

No. 25-365

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., PETITIONERS

v.

BARBARA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
A. The Citizenship Order complies with the Fourteenth Amendment	3
B. The Citizenship Order complies with Section 1401(a).....	7
C. The question presented warrants this Court’s review.....	8
D. This Court should grant review in both <i>Washington</i> and <i>Barbara</i>	10

TABLE OF AUTHORITIES

Cases:

<i>Biden v. Nebraska</i> , 600 U.S. 477 (2023)	9
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979).....	10
<i>DHS v. Regents of the University of California</i> , 591 U.S. 1 (2020)	9
<i>Department of Commerce v. New York</i> , 588 U.S. 752 (2019)	9
<i>Doe v. Trump</i> , No. 25-1169, 2025 WL 2814730 (Oct 3, 2025)	10, 11
<i>Elk v. Wilkins</i> , 112 U.S. 94 (1884)	2, 3
<i>Kwock Jan Fat v. White</i> , 253 U.S. 454 (1920).....	6
<i>Learning Resources, Inc. v. Trump</i> , No. 24-1287, 2025 WL 2601021 (Sept. 9, 2025)	9
<i>Ludlam v. Ludlam</i> , 31 Barb. 486 (N.Y. Gen. Term 1860)	5
<i>Lynch v. Clarke</i> , 1 Sand. Ch. 583 (N.Y. ch. 1844)	5
<i>NYSRPA v. Bruen</i> , 597 U.S. 1 (2022).....	4
<i>Summers v. Earth Island Institute</i> , 555 U.S. 488 (2009)	10
<i>Trump v. Casa</i> , 606 U.S. 831 (2025).....	1
<i>Trump v. Hawaii</i> , 585 U.S. 667 (2018)	9

II

Cases—Continued:	Page
<i>United States v. Rogers</i> , 4 How. 567 (1846)	3
<i>United States v. Wong Kim Ark</i> , 169 U.S. 649 (1898)	2-6
Constitution, statutes, and rule:	
U.S. Const.:	
Amend. XIV, § 1	2-4
Art. I	8
Art. III	10
Citizenship Clause.....	5, 7, 8
Act of June 30, 1834, ch. 46, § 25, 4 Stat. 733	4
8 U.S.C. 1401(a)	2-8
8 U.S.C. 1401(a)-(h)	8
8 U.S.C. 1408	8
42 U.S.C. 1983	7
Sup. Ct. R. 10(c).....	8
Miscellaneous:	
Spanish Treaty Claims Comm’n, U.S. Dep’t of Justice, <i>Final Report of William Wallace Brown</i> , Assistant Attorney-General (1910).....	6
Hannis Taylor, <i>A Treatise on International Public Law</i> (1901)	7

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These cases concern the lawfulness of a major Administration policy and raise questions about the United States' ability to define its citizenry and protect its borders.* They plainly warrant this Court's review. State respondents acquiesce (*Washington* Resp. Br. 16-17) in certiorari, recognizing that, in *Trump v. CASA*, 606 U.S. 831 (2025), the Court contemplated that the merits will soon "reach this Court." *Id.* at 859 n.18. In addition, nearly half the States in the Union have urged the Court to grant review, explaining that they "face significant economic, health, and public-safety issues from policies holding out a 'powerful incentive for illegal migration'" "beyond what the Citizenship Clause requires." Tenn. et al. Amici Br. 1 (citation omitted).

* The government is filing identical reply briefs in *Trump v. Washington* and *Trump v. Barbara*.

Respondents focus on the merits, but their contentions are incorrect. The Fourteenth Amendment’s Citizenship Clause was adopted to grant citizenship to newly freed slaves and their children—not, as respondents maintain, to the children of aliens illegally or temporarily in the United States. The Clause confers birth-right citizenship only upon those who are both born in the United States and “subject to the jurisdiction thereof.” U.S. Const. Amend. XIV, § 1. The original meaning of the jurisdictional requirement excludes individuals—such as children of illegal or temporarily present aliens—who are not “completely subject” to the United States’ “political jurisdiction,” *i.e.*, who do not owe it “direct and immediate allegiance.” *Elk v. Wilkins*, 112 U.S. 94, 104 (1884).

Individual respondents’ specific rationales for denying certiorari are likewise unsound. First, they contend (*Barbara Br. in Opp.* 16-24) that the Citizenship Order violates 8 U.S.C. 1401(a). But the question presented expressly encompasses that issue, and the government’s petitions explain why respondents’ statutory argument is incorrect. Second, they contend (*Barbara Br. in Opp.* 25-31) that this Court has already resolved the question presented in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). But *Wong Kim Ark* involved a child of aliens with lawful “permanent domicile and residence,” *id.* at 652, not the children of illegal or temporarily present aliens. Third, individual respondents argue (*Barbara Br. in Opp.* 31-37) that the government has not asked this Court to overrule *Wong Kim Ark*. But the government does not need to do so, since *Wong Kim Ark* does not address the question presented in these cases. This Court should grant both petitions.

A. The Citizenship Order Complies With The Fourteenth Amendment

Respondents contend (*Washington* Resp. Br. 17-35; *Barbara* Br. in Opp. 25-31) that the Citizenship Order violates the Fourteenth Amendment's Citizenship Clause. If this Court grants certiorari, the parties can brief that issue in full. For now, it suffices to note that respondents' principal arguments are incorrect.

1. Under the Citizenship Clause, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. Amend. XIV, § 1. A person satisfies the Clause's jurisdictional requirement only if he is "completely subject" to the United States' "political jurisdiction," owing it "direct and immediate allegiance." *Elk*, 112 U.S. at 102.

But respondents instead contend (*Washington* Resp. Br. 19; *Barbara* Br. in Opp. 32) that a person is subject to the United States' "jurisdiction" merely by being subject to its laws and authority. That theory conflicts with this Court's cases identifying persons who are not subject to the United States' jurisdiction and therefore not entitled to birthright citizenship.

For example, the Citizenship Clause does not extend citizenship to children of members of Indian tribes "owing immediate allegiance" to those tribes, *Elk*, 112 U.S. at 102, even though it was "firmly and clearly established" even before the Fourteenth Amendment that "Indian tribes residing within the territorial limits of the United States are subject to [the United States'] authority" and may be regulated by its laws, *United States v. Rogers*, 4 How. 567, 572 (1846). Similarly, the Clause does not extend citizenship to the children of foreign diplomats, see *Wong Kim Ark*, 169 U.S. at 657, even

though the Constitution does not restrict Congress's power to regulate foreign diplomats or their children. Nor does the Clause extend citizenship to "children born of alien enemies in hostile occupation," *id.* at 682, even though Congress plainly may regulate alien enemies and their children and subject them to U.S. laws when they are in the United States.

State respondents try to overcome that problem by arguing (*Washington* Resp. Br. 21) that the Citizenship Clause's applicability turns on whether the United States opts to apply its regulatory jurisdiction to someone, not on whether it has the power to do so. That theory still fails. For example, the United States has long chosen to apply its regulatory jurisdiction to tribal Indians. See, *e.g.*, Act of June 30, 1834, ch. 46, § 25, 4 Stat. 733 (punishing crimes by Indians against non-Indians in Indian country). Yet the children of such Indians are not entitled to birthright citizenship under the Constitution. State respondents' theory would also allow Congress to turn the Citizenship Clause on and off at will, by granting a particular group immunity from the United States' laws.

2. Respondents' historical arguments also lack merit. Respondents rely (*Washington* Resp. Br. 4; *Barbara* Br. in Opp. 10) on British common law, but British common law "is not to be taken in all respects to be that of America." *NYSRPA v. Bruen*, 597 U.S. 1, 39 (2022) (citation omitted). The Fourteenth Amendment was adopted in 1868, more than 90 years after the United States declared its independence from Great Britain. During that period, the American understanding of citizenship diverged from the British one. See Pet. 25-26.

Respondents also invoke (*Washington* Resp. Br. 5; *Barbara* Br. in Opp. 34) the New York Chancery Court's

decision in *Lynch v. Clarke*, 1 Sand. Ch. 583 (1844), that, under the common law, a child born to temporarily present aliens is a citizen of the United States. But a New York appellate court later held that, under the common law, when an individual “is traveling or sojourning” in another country, “his children” fall within “an exception to the rule which makes the place of birth the test of citizenship.” *Ludlam v. Ludlam*, 31 Barb. 486, 503 (N.Y. Gen. Term 1860); see *id.* at 501-502.

Finally, state respondents assert (*Washington* Resp. Br. 1) that their interpretation of the Citizenship Clause has been “shared across all branches,” as well as among “legal scholars and ordinary citizens,” “for nearly 150 years.” But the government has cited many 19th-century cases, executive-branch authorities, and treatises rejecting respondents’ theory of citizenship. See Pet. 20-21. Respondents insist (*Washington* Resp. Br. 33) that those 19th-century jurists, statesmen, and commentators all misunderstood the Constitution’s plain text. This Court should reject respondents’ attempt to treat their own position “as a foregone conclusion” and bypass rigorous historical inquiry. Tenn. et al. Amici Br. 2.

3. Contrary to respondents’ contention (*Washington* Resp. Br. 22-24; *Barbara* Br. in Opp. 25-31), *Wong Kim Ark* does not resolve the question presented. *Wong Kim Ark* addressed the status of “a child born in the United States” to aliens with “a permanent domicil and residence” in the country. 169 U.S. at 653. Respondents describe (*Washington* Resp. Br. 32; *Barbara* Br. in Opp. 29) the parents’ domicile as one of the “stipulated facts” of the case, but that fact played a central role in the Court’s legal analysis. The Court referred to the parents’ domicile more than 20 times. The Court also summed up its interpretation of the Citizenship Clause

as follows: “The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of * * * persons, of whatever race or color, *domiciled within the United States.*” *Wong Kim Ark*, 169 U.S. at 693 (emphasis added).

Individual respondents contend (*Barbara Br.* in Opp. 4) that *Wong Kim Ark* identified only four exceptions to birthright citizenship (children of diplomats, children of alien enemies, children born on foreign public vessels, and children of tribal Indians). But they overlook how *Wong Kim Ark* described the general rule to which those four categories are exceptions. According to *Wong Kim Ark*, the “Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory” for “all children born here of *resident* aliens,” subject to specified “exceptions.” 169 U.S. at 693 (emphasis added). In other words, the categories listed in *Wong Kim Ark* are exceptions to the rule of citizenship for children of domiciliaries, not exceptions to a rule of universal birthright citizenship.

Respondents’ overreading also conflicts with how the Court, the Executive Branch, and commentators understood *Wong Kim Ark*. This Court recognized that *Wong Kim Ark* concerned only children born to aliens who were “permanently domiciled in the United States.” *Kwock Jan Fat v. White*, 253 U.S. 454, 457 (1920). The Executive Branch’s view in 1910 was that *Wong Kim Ark* “goes no further” than addressing children of aliens “domiciled in the United States.” Spanish Treaty Claims Comm’n, U.S. Dep’t of Justice, *Final Report of William Wallace Brown, Assistant Attorney-General* 121. And after *Wong Kim Ark*, scholars continued to recognize that “children born in the United States to foreigners here on transient residence are not citizens,

because by the law of nations they were not at the time of their birth ‘subject to the jurisdiction.’” Hannis Taylor, *A Treatise on International Public Law* 220 (1901) (citation omitted).

B. The Citizenship Order Complies With Section 1401(a)

Individual respondents argue (*Barbara Br. in Opp.* 16-17) that the petitions for writs of certiorari present “a question of constitutional interpretation” and that the statutory challenge “poses a critical obstacle” to review. But the question presented is “whether the Executive Order complies with the Citizenship Clause *and with 8 U.S.C. 1401(a), which codifies that Clause.*” Pet. I (emphasis added). Granting review in these cases will thus enable this Court to consider both the constitutional and the statutory claims. And as the petitions explain, the statutory claims lack merit. See Pet. 28-30.

Respondents agree that Section 1401(a) must be read against the backdrop of the Citizenship Clause, but they contend (*Washington Resp. Br.* 36-37; *Barbara Br. in Opp.* 17-18) that the Clause incorporates Congress’s understanding of the Clause in 1952. But when Congress incorporates constitutional concepts into statutes, it usually expects courts to apply the Constitution’s actual meaning, not congressional misunderstandings of that meaning. Thus, courts applying 42 U.S.C. 1983, which creates a cause of action to enforce rights secured by the Constitution, ask what the Constitution actually means, not what Congress thought it meant in 1871. Similarly, courts applying an interstate-commerce jurisdictional element ask how far the Commerce Clause goes, not how far Congress thought it went when it enacted the statute. Section 1401(a) works the same way.

Section 1401(a)’s context confirms that the statute simply incorporates the Citizenship Clause’s meaning.

Section 1401 contains eight subsections: Subsection (a) repeats the Citizenship Clause’s language, and the other seven subsections then confer citizenship upon additional groups. See 8 U.S.C. 1401(a)-(h). That structure indicates that Congress incorporated the constitutional standard in subsection (a) and then used its Article I powers to go beyond the constitutional minimum in subsections (b) to (h).

State respondents invoke the interpretive canon that Congress is presumptively “aware of the longstanding judicial interpretation of a phrase” that it codifies. *Washington* Resp. Br. 37 (brackets and citation omitted). But they identify no “longstanding judicial interpretation” that extends birthright citizenship to children of unlawfully or temporarily present aliens. They cite (*ibid.*) *Wong Kim Ark*, but as discussed, that case addressed only children of aliens with a lawful permanent domicile in the United States.

Finally, even if this Court were to agree with respondents’ construction of the statute, it would need to address the scope of the Citizenship Clause to establish whether Congress could enact legislation to end near-universal birthright citizenship—a result already supported in this Court by 24 States.

C. The Question Presented Warrants This Court’s Review

Contrary to respondents’ suggestion (*Washington* Resp. Br. 16-17; *Barbara* Br. in Opp. 15-16), these cases present “an important question of federal law that has not been, but should be, settled by this Court,” Sup. Ct. R. 10(c): whether the Citizenship Order complies with the Citizenship Clause and Section 1401(a).

Respondents do not dispute the significance of that question. They do not deny that the United States has a profound interest in ensuring that U.S. citizenship is

extended only to those who qualify for it. Nor do they meaningfully address the government’s arguments that the erroneous extension of birthright citizenship has impaired the territorial integrity of the United States by encouraging illegal immigration and has demeaned the naturalization process by encouraging birth tourism. See Pet. 30-31.

Respondents instead argue that this case “presents no unsettled question,” *Washington* Resp. Br. 16, and that this Court has “already answered the constitutional question,” *Barbara* Br. in Opp. 25. But as discussed above, that position reflects an overreading of *Wong Kim Ark*. See pp. 5-7, *supra*. The question presented remains hotly disputed. The legal position underlying the Citizenship Order has been adopted by the President; has been endorsed by 24 States, see Tenn. et al. Amici Br. 2-3, and by multiple members of Congress, see, *e.g.*, Ted Cruz et al. Amici Br. 3-5; and is supported by a growing body of modern legal and historical scholarship, see Pet. 21 n.2.

State respondents argue (*Washington* Resp. Br. 16-17) that this Court should deny review because the question presented has not generated a circuit conflict. But this Court often grants review, even in the absence of a circuit conflict, when a court of appeals invalidates a significant federal policy. See, *e.g.*, *Learning Resources, Inc. v. Trump*, No. 24-1287, 2025 WL 2601021 (Sept. 9, 2025); *Biden v. Nebraska*, 600 U.S. 477 (2023); *DHS v. Regents of the University of California*, 591 U.S. 1 (2020); *Department of Commerce v. New York*, 588 U.S. 752 (2019); *Trump v. Hawaii*, 585 U.S. 667 (2018).

Moreover, the absence of a circuit conflict results from the quick granting of nationwide relief in the chal-

lengers’ chosen forums. For instance, respondent Illinois sued in the Ninth Circuit (not the Seventh Circuit), see *Washington* Pet. App. 2a, and a group of States led by New Jersey sued in the First Circuit (not the Third Circuit) in *Doe v. Trump*, No. 25-1169, 2025 WL 2814730 (Oct. 3, 2025). Thus, in the first few months since the Citizenship Order was promulgated, only a handful of courts have spoken. And now that they have affirmed a nationwide injunction (*Washington* Pet. App. 43a) and entered an injunction applicable to a nationwide class (*Barbara* Pet. App. 28a-30a), there is little likelihood that the question presented will meaningfully percolate in other circuits. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Having won the initial rounds in their chosen forums, respondents should not now be heard to argue (*Washington* Resp. Br. 16-17) that this Court should deny review because there is no circuit conflict.

D. This Court Should Grant Review In Both *Washington* And *Barbara*

Individual respondents agree (*Barbara* Br. in Opp. 37), and state respondents do not dispute (*Washington* Resp. Br. 37) that, if this Court grants certiorari, it should do so in both *Washington* and *Barbara*. State respondents suggest (*Washington* Resp. Br. 17) that, “because Petitioners do not challenge the Respondent States’ standing,” *Washington* “provides a clean vehicle to consider the merits.” But the government continues to believe that state respondents lack standing, and this Court would have an independent obligation to assure itself of Article III standing. See *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). If this Court grants review before the court of appeals’ judgment in *Barbara*, it could avoid those standing concerns, consistent with the principle that the Court may reach the

merits of a case so long as at least one party before it has standing. See Pet. 32-33. Further, since the filing of the petition for a writ of certiorari, the First Circuit has issued an opinion rejecting the government's defenses of the Citizenship Order. See *Doe*, 2025 WL 2814730. Given that decision, waiting for the First Circuit to resolve the appeal in *Barbara* would serve no useful purpose.

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The petition for a writ of certiorari in *Washington* and the petition for a writ of certiorari before judgment in *Barbara* should be granted.

Respectfully submitted.

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