Nos. 25-364 & 25-365

In the

Supreme Court of the United States

DONALD J. TRUMP, ET AL., *Petitioners*,
v.
STATE OF WASHINGTON, ET AL, *Respondents.*

DONALD J. TRUMP, ET AL, *Petitioners*,
v.
BARBARA, ET AL, *Respondents.*

On Petitions for a Writ of Certiorari to the U.S. Court of Appeals For the Ninth Circuit and Certiorari Before Judgment to the U.S. Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the importance of extending citizenship only to those who do not owe allegiance to foreign powers. The Center previously appeared before this Court as *amicus curiae* in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Claremont Institute scholars have been at the forefront of the scholarly research demonstrating that, as a matter of original public meaning, the Citizenship Clause did not extend to children born to those in the United States only temporarily or illegally. *See, e.g.*, Thomas G. West, *Immigration and the Moral Conditions of Citizenship*, in THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS AND JUSTICE IN THE ORIGINS OF AMERICA (1997); Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT (Pestritto and West, eds., Lexington Books 2003); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167 (2007); and John C. Eastman, *The Significance of "Domicile" in Wong Kim Ark*, 22 CHAP.

[1] All parties received timely notice of the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici curiae* made a monetary contribution to fund the preparation and submission of this brief.

L. REV. 301 (2019). Amicus believes that this significant body of historical scholarship will be of benefit to the Court.

SUMMARY OF ARGUMENT

All three courts below, as well as the several other forum-shopped courts that have addressed the President's "Protecting the Meaning and Value of American Citizenship" Executive Order, asserted that the text of the Fourteenth Amendment's Citizenship Clause, U.S. Const. amend. XIV § 1, is "plain," "unequivocal," and "clear," and that the issue of whether that Clause conferred automatic citizenship on the children of temporary visitors or illegal immigrations was definitively settled by the Court in *United States v. Wong Kim Ark*,169 U.S. 649 (1898). App.36a, 99a; AppB.33a.[2] Neither assertion is true. In fact, the opposite is true.

The Citizenship Clause, as understood by those who drafted and ratified it, required that the parents of children born on U.S. soil be subject to the complete jurisdiction of the United States, not a mere partial or territorial jurisdiction. The Fourteenth Amendment codified and constitutionalized the language of the 1866 Civil Rights Act, which expressly conferred automatic citizenship only on children born to parents who were not subject to any foreign power.

This understanding was recognized by this Court in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872), and upheld in *Elk v. Wilkins,* 112 U.S. 94

[2] "App." herein refers to the Cert. Petition Appendix in No. 25-364; "AppB" refers to the Appendix in No. 25-365.

(1884). It was confirmed by the leading treatise writers of the day. And it was put into effect by Executive Branch officials in the 1880s rejecting the claims of citizenship advanced by children who had been born to temporary visitors from other countries.

This Court's *holding* in *Wong Kim Ark* is not to the contrary, as the case involved a claim of citizenship by an individual born in the United States to parents who were lawfully and permanently domiciled in the United States at the time of his birth. The case did not involve children of temporary visitors or the children of parents who were present in the country unlawfully—the two categories of individuals covered by the President's Executive Order. Any language in the decision suggesting that such individuals are also covered by the Citizenship Clause is simply *dicta*.

Nevertheless, given the misunderstanding of the language of the Citizenship Clause and the scope of the *Wong Kim Ark* holding that has led these lower courts to treat the issue as settled, certiorari is warranted so that this Court can in fact settle the question whether the Citizenship Clause confers automatic citizenship on the children of temporary sojourners or illegal aliens, particularly in light of the fact that no such claim was ever presented to nor ratified by the American people in the process of ratification of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I. The Lower Court Holdings that the Citizenship Clause Confers Automatic Citizenship on the Children of Temporary Visitors and Illegal Aliens is Neither "Settled" Law Nor Correct.

The courts below all treated the question whether the Citizenship Clause of the Fourteenth Amendment confers automatic citizenship on the children born in the United States to temporary visitors or illegal aliens as "settled" law based on "plain," "clear," and "unequivocal" text and controlling precedent of this Court, App.36a, 98a, 106a; AppB.33a, when it is not. The lower courts therefore "decided an important federal question that has not been, but should be, settled by this Court," warranting this Court's review. Sect. Rule 10(c). Moreover, not only did this Court not "settle" the question in *Wong Kim Ark* or in any case since, the historical record does not support such a conclusion.

A. *Wong Kim Ark* did not consider whether the Citizenship Clause conferred automatic citizenship on the children of temporary visitors or illegal aliens.

The lower courts in these cases fundamentally misconstrue the scope of the *holding* of this Court's decision in *Wong Kim Ark*. They treat the case as conclusively establishing that virtually all persons born on U.S. soil, regardless of parental status, are automatically citizens under the Fourteenth Amendment, subject only to the few narrow exceptions of children born to diplomats or soldiers in occupying armies. *See, e.g.*, App.36a, 98a; AppB.33a. In doing so, the Ninth Circuit dismisses the critical fact of Wong Kim Ark's parents' lawful and permanent domicile as merely incidental, asserting that "domicile did not play a significant role in the Court's analysis of the Citizenship Clause's requirements." App.25a. This characteriza-

tion ignores both the Court's framing of the issue presented in the case and the established principles distinguishing holding from *dicta*.

The *Wong Kim Ark* Court explicitly described the "question presented" as concerning a child born in the United States to parents "who have a *permanent domicile* and residence in the United States, and are there carrying on business." *Wong Kim Ark*, 169 U.S. at 653 (emphasis added). This fact was not incidental—it was foundational to the District Court's certified question, the stipulated record, and the Court's entire analysis. *Id*. at 650–53. The terms "domicile," "domiciled," "permanent domicile," and "domiciled residents" appear nearly thirty times throughout the majority and dissenting opinions, underscoring the centrality of lawful, permanent residence to the Court's reasoning. *See generally id*.; Eastman, *The Significance of "Domicile"*, *supra*, at 304-05.

The legal significance of "domicile" cannot be overstated. It is not mere physical presence, but the *lawful* establishment of a "permanent home" with an intent to remain indefinitely—something fundamentally distinct from the transient presence of sojourners, visitors, or temporary residents. See Eastman, *Significance of "Domicile"*, *supra*, at 305–06. Accordingly, the actual *holding* of *Wong Kim Ark*—the binding legal determination answering the specific question presented—is limited to the citizenship status of children born in the United States to parents who were lawfully and permanently domiciled in the country. Statements in the opinion suggesting a broader application based solely on birth within the territory without regard to parental allegiance or domicile exceed the factual predicate of the case and constitute

non-binding *dicta*. As Chief Justice Marshall explained in *Cohens v. Virginia*, "general expressions ... taken in connection with the case" but extending "beyond the case ... may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), quoted in *Wong Kim Ark*, 169 U.S. at 679.

The lower courts' reliance on such *dicta* to assert that the citizenship of children born to temporary visitors or illegal aliens is "well-settled" is thus profoundly mistaken. This Court has never held that such children are automatically entitled to citizenship under the Fourteenth Amendment.

Thus, far from being an incidental detail, the domicile of Wong Kim Ark's parents was indispensable to the Court's holding. The lower courts' treatment of *Wong Kim Ark* as controlling on an issue not addressed in that decision warrants this Court's review.

B. The Historical Evidence Cited By The Lower Courts Is Inconclusive, at Best.

In reaching their conclusion that Plaintiffs (Respondents here) were likely to succeed on the merits of their facial challenge, the lower courts cite a patchwork of historical sources ranging from early Supreme Court cases to fragments of congressional debates and isolated comments from later decisions. But none of these authorities, properly understood, support their conclusion that the law on this subject is "well-settled."

i. Mischaracterization of *Gardner v. Ward*

The Ninth Circuit cited *Gardner v. Ward*, 2 Mass. (1 Tyng) 244 (1805), as evidence that prior to the Fourteenth Amendment, "the prevailing view was that the United States adopted this idea of citizenship by birth within the territory." App.27a. That claim is incorrect. As the case notes, the individual whose citizenship was at issue, Henry Gardner, "was born in *Salem* [Massachusetts] … in the year of our Lord 1747," nearly thirty years *before* the American Declaration of Independence. *Id.* at *1. He was therefore a British subject at birth who was clearly subject to the English rule of *jus soli*. The issue in the case was whether his departure in 1775 and then subsequent return in 1781 deprived him of the general wartime transfer of allegiance from Great Britain to the United States that applied to all British subjects in colonial America. The Court held that he was a U.S. Citizen because his temporary removal for business purposes did not constitute a repudiation of that new citizenship, not because of some American rule of birthright citizenship.

ii. Overreliance on *Lynch v. Clarke*

The Ninth Circuit's reliance on *Lynch v. Clarke* fares no better. *See* App.27a (citing *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844). *Lynch* was merely a state trial court decision, issued pursuant to an express provision of the New York state constitution that specifically adopted the English common law as controlling in New York unless and until changed by the legislature. *See* N.Y. Const. art. I, § 14; Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, at 19

n.70 (Feb. 22, 2025, rev. Apr. 17, 2025).[3] More fundamentally, in a subsequent flip-side-of-the-coin case, the New York Supreme Court (the State's intermediate appellate court), held that the children of those "traveling or sojourning abroad," "though born in a foreign country, are not born under the allegiance, and are an exception to the rule which makes the place of birth the test of citizenship." *Ludlam v. Ludlam*, 1860 WL 7475 (N.Y. Gen. Term. 1860). That decision was affirmed by the New York Court of Appeals, which held: "*By the law of nature alone*, children follow the condition of their *fathers*, and enter into all their rights. The *place of birth* produces no change in this particular…." *Ludlam v. Ludlam*, 26 N.Y. 356, 368 (1863) (emphasis in original).

iii. Discounting of Justice Story's *Commentaries on the Conflict of Laws*

The Ninth Circuit discounted Justice Joseph Story's views on citizenship as reflected in his *Commentaries on the Conflict of Laws*. App.28a. While acknowledging Story's view that a "reasonable qualification" of the birthright citizenship general rule was "that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business," the court read Justice Story's caveat—that "[i]t would be difficult, however, to assert, that in the present state of public law such a qualification is universally established"—as concession that the general rule was otherwise. *Id.* (quoting Joseph Story, *Commentaries on the Conflict of Laws* § 48, at 48 (1834)). But

[3] Available at https://ssrn.com/abstract=5140319.

Story's caveat implies the opposite, and it did not diminish the importance he assigned to the principle itself—citizenship based on consent rather than mere territorial birth by sojourners. *Id.*

Story's broader jurisprudence confirms this understanding. He recognized significant limitations on the application of English common law in America, explaining that Americans adopted "only that portion which was applicable to their situation." *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829); *see also* Erler, *supra*, at 179. In cases such as *Inglis v. Trustees of Sailor's Snug Harbor*, Story emphasized the revolutionary shift from the English doctrine of perpetual allegiance to a citizenship founded upon consent and election. See *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155–61 (1830) (Story, J.).

iv. Misunderstanding of Senator Conness's Remarks on Citizenship

The Ninth Circuit quoted Senator Conness's statement during congressional debates about "children of all parentage whatever" becoming citizens to suggest that Senator Conness supported a sweeping rule of birthright citizenship divorced from parental allegiance. App.30a (quoting Cong. Globe, 39th Cong., 1st Sess. 2891 (1866)). Read in context, however, just the opposite is the case. Senator Conness's statement arose during an exchange initiated by Senator Cowan. Senator Cowan asked whether the proposed language would extend citizenship to the children of Chinese immigrants and Gypsies, and he specifically asked whether they were to have "more rights than sojourners." *See* Cong. Globe, 39th Cong., 1st Sess. 2890-91 (1866) (statements of Sens. Cowan and Conness). Senator Cowan's question necessarily presumes that the

children of mere sojourners would not be entitled to automatic citizenship. Senator Conness's response, therefore, also necessarily only applies to Chinese immigrants and Gypsies who were not mere sojourners. Contrary to the Ninth Circuit's view, therefore, this exchange fully supports the provision in President Trump's executive order acknowledging that the Fourteenth Amendment does not confer automatic citizenship on children born to temporary visitors.

Moreover, the concerns raised by Senator Cowan prompted immediate and unambiguous clarification from the amendment's principal sponsors. Senators Trumbull and Howard reaffirmed that the phrase "subject to the jurisdiction thereof" imposed a requirement of "complete jurisdiction" and undivided allegiance, thereby excluding children whose parents owed allegiance to a foreign power. See *id*. at 2893 (statement of Sen. Trumbull); *id*. at 2895 (statement of Sen. Howard).

v. Overreliance on *Dicta* in several mid-20th century cases.

The Ninth Circuit also relied on statements in two mid-20th century cases, *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957), and *INS v. Errico,* 385 U.S. 214, 215 (1966), and two cases from the 1980s, *INS v. Rios-Pineda,* 471 U.S. 444, 446 (1985), and *Plyler v. Doe*, 457 U.S. 202, 215 (1982). App.32a-33a. Although all four include statements regarding birth citizenship, in none does that language form part of a binding holding.

In *Hintopoulos*, the question was whether the parents could be deported even though the Court assumed, without deciding, that their child was a citizen

by birth. 353 U.S. at 73. Had the Court answered that question in the negative, the child's citizenship would have been essential to its analysis, since the statute required a close familial relationship with a U.S. citizen. But the Court upheld the deportation order regardless, so the child's citizenship was never necessary to the judgment and cannot be treated as a holding. The same is true of *Rios-Pineda*. The Attorney General's refusal to suspend deportation rested on his discretionary authority, which could be exercised without determining whether the statutory eligibility requirements were satisfied. 471 U.S. at 449 (citing *INS v. Bagamasbad*, 429 U.S. 24 (1976)). In both cases, the citizenship of the child was irrelevant to the outcome and therefore constitutes *dicta*.

Errico is a bit different. The Court's statements in the consolidated cases that the children were citizens (in *Errico*, that "A child was born to the couple in 1960 and acquired United States citizenship at birth," *Errico*, 385 U.S. at 215, and in *Scott*, that "After entering the United States in 1958, she gave birth to an illegitimate child, who became an American citizen at birth," *id.* at 216), were necessary in light of the Court's ultimate holding that the respective parents could not be deported, as a close familial relationship to a citizen was one of the prerequisites for the statutory exemption from deportation at issue. These statements are thus not technically *dicta*, as was the case with the statements in *Hintopoulos* and *Rios-Pineda*. But the statements are not binding for another reason. The citizenship of the children was not contested, and the Court conducted no analysis of whether children born to illegal immigrants (in *Errico*, by making a material misrepresentation on the visa application;

in *Scott*, by entering into a sham marriage) were automatically citizens by virtue of the Fourteenth Amendment. It is well established that questions merely assumed or passed over without consideration do not establish binding precedent. *See, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Therefore, the unanalyzed assumption in *Errico* cannot be treated as binding precedent affirming automatic citizenship for children born under such circumstances.

Finally, the Ninth Circuit relied on a footnote in *Plyler v. Doe*. The footnote is clearly *dicta* because the issue in the case involved the Equal Protection Clause, not the Citizenship Clause. The case does, however, call to mind an important textual distinction between the two. The Equal Protection Clause applies to all "persons *within the jurisdiction*" of the United States, language with clear geographic import, whereas the "*subject to the jurisdiction*" language in the Citizenship Clause does not have (or at least does not necessarily have) such import. As this Court has frequently recognized, different language in different parts of the same legal text is generally presumed to have different meaning. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

II. The Contrary Evidence is Compelling.

A. The American Revolution Rejected the Feudal Doctrine of Birthright Subjectship in Favor of Citizenship Based on Consent and Allegiance

Understanding the Citizenship Clause of the Fourteenth Amendment requires appreciating the revolutionary break from English feudal concepts of subjectship, from which the modern notion of automatic birthright citizenship based solely on the accident of location at birth is derived. See Erler, *supra*, at 170–72.

i. English Common Law and Perpetual Allegiance

Under English common law, as articulated in *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B. 1608), and William Blackstone's *Commentaries*, birth within the King's dominions automatically rendered one a "natural-born subject." *See* William Blackstone, Commentaries 1:366–70 (1765). Blackstone described this natural allegiance as a "debt of gratitude" that could not be "forfeited, cancelled, or altered, by any change of time, place, or circumstance." *Id*. at 357-58.

This conception explicitly denied the right of expatriation. Once born a subject, a person remained a subject for life, regardless of any later wishes or actions. *See id.*; *see also*, Erler, *supra*, at 179.

ii. The American Revolution and the Shift to Citizenship by Consent

The American Revolution repudiated this feudal doctrine. The Declaration of Independence proclaimed that governments derive "their just powers from the consent of the governed," and that the people possess an inherent right to "alter or abolish" any government

destructive of their rights. *The Declaration of Independence* ¶ 2, 1 Stat. 1 (1776). Its closing paragraph made this rejection of perpetual allegiance unmistakable, declaring "That these United Colonies are, and of Right ought to be Free and Independent States; [and] that they are *Absolved from all Allegiance to the British Crown* ...." *Id.* ¶ 32 (emphasis added). Indeed, Thomas Jefferson had earlier described the right of expatriation, "of departing from the country in which chance, not choice, has placed them", as a natural right inherent in all men. Thomas Jefferson, *A Summary View of the Rights of British America* (1774), quoted in Erler, *supra*, at 169.

Thus, the Revolution transformed the legal conception of political membership from one based on birthright subjectship to one based on mutual consent. *See* Erler, *supra*, at 182; *see also* James Madison, Essay "On Sovereignty" (ca. 1835), (discussing the need to "consult the Theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights and the safety & the interest of each may be under the safeguard of the whole"), quoted in Erler, *supra*, at 181.

The Expatriation Act of 1868, enacted contemporaneously with the Fourteenth Amendment, confirmed this understanding. It declared that "the right of expatriation is a natural and inherent right of all people," and that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of the Republic." Act of July 27,

1868, ch. 249, § 1, 15 Stat. 223. Congress thereby decisively repudiated the feudal doctrine of perpetual allegiance upon which the English rule of *jus soli* had rested.

Accordingly, any interpretation of the Citizenship Clause must proceed from this foundational principle of mutual consent and allegiance, not from the feudal doctrine of perpetual subjectship imposed by location of birth.

B. Antebellum Law Confirmed That Citizenship Depended on Allegiance, Not Mere Birthplace

The revolutionary shift from perpetual subjectship to citizenship by consent shaped American law throughout the antebellum period. Courts, lawmakers, and legal commentators recognized that allegiance—often determined by parental status and the voluntary assumption of political obligations—was critical to citizenship.

In *Inglis,* 28 U.S. (3 Pet.) at 99., the Court considered the citizenship of a person born in New York near the time of the Declaration of Independence. The Court held that the son's "election and character followed that of his father," who had remained loyal to Britain. *Id*. at 126. Because the father maintained allegiance to Britain, the son was deemed a British subject—despite being born within the United States—unless he affirmatively disavowed that allegiance upon reaching majority, which he failed to do. *Id*. at 159–61.

Similarly, in *Minor v. Happersett*, 88 U.S. 162 (1875), decided several years *after* the Fourteenth

Amendment's ratification, this Court reviewed the understanding of citizenship as it existed *prior* to the Amendment. Chief Justice Waite, writing for the Court, observed that while it was "never doubted that all children born in a country of parents who were its citizens became themselves ... citizens," as for the distinct group of those "born within the jurisdiction without reference to the citizenship of their parents ... there *have been doubts*." *Id.* at 167-68 (emphasis added).

C. The 1866 Civil Rights Act, which the 14th Amendment was designed to codify and constitutionalize, clearly excluded children who, through their parents, were subject to a foreign power.

Further compelling evidence that the Fourteenth Amendment was not intended to grant automatic citizenship based merely on birth location comes from its direct statutory precursor, the Civil Rights Act of 1866. Enacted by the same Congress that framed the Fourteenth Amendment, the Act sought to secure citizenship for the freedmen following the abolition of slavery. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. Its opening sentence defined the prerequisites for citizenship: "That all persons born in the United States and *not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States ...." *Id.* (emphasis added).

By conditioning citizenship on being "not subject to any foreign power," the Act plainly excluded children born on U.S. soil to parents who remained citizens or subjects of another nation and thus owed allegiance elsewhere. Lash, *supra*, at 35-41. During the debates, Senator Lyman Trumbull, the Act's sponsor,

confirmed this understanding, explaining that the clause referred to those who owed allegiance solely to the United States. *See id*. at 38-40 (citing Cong. Globe, 39th Cong., 1st Sess. 572 (1866)). Representative John Bingham, a key figure in drafting the Fourteenth Amendment, was even more direct, stating that "every human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign sovereignty* is ... a natural-born citizen." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (emphasis added), *quoted in* Lash, *supra*, at 42.

Recognizing that a statute might be repealed or declared unconstitutional (particularly in light of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)), the framers sought to embed these principles into the Constitution via the Fourteenth Amendment. Erler, *supra,* at 170. The shift in phrasing from the Act's "not subject to any foreign power" to the Amendment's "subject to the jurisdiction thereof" was considered by Senator Trumbull to be a "better" formulation intended to achieve the "same object"—namely, ensuring citizenship was conferred only upon those owing full allegiance to the United States. Cong. Globe, 39th Cong., 1st Sess. 2894 (1866); *see also* Lash, *supra*, at 48. Thus, the Civil Rights Act of 1866 demonstrates the contemporaneous congressional understanding that citizenship required more than birth; it required an allegiance inconsistent with being subject, through one's parents, to a foreign power.

D. Key Proponents of the 14th Amendment expressly stated that "subject to the jurisdiction" meant complete jurisdiction, not merely partial, territorial jurisdiction.

Any ambiguity surrounding the phrase "subject to the jurisdiction thereof" was definitively resolved during the Senate debates by the Amendment's chief proponents. The phrase required the full political allegiance associated with citizenship, not merely the partial, territorial jurisdiction applicable to all persons physically present within the United States. This crucial distinction was not hinted at; it was explicitly articulated.

Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, when pressed on the phrase's meaning, particularly concerning Indian tribes, was unequivocal: "What do we mean by 'subject to the jurisdiction of the United States?' *Not owing allegiance to anybody else*. That is what it means." Cong. Globe, 39th Cong., 1st Sess. 2893 (1866) (emphasis added). He reinforced this by stating it excluded those owing even "partial allegiance ... to some other Government," because they were not subject to the "*complete* jurisdiction of the United States." *Id*. (emphasis added); Lash, *supra*, at 52. Trumbull specifically distinguished this required "complete jurisdiction" from the mere amenability to laws or treaties that might apply to those not fully within the political community. Cong. Globe, 39th Cong., 1st Sess. 2893 (1866).

Senator Jacob Howard, who introduced the specific language of the Citizenship Clause, was equally clear. He insisted that "jurisdiction" as used in the amendment "ought to be construed so as to imply *a full and complete jurisdiction* ... that is to say, the same jurisdiction in extent and quality as applies to every *citizen* of the United States now." Cong. Globe, 39th Cong., 1st Sess. 2895 (1866) (emphasis added);

see also id. at 2890. This understanding was so apparent to those present that Senator Reverdy Johnson could confidently state, "Now, all that this amendment provides is, that all persons born in the United States and *not subject to some foreign Power*—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered citizens of the United States." *Id*. at 2893 (emphasis added).

These explicit, contemporaneous explanations by the Amendment's leading proponents leave no room for doubt. They intended "subject to the jurisdiction thereof" to signify a complete political attachment and allegiance to the United States, fundamentally distinct from the mere temporary or territorial jurisdiction that obligates aliens and visitors to obey local laws. Erler, *supra,* at 167–68.

E. This Court's initial decisions interpreting the Citizenship Clause recognized that the "subject to the jurisdiction" restriction excluded children whose parents owed allegiance to a foreign power or a domestic Indian tribe.

This Court's earliest interpretations of the Fourteenth Amendment's Citizenship Clause align with the framers' understanding that being "subject to the jurisdiction" meant complete political allegiance. In *The Slaughter-House Cases*, decided just four years after the Amendment's ratification, the Court observed (albeit in *dicta*) that the phrase "subject to its jurisdiction" was intended precisely "to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States born within the United*

States." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73 (emphasis added).

This understanding, requiring more than mere birth on U.S. soil, became holding in *Elk v. Wilkins*, 112 U.S. 94 (1884). There, the Court held that John Elk, an American Indian born within the territorial United States but who owed allegiance to his tribe at birth, was not a citizen under the Fourteenth Amendment. *Id*. at 109. The Court reasoned that being "subject to the jurisdiction thereof" required being "completely subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id*. at 102. Because Elk owed allegiance at birth to his tribe—an "alien, though dependent, power"—he was not subject to the complete jurisdiction of the United States in the manner required by the Amendment. *Id*. at 99, 102. Thus, this Court's initial encounters with the Citizenship Clause recognized that the jurisdictional requirement excluded those, like Elk, whose allegiance lay with another sovereign, whether foreign or domestic tribal. *See* Lash, *supra*, at 66–68.

F. The leading treatise writer and the Secretary of State in the years shortly after the adoption of the 14th Amendment agreed.

This interpretation was shared by leading commentators and executive officials in the years immediately following the Fourteenth Amendment's adoption. Thomas Cooley, perhaps the most prominent constitutional treatise writer of the era, explicitly adopted the view articulated by Senators Trumbull and Howard. Cooley wrote that being "subject to the jurisdiction thereof" meant "that full and complete jurisdiction to which citizens generally are subject, and

not any qualified or partial jurisdiction, such as may consist with allegiance to some other government." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 243 (1880).

The Executive Branch likewise initially concurred. Secretaries of State Frelinghuysen and Bayard concluded in the 1880s that children born to parents only temporarily in the United States, lacking intent to remain and thus not fully submitting to U.S. jurisdiction, were not citizens by birth. *Wong Kim Ark*, 169 U.S. at 719 (Fuller, C.J., dissenting) (citing *Hausding's Case* (1885) and *Greisser's Case*). These contemporaneous interpretations confirm that the Citizenship Clause required complete political allegiance, not mere territorial birth. *See* Lash, *supra*, at 61–64.

III. For Nearly 100 Years After Adoption of the 14th Amendment, Both Congress and the Executive Branch Recognized That More Than Birth Alone Was Necessary For Automatic Citizenship.

A. Indian Citizenship Act of 1924

Perhaps the clearest legislative example that the political branches of government did not read *Wong Kim Ark* or the 14th Amendment itself as conferring citizenship based on birth alone is the Indian Citizenship Act of 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)). This Act declared that "all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United

States." *Id*. The very necessity of this Act demonstrates that Congress did not believe the Fourteenth Amendment had automatically conferred citizenship upon all Native Americans born within the United States after 1868, or that *Wong Kim Ark* had done so, either.

If the Ninth Circuit's broad interpretation of the Citizenship Clause—equating "subject to the jurisdiction" with mere territorial presence—were correct, the 1924 Act would have been entirely superfluous. Those individuals whom it purported to make citizens would have already been citizens by virtue of the Fourteenth Amendment itself. However, Congress understood, consistent with this Court's decision in *Elk v. Wilkins*, that Native Americans born into tribal allegiance were *not* "subject to the jurisdiction" of the United States in the complete political sense required by the Amendment. *See Elk,* 112 U.S. at 102. The 1924 Act was thus a legislative grant of citizenship under Congress's Article I naturalization power, enacted precisely because the Fourteenth Amendment's constitutional grant did not reach all Native Americans born within U.S. territory. Lash, *supra*, at 26.

If anything, children born to members of Indian tribes had a stronger claim to being "subject to the jurisdiction" of the United States than children born to foreign subjects temporarily in the United States because the tribes themselves, unlike foreign nations, were "completely under the sovereignty and dominion of the United States." *Elk*, 112 U.S. at 122. Yet this Court held even that did not qualify for automatic citizenship.

B. The Depression-Era Repatriation

A negative inference can also be drawn from the historical example of the repatriation of Mexican workers that occurred following the stock market crash in October 1929 and the ensuing "Great Depression." As the California legislature has recently recognized, an estimated "two million people of Mexican ancestry were forcibly relocated to Mexico, approximately 1.2 million of whom had been born in the United States" and would therefore be citizens under the expansive interpretations of the Fourteenth Amendment and *Wong Kim Ark* advanced by Respondents here. *See* SB 670, Apology Act for the 1930s Mexican Repatriation Program, Cal. Gov't Code § 8720 *et seq*. (added by Stats. 2005, ch. 663, § 1).[4] Yet to our knowledge, not a single case was ever brought at the time claiming that the children born in the United States to those who had come as temporary workers in the "Roaring Twenties" and who retained their Mexican citizenship could not be removed because they were citizens. Such silence is deafening.

C. Passport forms requiring "status of parents at birth" until changed, inexplicably, in 1966.

Another indication that mere birth on U.S. soil was not understood to confer automatic citizenship appears in pre-1966 passport application requirements. At that time, regulations required applicants to disclose not only their own birth details but also

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[4] Available at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0651-0700/sb_670_bill_20051007_chaptered.html.

their father's name, date and place of birth, and residence. If the father was foreign-born, the application required information on his immigration and naturalization status. See, e.g., 22 C.F.R. § 20 (1938), citing Rev. Stat. § 4076 (1878), codified at 22 U.S.C. § 212. If place of birth alone sufficed under a well-settled interpretation of the Citizenship Clause, such disclosures would have been unnecessary. The federal government's continued emphasis on parental status confirms that it did not view birthplace as dispositive. The 1966 change—unaccompanied by any contemporaneous legal development—reflects a bureaucratic revision, not a constitutional one.[5]

CONCLUSION

This Court should grant the petitions for certiorari and then hold that the "subject to the jurisdiction" requirement of the Fourteenth Amendment's Citizenship Clause requires, as its drafters expressly noted, a complete jurisdiction, not merely a territorial jurisdiction, and therefore does not confer automatic citizenship on the children of temporary sojourners or those present in the United States illegally.

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[5] The questions about parental status were dropped from the application regulations in 1966, and only evidence of birth in the United States was then required—primary evidence such as a birth or baptismal certificate, or secondary evidence such as census records, newspaper files, or family Bibles. 31 Fed.Reg. 13537, 13542 (§ 51.43); *see also* 22 C.F.R. § 51.42.

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