Nos. 24A884, 24A885, 24A886

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Applicants,

vs.

CASA, INC., ET AL.,

Respondents.

DONALD J. TRUMP, ET AL.,

Applicants,

vs.

STATE OF WASHINGTON, ET AL.,

Respondents.

DONALD J. TRUMP, ET AL.,

Applicants,

vs.

STATE OF NEW JERSEY, ET AL.,

Respondents.

On Applications for Partial Stays of the Injunctions Issued by the United States District Courts for the District of Maryland, the Western District of Washington, and the District of Massachusetts

BRIEF FOR PROFESSORS GABRIEL J. CHIN, ERIKA LEE, AND PAUL FINKELMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

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Amici Professors Chin, Lee, and Finkelman have a strong interest in assisting the Court to understand the historical and legal landscape giving rise to birthright citizenship, specifically as it relates to Asian immigrants, to ensure that the constitutionally protected right is upheld.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored the brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 150 years, the Fourteenth Amendment has guaranteed birthright citizenship to virtually all children born in the United States,[2] without regard to the immigration or legal status of the child's parents. The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, cl. 1. The Court affirmed the foundational tenet of the Citizenship Clause in *United States v. Wong Kim Ark*, holding that "[t]he [Fourteenth] [A]mendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States." 169 U.S. 649, 693 (1898). Notably, the Court reached this conclusion in *Wong Kim Ark* notwithstanding the systematic physical, economic, and political exclusion of Asians from the United States. Asian Americans, who make up over 7% of the U.S. population,[3] have since relied on the protections of birthright citizenship, as generations of Asian Americans have otherwise had no legal pathway to citizenship in this country.[4]

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[2] The Citizenship Clause of the Fourteenth Amendment does not apply to children of diplomats and children born to hostile armies in the country, and initially did not apply to children of Native Americans living on tribal lands. *See infra* note 8.

[3] Asian Americans: A Survey Data Snapshot, Pew Research Center, https://www.pewresearch.org/race-and-ethnicity/2024/08/06/asian-americans-a-survey-data-snapshot/ (last visited Apr. 28, 2025).

[4] The term "Asian American" is used herein to include persons of East, Southeast, and South Asian descent.

Applicants now seek to ignore the Fourteenth Amendment and this Court's clear holding in *Wong Kim Ark* and deny children of immigrants born in the United States the birthright citizenship to which they are constitutionally entitled. On January 20, 2025, President Donald J. Trump signed an Executive Order titled, "Protecting The Meaning and Value of American Citizenship" (the "Executive Order"), which provides:

> It is the policy of the United States that no department or agency of the United States government shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons: (1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth.

90 Fed. Reg. 8449 § 2 (Jan. 20, 2025). The Executive Order on its face violates the Fourteenth Amendment's right to birthright citizenship and threatens the safeguards and privileges that have long been afforded to immigrant communities.

ARGUMENT

I. The Executive Order Will Have a Disproportionate Impact on Asian Americans.

If the Executive Order is allowed to take effect, Asian Americans in particular will be disproportionally negatively and irreparably affected. Sixty-five percent of Asian Americans are foreign-born, over 63% of international students are from Asia,

and 85% of H-1B workers are from either India or China.[5] As of 2022, there were approximately 1.7 million undocumented Asian immigrants; 1 out of every 7 undocumented immigrants is Asian.[6] Denying birthright citizenship to children of undocumented Asian immigrants and children of parents on a student or work visa may render those children stateless and deprive them of fundamental civil rights, including the rights to vote, serve on juries, run for elected office, receive a passport, and obtain federal benefits.

As citizenship for Asian immigrants was severely restricted until 1952, birthright citizenship became the sole means for Asian Americans to participate and be represented in the political community. "[B]irthright citizenship continues to be one of the most common pathways for Asian Americans . . . to establish roots and build thriving futures in America."[7] Millions of Asian Americans in the U.S. are descended from immigrants. Without birthright citizenship, they would continue to be denied the right to participate in American society.

As set forth below, generations of Asian Americans have been impacted by the state-sanctioned, racially motivated exclusionary laws of the eighteenth, nineteenth, and twentieth centuries. While these laws have long been discarded, the

[5] Karthick Ramakrishnan *et al.*, By The Numbers: Immigration, AAPI Data (Jan. 9, 2025), https://aapidata.com/featured/by-the-numbers-immigration/; Carolyne Im, Alexandra Cahn & Sahana Mukherjee, What we know about the U.S. H-1B visa program, Pew Research Center (Mar. 4, 2025), https://www.pewresearch.org/short-reads/2025/03/04/what-we-know-about-the-us-h-1b-visa-program/; Open Doors Report: Top 25 Places of Origin of International Students, 2000/01 – 2023/24, Institute of International Education (2024), https://opendoorsdata.org/data/international-students/leading-places-of-origin/.

[6] Ramakrishnan *et al.*, *supra* note 5.

[7] Protect Birthright Citizenship, Stop AAPI Hate, https://stopaapihate.org/protect-birthright-citizenship/ (last visited Apr. 28, 2025).

disenfranchisement of Asian immigrants and Asian Americans by these laws led to Asians being deprived of political representation and left unable to participate in American democracy.

Despite this painful history, the United States has slowly recognized that efforts to deny citizenship to certain categories of people based on race alone is un-American and counterproductive to the American economy and society. Congress in passing the Fourteenth Amendment, and this Court in deciding *Wong Kim Ark*, came to the right conclusions regarding birthright citizenship as belonging to virtually all U.S.-born persons,[8] regardless of race, citizenship, or other status of their parents. The Executive Order unconstitutionally seeks to undo over a century of efforts to secure rights guaranteed by the Fourteenth Amendment that provide Asian Americans the right to political and economic participation. Today, more than 150 years after the ratification of the Fourteenth Amendment, is not the time to revive the experiment that made the Amendment necessary—namely, the exclusion of large hereditary groups from the political community.

II. Federal Laws Prohibited Asians from Immigrating and Naturalizing.

Although Asians today are permitted to seek citizenship in the U.S., that right has come about only gradually. From the late eighteenth century through the mid-twentieth century, U.S. immigration and citizenship laws explicitly excluded certain

[8] There are only two categories of U.S.-born children to whom the Citizenship Clause does not apply: children born to diplomats and children born to hostile armies in the country. *Wong Kim Ark*, 169 U.S. at 682. Although Native Americans were initially denied birthright citizenship (*Elk v. Wilkins*, 112 U.S. 94, 102 (1884)), Congress statutorily granted it to them in 1924 (8 U.S.C. § 1401(b)).

immigrants based on their race and nationality. As a result, Asians—who have been in the United States since the late eighteenth century—were denied both formal legal status and the possibility of inclusion and integration into the political community.[9] This exclusion lasted, in whole and in part, over 150 years, from 1790 until 1952.

Between 1940 and 1946, Congress allowed people from the Philippines, China, and the Indian Subcontinent to naturalize, while people from Japan, other parts of east, central, and southeast Asia, and various islands in the Pacific were not allowed to naturalize. *See, e.g.*, Luce-Cellar Act of 1946, Pub. L. No. 79-483, ch. 534, 60 Stat. 416 (1946) (allowing 100 persons from each of India and the Philippines to immigrate to the United States each year); Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600 (1943) (repealing the Chinese Exclusion Act); *see also* Gabriel J. Chin & Paul Finkelman, *The "Free White Person" Clause of the Naturalization Act of 1790 As Super-Statute*, 65 Wm. & Mary L. Rev. 1047, 1110 (2024). It was not until 1952, with the passage of the Immigration and Nationality Act of 1952, that all Asians were permitted to seek U.S. citizenship. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, ch. 477, § 201(a), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 (2012)). As recounted below, the passage of the Immigration and Nationality Act of 1952 vitiated decades of discriminatory laws aimed at precluding Asians from becoming citizens.

[9] "Political community" is a term with multiple meanings. According to Professor of Philosophy Tomasz Homa, political community "primarily refers to a civic community . . . that is co-created by its members who are entitled to participate in its governance and its judicial system (courts), i.e. its citizens[.]" Tomasz Homa, *Political community* (Apr. 22, 2021), https://www.researchgate.net/publication/351057543_Political_community.

A. The Naturalization Act of 1790

The Naturalization Act of 1790, the first federal statute governing citizenship, restricted naturalization to "[a]ny free white person." Naturalization Act of 1790, Pub. L. No. 1-3, ch. 3, § 1, 1 Stat. 103 (1790). Although it was later amended to allow naturalized citizenship "to aliens of African nativity and to persons of African descent[,]" *see* Naturalization Act of 1870, Pub. L. No. 41-254, § 7, 16 Stat. 256 (1870), Asian and other non-White immigrants continued to be denied the right to become U.S. citizens.

B. The Anti-Coolie Act of 1862

In 1862, the U.S. Congress passed "An Act to Prohibit the 'Coolie Trade' by American Citizens in American Vessels," which prohibited U.S. citizens or vessels from transporting "the inhabitants or subjects of China, known as 'coolies,' . . . as servants or apprentices, or to be held to service or labor[.]"[10] Ch. 27, § 1, 12 Stat. 340 (1862). Although couched as anti-slavery legislation, the Anti-Coolie Act sought to protect the economic interests of White laborers by restricting Asian immigration.

C. The Page Act of 1875

An Act Supplementary to the Acts in Relation to Immigration (commonly known as the "Page Act of 1875"), Pub. L. No. 43-141, ch. 141, 18 Stat. 477 (1875), specifically "targeted Chinese women, requiring them to obtain certificates of

[10] The term "coolie" is a derogatory term referring to "an unskilled laborer or porter usually in or from the Far East hired for low or subsistence wages." *Coolie*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/coolie (last visited Apr. 23, 2025); *see also* Moon-Ho Jung, *Outlawing "Coolies": Race, Nation, and Empire in the Age of Emancipation*, 57 Am. Q. 677, 679 (2005).

immigration showing that they were not entering the United States 'for lewd and immoral purposes.'" Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan. L. Rev. 809, 836 (2007). The Page Act provided:

> In determining whether the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary, . . . it shall be the duty of the consul-general or consul of the United States residing at the port from which it is proposed to convey such subjects, in any vessels enrolled or licensed in the United States, or any port within the same, . . . to ascertain whether such immigrant has entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes . . . .

Page Act of 1875 § 2. While couched as anti-prostitution legislation, "the Page Act was discriminatorily applied and aimed to exclude all Chinese women based on a constructed stereotype that Chinese women had a cultural inclination toward prostitution." Stewart Chang, *Feminism in Yellowface*, 38 Harv. J.L. & Gender 235, 242 (2015). To that end, "the Asian prostitute was politically utilized in the nineteenth century as a racial 'Other' against which normative citizen and immigrant subjects who could racially and culturally belong in America were defined." *Id.*

Congress did not repeal the Page Act until 1974.

D. The Chinese Exclusion Act of 1882 and the Geary Act of 1892

The Chinese Exclusion Act of 1882 continued to exclude Asians by halting the immigration of laborers from China or of Chinese ancestry. Officially titled "An act to execute certain treaty stipulations relating to Chinese," the Chinese Exclusion Act expressed "the opinion of the Government of the United States [that] the coming of Chinese laborers to this country endangers the good order of certain localities within the territory[.]" Pub. L. No. 47-126, ch. 126, § 1, 22 Stat. 58 (1882). This Act halted

the immigration of "skilled and unskilled [Chinese] laborers and Chinese employed in mining" for a ten-year period and prohibited Chinese immigrants from becoming naturalized citizens. *Id.* §§ 1, 14-15.

With the Act of May 5, 1892, commonly known as the Geary Act, Congress extended the Chinese Exclusion Act by another ten years. Pub. L. No. 52-60, 27 Stat. 25 (1892). Section 6 of the Geary Act also created an additional requirement that Chinese persons—and only Chinese persons—lawfully present in the country must register with the "collector of internal revenue of their respective districts" and carry a "certificate of residence" to prove their lawful entry. *Id.* Failure to register rendered the Chinese person's presence unlawful and subjected that person to arrest, imprisonment, and deportation. *Id.*

In 1902, as the Geary Act was expiring, Congress extended the Chinese Exclusion Act indefinitely. Act of April 29, 1902, Pub. L. No. 57-90, 32 Stat. 176 (1902). The Chinese Exclusion Act was not repealed until 1943. Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600 (1943). In addition, until 1965, Chinese were restricted by other provisions of the Immigration and Nationality Act of 1952, such as a limit on Asian immigration from anywhere in the world to 2,000 annually. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 291 & nn.68-69 (1996).

E. The Immigration Act of 1917

The Immigration Act of 1917 built upon the Chinese Exclusion Act. Among other things, the Immigration Act of 1917 banned all immigrants from the "Asiatic Barred Zone," which spanned from the Middle East to Southeast Asia. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 875-76 (1917). As a result, an estimated 500 million Asian people were officially barred from immigrating. Erika Lee, *America for Americans: A History of Xenophobia in the United States* 138 (2019). In addition, the literacy requirement imposed by the Immigration Act of 1917 "significantly reduced immigration from countries with lower levels of literacy by approximately 70%." Ina Ganguli & Jennifer R. Withrow, *Closing the Gates: Assessing Impacts of the Immigration Act of 1917*, at 7 (Nat'l Bureau of Econ. Research, Working Paper No. 32624, 2024).

The Immigration and Nationality Act of 1952 repealed the Immigration Act of 1917.

III. Courts Uphold Laws Denying Asian Immigrants from Participating in the Political Community.

Legislative efforts to limit Asians from becoming U.S. citizens were reinforced by the courts, which held on numerous occasions that such restrictions were permissible and properly denied Asians citizenship on grounds that they were not White. Such rulings reinforced the notion that Chinese immigrants were not part of the political community.

In *In re Ah Yup*, the Chinese-born petitioner sought to become a naturalized citizen. 1 F. Cas. 223, 223 (C.C.D. Cal. 1878). The United States Circuit Court for

the District of California denied the petition on grounds that, "[i]n all the acts of congress relating to the naturalization of aliens, from that of April 14, 1802, down to the Revised Statutes, the language has been 'that any alien, being a free white person, may be admitted to become a citizen,' etc." *Id.* The court found that "it [wa]s entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization." *Id.* at 224. Because "a native of China . . . is not a white person within the meaning of the act of congress," Ah Yup could not become a U.S. citizen. *Id.*

In *Fong Yue Ting v. United States*, the Court upheld the constitutionality of the Geary Act of 1892. 149 U.S. 698 (1893). The Court explained that "[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country." *Id.* at 707. Chinese migrants "continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest." *Id.* at 724. The reasoning articulated in *Fong Yue Ting* made clear the Court's belief that Chinese immigrants were inferior to, and were not entitled to the same legal protections as, U.S. citizens.

The Court later expanded its views on what it meant to be White for purposes of naturalization. In *Ozawa v. United States*, 260 U.S. 178 (1922), Takao Ozawa, a

Japanese man who had been born in Japan and resided in the United States for 20 years, sought citizenship under the Naturalization Act of June 29, 1906, 34 Stats. at Large, Part I, Page 596, which provided "for a uniform rule for the naturalization of aliens." Despite this, the Court concluded that it was Congress's intent for naturalization to be limited to "aliens, being free white persons and to aliens of African nativity and to persons of African descent," as set forth in section 2169 of the Revised Statutes. *Ozawa*, 260 U.S. at 192-94. Indeed, the Court recognized the exclusion of non-White aliens from citizenship as "a rule in force from the beginning of the government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions[.]" *Id.* at 194. The Court ultimately held that Ozawa was not White because he was not Caucasian. *Id.* at 198 ("The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian[.]"); *id.* at 198 ("[T]he words 'white person' are synonymous with the words 'a person of the Caucasian race[.]'").

Similarly, in 1925, the Court denied naturalization to a Japanese immigrant who had honorably served in the United States Navy in World War I and sought citizenship under a statute that allowed honorably discharged veterans from the war to be naturalized. *Toyota v. United States*, 268 U.S. 402 (1925); *see also* Paul Finkelman, *Coping with a New Yellow Peril: Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. Va. L. Rev. 1409, 1456 (Spring 2015).

A year after the *Ozawa* decision, the Court held that "Whiteness" also excluded persons of Indian descent. *United States v. Thind*, 261 U.S. 204 (1923). Bhagat Singh Thind, an immigrant from the Punjab region of India, applied for citizenship. *Id.* at 210. The Court held that "the words 'free white persons' [we]re words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood." *Id.* at 214-15. Because Thind was not Caucasian, he was not entitled to citizenship. *Id.* at 215 ("As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs.").

IV. State Legislation Denied Economic Opportunities for Asian Immigrants and Asian Americans.

Chinese-born persons were not just restricted from immigrating. States and local governments enacted laws prohibiting immigrants who were already in the United States from fully participating in the labor market and the economy. Such laws further established Asian immigrants as the "other" in the political community.

A. Alien Land Laws

In the mid-1800s, several states enacted laws that denied immigrants of Asian descent the right to own or lease property, thereby prohibiting them from farming their own land and ensuring they remained economically subordinate to their White counterparts.

In 1879, California amended its Constitution to restrict land ownership to only immigrants of "the white race or of African descent." Cal. Const., art. XIX, § 2, as

ratified 1879. In 1913, California passed the first Alien Land Law, which allowed only "aliens eligible to citizenship [to] acquire, possess, enjoy, transmit, and inherit real property or any interest therein." Gen. Laws Cal. Act 261. § 1. Seven years later, California voters passed an initiative that tightened the 1913 Alien Land Law by banning "persons ineligible to citizenship," as well as corporations with a majority of shareholders who were ineligible for citizenship, from leasing agricultural land. California Initiative, 1921 Cal. Stat. lxxxvii, §§ 1-14 (Nov. 2, 1920)

Between 1917 and 1935, Arizona, Washington, Louisiana, New Mexico, Idaho, Montana, Oregon, and Kansas enacted their own alien land laws with similar language. *See* 1917 Alien Land Law Act (Ariz.), ch. 43, 1917 Ariz. Sess. Laws 56, 56-58; 1921 Alien Land Law Act (Wash.), ch. 50, 1921 Wash. Sess. Laws 156, 156-60; 1921 Alien Land Law Act (La.), La. Const. art. XIX, § 21 (1921); 1922 Alien Land Law Act (N.M.), ch. 116-117, 1922 N.M. Laws 1473, 1473; 1923 Alien Land Law Act (Idaho), ch. 122, 1923 Idaho Sess. Laws 160, 160-65; 1923 Alien Land Law Act (Mt.), ch. 57-58, 1923 Mt. Sess. Laws 123, 124-26; 1923 Alien Land Law Act (Or.), ch. 98, 1923 Or. Laws 145, 145-50; 1935 Alien Land Law Act (Kan.), ch. 67, 1935 Kan. Stat. Ann. 1638, 1662-64.

During this period, the Naturalization Acts of 1790 and 1870 remained in effect and continued to make Asian immigrants ineligible for citizenship. *See supra* § II(A). Thus, while these Alien Land Laws appeared to be race-neutral, they in fact targeted Asian immigrants. The Court nevertheless upheld the constitutionality of such laws, despite their discriminatory intent and effects. *See, e.g.*, *Webb v. O'Brien*, 263 U.S.

313, 322 (1923) ("The provision of the [1920 California Alien Land Law] which limits the privilege of ineligible aliens to acquire real property or any interest therein to that prescribed by treaty is not in conflict with the Fourteenth Amendment."); *Porterfield v. Webb*, 263 U.S. 225, 233 (1923) ("We cannot say that the failure of the California Legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable."); *Terrace v. Thompson*, 263 U.S. 197, 211, 216-17 (1923) (upholding validity of Washington's 1921 Alien Land Law).

B. Laws Limiting or Banning Job Opportunities

Economic opportunities for Asian immigrants were further reduced by state and local laws that sought to restrict the types of businesses Asian immigrants could own or operate, and excluded them from certain occupations.

"Anti–Chinese sentiment was a major impetus for the California Constitutional Convention of 1879." *In re Chang*, 60 Cal. 4th 1169, 1172 (2015). In addition to prohibiting Chinese immigrants from owning land, the California legislature amended the California Constitution to make it unlawful for corporations to "employ directly or indirectly, in any capacity, any Chinese or Mongolian." Cal. Const., art. XIX, § 2, as ratified 1879.

In 1880, San Francisco sought to limit Chinese persons from operating laundries by passing two ordinances that required laundries constructed of wood to obtain a permit from the Board of Supervisors. *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886). The Board of Supervisors had sole discretion over who would receive a

permit. *Id.* At the time, people of Chinese descent owned 240 of the 320 laundries in San Francisco—none of them had been granted a permit. *Id.* at 373.

In a unanimous opinion, this Court held that, despite the race-neutral language of the ordinances, their biased enforcement violated the Equal Protection Clause. *Id.* at 374 ("[T]the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."). The Court further made clear that "[t]he rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the emperor of China." *Id.* at 368.

Chinese immigrants were also precluded from practicing law in many states. *See In re Chang*, 84 Cal. 163, 165 (1890), *abrogated by In re Chang*, 60 Cal. 4th 1169 (2015) ("Only those who are citizens of the United States, or who have *bona fide* declared their intention to become such in the manner provided by law, (and we hold that this requires that they shall be persons eligible to become such, as well as to have declared their intention), are entitled to be admitted to practice as attorneys and counselors of this court[.]") (citing Cal Civ. Proc. Code, former § 279, enacted 1872 and repealed by Stats. 1931, ch. 861, § 2, p. 1762). Because the Chinese Exclusion Act prohibited Chinese immigrants from becoming citizens, they were also denied admission to the state bar. *See In re Chang*, 60 Cal. 4th at 1175 (the discriminatory

exclusion of noncitizen Chinese immigrants "was . . . a blow to countless others who, like Chang, aspired to become a lawyer only to have their dream deferred on account of their race, alienage, or nationality. And it was a loss to our communities and to society as a whole, which denied itself the full talents of its people and the important benefits of a diverse legal profession.").[11]

V. The Fourteenth Amendment Makes Birthright Citizenship a Constitutional Right.

On July 28, 1868, Congress passed the Fourteenth Amendment to the U.S. Constitution, the first sentence of which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, cl. 1. In ratifying this Clause, Congress constitutionalized the common law rule of *jus soli*, the principle that one's citizenship is based on place of birth.[12] The Citizenship Clause repudiated this Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), that individuals of African descent, whether born a free person, manumitted and thus free, or enslaved, could never be U.S. citizens, even though they were able to vote and hold office in a number of states. *See* Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of the Revolution and Chief Taney's Originalism in* Dred Scott, 24 U. Pa. J. Const. L. 676

[11] In *In re Chang*, the California Supreme Court "grant[ed] Hong Yen Chang posthumous admission as an attorney and counselor at law in all courts of the State of California." 60 Cal. 4th at 1170. Mr. Chang, who had graduated from Columbia Law School in 1886, had been denied admission to the State Bar of California in 1890 on grounds that he was not a U.S. citizen. *Id.*; *see In re Chang*, 84 Cal. 163.

[12] Systems based on *jus sanguinis*, on the other hand, determine a child's citizenship based on that of their parents.

(2022); Paul Finkelman, Scott v. Sandford: *The Court's Most Dreadful Case and How it changed History*, 82 Chi.-Kent L. Rev. 3 (2007).

In addition to the plain language of the Amendment, Congressional debates evidence Congress's intent that the Fourteenth Amendment would grant citizenship to all U.S. born children—including children of Chinese immigrants. *See* Cong. Globe, 39th Cong., 1st Sess. 498 (1866) ("Mr. COWAN. I will ask whether it will not have the effect of naturalizing the children of Chinese and Gypsies born in this country? Mr. TRUMBULL. Undoubtedly."); *id.* ("Mr. TRUMBULL. If the Senator from Pennsylvania will show me in the law any distinction made between the children of German parents and the children of Asiatic parents, I might be able to appreciate the point, which he makes; but the law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European.").

Moreover, when it drafted and ratified the Fourteenth Amendment, Congress knew that unauthorized migrants lived within the United States, as evidenced by the numerous then existing immigration statutes regulating entry and deportation; most notably, those prohibiting the slave trade. *See generally* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. Davis L. Rev. 2215, 2227 (2021).

VI. *Wong Kim Ark* Holds that Children of Asian Immigrants Are Entitled to Birthright Citizenship.

This Court's seminal decision in *Wong Kim Ark* affirmed Congress's intent that birthright citizenship applied to children of noncitizen parents. *Wong Kim Ark* also

provides an example of how Chinese immigrants were denied the opportunity to become members of the political community.

A. Wong Kim Ark Is Born to Noncitizen Parents in California.

Wong Kim Ark was born in 1873 in San Francisco to parents who "were persons of Chinese descent, and subjects of the emperor of China" but who "at the time of his birth [were] domiciled residents of the United States[.]" *Wong Kim Ark*, 169 U.S. at 649, 650-51. Despite being long-time San Francisco residents, the immigration laws in effect at that time made Wong Kim Ark's parents ineligible for citizenship. Erika Lee, *Birthright Citizenship, Immigration, and the U.S. Constitution: The Story of* United States v. Wong Kim Ark*, in* Race Law Stories 89, 90 (Rachel F. Moran & Devon W. Carbado eds., 2008) ("Lee"). Wong Kim Ark and his parents maintained "permanent domicile and residence . . . [in] San Francisco[.]" *Wong Kim Ark*, 169 U.S. at 649, 651; Lee at 91. Wong Kim Ark was a restaurant cook; his father was a merchant. Lee at 89, 91.

B. Wong Kim Ark Is Denied Entry into the United States.

In 1890, anti-Chinese hostilities in San Francisco drove Wong Kim Ark and his parents to leave California for China. Lee at 91-92. While his parents remained in China, Wong Kim Ark returned to California that same year. *Id.* at 92; *Wong Kim Ark*, 169 U.S. at 652. Upon entry, "Wong was recognized as a native-born citizen and quickly re-admitted into the country" where he claimed to be a U.S. citizen. Lee at 92; *Wong Kim Ark*, 169 U.S. at 652.

In 1894, Wong Kim Ark "again departed for China on a temporary visit, and with the intention of returning to the United States[.]" *Wong Kim Ark*, 169 U.S.

at 652. But at this point, "the United States was quickly moving towards greater immigration restriction," and "[i]t was widely known that immigration officials could and did deny entry to those claiming birth in the United States." Lee at 92, 95. Indeed, Wong Kim Ark was denied re-entry in the United States and detained on "the sole ground that he was not a citizen of the United States." *Wong Kim Ark*, 169 U.S. at 653; Lee at 96. Because he was ostensibly of Chinese descent and thus not a U.S. citizen, he was deemed subject to the Chinese Exclusion Act of 1882 and not permitted to enter the country. *Wong Kim Ark*, 169 U.S. at 699. He was detained for four months. *Id.*

C. The Court Holds that Wong Kim Ark and All Children Born in the United States Are Citizens.

Wong challenged his exclusion as contrary to the Fourteenth Amendment's Citizenship Clause, asserting that he was a United States citizen by birth. *See generally Wong Kim Ark*, 169 U.S. In a 6-2 decision in 1898, this Court agreed, holding that "a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China . . . becomes at the time of his birth a citizen of the United States." *Id.* at 705. This Court explained:

> The right of citizenship never descends in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.

Id. at 665 (cleaned up). With this ruling, the Court made clear that the Fourteenth Amendment's Citizenship Clause applied to all persons born in the United States, regardless of race, citizenship, or other status of their parents. The Court thus

applied a "readily administrable bright line rule" as it has in other jurisdictional contexts. *Henderson* ex rel. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

VII. The Executive Order Defies the Fourteenth Amendment and *Wong Kim Ark*.

The Executive Order relies on an incorrect presumption that U.S.-born children of parents who are outside the political community should likewise be excluded. 90 Fed. Reg. 8449 § 1 (incorrectly asserting that "[t]he Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not 'subject to the jurisdiction thereof'"). This presumption runs contrary to the Court's decision in *Wong Kim Ark* and concurrent social policies, and seeks to resurrect an incorrect interpretation of the Fourteenth Amendment that ignores its literal terms and conflates race with membership in the political community. Indeed, as noted above, the Court in *Wong Kim Ark* focused solely on whether a child of aliens was "born in the country" in determining whether such child is a citizen of the United States. *Wong Kim Ark*, 169 U.S. at 665.

The logic embedded in the Executive Order echoes the exclusionary frameworks upheld by the since-repudiated Chinese Exclusion Act, *Fong Yue Ting*, *Ozawa*, and *Thind*. *See supra* §§ II(D), III. In each instance, citizenship and legal membership were explicitly tied to Whiteness or proximity to it, excluding those deemed racially and culturally incompatible with U.S. citizenship. The Executive Order's challenge to birthright citizenship for non-White children perpetuates this racialized gatekeeping. Like *Fong Yue Ting*, it questions the legitimacy of long-term residents; like *Ozawa* and *Thind*, it reinforces the belief that American citizenship

must align with Whiteness. Not only is this blatantly unconstitutional, it attempts to reverse more than a century's worth of efforts of ensuring that Asians and Asian Americans are permitted to participate in the political community as equals.

CONCLUSION

For the foregoing reasons, the Court should deny the applications.

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