OVERSIGHT PROJECT
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Comment in Support of Proposed Rule, Docket No. USBC-2026-0628 (RIN 0607-AA75)

I. Introduction and Statement of Interest.

A. Introduction.

The Constitution apportions the House of Representatives—and, through it, the Electoral College—among the States according to the number of their inhabitants. At the Founding, an "inhabitant" was a person domiciled in a place with the settled intent to remain and, in the leading definition of the day, with the sovereign's permission to settle there. Illegal aliens do not meet that test. Yet the residence criteria used in 2020 counted them anyway, and by one estimate doing so shifted two House seats—and with them two electoral votes—among the States. *See* Section II.E.2. The Census Bureau's proposed rule would end that practice, and it is right to do so. *Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions*, 15 CFR Parts 60 and 70, RIN 0607-AA75, Docket No. USBC-2026-0628, 91 Fed. Reg. 57,524 (Sept. 10, 2026).

The REPAIR Initiative, a project of The Oversight Project ("Commenter") support the Bureau's proposed residence criteria under Part 60, in particular the exclusion of illegal aliens from the apportionment base under § 60.4 and the framework for the enumeration period at § 60.2, as well as the restrictions on demographic questions under Part 70. Constitutional text, history, and precedent all support the rule's central judgment, and the two principal contrary authorities in the record—a 1988 Office of Legal Counsel memorandum and a 2012 Congressional Research Service report—do not withstand scrutiny.

B. Statement of Interest.

The Oversight Project's REPAIR Initiative. The Oversight Project is a watchdog organization with the goal of promoting government transparency by investigating and exposing instances of what it claims are fraud, corruption, and abuse within the U.S. government. The Redistricting and Election Protection for American Integrity and Representation (REPAIR) Initiative focuses on redistricting litigation and oversight of map drawing, including monitoring congressional and state legislative redistricting following the decennial census. Apportionment determines how many congressional seats each State must draw, and the residence criteria adopted in this rulemaking will fix the population baseline for the 2030 apportionment and the state and local redistricting cycles that follow. REPAIR therefore has a direct and substantial interest in ensuring that the criteria governing who is counted, and where, are constitutionally sound, administrable, and faithful to the apportionment power's original purpose: allocating representation among the body politic.

Commenter shares an interest in residence criteria for the 2030 census that reflect a constitutionally defensible, empirically informed understanding of "usual residence" — all

in a rulemaking record that candidly addresses the relevant legal authority, including authority that has reached a contrary conclusion.

C. Summary of Position.

Commenter supports the proposed rule. Its central premise—that illegal aliens should not be counted toward any State's share of the House of Representatives and the Electoral College—is correct. Its plan to apply that premise through administrative records shared across agencies is sound. Both features trace directly to two actions of the first Trump Administration: Executive Order 13,880 of July 11, 2019, *Collecting Information About Citizenship Status in Connection with the Decennial Census*, 84 Fed. Reg. 33,821 (July 16, 2019), and the Presidential Memorandum of July 21, 2020, *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020).

II. Illegal Aliens Are Not Among the "Persons in Each State," and in All Events the Bureau Has Authority to Exclude Them.

The Bureau's core legal conclusion is correct: illegal aliens are not "persons" within the meaning of the Apportionment Clauses of Article I, Section 2 and Section 2 of the Fourteenth Amendment, and they should not be counted for congressional apportionment.

The clearest support for that conclusion is textual and historical.

The Constitution provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3, a command the Fourteenth Amendment carries forward by "counting the whole number of persons in each State," *id.* amend. XIV, § 2. To ensure fair representation among the States, the Constitution requires that the count of each State's population be an "actual Enumeration" of the "persons" in each State, conducted every ten years "in such Manner as [Congress] shall by Law direct." *Id.* art. I, § 2, cl. 3.

The Constitution does not apportion representation to every human being physically present within a State's borders; it apportions representation to "persons," a term the Framers and the Fourteenth Amendment's drafters used interchangeably with "inhabitants." "Inhabitant" was, and is, a legal term of art requiring a domicile and the settled intent to remain—and, under the definition given by the leading contemporaneous authority on the law of nations, the sovereign's permission to settle in the country in the first place. 1 Emmerich de Vattel, THE LAW OF NATIONS § 213 (1760). Illegal aliens are, by definition, present without that permission, and federal law makes their continued presence revocable at any time. They are therefore not "inhabitants" in the sense the Constitution has always used that word, and they were never intended to be counted toward any State's representation in the House or, through the Electoral College, the presidency. Moreover, it would make no sense to apportion political power between States based on a revocable, non-legal status like mere illegal presence a given State. Of course, States often joust with each other in a kind of competitive political and policy scrum and they should not immediately be placed at significant comparative disadvantage by virtue of (a) the willingness of some States to tolerate or encourage illegal immigrant presence within the borders of States of the latter ilk; and/or (b) the happenstance of which States illegal aliens themselves would prefer to

live in until their presence is revoked and they voluntarily depart or are deported by the superior federal sovereign.

This textual conclusion (and its self-evident legal policy logic) does not stand alone. It is independently reinforced by: (1) the Supreme Court's holding that the census's "usual residence" standard already incorporates an "element of allegiance or enduring tie to a place," *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992); (2) the settled distinction between rights aliens may generally claim and the narrower category of political functions—apportionment among them—from which the political community may exclude even lawfully present noncitizens, *see, e.g., Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court), *aff'd*, 565 U.S. 1104 (2012); (3) an independent defect in current practice under the principle of one person, one vote, since counting a nonvoting population dilutes the votes of citizens who share a district with them; and (4) the Bureau's own substantial delegated discretion to define the census's population baseline, confirmed in *Wisconsin v. City of New York*, 517 U.S. 1, 19–20 (1996), and, by close analogy, in *Evenwel v. Abbott*, 578 U.S. 54 (2016) (States have wide discretion to choose their own apportionment baseline).

The decennial census is designed to serve "the constitutional goal of equal representation." *Franklin*, 505 U.S. at 804. To that end, Congress has delegated to the Secretary of Commerce the authority to conduct the census, 13 U.S.C. § 141(a), so that Representatives—and with them, Electoral College votes—are "apportioned among the several States according to their respective numbers," U.S. Const. amend. XIV, § 2. The Secretary may in turn sub-delegate that authority to the Census Bureau. 13 U.S.C. §§ 2, 4.

For these reasons, and those set out below, excluding illegal aliens under proposed § 60.4 is not merely permissible; it is correct. The Bureau should adopt it.

A. In the Apportionment Clauses, "Persons" Means "Inhabitants," and Illegal Aliens Are Not Inhabitants.

The proposed rule rests on the correct reading of the constitutional text, and that reading compels the result the Bureau has reached. Article I, Section 2 and Section 2 of the Fourteenth Amendment apportion representation according to the "whole number of persons in each State." The word "persons" was chosen over "citizens," but that choice reflects the historical fact that the Constitution's apportionment formula was built around the Three-Fifths Compromise—a mechanism for partially counting enslaved individuals who were not citizens—not a decision to extend apportionment credit to every human being physically present within a State's borders, regardless of any tie to its political community. The Fourteenth Amendment rightly repealed that Compromise and rejected the odious premise that persons of African descent were anything less than full and equal persons under the Constitution. But in doing so, it did not alter the surrounding, settled understanding of what "persons" meant in the apportionment context: individuals who qualify as members of the political community being represented. That understanding has a name, and the Framers used it. It is "inhabitants."

The Convention debates leave no serious doubt on this point. "The debates at the Convention," the Supreme Court has explained, "make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in

allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13–14 (1964). The Constitution's own text confirms as much elsewhere, repeatedly describing the members of a State's political community as its "inhabitants." *See* Timothy Farrar, MANUAL ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 55–56 (1867) (cataloguing constitutional usages of "inhabitants of a State" to denote membership in the body politic). "Persons" and "inhabitants" were not competing concepts in this context; the former was understood in light of the latter.

"Inhabitant" was not, and is not, a synonym for bare physical presence. It was a legal term of art requiring both a domicile and the settled intent to remain—what the sources of the era called the *animus manendi* or *animus habitandi*. A New Jersey court explained that an "inhabitant," in the "popular acceptation of the phrase," means "something more than a person having a mere temporary residence" and "imports citizenship and municipal relations." *Potter v. Ross*, 23 N.J.L. 517, 520 (N.J. 1852). Applying the same principle, a federal circuit court held that a Spanish merchant who had remained in Philadelphia for four months "was not an inhabitant of this country, as no person is an inhabitant of a place, but one who acquires a domicil there." *Bas v. Steele*, 2 F. Cas. 988, 993 (C.C.D. Pa. 1818) (Washington, J.). John Adams put the point most directly: "[t]he Domicil and the animus habitandi is necessary in all" definitions of the term, and "every Stranger who has been in the United States, or who may be there at present, is not an Inhabitant." Letter from John Adams to the President of Congress (Nov. 3, 1784), in 16 PAPERS OF JOHN ADAMS 362 (Gregg L. Lint et al. eds., 2012).

The leading contemporaneous authority on the law of nations defined "inhabitant" in a way that already presupposes the sovereign's permission: Vattel described "inhabitants, as distinguished from citizens," as "strangers, who are ***permitted*** to settle and stay in the country." 1 Emmerich de Vattel, THE LAW OF NATIONS § 213, at 92 (1760) (emphasis added).[1] Permission from the sovereign to settle was not an incidental feature of inhabitancy; it was built into the authoritative definition. A person whose presence the sovereign has never authorized, and whose continued presence the sovereign's laws affirmatively forbid, has not been "permitted to settle" in any sense that the law of nations or the Founding generation would recognize.

[1] America's Founding generation adopted the universal consensus of their era that the law of nations "forms a part of the common law of every civilized country." William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 108 (Philadelphia 2d ed. 1829); *compare* 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *66–*67 (1769) (observing that the law of nations has reached "universal consent among the civilized inhabitants of the world" because it derives "from those principles of natural justice in which all the learned of every nation agree"), *with Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.) ("The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America"). They accordingly understood the law of nations as "form[ing] a part of the law of the land" of the United States, and that the Executive Branch is thus "charged with the execution of . . . the laws of Nations[.]" Alexander Hamilton, *Pacificus No. I* (June 29, 1793); *see also, e.g.*, James Madison, *"Helvidius" Number 2* (Aug. 31, 1793) (agreeing with Hamilton that the Executive is charged with the execution of the law of nations). Moreover, "[i]n ascertaining principles of the law of nations, lawyers and judges of that era relied heavily on continental treatise writers, Vattel being the most often consulted by Americans." Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 823 (1989).

As it occurs in the Constitution, the term "the people" refers to "all members of the political community" constituted by the Constitution and the laws of the United States. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). Illegal aliens are not members of the political community constituted by the Constitution and thus cannot be counted for apportionment purposes.

The drafts of the apportionment provision, including the version initially approved by the Constitutional Convention, used the term "inhabitants" rather than "residents." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350, 352 (Max Farrand ed., 1937) (referring to the "whole number of . . . 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)").

Applied here, this historical meaning yields an unambiguous answer. Illegal aliens are, by definition, present without the sovereign's permission—the opposite of an "inhabitant" under the law as universally understood at the time of ratification. Their presence is ***legally*** nondurable in every case, because federal immigration law embodies the political branches' judgment that such presence is unauthorized and subject to termination at any time. Whatever subjective intention an individual illegal alien may have to remain indefinitely, where the sovereign has not granted — and by law cannot be understood to have granted — the settled and lawful tie to the political community requirement that "inhabitant" status, the illegal alien cannot be deemed an inhabitant and thus cannot be counted in the census. An "*animus manendi*" the law itself refuses to recognize as legitimate is not the *animus manendi* the Apportionment Clauses were written to reward. The soundest, most historically grounded reading of the constitutional text is the one the Bureau has adopted: illegal aliens are not "inhabitants," so they are not "persons" within the meaning of the Apportionment Clauses, and they were never meant to be counted toward any State's representation in the House or, derivatively, the Electoral College.

The Census Act should be read the same way. It provides that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. § 141(a). It further provides that "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b). Reading "population" in § 141 to encompass persons unlawfully present in the United States would raise serious constitutional questions under Section 2 of the Fourteenth Amendment, Article I, Section 2, and Article II, Section 1: on that reading, the statute would require including illegal aliens in the apportionment base, in violation of the Constitution. To avoid those questions, "population" in § 141 should be read to mean the legally present population of the States. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the avoidance canon as "a tool for choosing between competing plausible interpretations of a statutory text"); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that the Court will construe a statute to avoid serious constitutional problems "unless such construction is plainly contrary to the intent of Congress").

Properly read, 13 U.S.C. § 141(b) and 2 U.S.C. § 2a require an enumeration of the legally present population of the United States and an apportionment of congressional seats and Electoral College votes based on that population.

B. "Usual Residence" Has Always Been an Evaluative Standard, Not a Bare Test of Physical Presence.

The historical meaning of "inhabitant" developed in Section II.A is not an isolated textual observation. The Supreme Court has already applied the same understanding to the modern census. The apportionment power has never required a purely literal headcount of everybody physically present within a State's borders on Census Day (April 1 of the census year, *see* 13 U.S.C. § 141(a)). As the Bureau's own notice recognizes, the Supreme Court in *Franklin* read "usual residence" to permit the Secretary to weigh an "element of allegiance or enduring tie to a place" in deciding who counts toward a State's apportionment base. 505 U.S. 788, 804 (1992). That reading reflects a longstanding view that the constitutional concept of "persons in each State" was always bound up with inhabitancy: a stable, examinable relationship between a person and a political community, not a snapshot of physical location.

The term's history confirms the same reading. When the apportionment language was drafted, and again when the Fourteenth Amendment was ratified, neither the Framers nor the Reconstruction Congress had occasion to contemplate a population category resembling the modern illegal alien, because, apart from the Alien Friends Act of 1798, which expired after two years, Congress did not restrict immigration by statute until 1875. *See* Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; Section III.2. Congress's naturalization power, though exercised from the beginning, governed who could become a citizen, not who could enter or remain. The absence of any evidence that either generation intended to extend apportionment credit to persons unlawfully present is itself probative. *See* Dennis L. Murphy, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RSRV. L. REV. 969, 981–82 (1991); *see also Joe Wolverton*, II, *Counting Illegal Aliens in the Census: Constitutional Considerations*, THE NEW AMERICAN (May 10, 2024).

The proposed rule's own reliance on *Franklin*'s "allegiance or enduring tie" language confirms that the Bureau stands on firm doctrinal ground in treating "usual residence" as an evaluative standard—not a bare test of physical presence—that separates those who belong to a State's political community from those who do not.

C. Counting Illegal Aliens Dilutes Citizens' Votes, and the Political Branches Have Ample Authority to Put a Stop to It.

The textual and historical case does not stand alone. A second, independent line of argument—the principle of one person, one vote—reaches the same result. *See* Murphy, *supra*.

First, including illegal aliens in the reapportionment base is in serious tension with the principle of one person, one vote that the Supreme Court announced in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964). *See* Murphy, *supra*, at 973–74.

Where one congressional district contains a substantial population of nonvoting illegal aliens and a neighboring district of equal total population does not, a citizen's vote in the first district is mathematically worth more than a citizen's vote in the second, because fewer actual voters are needed to elect a representative. This is precisely the kind of geographically arbitrary vote dilution the reapportionment cases condemn: the *Reynolds* Court's own language forecloses weighting a citizen's vote differently "merely because of where they happen to reside." *Reynolds*, 377 U.S. at 562–63. This disparity is not one of the limited forms of non-equality in representation the Constitution itself compels, such as the guaranteed minimum of one representative per State, and the political branches should correct it where they have the power to do so. *See* Murphy, *supra*, at 983. Commenter does not contend that the Constitution compels this correction; as Section II.K explains, *Evenwel* rejected a vote dilution claim of that kind. The dilution is instead a sound reason for the Secretary to exercise the discretion he already possesses to exclude illegal aliens.

Second, and more directly relevant to the Bureau's authority to act by regulation, three independent sources of constitutional power support exclusion: (1) Congress's Article I, Section 2 authority to conduct the census "in such Manner as they shall by Law direct," which Congress has delegated to the Secretary of Commerce and, through the Secretary, to the Bureau; (2) Congress's Fourteenth Amendment, Section 5 power to enforce the Amendment's apportionment provision by appropriate legislation; and (3) Congress's Article I, Section 8 power to establish a uniform rule of naturalization, which necessarily includes the power to define categories of alienage relevant to that scheme. *See* Murphy, *supra*, at 985. And the Supreme Court has long recognized that policy toward aliens is so thoroughly entrusted to the political branches as to be largely immune from judicial inquiry or interference. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952). That is precisely the sort of line-drawing the Bureau, acting under delegated authority, is competent to undertake.

The "territorial approach"—the theory that apportionment allocates power among States as territorial units rather than representing individual persons as members of the relevant political unit, and so should count everyone physically present regardless of status—should not survive the Supreme Court's one-person, one-vote cases. The *Reynolds* Court's own statement that legislators "'represent people, not trees or acres'" leaves no room for a theory that represents States as such to override individual voter equality. Murphy, *supra*, at 981–82 (quoting *Reynolds*, 377 U.S. at 562). If representation runs to people rather than land, a State's claim to representation credit for a person requires some genuine relationship between that person and the State's political community. That is precisely the inquiry §§ 60.2 and 60.4 are designed to operationalize.

D. The Bureau's Approach Continues, Rather Than Departs From, Historical Administrative Practice.

The Bureau's exclusion of tourists and diplomats, and its inclusion of overseas military personnel—detailed in Section III below—confirm that "usual residence" has always required an evaluative judgment about the durability of a person's tie to a place, not a mechanical presence test. Section 60.4's exclusion of illegal aliens continues that same administrative logic, applied to a category whose relationship to the political community is, by definition, nondurable and unsanctioned by the sovereign whose laws govern admission

and residence. *Franklin*'s standard of allegiance, Congress's delegated authority, and the Bureau's own historical practice together supply ample footing for excluding illegal aliens under § 60.4.

E. Text and Purpose Converge: The Apportionment Power Exists to Distribute Political Power Among the Political Community, Not to Confer Rights on Individuals.

Section II.A establishes, from the historical meaning of "inhabitant," that "persons" in the Apportionment Clauses does not extend to illegal aliens. That conclusion is independently confirmed from a second and doctrinally distinct direction: the ***function*** the apportionment power exists to serve. Where Section II.A asks what the Framers understood the word to mean, this subsection asks what the provision is for. The two inquiries arrive at the same place.

1. Constitutional text is construed in light of the function the provision performs, not as a term floating free of its purpose. Identical language in different constitutional provisions need not carry identical scope when the provisions serve different ends. "The tendency to assume that a word which appears in two or more legal rules . . . should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against." Walter Wheeler Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933), quoted in *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 118 n.36 (D.C. Cir. 1982). The proper inquiry is not simply what "persons" has meant elsewhere in the Constitution, but what "persons" means ***in the Apportionment Clauses specifically***—a question that cannot be answered without first asking what those Clauses are for.

2. The apportionment power exists for one purpose: to distribute a fixed quantum of political power—House seats and, through them, Electoral College votes—among the States' political communities. The Second Circuit stated this plainly, in language the Census Bureau's own proposed rule already quotes approvingly: although census data has become "the delight of statisticians and sociologists," the census's constitutional purpose "was to determine the apportionment of Representatives among the States." *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir. 1981). That purpose extends beyond the House: because Article II ties each State's presidential electors directly to the size of its congressional delegation, U.S. Const. art. II, § 1, cl. 2, the apportionment power is simultaneously the mechanism that allocates the Electoral College. Every constitutional apportionment provision—Article I, Section 2's original Enumeration Clause and Section 2 of the Fourteenth Amendment alike—exists to answer a single question: how much of the Nation's political power each State's community commands. Unlike the Due Process and Equal Protection Clauses, which protect ***individuals*** from government overreach, the Apportionment Clauses do not confer a benefit or protection on the persons counted; they measure and distribute governing authority among the represented political communities. The stakes are not theoretical. By one estimate, the presence of illegal immigrants in the 2020 census redistributed two House seats—and, by the same mechanism, two electoral votes—and that effect is projected to grow to as many as seven seats by 2030 if current trends continue. Steven A. Camarota & Karen Zeigler, *Tilting the Balance*, Ctr. for Immigr. Studies (Oct. 31, 2024). The number of seats and electoral votes is fixed, so a seat credited to

one State on the strength of its unlawfully present population is a seat—and an elector—taken from another. *Id.* Any construction of "persons" within these Clauses should track that function.

3. The Supreme Court's doctrine confirms that "persons" is properly read differently depending on whether the function at issue is the protection of rights or the allocation of political power. This is the Court's own settled approach to alienage cases generally, and two lines of authority establish it.

First, within the Fourteenth Amendment itself, "persons" does not carry uniform scope across the Amendment's clauses. Since *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886), the Court has treated "a business corporation [a]s a 'person' entitled to the protection of the Equal Protection Clause" and Due Process Clause of the Fourteenth Amendment. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting); *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (recognizing that a corporation is a "'person' within the meaning of the equal protection and due process of law clauses"); *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (striking down a statute singling out railroads under the Equal Protection Clause and explaining that a State has "no more power to deny to corporations the equal protection of the law" than to deny it to individuals).

Yet no one has ever suggested that corporations should be counted in the population base under the same Amendment's separate apportionment provision. The same word, in the same Amendment, reaches a different universe of subjects depending on which function the Clause performs.

Second, the Court distinguishes rights aliens may generally claim from the narrower category of political functions from which they may be excluded, denying aliens no right extended to citizens "excepting only those rights bearing on ***political interests***." *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring). That principle bars aliens from civil service positions that "go to the heart of representative government," *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); from police officer positions involving discretionary authority tied to the functions of government, *Foley v. Connelie*, 435 U.S. 291, 296 (1978); and from probation officer positions on the same reasoning, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982). And then-Judge Kavanaugh applied the same principle to campaign contributions and expenditures by foreign citizens, holding they may be excluded from "activities that are part of democratic self-government" because "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in . . . activities of democratic self-government." *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court), *aff'd*, 565 U.S. 1104 (2012); *see* Section II.F.

Plyler itself fits comfortably on the protective side of this line: public education is not a right bearing on political interests, which is precisely why the Court extended it to illegal alien children without disturbing the cases on political functions. Apportionment fits just as comfortably on the other side: under the *Carey* framing above, it ***is*** the allocation of political power—the constitutional mechanism by which population is converted into governing authority. A construction of "persons" that reaches illegal aliens for this purpose would

extend a benefit bearing on political interests that *Sugarman*, *Foley*, *Cabell*, and *Bluman* confirm the political community may reserve to itself, even as those same authorities leave undisturbed illegal aliens' claim to *Plyler* protections.

4. Text and purpose therefore converge, and each confirms the other. The apportionment power's purpose—distributing political power among the political community, as *Carey* describes and as the Electoral College's structural dependence on House apportionment confirms—is the reason the Court's own alienage doctrine draws the line exactly where it does. The doctrine does not treat exclusions from political functions as an arbitrary exception from a general rule that aliens count as "persons" everywhere; it treats them as the natural consequence of what provisions governing political functions ***are for***. Apportionment's purpose supplies the functional justification the doctrine requires, and the doctrine supplies the textual mechanism—a narrower, context-dependent reading of "persons"—by which that purpose is given effect.

5. This reading of text and purpose also explains why "usual residence" has always been treated as an evaluative standard rather than a bare test of physical presence. The Bureau's exclusion of tourists and diplomats, and its inclusion of military personnel stationed abroad, *see* Section III below, reflects exactly this functional understanding: presence matters less than membership in the community the apportionment power exists to represent. *Franklin* gave this practice constitutional footing, holding that the Secretary's "usual residence" determination may weigh an "element of allegiance or enduring tie to a place." 505 U.S. 788, 804 (1992). Section 60.4's exclusion of illegal aliens continues that same purposive standard, applied to a category whose relationship to the political community is, by definition and by federal law, neither durable nor sanctioned.

6. Section 60.4 draws a familiar line. Read for what it is—a mechanism for allocating political power, not a guarantee of individual rights—the Apportionment Clauses' use of "persons" is properly construed in light of that allocative purpose. Section 60.4 does not ask the Bureau to adopt a novel or aggressive reading of the term. It asks the Bureau to apply, in this one remaining context, the same line between rights and political functions that the Constitution's text, purpose, and the Supreme Court's alienage doctrine already draw everywhere else.

F. Exclusion From the Franchise Confirms That Illegal Aliens Are Not Part of the Political Community.

It is incoherent for a population barred from the franchise to be the mechanism by which a State gains additional votes in the very institutions that population cannot vote for. Illegal aliens cannot vote in federal elections, and their presence is, in the overwhelming majority of cases, itself a violation of federal immigration law. They are not nonvoters in the incidental sense that children or felons are nonvoters; they are nonvoters whose very domestic presence the political branches have determined should not be occurring. Reading the Apportionment Clause to reward a State with additional representation and electoral votes for harboring a larger unlawfully present population would make the Constitution an incentive for the very condition Congress has spent a century legislating against. It would

invite States to tolerate, or even encourage, that population precisely to gain political influence. *See* Wolverton, *supra*.

The principle is not new. Then-Judge Brett Kavanaugh, writing for a three-judge district court, articulated it in the closely analogous setting of campaign finance law. In *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court), *aff'd*, 565 U.S. 1104 (2012), the court upheld the federal ban on campaign contributions and election-related spending by foreign citizens, explaining that "the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government in the United States," activities that have long included voting, jury service, and other core forms of political participation. *Id.* at 286–87. The court distilled the principle into a single sentence: "It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." *Id.* at 288.

That principle applies here with equal, if not greater, force. The plaintiffs in *Bluman* were foreign citizens ***lawfully*** present on temporary work visas—individuals with a colorable, sanctioned tie to the country who simply lacked citizenship. *Id.* at 284. Illegal aliens have no comparable claim; their presence lacks not only citizenship but lawful sanction altogether. If the Constitution permits the political process to exclude even lawfully present noncitizens from the mechanics of democratic governance, it is difficult to construct a coherent theory under which the Apportionment Clause nonetheless requires that same process to expand a State's representation and electoral votes on account of a population with a weaker claim to membership than the *Bluman* plaintiffs possessed. Excluding illegal aliens from the reapportionment base does not deny them a right the Constitution otherwise protects; it simply declines to convert their presence into a lever by which they, and citizens residing alongside them inside the same State's borders, gain a voice in the institutions of government from which *Bluman* confirms they may lawfully be excluded.

If the political community may exclude even lawfully present noncitizens from the mechanics of democratic governance, it may at a minimum decline to count unlawfully present aliens toward its representation. Additionally, it certainly cannot be ignored that the logic of *Bluman* would support the exclusion of lawful permanent residents from being counted in the census as well.

G. Hoffman *Plastic Compounds* Confirms That Federal Immigration Policy Can Foreclose Generally Available Statutory Benefits to Persons Unlawfully Present.

The Supreme Court has established, in a majority opinion joined by five Justices, that federal immigration policy, specifically the Immigration Reform and Control Act of 1986 (IRCA), can foreclose the extension of a statutory benefit, generally applicable on its face, to a person whose presence and employment in the United States is independently unlawful, even where nothing in the text of the statute conferring the benefit draws that distinction. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

In *Hoffman*, an undocumented worker, Jose Castro, was laid off in retaliation for union organizing—a clear violation of the NLRA. *Id.* at 140–41. The NLRB awarded him backpay for the period following his layoff, and the D.C. Circuit enforced the award. *Id.* at 141–42. The

Supreme Court reversed, holding that "such relief is foreclosed by federal immigration policy, as expressed by Congress" in IRCA. *Id.* at 140. The Court reasoned that awarding backpay to a worker who was never lawfully entitled to be employed in the United States would "trench upon" a federal statute and policy—immigration law—that lies "outside the Board's competence to administer," and that the Board's broad remedial discretion under the NLRA must yield when its exercise would conflict with that independent federal scheme. *Id.* at 147, 151.

Critically, *Hoffman* did not hold that undocumented workers cease to be "employees" under the NLRA; *Sure-Tan*'s holding on that point survived. *See id.* at 144, 150 n.4. What *Hoffman* holds is narrower and, for present purposes, more useful: even where a statute's own terms would, read in isolation, extend a benefit to a person unlawfully present, that extension must give way where it would conflict with the federal government's immigration policy. The Court framed this as a settled principle running back decades—to *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), and to *Sure-Tan* itself: the Board's "remedial preferences" cannot be deployed in a manner that undercuts federal statutes and policies "unrelated to the NLRA." *Hoffman*, 535 U.S. at 144.

The application to this rulemaking is straightforward. The proposed § 60.4 exclusion does not require the Bureau to declare that illegal aliens are not "persons" in the abstract, any more than *Hoffman* required the Court to declare that Jose Castro was not an "employee." It requires only the narrower conclusion—precisely the one *Hoffman* reached in the closely analogous context of labor law—that extending a discretionary, administratively defined benefit (there, a backpay remedy; here, apportionment credit under the "usual residence" standard) to persons whose presence in the country is independently unlawful conflicts with, and must yield to, the federal government's immigration policy. If the Board's otherwise broad remedial authority under the NLRA must bend to IRCA, the Bureau's own discretionary "usual residence" standard, which the proposed rule and *Franklin v. Massachusetts* both confirm already incorporates an "element of allegiance," 505 U.S. at 804, can and should bend the same way.

In short, this principle rests on controlling Supreme Court precedent—the most authoritative support available short of a decision addressing apportionment itself.

H. Apportionment Fixes Political Power for a Decade, But Federal Law Makes Illegal Aliens' Presence Revocable From the Day They Are Counted.

Apportionment is not a snapshot without consequences. Once the decennial count is taken, the resulting allocation of House seats—and, through Article II, Electoral College votes—remains fixed for ten years, however the population changes in the interim. That feature makes the legal status of the population counted directly relevant to whether counting them serves any coherent purpose, and supplies a policy justification for § 60.4 independent of the constitutional and doctrinal arguments above.

1. Illegal aliens are, by definition and as a matter of settled federal law, subject to removal at any time. Federal immigration law makes aliens unlawfully present in the United States removable. An admitted alien "present in the United States in violation of [the Immigration and Nationality Act] or any other law of the United States . . . is deportable," 8

U.S.C. § 1227(a)(1)(B), and an alien "present in the United States without being admitted or paroled" is inadmissible, *id.* § 1182(a)(6)(A)(i); *see also* 8 U.S.C. §§ 1229a, 1182(a)(9)(B) (removal proceedings and escalating bars to future admission). Aliens who entered without inspection are removable as inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) (alien "present in the United States without being admitted or paroled"). While Section 1227(a)(1)(B) doesn't create a mandatory duty, it says "is deportable," which is a discretionary power that could be utilized by the federal government at any time.

The Supreme Court has described removal proceedings as the mechanism by which the government gives effect to Congress's judgment that unlawfully present aliens have no legal entitlement to remain. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984); *see also Arizona v. United States*, 567 U.S. 387, 396 (2012). Whatever discretion the Executive Branch may exercise in the pace or priority of enforcement in any given period, the underlying legal status does not change: an illegal alien counted on Census Day has, as a matter of federal statute, no legal right to remain in the United States the following day, much less for the ten years the resulting apportionment will govern.

2. This policy problem exists independent of, and reinforces, the constitutional and doctrinal arguments developed above. Sections II.A through II.H establish that the constitutional text, properly read in light of the apportionment power's purpose, does not compel counting illegal aliens, and that Congress and the Bureau possess ample authority to exclude them. This subsection adds a distinct justification that does not depend on the Constitution: it would make little sense to apportion a decade of political representation on the strength of a population that federal law itself classifies as subject to removal. The constitutional "enduring tie" standard from *Franklin* and the policy incoherence of counting a legally removable population are, at bottom, the same concern viewed from two directions.

I. Then-Judge Kavanaugh's Dissent in *Agri Processor Co. v. NLRB* Applies the Same Principle to a Closely Parallel Election.

A union election presents a problem closely analogous to apportionment, and then-Judge Kavanaugh's dissent in *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), addresses it directly. There, a company's employees voted to unionize, and the employer later discovered that a majority of those who cast ballots were unauthorized workers whose employment was itself illegal under federal immigration law. *Id.* at 10 (Kavanaugh, J., dissenting). The employer argued that the election could not stand because illegal workers did not qualify as "employees" entitled to organize and vote under the National Labor Relations Act. The panel majority, applying the Supreme Court's holding in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), disagreed and enforced the election result.

Judge Kavanaugh dissented, observing that "illegal immigrant workers voted in a union election and affected the election's outcome," even though their presence in the workforce was independently unlawful. *Agri Processor*, 514 F.3d at 10 (Kavanaugh, J., dissenting). The term "employee" in the NLRA, he reasoned, could not be read in isolation from Congress's subsequent Immigration Reform and Control Act of 1986, which made it unlawful for employers to hire unauthorized workers in the first place. Reading the NLRA to let illegal workers decide a representation election was, as even Judge Henderson acknowledged in a

concurring opinion, "somewhat peculiar": it let a category of persons whose very presence in the regulated activity was unlawful control the outcome of a process reserved for lawful participants. *See id.* at 9–10 (Henderson, J., concurring).

The parallel to apportionment is direct. Just as then-Judge Kavanaugh read the immigration laws' prohibition on unauthorized employment as bearing on whether unauthorized workers should be treated as "employees" entitled to shape a union election's outcome, the immigration laws' prohibition on unauthorized presence should equally inform whether unlawfully present persons are properly treated as "persons" whose presence shapes the outcome of the apportionment process—a process that, like the union election in *Agri Processor*, exists to measure and give effect to the will of a defined, lawfully constituted constituency. Then-Judge Kavanaugh's answer was that the later immigration law should inform the reading of the older term. That is the right answer here as well.

J. Reapportionment Must Track the Citizens It Represents, Not a Population Detached From Them.

Bluman establishes that noncitizens, even those lawfully present, have no constitutional entitlement to participate in democratic governance. *Hoffman* establishes, and then-Judge Kavanaugh's *Agri Processor* dissent confirms, that federal immigration policy properly limits the extension of generally worded statutory benefits to persons whose presence is independently unlawful. And counting a nonvoting population in the reapportionment base debases the votes of citizens who live alongside them, in precisely the manner *Wesberry* and *Reynolds* condemn. *See* Murphy, *supra*, at 973–74, 983. Taken together, these authorities compel a conclusion beyond the narrow legal question of whether illegal aliens are "persons": a reapportionment base that counts them shifts the benefits of political representation away from citizens who abide by the Nation's laws and toward the States that countenance noncompliance with those laws. The number of House seats and electoral votes is fixed. A seat awarded to a State on the strength of its unlawfully present population is a seat necessarily taken from a State whose residents are lawfully present and who, unlike the population inflating their neighbor's count, are actually entitled to select the representatives who wield it. *See* Section II.E.2 (citing Camarota & Zeigler, *supra*).

California, New York, and Illinois make this concrete. The 2020 census fixed the current allocation of House seats and Electoral College votes through 2030. In that count, California grew 6.1% and New York 4.2% over the preceding decade, though both trailed the national rate of 7.4%; Illinois was one of only three States to lose population at all, declining 0.1%. U.S. Census Bureau, *2020 Census Apportionment Results* (Apr. 26, 2021). Those counts—not the States' citizen populations—fixed each State's current share of the House and the Electoral College. The Bureau's own most recent official population estimate shows that growth has since reversed: California is now down 0.51% and New York down 1.00% since the 2020 count, while Illinois's decline has continued and deepened to 0.80%. U.S. Census Bureau, *Vintage 2025 Population Estimates* (Jan. 27, 2026). All three States are now moving in a direction opposite to—or, for Illinois, further along—the trend that determines their current representation.

The convergence across three States with distinct geography and distinct economic circumstances is the point. Under current practice, the entire estimated unauthorized population in each of these States, whatever its precise size, is counted toward that State's apportionment total at full weight, regardless of whether the State's actual citizen population is growing, stable, or in decline. California's and New York's House delegations and Electoral College votes were built on growth during the 2010s that has since reversed; Illinois's declining representation has been cushioned for over a decade by an unauthorized population large enough to rank among the Nation's largest.

The current practice also undermines the competition among the States that our federal system is designed to foster. As the Supreme Court has explained, the federalist structure "makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Economists know the idea as the Tiebout hypothesis: "The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods." Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956). To be sure, Tiebout wrote about local governments. See id. at 418 n.9. But the Constitution builds the same competition into the relationship among the States, and the decennial apportionment keeps score. A State that grows its economy attracts workers and residents, and a State that grows faster than its sister States gains seats in the House and votes in the Electoral College. See U.S. Const. art. I, § 2, cl. 3; id. art. II, § 1, cl. 2. That is how apportionment is supposed to work. It rewards the States that succeed in attracting new lawful residents through their legal policy choices.

Counting illegal aliens inverts that design. A declining State is not supposed to be rewarded for inducing, or even merely tolerating, the in-migration of aliens whose presence federal law forbids. Yet the current practice does just that: it lets a State offset the residents it loses to faster-growing States with a population that has no lawful claim to be there, and so keep seats and electoral votes the competition would otherwise have shifted elsewhere. A system designed to reward responsive government instead rewards the toleration of unlawful immigration. That defeats the federalism-promoting purposes of the Constitution and runs entirely contrary to the logical thrust of the Supremacy Clause.

No claim about any State's motive is required to make this point. Whether or not any State's policies are calibrated toward this outcome, the mechanism operates the same way: it allows a State's congressional delegation and Electoral College weight to be detached from the citizen population actually governing itself within it, so long as an unauthorized population large enough to compensate is present and counted. That three States differing in geography and economic circumstance all share this feature confirms that it is a property of the ***rule***, not an artifact of any single State's politics. And under the current practice the proposed rule would correct, a State that tolerates the growth of an unlawfully present population within its borders is rewarded for that choice with seats and electoral votes that properly belong to the citizens of States that comply with, and support the enforcement of, the Nation's immigration laws. Basic economics tells us that that which any system incentivizes will continue, if not expand. Yet the expansion of illegal immigration is manifestly contrary to the expression of Congress's Naturalization Clause powers in our immigration laws.

Section 60.4 restores the reapportionment base to the population that the apportionment power exists to represent, and removes the incentive for States to treat toleration of unlawful immigration as a strategy for acquiring political power at their lawful neighbors' expense.

K. *Evenwel v. Abbott* Confirms That the Population Baseline Is a Matter of Discretion for the States, Which the Secretary Possesses in at Least Equal Measure.

Evenwel v. Abbott, 578 U.S. 54 (2016), speaks directly to the nature of the discretion § 60.4 exercises. Properly read, it reinforces the Bureau's authority to adopt § 60.4.

In *Evenwel*, Texas voters challenged the State's use of total population, rather than the citizen population of voting age, as the baseline for drawing state senate districts, arguing that the practice diluted their votes relative to voters in districts with more nonvoting residents. A unanimous Court rejected the challenge, holding "based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population." *Id.* at 58. The Court's holding was framed throughout in the language of permission, not command: it concluded that "it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts," not that they are constitutionally required to do so. *Id.* at 64.

The Court also went out of its way to leave the opposite choice open, declining to decide whether Texas could instead use the population of eligible voters: "Because history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population." *Id.* at 75. Justice Alito's concurrence called that choice "an important and sensitive question" left for another day. *Id.* at 94 (Alito, J., concurring in the judgment). *Burns v. Richardson*, 384 U.S. 73, 92–94 (1966), on which *Evenwel* relied, had already confirmed that a jurisdiction may depart from a total-population baseline for a legitimate reason, there sustaining Hawaii's use of a registered-voter baseline. Justice Thomas's concurrence made the point explicit: "The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway . . . to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government," and "leaves the choice to the people alone." *Evenwel*, 578 U.S. at 76 (Thomas, J., concurring in the judgment).

Evenwel therefore stands for a principle that supports, rather than forecloses, § 60.4: the choice of population baseline for apportionment is an area of substantial discretion, not one governed by a single judicially fixed rule. That principle applies with at least equal force to the Secretary's choice here. Texas's discretion rests on nothing more than the Constitution's silence; the Secretary's discretion to define the "usual residence" baseline rests on an express congressional delegation, 13 U.S.C. § 141, that the Supreme Court has already construed to include the discretion to weigh an "element of allegiance or enduring tie to a place." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992); *see also Wisconsin v. City of New York*, 517 U.S. 1, 19–20 (1996). If the bare inference of discretion *Evenwel* drew for Texas is sufficient to sustain a State's chosen baseline against constitutional attack, the Secretary's express, statutorily delegated, and judicially confirmed discretion is at least sufficient to sustain the Bureau's proposed refinement of the "usual residence" baseline under § 60.4. Section 60.4

asks for nothing approaching the latitude that *Burns* recognized, and *Evenwel* left open, for state and local governments choosing among total-population, eligible-voter, and registered-voter baselines. It asks only that the Secretary continue applying the durable-tie standard *Franklin* already blesses to an additional category of persons.

That also answers any objection that *Evenwel*'s rejection of the vote-dilution theory forecloses § 60.4. The *Evenwel* plaintiffs argued that counting nonvoting residents—children and lawfully present noncitizens among them—in a total-population baseline diluted their votes, and the Court rejected that theory as a basis for compelling a different baseline. But *Evenwel* did not present, and its reasoning does not resolve, the distinct question presented here: whether, having chosen a total-population baseline, the entity responsible for defining that baseline may draw a status-based line within it between persons whose presence is lawful and persons whose presence independently violates federal law. *Evenwel* forecloses the argument that the Constitution ***compels*** a switch to an eligible-voter baseline; it says nothing about, and does not foreclose, the Secretary's authority to refine who counts as a "usual resident" within the population baseline the Bureau already uses—precisely the *Franklin* inquiry § 60.4 undertakes.

In short, *Evenwel* joins *Franklin*, *Wisconsin v. City of New York*, and *Department of Commerce v. New York* in recognizing broad discretion over who is counted and how, rather than a single, textually compelled rule.

III. Historical Practice Does Not Support Counting Illegal Aliens.

1. Counting illegal aliens for apportionment is a historically recent practice, not a longstanding tradition. The inclusion of illegal aliens in the reapportionment base "has not been an issue until recently." Murphy, *supra*, at 972. Before the 1980 census, illegal immigration was minimal and the Census Bureau did not seek out illegal aliens for the count; only in 1980 did the Bureau begin encouraging illegal aliens to "come forward" and "be counted." Murphy, *supra*, at 972 (citing *1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing Before the House Comm. on Post Office and Civil Service*, 100th Cong., 2d Sess. 53–54 (1988) (statement of Daniel A. Stein, Exec. Dir., Federation for American Immigration Reform)). The Bureau is estimated to have counted approximately 2,056,000 illegal aliens in the 1980 census and included them in the apportionment figures for each State. Murphy, *supra*, at 972 (citing *Ridge v. Verity*, 715 F. Supp. 1308, 1313 (W.D. Pa. 1989)).

2. No legal category of "illegal alien" existed when the relevant constitutional text was adopted, so the Framers cannot be said to have intended to include a category unknown to them. There were no legal conditions for residency in the United States until 1875, when Congress passed the first restrictive federal immigration statute. Murphy, *supra*, at 981–82 (citing Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 846 (1981); 1 C. Gordon & S. Mailman, IMMIGRATION LAW & PROCEDURE § 2.02(1) (rev. ed. 1988) ("The first 100 years of our national existence was a period of unimpeded immigration.")). The Fourteenth Amendment was ratified in 1868, seven years before that first restrictive statute existed. Murphy, *supra*, at 982 n.81. The Constitution imposed no citizenship requirement for

residency, because the Framers wanted to "encourage the immigration of able, skillful, and industrious" people. Murphy, *supra*, at 982 (quoting *Census Equity Act: Hearings on H.R. 2661 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 101st Cong., 1st Sess. 83 (1989) (statement of Robert L. Byer)) (in turn quoting 3 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 444 (1911)). James Madison and the First Congress did use the word "inhabitants," encompassing lawfully present aliens, to describe those to be counted. Murphy, *supra*, at 982 n.78 (citing *1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing Before the House Comm. on Post Office and Civil Service*, 100th Cong., 2d Sess. 43 (1988) (statement of Prof. T. Alexander Aleinikoff) (citing Act of Mar. 1, 1790, 1 Stat. 101; Federalist No. 54 (James Madison))). But it is illogical to transform an intent to include legal aliens into a presumption that the Framers and the drafters of the Fourteenth Amendment also intended to include illegal aliens. Murphy, *supra*, at 982 (quoting *H.R. 2661 Hearings*, *supra*, at 83 (statement of Robert L. Byer)). Neither group had any concept of an alien whose presence was itself unlawful, so neither can be said to have intended to include illegal aliens within the meaning of "persons" in the census and Apportionment Clauses. Murphy, *supra*, at 982.

3. The Bureau's own historical practice has never actually followed a literal rule of counting every person physically present. The governing standard is the "principle of usual residence," and even the Census Bureau has never strictly followed it. Murphy, *supra*, at 980 (citing Slattery & Bauleke, *"The Right to Govern is Reserved for Citizens": Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes*, 28 WASHBURN L.J. 227, 230 (1988)). Specifically:

- The Bureau **excludes** foreign tourists, treating them as nonresidents, and excludes foreign diplomats living on embassy grounds, treating them as residents of "foreign soil," notwithstanding that both groups are physically present within the United States. Murphy, *supra*, at 980 (citing *FAIR v. Klutznick*, 486 F. Supp. 564, 567 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980)).

- The Bureau **includes** overseas U.S. military personnel and their dependents in the reapportionment base notwithstanding their physical absence from the country—a policy that itself changed during the relevant period, as the Bureau formerly excluded this population and announced the shift at a 1989 congressional hearing. Murphy, *supra*, at 980 & n.77 (citing *H.R. 2661 Hearings*, *supra*, at 178, 184 (statement of Jacob S. Siegel, Dep't of Demography, Ctr. for Population Research, Georgetown Univ.)).

Excluding illegal aliens "would be but another deviation from the loose 'rule of usual residence'" the Bureau has always applied unevenly, not a departure from an otherwise consistent constitutional baseline. Murphy, *supra*, at 980. Moreover, if one searches for the single line of logic running through excluding foreign tourists while counting absent servicemembers, that can only be a line that all those who are part of the political community in the United States are to be counted. And illegal aliens fall on the excludable side for census purposes of that logical line.

4. Historical custom, even where it exists, carries little independent weight against the principle of one person, one vote. Even a historical practice of long standing would not,

standing alone, justify a constitutional infirmity: the Supreme Court has refused to be "persuaded by arguments that explain the debasement of citizens' constitutional right to equal franchise based on exigencies of history or convenience." Murphy, *supra*, at 981 (quoting *Board of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989)).

IV. The Contrary Authorities in the Record Do Not Foreclose the Rule.

A. The 1988 OLC Memorandum's Conclusion That "Persons" Includes Illegal Aliens Does Not Withstand Scrutiny.

The principal contrary authority in the record is a 1988 Office of Legal Counsel memorandum concluding that illegal aliens must be counted for apportionment. *The Application of the Apportionment Clause of the Fourteenth Amendment to Illegal Aliens*, Mem. from John O. McGinnis, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John R. Bolton, Assistant Att'y Gen., Off. of Legis. Affairs (May 16, 1988). OLC read the choice of "persons" over "citizens" as extending apportionment credit to everyone physically present in a State. It relied on the Fourteenth Amendment's drafting history, on the Bureau's practice of counting resident aliens before any legal category of unlawful presence existed, and on *Plyler v. Doe*, 457 U.S. 202 (1982). That reasoning is considerably weaker than its longevity on the field suggests.

1. The memorandum rests on no binding authority. No court has held that illegal aliens must be counted for apportionment. The two cases most often invoked for that proposition, *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), and *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989), were each dismissed without reaching the constitutional merits, so any statement in them about who must be counted is dictum. One perspective is that OLC opinions bind the Executive Branch while in effect. *See Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just*., 922 F.3d 480, 484 (D.C. Cir. 2019) (noting that "a former head of the OLC has described its formal written opinions and informal advice as 'authoritative' and 'binding by custom and practice in the executive branch'"), *But see Public Citizen v. Burke*, 655 F. Supp. 318, 321–22 (D.D.C. 1987) (distinguishing at least some OLC opinions as advisory) (citing *Edwards v. Carter*, 580 F.2d 1055, 1103 n.42 (D.C. Cir. 1978)). In order to avoid adverse assertion of the 1988 OLC opinion by prospective opponents in litigation challenges to the proposed regulations, and be best positioned to defend the constitutional, statutory, and policy grounds and decision-making for the proposed regulations, the Secretary should, prior to finalization of the proposed rule, work with DOJ's OLC to rescind the 1988 opinion, or at least provide a well-reasoned explanation in the prospective final rule as to why the 1988 opinion is inapplicable.

2. Neither *Plyler* nor historical practice controls. *Plyler* construed the Equal Protection Clause of Section 1, which protects individuals against the State. Section 2's apportionment provision serves a different function: it measures each State's share of national political power. *See* Section II.E.3. OLC simply assumed that "persons" must carry the same scope in both clauses. The Bureau's historical practice of counting resident aliens without regard to legal status proves no more. It reflects the absence of the category, not a judgment to include it, because the concept of an alien whose presence itself violates federal law matured only with the Immigration and Nationality Act of 1952 and IRCA in 1986. *See* Section III.2. Even

OLC acknowledged that the Bureau never conducted a literal headcount, since it has always excluded tourists and diplomats.

3. Intervening Supreme Court authority confirms the Bureau's discretion. Four years after the memorandum, *Franklin* held that the Secretary's "usual residence" determination may weigh an "element of allegiance or enduring tie to a place." 505 U.S. at 804. *Wisconsin v. City of New York*, 517 U.S. 1 (1996), confirmed the Secretary's broad discretion in conducting the census, and *Department of Commerce v. New York*, 588 U.S. 752 (2019), confirmed that the Enumeration Clause permits inquiry into citizenship. None of these decisions existed in 1988, and each widens the room available to the Bureau in exactly the direction the proposed rule takes.

B. The 2012 CRS Report Addresses Congressional Legislation, Not the Secretary's Delegated Rulemaking Authority.

The second contrary authority that can quickly be dispatched is a Congressional Research Service report concluding that a statutory exclusion of illegal aliens, of the kind proposed in bills such as H.R. 3797 and H.J. Res. 11, would likely require a constitutional amendment. Cong. Rsch. Serv., R41048, *Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes* (Apr. 13, 2012). CRS relied on the same *FAIR v. Klutznick* dictum and drafting history addressed above. Read closely, the report supports the Bureau's authority to act by rule.

1. CRS analyzed a different question. CRS asked whether Congress could enact a new, categorical exclusion by statute. It did not ask whether the Secretary may exercise authority Congress has already delegated to define the residence criteria that govern the count.

Congress has delegated to the Secretary standing authority to conduct the census "in such form and content as he may determine," 13 U.S.C. § 141(a), and to report the "tabulation of total population by States . . . as required for the apportionment," *id.* § 141(b). The Supreme Court has confirmed that this authority includes substantial discretion to define the residence criteria that determine who is counted, and where. *Wisconsin*, 517 U.S. at 19–20; *Franklin*, 505 U.S. at 804. Proposed § 60.4 does not amend the apportionment formula or otherwise legislate. It exercises exactly that delegated discretion. CRS's silence on this mechanism—which the Bureau uses every census cycle to decide where to count students, military personnel, and prisoners—reflects only that CRS was never asked to address it. CRS itself acknowledged commentators who argue that the Constitution does not require illegal aliens to be counted at all. Cong. Rsch. Serv., R41048, *supra*, at n.19 (citing Charles Wood, *Losing Control of America's Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1999)).

2. The Bureau's capacity to verify legal status has changed. CRS, like other commentary of that era, treated the lack of a reliable way to verify legal status as a serious practical obstacle. The proposed rule's expanded sharing of records with DHS, the State Department, and other agencies—arrangements that trace directly to Executive Order 13,880 and did not exist in 2012—answers that concern.

C. No Adverse Authority Forecloses This Rulemaking.

Neither source examined the mechanism the proposed rule actually uses. OLC asked whether the bare text compels counting illegal aliens, without the benefit of *Franklin*, *Wisconsin*, or *Department of Commerce*. CRS asked whether Congress could enact a new statutory exclusion. Neither addressed the Secretary's existing discretion (to say nothing of the Department's quiet enjoyment of using that discretion in practice), confirmed by the Supreme Court, to define residence criteria by rule. In the reasonable exercise of that discretion, the Secretary may read "persons" not to extend to illegal aliens for apportionment purposes, and no further legislative or constitutional action is required.

V. Conclusion and Requested Action.

The proposed rule rests on a correct reading of the Constitution. The Apportionment Clauses count the "inhabitants" of each State—the members of the political community that the House of Representatives exists to represent. An alien whose presence the sovereign has never permitted, and whose removal federal law directs, is not such an inhabitant. Counting illegal aliens toward a State's share of the House and the Electoral College gives that State political power at the expense of citizens in States that respect and enforce the Nation's immigration laws. The Constitution does not require that result, and the Secretary has ample delegated authority to end it.

Commenter therefore respectfully requests that the Census Bureau:

1. Adopt the exclusion of illegal aliens from the apportionment base, grounded in both the best reading of the Constitution and the Secretary's discretion under 13 U.S.C. § 141.
2. State expressly that nothing in Part 60 limits the President's authority to settle the apportionment under 2 U.S.C. § 2a.
3. Commit to publishing a total resident population tabulation as a separate statistical product, outside the apportionment base.
4. Provide tabulations of the citizen population of voting age to any State that requests them for redistricting.
5. Adopt the restrictions on demographic questions in Part 70.
6. Prior to finalization of the proposed rule, work with DOJ's OLC to rescind the 1988 OLC opinion, or at least provide a well-reasoned explanation in the prospective final rule as to why the 1988 OLC opinion is inapplicable.

Commenter appreciates the opportunity to comment and would welcome the chance to discuss these recommendations with the Bureau.

Respectfully submitted,

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