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10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 CITY OF SAN JOSE, CALIFORNIA,
14 *et al.*,
15 *Plaintiffs,*

16 v.

17 DONALD J. TRUMP, in his official
18 capacity as President of the United States, *et*
19 *al.*,
20 *Defendants.*

21 _____
22 STATE OF CALIFORNIA, *et al.*,
23 *Plaintiffs,*

24 v.

25 DONALD J. TRUMP, in his official
26 capacity as President of the United States, *et*
27 *al.*,
28 *Defendants.*

) **No. 5:20-cv-05167-LHK-RRC-EMC**
) **No. 5:20-cv-05169-LHK-RRC-EMC**
)
) **IMMIGRATION REFORM LAW**
) **INSTITUTE’S *AMICUS CURIAE***
) **BRIEF IN SUPPORT OF**
) **DEFENDANTS’ OPPOSITION TO**
) **PLAINTIFF’S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **AND IN SUPPORT OF DEFENDANTS’**
) **MOTION TO DISMISS AND MOTION**
) **FOR PARTIAL SUMMARY**
) **JUDGMENT**
)
) Date: October 8, 2020, 2020
) Time: 1:30 p.m.
) Ctrm: Courtroom 8, 4th Floor
) Judge: Hon. Richard R. Clifton
) Hon. Lucy H. Koh
) Hon. Edward M. Chen
)

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1 **MEMORANDUM OF PONTS AND AUTHORITES**

2 Pursuant to this Court’s Order dated August 27, 2020 (ECF #62), *amicus curiae*
3 Immigration Reform Law Institute submits this memorandum of points and authorities in
4 opposition to plaintiffs’ motion for partial summary judgment (ECF #63) and the plaintiffs’
5 accompanying memorandum of points and authorities (“Pls. Memo.”) and in support of the
6 defendants’ motion to dismiss and motion for partial summary judgment (ECF #84).
7

8 **IDENTIFY AND INTERESTS OF AMICUS CURIAE**

9 *Amicus curiae* Immigration Law Reform Institute (“IRLI”) is a nonprofit 501(c)(3) public-
10 interest law firm incorporated in the District of Columbia.¹ IRLI is dedicated to litigating
11 immigration-related cases on behalf of, and in the interests of, United States citizens and lawful
12 permanent residents and to assisting courts in understanding and accurately applying federal
13 immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases.
14 For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted
15 by IRLI staff from IRLI’s affiliate, the Federation for American Immigration Reform, because the
16 Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in
17 the issues here.
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19

20 **INTRODUCTION**

21 In these two cases, nonprofit organizations, state and local governments, and individuals
22 have sued various federal offices and officers to challenge a memorandum that the President issued
23 to establish “the policy of the United States to exclude” illegal aliens from the apportionment base
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25 ¹ Consistent with FED. R. APP. P. 29(a)(4)(E), counsel for *amicus curiae* authored the motion
26 and brief in whole, and no counsel for a party authored the brief in whole or in part, nor did any
27 person or entity, other than the *amicus* and its counsel, make a monetary contribution to preparation
28 or submission of the brief.

1 “to the extent feasible and to the maximum extent of the President’s discretion under the law.”
2 Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg.
3 44,679, 44,680 (July 23, 2020). Plaintiffs moved for partial summary judgment on their claims
4 under the Apportionment Clause, the Enumeration Clause, 13 U.S.C. §§ 141 and 195, and 2 U.S.C.
5 2a; defendants have cross-moved to dismiss and for partial summary judgment. IRLI writes in
6 support of defendants and supplements their argument with the following.
7

8 **SUMMARY OF ARGUMENT**

9 This case challenges the President’s decision not to include illegal aliens in the
10 apportionment count of the census. As a matter of constitutional interpretation, however, the
11 President is on very solid footing. Counting people for apportionment purposes, after all, confers
12 representation on them in our national government. But, according to both common sense and the
13 understanding of the Framers, only members of our national political community, broadly defined
14 as coterminous with “the people” as used several times in the U.S. Constitution, should be given
15 such representation, or are given it in the Constitution. And illegal aliens, who are foreign citizens
16 subject to a national policy of removal from the country, are not members of the people according
17 to precedent of the U.S. Supreme Court, nor members of our national political community. It
18 follows that they should not be given representation in our national government by being included
19 in the apportionment count. At the very least, the President’s policy of not including them in that
20 count rests on a permissible interpretation of the Constitution.
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23 **ARGUMENT**

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

4 Despite plaintiffs’ assertions that the language of these provisions provides a clear answer
5 to the question of whether illegal aliens should be counted for purposes of apportionment, Pls.’
6 Memo. at 14-17, the phrase “whole number of persons in each State” does not mean “the whole
7 number of persons physically present in each State.” If it did, foreign tourists, for example, who
8 were in a state would be counted for apportionment and given representation in our national
9 government. Also, military personnel stationed abroad, and thus not physically present in a state,
10 could not be counted for apportionment, though the U.S. Supreme Court has held that they may
11 be. *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (“The Secretary’s judgment does not
12 hamper the underlying constitutional goal of equal representation, but, assuming that employees
13 temporarily stationed abroad have indeed retained their ties to their home States, actually promotes
14 equality.”).

15 Whatever else the legal phrase “the whole number of persons in each State” may mean, a
16 simple, two-step argument shows that it should not be read to imply that illegal aliens are to be
17 counted for apportionment: 1) the Constitution confers representation in our national government
18 only on the people of the United States, defined as all members of our national political
19 community, and 2) illegal aliens are not part of the people of the United States, or members of our
20 national political community. It follows, by pure logic, that illegal aliens should not be accorded
21 representation in our national government by being counted for apportionment purposes.
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1 **I. ONLY THE MEMBERS OF OUR NATIONAL POLITICAL COMMUNITY**
2 **SHOULD BE REPRESENTED IN OUR NATIONAL GOVERNMENT.**

3 To begin with, it seems a mere matter of definition that representation in our national
4 government should not be given, and cannot be thought to be given in the Constitution, to those
5 outside of our national political community. As a three-judge panel of the U.S. District Court for
6 the District of Columbia, in an opinion by then-Circuit Judge Kavanaugh, held while upholding a
7 provision of federal law prohibiting foreign nationals from participating in election speech, “[i]t is
8 fundamental to the definition of our national political community that foreign citizens do not have
9 a constitutional right to participate in, and thus may be excluded from, activities of democratic
10 self-government.” *Blumen v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d*, 565 U.S. 1104
11 (2012); *see id.* at 284 (defining “foreign nationals” as all foreign citizens who are not U.S. lawful
12 permanent residents). From the holding in *Blumen* that lack of membership in the national political
13 community justifies exclusion even from the right to political speech, it is but a short step to the
14 conclusion that the same lack, also by definition, is ground for exclusion from any right to political
15 representation in our national government.
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18 The claim that the Constitution, in the Apportionment Clause, gives representation to those
19 outside the national political community is not in accord with other provisions of the Constitution.
20 *See, a fortiori, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (“[I]n expounding a statute,
21 we . . . look to the provisions of the whole law, and to its object and policy.”); *see also, e.g., Nat’l*
22 *Prohibition Cases*, 253 U.S. 350, 384 (1920) (“The Ninth and Tenth Amendments must be read[]
23 with the whole Constitution”); *NLRB v. Canning*, 573 U.S. 513, 536 (2014) (“[W]e think it most
24 consistent with our *constitutional structure* to presume that the Framers would have allowed intra-
25 session recess appointments”) (emphasis added). Indeed, to make that claim is to embrace the
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1 absurdity that “the People,” when they ordained and established the Constitution, U.S. Const.
2 preamble, and when they gave “the People of the several States” the power to choose members of
3 Congress, U.S. CONST. art. I, § 2, cl. 1, nevertheless conferred political representation in that
4 Congress not just on themselves—“the people”—but on others, as well. *See, e.g., District of*
5 *Columbia v. Heller*, 554 U.S. 570, 580 (2008) (analyzing the application of the Second
6 Amendment and noting that “in all six other provisions of the Constitution that mention ‘the
7 people,’ the term unambiguously refers to all members of the political community”); *McCulloch*
8 *v. Maryland*, 17 U.S. 316, 435 (1819) (“The people of all the States, and the States themselves, are
9 represented in Congress”).

10
11 As might be expected, the Framers themselves believed that the people were the ones to be
12 counted in the census and accorded representation. *See Wesberry v. Sanders*, 376 U.S. 1, 13 (1964)
13 (“The Constitution embodied Edmund Randolph’s proposal for a periodic census to ensure ‘fair
14 representation of *the people*’”) (quoting 3 *The Records of the Federal Convention of 1787* (Farrand
15 ed. 1911) 580) (emphasis added). Alexander Hamilton argued that “an actual Census or
16 enumeration of *the people* must furnish the rule” for apportionment of direct taxes. THE
17 FEDERALIST NO. 36, at 216 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis added). Congress has
18 echoed this commonsense understanding when passing census legislation. “[T]here is but one basic
19 constitutional function served by the census. It is to provide an enumeration of the people for the
20 purpose of redistributing congressional representatives proportioned thereto.” S. REP. NO. 71-2, at
21 2 (1929). “The Department of Commerce counts the people (as it always has done).” *Id.* at 4-5. As
22 these examples show, it is neither a remarkable nor a controversial proposition that the Constitution
23 confers representation in our national government on the people, understood broadly as “all
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1 members of the political community.” *Heller, supra*. At the very least, there is nothing to bar the
2 President from arriving at this sensible interpretation.

3 **II. ILLEGAL ALIENS ARE NOT MEMBERS OF OUR NATIONAL POLITICAL**
4 **COMMUNITY.**

5 It is equally clear that illegal aliens are not members of our national political community.
6 *See Blumen*, 800 F. Supp. 2d at 288 (holding that the lack of a right of “foreign citizens” to
7 participate in activities of democratic self-government flows from the very “definition of our
8 national political community”). As the Supreme Court explained in *United States v. Wong Kim*
9 *Ark*, 169 U.S. 649, 694 (1898), aliens who lack permission to be in the country are outside the
10 allegiance and protection, and the jurisdiction, of the United States:
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12 Chinese persons, born out of the United States, remaining subjects of the
13 Emperor of China, and not having become citizens of the United States, are
14 entitled to the protection of and owe allegiance to the United States, *so long as*
15 *they are permitted by the United States to reside here*; and are “subject to the
jurisdiction thereof,” in the same sense as all other aliens residing in the United
States (emphasis added).

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

4 Indeed, if illegal aliens were members of our national political community—a part of our
5 people—the official national policy, reflected in our immigration laws, of detecting, detaining, and
6 removing them from the country, and thus removing them from that political community, would
7 be both paradoxical and unconscionable. But, of course, our immigration laws, and their
8 enforcement, are neither of these things, but flow from the nation’s sovereign right to control its
9 borders. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) (“The
10 exclusion of aliens is a fundamental act of sovereignty . . . inherent in [both Congress and] the
11 executive department of the sovereign”).
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14 Nor are illegal aliens a part of “the people,” when that term is used in the Constitution to
15 refer to “all members of the political community.” *Heller*, 554 U.S. at 580. For example, illegal
16 aliens lack a Second Amendment right to bear arms because the Constitution gives that right to
17 “the people.” *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) (“[I]llegal aliens do
18 not belong to the class of law-abiding members of the political community to whom the protection
19 of the Second Amendment is given.”); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259,
20 272 (1990) (leaving open the question of whether the Fourth Amendment, which protects rights of
21 “the people,” applies to illegal aliens); *City of El Cenizo v. Texas*, 890 F.3d 164, 186 n.20 (5th Cir.
22 2018) (questioning whether the Fourth Amendment applies to illegal aliens).
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25 The closest the Supreme Court came, before *Heller*, to defining “the people” as used in
26 these constitutional provisions was when it “suggest[ed] that ‘the people’ protected by the Fourth
27 Amendment, and by the First and Second Amendments, and to whom rights and powers are
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1 reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national
2 community or who have otherwise developed sufficient connection with this country to be
3 considered part of that community.” *Verdugo-Urquidez*, 494 U.S. at 265. But, apparently to guard
4 against any conclusion that a “sufficient connection” test can be used to include *some* illegal aliens
5 among the people (surely an unworkable test for census purposes, in any event), the Court
6 immediately cited a Supreme Court case holding that illegal aliens are not so included:
7

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

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

14 Contrary to plaintiffs’ claim, Pls.’ Memo. at 15-16, an entitlement of illegal aliens to the
15 equal protection of the laws under the Fourteenth Amendment does not make them part of the
16 people. The Fourteenth Amendment may give the right to equal protection to all persons physically
17 present in a state, *Plyler v. Doe*, 457 U.S. 202, 212 (1982)—but that category includes, for
18 example, foreign visitors, and obviously is broader than those to whom representation is afforded
19 in the Constitution. The same is true for the right of due process, which the Fourteenth
20 Amendment’s text gives to “any person” regardless of location. U.S. CONST. amend. XIV, § 1.
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22 In sum, the Constitution gives political representation in our national government only to
23 members of our national political community, and illegal aliens are not in our national political
24 community. It follows that illegal aliens should not be counted for purposes of apportionment. At
25 the very least, the President’s policy of excluding them from the apportionment count, even if not
26 required by, rests on a fully permissible interpretation of, the Constitution.
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CONCLUSION

For the foregoing reasons, defendants’ motion to dismiss and motion for partial summary judgment should be granted and plaintiffs’ motion for partial summary judgment should be denied.

Dated: September 15, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2020, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Notice of this filing will be sent by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic filing. Parties may access this filing through the Court’s CM/ECF System.

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