No. 140, Original

IN THE
Supreme Court of the United States

STATE OF LOUISIANA AND
JAMES D. CALDWELL, ATTORNEY GENERAL,
Plaintiffs,

v.

JOHN BRYSON, SECRETARY OF COMMERCE,
ROBERT GROVES, DIRECTOR, UNITED STATES
CENSUS BUREAU, AND KAREN LEHMAN HASS,
CLERK, UNITED STATES HOUSE OF REPRESENTATIVES,
Defendants.

BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE A COMPLAINT

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QUESTION PRESENTED

Amici curiae address the following question only:

Whether unlawfully present aliens should be counted for purposes of apportioning seats in the United States House of Representatives and, in turn, the number of electors representing each State in the Electoral College.

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INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. is a non-partisan educational foundation that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned about the failure to enforce the nation's immigration laws and the corrosive effect of this failure on our institutions and the rule of law. Among the problems caused by this failure is a redistribution of seats in the U.S. House of Representatives to States with large populations of unlawfully present aliens. *Amici* respectfully submit that neither Article I Section 2 of the U.S. Constitution, the Fourteenth Amendment, or any other provision of the Constitution authorize or permit the inclusion of unlawfully present aliens in

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of their intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

the apportionment process. As a result, this case raises issues critical not just to Louisiana, but to every State, every American citizen, and our federal system of government. For these reasons, *Amici* urge the Court to grant Plaintiffs' motion for leave to file a complaint.

STATEMENT OF THE CASE

This case challenges the federal policy of including unlawfully present aliens[2] in the census figures used to apportion seats in the House of Representatives. As a result of this policy, the State of Louisiana alleges that it has been deprived of an additional Member of Congress to which the State is entitled, as well as an additional elector in the Electoral College.

Article 1 Section 2 of the U.S. Constitution mandates that a census be taken every ten years expressly for the purpose of apportioning seats in the House of Representatives. The census figures are then used to divide up the 435 seats in the House among the States. The census counts self-described "residents" of each State. Because no effort is made to differentiate among lawful and unlawful residents, millions of unlawfully present aliens are therefore included in the tally. In fact, the Census Bureau admits that counting "undocumented residents" for apportionment purposes is its express

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[2] Instead of unlawfully present aliens, Plaintiffs refer to "non-immigrant foreign nationals," which includes holders of student visas and guest workers. *Amici* agree that these groups also should not be counted for purposes of apportioning House seats.

policy. *See* U.S. Census Bureau, Frequently Asked Questions, (http://www.census.gov/population/--apportionment/about/faq.html#Q16).

Because the population of unlawfully present aliens is not distributed uniformly among the States, the inclusion of these individuals in apportionment calculations alters the apportionment of seats in the House of Representatives. States containing large populations of such individuals are apportioned House seats at the expense of States containing relatively few. The Census Bureau's decision to count unlawfully present aliens in the 2010 Census for apportionment purposes allegedly will cause at least five States to lose House seats to which they are entitled, and at least three States to gain seats to which they are not entitled. That apportionment, in turn, determines the apportionment of electors in the Electoral College for the next three presidential elections. U.S. Const., art. II, § 1, cl. 2.

Louisiana is among the States that will lose a House seat due to the inclusion of unlawfully present aliens in the apportionment count. If unlawfully present aliens had not been included in the 2010 apportionment count, Louisiana allegedly would have been apportioned seven House seats. Based on the Census Bureau's calculation, however, Louisiana is due only six. In effect, representation is taken away from States such as Louisiana with a high percentage of U.S. citizens so that new congressional districts can be created in states with relatively large populations of unlawfully present aliens. This reduces States' representation in Congress and,

because representation in the House affects the number of Electoral votes a State has in the Electoral College, impacts Presidential elections.

REASONS FOR GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE A COMPLIANT

The policy of counting unlawfully present aliens in the nation's decennial census is unconstitutional and undermines both our federal system of government and our democratic institutions. By failing to enforce our immigration laws, we are losing control of a fundamental right – the right of Americans to democratic representation. The Constitution unequivocally states that representation in the "people's chamber" – the House of Representatives – is to be determined by "the People of the several States." Longstanding precedent has held that the terms "the People" and persons refer to the "political community" and members of the political community. The counting of unlawfully present aliens in the apportionment process redefines this concept of the political community.

I. Failure to Enforce Our Immigration Laws Has Resulted in the Critical Issue Raised in This Case.

This case arises as a direct result of the failure to enforce our nation's immigration laws. The most comprehensive of these laws, the Immigration and Nationality Act, enacted in 1952, plainly regulates the conditions upon which aliens may enter and

remain in the country. 8 U.S.C. §§ 1101-1778. The federal government is tasked with, among other things, "detaining illegal immigrants and ensuring their departure (or removal) from the United States." Yet even President Obama has recognized the failure to enforce our immigration laws, conceding that the "the system is broken" and "everybody knows it." Peter Baker, *Obama Urges Fix to "Broken" Immigration System*, N.Y. Times, July 1, 2010. Furthermore, as Justice Scalia has wryly noted, "nobody would [have thought] that . . . the Federal Government would not enforce [immigration laws]. Of course, no one would have expected that." *Chamber of Commerce v. Whiting*, No. 09-115, Tr. of Oral Arg. at pp. 7-8 (Dec. 8, 2010).

The result of this failure, as described by one court, has been "rampant illegal immigration." *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010). Either by design or neglect, or both, we have allowed at least 11 million aliens to remain in our country unlawfully. Our failure to enforce our immigration laws has had widespread effects on our nation, which range from employment issues to police practices, education, and healthcare. It also has another critical effect as it undermines the rule of law.

The corrosive effect that our failure to enforce our immigration laws has had on the rule of law can be seen from many vantage points. For instance, even though federal law prohibits the employment of unlawfully present aliens, the federal government provides tax identification numbers to unlawfully

present aliens and accepts their tax dollars earned from unlawful employment. Meanwhile, some States grant "in-state" tuition to unlawfully present aliens who attend their colleges and universities. They do so even though these students will not, at least lawfully, be able hold employment following their schooling.

The failure to enforce our immigration laws also has harmed relations between the States and the federal government. Due to this lack of enforcement, a number of States have stepped in to aid in the enforcement effort. Instead of welcoming this assistance, the federal government has sued these States for their efforts. One of these laws is currently before the Court. *Arizona v. United States*, No. 11-182 (*cert. granted* Dec. 12, 2010). At the same time, other jurisdictions around the nation have enacted "sanctuary policies." Such policies stated purpose is to try and shield unlawfully present aliens from law enforcement.

As this case now demonstrates, the failure to enforce our laws is now undermining not just the rule of law, but a foundational aspect of our representative democracy. It is skewing States' representation in our federal system of government. This case thus raises a question of significant consequence. It should be decided by the Court.

II. The People of the United States Should Be the Basis For Apportionment.

The Constitution provides that Representatives are chosen "by the People of the several States," U.S. Const. art. I, § 2, cl.1. These "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers"[3] and that "the whole number of persons in each State"[4] shall be used for apportionment. As Plaintiffs demonstrate in their motion, "person" has long been understood to indicate a stronger relationship to a State than mere presence. This is entirely consistent with Article I which confirms that representatives are to be chosen not by persons who are merely present within the geographic boundaries of a district, but by the "People *of* the several States."

This Court considered the question of who is a "person" in a decision issued only six years after adoption of the Fourteenth Amendment. In *Minor v. Happersett*, 88 U.S. 162 (1875), Chief Justice Waite, writing for a unanimous Court, analyzed whether the Fourteenth Amendment extended suffrage to women who were citizens as one of the privileges and immunities of citizens. The Court began by explaining the nature of citizenship in this way:

> There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies

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[3] U.S. Const. Art. I, § 2, cl. 3.
[4] *Id.* amend. XIV, § 2.

> an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. This one is a compensation for the other; allegiance for protection and protection for allegiance.

Id. at 166-67. Through these reciprocal obligations, according to the Court, a "political community" is formed. *Id.*

Importantly, the Court then explained that a political community is comprised of "persons" and that these persons are sometimes referred as "inhabitants" or "citizens." *Id.* at 166. Citizens were then distinguished from "aliens or foreigners," who were, of course, not citizens but could be naturalized. Finally, the Court noted that "[w]omen and children are, as we have seen, 'persons.' They are counted in the enumeration upon which apportionment is to be made . . . ." *Id.* at 174.

While the Court concluded that the Fourteenth Amendment did not extend suffrage to women, the decision demonstrates plainly the contemporary understanding of the contours of the political community. Even though they did not have a right to vote, women were recognized as within the political community as "persons" and citizens. They

were part of "the People" as were children. Aliens were not.

More recently, in *District of Columbia v. Heller*, the Court considered the meaning of "the People" as referenced in various parts of the Constitution. 554 U.S. 570, 579-81 (2008). The phrase appears in the Preamble ("We the People"), the First, Second, Fourth, Ninth, and the Tenth Amendments, and Article I's provision dealing with popular election of the House of Representatives. The Court adopted Chief Justice Rehnquist's majority opinion in *United States v. Verdugo-Urquidez* defining "the People":

> "[T]he people" seems to have been a term of art employed in selected parts of the Constitution . . . . [It] refers to class of person who are part of a community or who otherwise developed sufficient connection with this country to be considered part of that community."

See Heller, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

The Court in *Heller* the confirmed that the reference to "the people" in the Second Amendment unambiguously refers to members of the political community. 554 U.S. at 580.[5] Thus, "the People"

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[5] As explained by Professor Akhil Amar:

> When the Constitution speaks of "the people" rather than "persons," the collective connotation

refers to persons who are part of or connected to the political community of the United States.

A. Unlawfully Present Aliens Are Not Part of the Political Community.

Section 2 of the Fourteenth Amendment directs that the "whole number of persons" be counted for apportionment. This directive, however, has never been interpreted to encompass every single individual physically present in the United States. Section 2 itself excludes "Indians not taxed" from apportionment, as they were distinct communities, if

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> is primary. In the Preamble, "We the People . . . do ordain and establish this Constitution: as public citizens meeting together in conventions and acting in concert, not as private individuals . . . The only other reference to "the people" in the Philadelphia Constitution of 1787 appears a sentence away from the Preamble, and here, too, the meaning is public and political, not private and individualistic: every two years, "the People" – that is, the voters – elect the House . . .
>
> The rest of the Bill of Rights confirms this republican reading. The core of the First Amendment's Assembly Clause is the right of "the people" – in essence, voters – to "assemble" in constitutional conventions and other political conclaves. Likewise, the core rights retained and reserved to "the people" in the Ninth and Tenth Amendments were rights of the people collectively to govern themselves democratically.

Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 Utah L. Rev. 889, 892-93.

not nations, separate from our political community. Similarly, while unlawfully present aliens may be "persons," they are not part of our "political community" and, therefore, not properly included in apportionment.

B. Aliens Are Routinely Treated Differently Under the Constitution.

This Court has long recognized that aliens (whether lawfully or unlawfully present) are entitled to a certain minimum constitutional protection. Justice Jackson's "ascending scale of rights" analysis is fully applicable today:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950) (emphasis added). As a result, lawfully present aliens who are present within the Constitution's jurisdiction and have "developed substantial connections with this country" are entitled to certain

constitutional protections. *Verdugo-Urquidez*, 494 U.S. at 271. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 376 (1971) (resident aliens may raise equal protection challenges under the Fourteenth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to certain Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (resident aliens protected by due process rights of Fourteenth Amendment).

Neither lawfully present aliens, and certainly not unlawfully present aliens, possess the full array of rights and privileges of U.S. citizens, including political rights. To the contrary, that status, by definition, places such individuals outside the full scope of protections of the Constitution:

> We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class . . . has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately

> related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested allegiance to become a citizen of the Nation.

Plyler v. Doe, 457 U.S. 202, 221 n.19 (1982). *See, e.g., Verdugo-Urquidez*, 494 U.S. at 268-69 (rejecting application of Fourth Amendment to search of foreign national because not "every constitutional provision applies wherever the United States Government exercises its power"); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (Fourth Amendment exclusionary rule not applicable to civil deportation proceedings); *Mathews*, 426 U.S. at 79-80 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment did not extend right to jury trials to territories within U.S. control like Puerto Rico); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (excludable alien not entitled to First Amendment protection from deportation because

"[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law").

One critical way in which aliens are treated differently is that they do not have the same political rights as citizens. The Court has made clear that aliens may be denied certain rights and privileges that U.S. citizens possess, especially when they touch upon our democratic institutions. For example, the Court has ruled that government may bar aliens from voting, serving as jurors, working as police or probation officers, or working as public school teachers. *See Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a law barring aliens from working as probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a law barring aliens from teaching in public schools unless they intend to apply for citizenship); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a law barring aliens from serving as police officers); *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976) (upholding a law barring aliens from serving as jurors); *Sugarman v. Douglas*, 413 U.S. 634, 648-49 (1973) ("citizenship is a permissible criterion for limiting" the "right to vote or to hold high public office"). Moreover, the Constitution itself bars aliens from holding certain offices. *See* U.S. Const. art. I, §§ 2, 3; U.S. Const. art. II, § 1.

In those many decisions, the Court has drawn a fairly clear line: The government may exclude foreign citizens from activities "intimately related to the process of democratic self-government." *Bernal*

v. Fainter, 467 U.S. 216, 220 (1984); *see also Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *Cabell*, 454 U.S. at 439-40. As the Court has written, "a State's historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign's obligation to preserve the basic conception of a political community." *Foley*, 435 U.S. at 295-96 (internal quotation marks and citation omitted).

When reviewing a statute barring foreign citizens from serving as probation officers, the Court explained that the "exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition." *Cabell*, 454 U.S. at 439 (emphasis added). Upholding a statute barring aliens from teaching in public schools, the Court reasoned that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State . . . It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens." *Ambach*, 441 U.S. at 75 (emphasis added). And in upholding a ban on aliens serving as police officers, the Court stated that, "although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens." *Foley*, 435 U.S. at 297. *See also Bluman v. FEC*, No. 11-275 (Jan. 9, 2012) (affirming that

aliens living in the United States have no constitutional right to try to influence U.S. elections for any government office).

The Court thus has recognized numerous distinctions as to aliens under the Constitution and confirmed that they stand outside of our "political community." The Constitution does not recognize aliens, and in particular, unlawfully present aliens, as members of the political community. Apportionment should not be based on their presence.

III. Apportionment Based on the Presence of Illegal Aliens Undermines Our Federal System.

The tangible effects of counting illegal aliens for purposes of apportionment are manifest. Because of the failure to enforce our immigration laws, large populations of illegal aliens are present in certain States. We have allowed this problem to grow such that it now skews key institutions of our democracy.

Unlawfully present aliens, however, are not part of our political community as it does not include every person who may be present in United States. The Census Bureau itself does not count all "persons" who may be physically present, as it excludes, for example, foreign diplomats and foreign tourists. Such persons may be present at the time of the census, but they are not part of our political community – nor are they the People *of* the several States – and they are properly not counted.

Illegal aliens are not included for the same reason. They are not part of the political community and counting them for purposes of apportionment unconstitutionally increases representation for some states while diminishing it for others. The gain or loss of a seat in Congress also directly affects the size of a state's congressional delegation and its influence. The Electoral College also is affected as the number of electors from each State is based on the size of their respective congressional delegations.

Failure to enforce our immigration laws has brought this problem to the fore. It has demonstrable and unconstitutional effects on our democracy and cannot be ignored.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for leave to file an original complaint should be granted.

Respectfully submitted,

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