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.*,

Respondents.

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

AMERICA FIRST POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The America First Policy Institute (AFPI) is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to advance policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.

AFPI believes both the Executive and Legislative branches have broad constitutional authority over matters of immigration and foreign relations and have extensive powers related to national defense and sovereignty. Accordingly, AFPI believes that each branch has the power and the duty to end birthright citizenship for children of illegal aliens, alien tourists, and aliens in the U.S. legally but temporarily. Along with being constitutionally valid, revoking birthright citizenship for these categories of aliens is also sound policy that protects the value of citizenship in the United States. An America-first approach to immigration policy not only guarantees the security of the border and defends American citizens against the malignant influence of drug cartels, human traffickers, and terrorist organizations, but it also protects the citizenry against the dilution of their rights and powers.

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1. No counsel for a party authored this brief, in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Sup. Ct. R. 37.6.

SUMMARY OF THE ARGUMENT

The Citizenship Clause of the Fourteenth Amendment builds upon the history and tradition of birthright citizenship in Anglo-American law, making it clear that for one to be recognized as a citizen he must satisfy *two* conditions: residence and allegiance. This two-pronged approach to citizenship has deep roots in the common law tradition. Accordingly, while the children of temporary residents and the children of illegal aliens are born within the dominions of the United States in satisfaction of the residence condition, they do not possess the requisite allegiance necessary to be recognized as citizens under the Fourteenth Amendment.

ARGUMENT

I. The Fourteenth Amendment requires both residence and allegiance as conditions to citizenship.

The Fourteenth Amendment states, "All 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. The plain text makes clear that birth within the dominions of the United States is an essential element of constitutional citizenship. However, the plain text also makes clear that the phrase "subject to the jurisdiction thereof" must be read as necessitating a second condition. This Court has long recognized the surplusage canon of constitutional interpretation, requiring that no clause in the Constitution be read as to render it meaningless. *Marbury v. Madison*, 5 U.S. 137, 174 (1803). Therefore, "subject to the jurisdiction thereof" must serve a greater function within the Fourteenth

Amendment than merely reaffirming the preceding clause outlining the residence condition to constitutional citizenship. Ultimately, this additional clause is most reasonably read as codifying the condition of allegiance that undergirded the common law doctrine of birthright citizenship.

This Court has long recognized the importance of allegiance to understanding the Fourteenth Amendment's notion of citizenship. In *Elk v. Wilkins*, the Court held, "The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, owing them direct and immediate allegiance." 112 U.S. 94, 102 (1884). Additionally, in *United States v. Wong Kim Ark*, the Court again explicitly equated allegiance with jurisdiction. 169 U.S. 649, 655 (1898). Understanding "subject to the jurisdiction thereof" as referring to more than mere regulatory jurisdiction is also the best way to make sense of the universally recognized exceptions to birthright citizenship present at common law and upheld by this Court — namely children of foreign ambassadors, children of alien enemies, and children belonging to the American Indian tribes. *See id.* at 680-81, 693. The primary justification for exclusion of these groups is that they lack the requisite allegiance that would mark them as citizens, clearly demonstrating that birth on U.S. soil is insufficient on its own to confer citizenship.

Undoubtedly, the children of temporary residents and children of illegal aliens are not universally recognized exceptions at common law. However, that does not mean that they are *prima facie* precluded from the implied

exclusions of the Fourteenth Amendment. This Court has held that "analogical inquiry" grounded in our "Nation's historical traditions[s]" help to illuminate the meaning and application of the text of the Constitution. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17, 29 (2022). Therefore, the question before this Court is not whether the Fourteenth Amendment contemplates exceptions to the general rule of birthright citizenship — it clearly does — but whether the subjects of President Trump's executive order — children of temporary residents and children of illegal aliens — are more analogous to the already recognized exceptions or to those subject to the general rule.

Historically, American law has not limited itself to the primary, universally recognized exceptions to the common law rule of birthright citizenship. Justice Story identified as a "reasonable qualification" to the general rule that persons born to parents who are temporary residents are not citizens of the country in which their parents temporarily reside. Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* 48 (1834). While not universal, this exception experienced widespread support among the various states well into the 19th century, including after passage of the Fourteenth Amendment. *See Benny v. O'Brien*, 58 N.J.L. 36, 39 (N.J. 1895); *Hardy v. De Leon*, 5 Tex. 211, 237 (Tex. 1849); *Ludlam v. Ludlam*, 31 Barb. 486, 503 (N.Y. 1860). An exception for the children of temporary residents was also recognized by numerous members of Congress who participated in the debates surrounding the Citizenship Clause and similar relevant sections of the Civil Rights

Act of 1866, including Representative James Wilson and Senator Benjamin Wade. Cong. Globe, 39th Cong., 1st Sess. 1117, 2893 (1866). Therefore, it cannot be assumed that the Fourteenth Amendment's silence on this disputed exception precludes it any more than silence precludes the universally recognized exceptions.

The historical record has little to say regarding an exception for the children of illegal aliens. Yet, this is not because such children were widely considered to fall under the general rule of birthright citizenship. Rather, it is because illegal immigration as we know it did not exist at the time of the framing of the Fourteenth Amendment. Prior to the late 19th century, regulating immigration was primarily the province of the states and not the federal government. *See generally* Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 Vand. L. Rev. 1353 (2019). The first federal law broadly restricting immigration did not pass until 1882, and the border was not regularly policed until the Border Patrol was created in 1924. Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 Tex. Rev. L. & Pol. 135, 178 (2020); Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 Yale L.J. 329, 378 (2024). Therefore, this Court should not interpret the plain text of the Citizenship Clause as presumptively conferring citizenship to a category of people not contemplated by the drafters of the Fourteenth Amendment. To do so would be an exercise of a "general authority to establish norms for the rest of society" that the judiciary does not possess. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring). Instead, the Court should turn to the history and tradition of birthright citizenship in Anglo-American

law to determine whether an exception for the children of illegal aliens is analogous to those already universally recognized. Ultimately, an examination of this history and tradition reveals that children of illegal aliens are not considered citizens under the Fourteenth Amendment.

II. Allegiance is more important to the common law doctrine of birthright citizenship than place or parentage.

A. The English common law doctrine of natural-born subjectship was rooted in a robust understanding of allegiance.

While history and tradition always play a significant role in constitutional interpretation, they are especially crucial to understanding constitutional citizenship. Citizenship under the English common law system has long been recognized as an important historical resource to understanding and applying the Citizenship Clause. Nowhere is this more evident than in this Court's reliance on *Calvin's Case*, 77 Eng. Rep. 377 (K.B. 1608), in *Wong Kim Ark*, where the Court stated that the Citizenship Clause "must be interpreted in the light of the common law." *See* 169 U.S. at 655-56, 690.

The English common law system long affirmed a qualified form of *jus soli*[2] citizenship whereby persons

2. Literally, "right of the soil." *Jus soli* is the law that anyone born within the dominions of a given nation is presumptively a citizen of that nation. This is a distinct concept from *jus sanguinis*, or "right of blood," which grounds citizenship in the nationality of one's parents.

born within the royal dominions were generally subjects of the king, owing him their obeisance in perpetuity. *See generally* James H. Ketter, *The Development of American Citizenship*, 1608-1870 13-46 (1978); 42 Edw. 3, c. 10 (1368). *See also* 23 Eliz. 1 (1580). However, the common law did not promote a pure *jus soli* concept of citizenship. Rather, contrary to popular belief, under the common law system, what is more important than place or parentage in determining citizenship status is one's allegiance.

As recognized by this Court in *Wong Kim Ark*, allegiance is nowhere more prominent than in the oft-cited and oft-misunderstood *Calvin's Case*. 169 U.S. at 655 ("the fundamental principle of the common law . . . was . . . allegiance"). In *Calvin's Case*, Judge Coke defined allegiance as the "true and faithful obedience of the subject due to his sovereign." 77 Eng. Rep. at 382. To Judge Coke, he who receives protection from the sovereign by "birthright" owes "ligeance and obedience" to the sovereign just as the child owes "ligeance and obedience" to his parents. *Id*. at 383; *see also* Ketter, *supra*, 18.[3] Therefore, under the English common law system, citizenship is irrevocably tied to the bond between sovereign and subject derived from the allegiance possessed by one born within the sovereign's realm and, by extension, under the sovereign's protection. However, the common law doctrine of birthright citizenship was not unqualified.

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3. A similar emphasis on allegiance can be found in William Blackstone's influential *Commentaries*, written 150 years after *Calvin's Case*, thereby demonstrating the staying power of the concept of tying citizenship to allegiance. *See* 1 William Blackstone, *Commentaries on the Laws of England* 358, 369-70 (1765).

Calvin's Case states that the general rule of natural-born subjectship applies only if a person's parents were "under the actual obedience of the King." 77 Eng. Rep. at 399. No one can "be a subject to the King . . . unless at the time of his birth he was under the ligeance and obedience of the King." *Id.* Based on this reasoning, two primary exceptions to the common-law rule of natural-born subjectship existed for children of ambassadors and invaders because their parents held no actual allegiance to the king. *Id.* at 383; Blackstone, *supra*, at 373. These children are excluded from the general rule because, at common law, the children of non-citizens born within the dominions of the sovereign were divided into two camps: alien enemies and alien friends. *Calvin's Case*, 77 Eng. Rep. at 397; Blackstone, *supra*, at 372-73. Alien friends owed allegiance to the sovereign and had certain rights and privileges while alien enemies, who bore no such allegiance, did not possess those same rights and privileges. Blackstone, *supra*, at 372-73. This categorization of aliens has long been recognized in American law. *See* Story, *supra*, 48; *see also Elk*, 112 U.S. at 102; *Wong Kim Ark*, 169 U.S. at 682. Therefore, in order to determine whether or not the children of illegal aliens are citizens under the Fourteenth Amendment, the Court must determine whether their parents are more analogous to alien friends or alien enemies.

B. The children of illegal aliens do not satisfy the allegiance condition of constitutional citizenship.

Under the common law doctrine of birthright citizenship, allegiance and obedience — not soil — is what marks persons as citizens. This emphasis on allegiance is

not a vestige of a bygone era but persisted as an important element in determining citizenship in the American context even after the passage of the Fourteenth Amendment.[4] Ultimately, the children of illegal aliens do not inherit the requisite allegiance and obedience from their parents because their parents are aliens in enmity with the United States. Therefore, these children should be considered an exception to the general rule of birthright citizenship.

Illegal immigrants are necessarily in enmity with the country they enter because they have broken the law by crossing its borders. By definition, illegal immigration betrays a lack of allegiance to the laws of the sovereign. Gage Raley, *Could the Supreme Court Defy the "Legal Consensus" and Uphold a Trump-like Executive Order*

4. In fact, allegiance may be even more important in the American context, given America's robust, historical emphasis on actual allegiance in determining questions of citizenship, as demonstrated by the Declaration of Independence, the "right of election" in the aftermath of the colonies' separation from Great Britain, the impressment controversy that led to the War of 1812, and the 1868 Expatriation Act. The Declaration of Independence para. 2, 32 (U.S. 1776); *Respublica v. Chapman*, 1 U.S. 53, 58 (Pa. 1781); *Baynard v. Singleton*, 1 N.C. 5 (1787); *Hamilton v. Eaton*, 1 N.C. 641 (Cir. Ct. D.N.C. 1792); *Jackson v. White*, 20 Johns. 313 (N.Y. Sup. Ct. 1822); *M'Ilvaine v. Coxe's Lesee*, 6 U.S. 280 (1805); *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99 (1830); Bradford Perkins, *Prologue to War: England and the United States 1805-1812* 89-90 (1961); Act of July 27, 1868, ch. 249, § 1, 15 Stat. 223. Additionally, this Court in *Wong Kim Ark* recognized that allegiance is not a one-way street but contains an element of mutual consent. *See* 169 U.S. at 694 (persons "are entitled to the protection of and owe allegiance to the United States, so long as they are *permitted* by the United States to reside here") (emphasis added).

on Birthright Citizenship? 17 Charleston L. Rev. 95, 112-13 (2022). Essentially, illegal immigration demonstrates a refusal to recognize the sovereign's right to rule. *Id.* at 113. Moreover, unlike other crimes, it is an ongoing act of defiance, or an "ongoing crime." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 n. 3 (1984). Because their parents have demonstrated a lack of allegiance to the governing authorities, children of illegal aliens cannot inherit the allegiance that defines the common law rule of natural-born subjectship. Parents cannot pass onto their children that which they do not themselves possess.

Additionally, illegal aliens do not possess the same protections afforded to citizens or legal residents. Since they have no right to dwell in the country in which they are illegally present, illegal aliens face the constant threat of removal from the sovereign's dominion. This threat further ensures that children of illegal aliens will not possess the allegiance required by the common law rule. Instead of seeing the sovereign as a protector, they may see him as a persecutor, thereby incurring "grudge[s] of resentment as opposed to debts of gratitude." Raley, 17 Charleston L. Rev. at 114. Accordingly, were illegal immigration as it exists in the modern era to have been present under the common law, illegal alien children likely would have been denied citizenship as children of aliens in enmity with the sovereign. Therefore, it would be in keeping with both the plain text of the Citizenship Clause and the history and tradition of citizenship in Anglo-American law to exclude the children of illegal aliens from the privileges of citizenship.

CONCLUSION

For these reasons stated herein, *amicus curiae* respectfully requests that this Court vacate the lower court's injunction of the executive order and allow the political branches to make determinations concerning citizenship and naturalization pursuant to their constitutional duties.

Respectfully submitted,

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