative Bankhead drew attention to the "2,000,000 to 3,000,000 aliens in the United States at the present time who are here unlawfully".[99] According to Bankhead, his amendment was "directed solely at that class of people who are here contrary to the Constitution and laws of the United States" and whether they could be "accorded representation in the House, based on their illegal citizenship".[100] In opposing the Bankhead amendment, Representative Schafer (Wisconsin) declared bluntly, "The constitutional provisions which require that aliens be counted in the apportionment

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[96] *Id.* at 2361-63. Representative Hoch had doubts over the constitutionality of his proposed amendment. *See* 70 Cong. Rec. 698-99 (1928); 71 Cong. Rec. 2361 (1929).

[97] 70 Cong. Rec. 493 (1929) (Rep. LaGuardia (New York)); 71 Cong. Rec. 2362 (1929) (Rep. Sirovich (New York)).

[98] 71 Cong. Rec. 2338 (1929).

[99] *Id.* at 2339.

[100] *Id.* Representative Rankin of Mississippi echoed Bankhead's concerns. *Id.* at 2604.

are binding and I can not vote for any amendment which would nullify such provisions."[101]

The Hoch amendment originally passed the House,[102] but when northern Congressmen, led by Representative Tinkham (Massachusetts), retaliated with an amendment to enforce Section 2 of the Fourteenth Amendment against southern states that denied Blacks the right to vote,[103] Majority Leader Tilson (Connecticut) proposed a compromise to remove both the Hoch and Tinkham amendments and to pass Section 22 of the 1929 Census Act (*i.e.*, 2 U.S.C. § 2a) in its final form.[104] The Tilson amendment preserved the language "the number of whole persons in each state, excluding Indians not taxed", taken directly from Section 2 of the Fourteenth Amendment.[105] This amendment also retained the interlocking census bill proposed by Senator Vandenberg (*i.e.*, 13 U.S.C. § 141). The 1929 Census Act was signed into law on June 18, 1929.[106]

Thus, the 1929 Census Act, which is the basis for the current census statutes, evidences Congress's deliberate adoption of the standard from Section 2 of the Fourteenth Amendment ("whole persons") to

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[101] *Id.* at 2341.

[102] *Id.* at 2343.

[103] *Id.* at 2348.

[104] *Id.* at 2448-54; *see* Orville J. Sweeting, *John Q. Tilson and the Reapportionment Act of 1929*, 9 W. Pol. Q. 434 (1956). The Bankhead amendment was removed at the same time. 71 Cong. Rec. 2456 (1929).

[105] 71 Cong. Rec. 2448-54 (1929).

[106] 46 Stat. 21, 26 (1929).

include all immigrants, including those who are undocumented and here unlawfully.

B. History Since the 1929 Census Act Confirms the Historical Understanding that All Persons, Regardless of Citizenship or Immigration Status, Are Included in the Apportionment Count.

Acknowledging the constitutional barrier to excluding noncitizens from the count for apportionment, proponents of exclusion over the next several years introduced a series of resolutions to "amend the Constitution of the United States to exclude aliens in counting the whole number of persons in each State for apportionment of Representatives among the several States".[107] None of these resolutions was voted on after referral to committee.[108]

In connection with the 1940 census, the House considered a bill which, among other things, "provid[ed] for the exclusion of aliens from the population totals in making the apportionment".[109] A supporter, Representative Rankin, asked whether "aliens who are in this country in violation of law have

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[107] *See*, *e.g.*, 74 Cong. Rec. 5454 (1931) (H.J. Res. 356); 75 Cong. Rec. 2453 (1932) (H.J. Res. 97); 78 Cong. Rec. 6637-41 (1934) (S.J. Res. 10); 87 Cong. Rec. 465 (1941) (S.J. Res. 34); 93 Cong. Rec. 718 (1947) (S.J. Res. 50).

[108] *See 1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing before the H. Comm. on Post Off. and Civ. Serv.*, 100th Cong. 142-43 (1988) (Congressional Research Service report).

[109] 86 Cong. Rec. 4367 (1940) (S. 2505).

the right to be counted and be represented" in Congress.[110] Representative Celler (New York), who believed the proposed bill was unconstitutional,[111] responded that "[t]he Constitution says that all persons shall be counted", including "aliens here illegally".[112] Representative Celler's arguments carried the day.[113]

More recent efforts to exclude undocumented immigrants from the apportionment have been consistently rejected. In the lead-up to the 1980 census, a group of plaintiffs sought to exclude undocumented immigrants from the apportionment count. In dismissing the lawsuit, the three-judge court noted that plaintiffs' case was "very weak on the merits" because "immigrants, legal and illegal alike, are clearly 'persons'" under any reading of the Constitution.[114] Numerous bills were introduced to exclude undocumented immigrants from the enumeration count, and, consistent with Department of Justice Office of Legal Counsel advice, all were

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[110] *Id.* at 4372.

[111] Representative Gifford (Massachusetts) stated that he was "amazed" to see the proposal to exclude aliens from the apportionment, given that it was "too plainly unconstitutional". *Id.* at 4378. Representative Cochran (Missouri) labeled the proposal a "direct violation of the Constitution". *Id.*

[112] *Id.* at 4372.

[113] *Id.* at 4386, 4401.

[114] *FAIR v. Klutznick*, 486 F. Supp. 564, 569-73, 576 (D.D.C. 1980) (three-judge court).

rejected as unconstitutional.[115] Likewise, an amendment to block funding to certify the 1980 census figures due to the inclusion of undocumented immigrants was denounced as unconstitutional and voted down.[116] Similar events occurred around the time of the 1990 census.[117] These efforts have continued unsuccessfully in recent years.[118]

The historical practice is thus longstanding and unbroken. The census has always counted all persons in the United States, regardless of citizenship or immigration status, and included them in the congressional apportionment. All proposals to the contrary have properly been rejected as unconstitutional.

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[115] *See, e.g.*, 126 Cong. Rec. 3578 (1980) (H.R. 6577); *id.* at 4202 (S. 2366); *id.* at 4528 (H. Res. 594); *id.* at 5266 (H.R. 6769); *id.* at 5522 (H.R. 6812); *id.* at 22,140 (H. Amdt. to H.R. 7583); *see also Census: Counting Illegal Aliens, Hearing Before the Subcomm. on Energy, Nuclear Proliferation and Fed. Servs. of the S. Comm. on Governmental Affairs on S. 2366*, 96th Cong. 95 (1980) (DOJ analysis).

[116] 126 Cong. Rec. 22,140 (1980) (H.R. 7542); *id.* at 31,899 (vote on H.R. 7542); *see also Undercount and the 1980 Decennial Census: Hearing before the Subcomm. on Energy, Nuclear Proliferation and Fed. Servs. of the S. Comm. on Governmental Affs.*, 96th Cong. 44 (1980) (statement of Vincent Barabba, director of Census Bureau).

[117] *See 1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing before the H. Comm. on Post Off. and Civ. Serv.*, 100th Cong. 148 (1988) (Congressional Research Service report); *id.* at 240 (DOJ analysis of H.R. 3814).

[118] *See* Cong. Research Serv., R41048, *Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes* 10 (2012).

CONCLUSION

For the reasons stated, *Amici* respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

MARK TRACHTENBERG
HAYNES AND BOONE LLP
1221 McKinney, Suite 4000
Houston, Texas 77010
(713) 547-2000

RICHARD W. CLARY
Counsel of Record
ANTONY L. RYAN
HELAM GEBREMARIAM
NATHALIE BAKER
ALLISON DAVIDO
DEBORAH L. FOX
ADAM F. MINCHEW
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
rclary@cravath.com

Counsel for *Amici Curiae*

November 16, 2020

APPENDIX

APPENDIX A
LIST OF *AMICI CURIAE*

1. Margo Anderson, Distinguished Professor Emerita in History and Urban Studies at the University of Wisconsin, Milwaukee.

2. Andrew Beveridge, Professor Emeritus of Sociology at Queens College and the CUNY Graduate Center and the CEO of Social Explorer.

3. Dan Bouk, Associate Professor of History at Colgate University.

4. Rachel Buff, Professor of History and Director of the Cultures and Communities Program at the University of Wisconsin, Milwaukee.

5. Libby Garland, Associate Professor of History at Kingsborough Community College, The City University of New York.

6. J. Morgan Kousser, Professor Emeritus of History and Social Science at the California Institute of Technology.

7. Erika Lee, Rudolph J. Vecoli Chair in Immigration History and Director of the Immigration History Research Center at the University of Minnesota.

8. Natalia Molina, Professor of American Studies and Ethnicity at the University of Southern California.

9. Joel Perlmann, Senior Scholar, Levy Economics Institute and Research Professor, Bard College.

10. Theodore Porter, Distinguished Professor of History at the University of California, Los Angeles.

11. Steven Ruggles, Regents Professor of History and Population Studies and the Director of the Institute for Social Research and Data Innovation at the University of Minnesota.