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 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] 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

The court below, the several other forum-shopped courts that have addressed the President's "Protecting the Meaning and Value of American Citizenship" Executive Order, and even three Justices of this Court in their dissenting opinions in *Trump v. CASA,* all 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 immigrants was definitively settled by the Court in *United States v. Wong Kim Ark*,169 U.S. 649 (1898). 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 (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*, as at least one of the lower courts addressing the President's executive order acknowledged. *Doe v. Trump*, 766 F. Supp. 3d 266, 280 (D. Mass. 2025) (subsequent history omitted); *cf. CASA, Inc. v. Trump,* 763 F. Supp. 3d 723, 738 (D. Md. 2025) (subsequent history omitted) (even if the broad language in *Wong Kim Ark* was dicta, the district court was "not free to ignore" it).

More fundamentally, the claim that the Fourteenth Amendment codified the English feudal rule of *jus soli*, and that *jus soli* was the rule that prevailed in the United States from the beginning of its existence as a separate nation, is simply incompatible with the doctrine of consent articulated in the Declaration of Independence and the Declaration's explicit rejection of the perpetual allegiance that *jus soli* required.

ARGUMENT

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

The court below, as well as the several other forum-shopped courts to have considered the issue and the dissenting opinions of three Justices of this Court in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), 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, when it is not. *See, e.g.*, App.33a; *CASA*, 606 U.S. at 883, 891, 899 (Sotomayor, J., joined by Kagan and Jackson, Jj., dissenting)[2] ("clear" and "clearly established"); *id.* at 936, 940 (2025) (Jackson, J., dissenting) ("unequivocal"; "plainly wr[itten] into the Constitution").[3] 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.

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[2] Unless otherwise noted, subsequent references to *CASA* herein are to Justice Sotomayor's dissenting opinion.

[3] *See also, e.g.*, *Doe*, 766 F. Supp. 3d at 278 (subsequent history omitted); *Washington v. Trump*, 765 F. Supp. 3d 1142, 1149, 1151 (W.D. Wash.) (subsequent history omitted); *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723, 733 (D. Md. 2025), *stay granted in part by Trump v. CASA, Inc.*, 606 U.S. 831 (2025) (subsequent history omitted).

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 court here and in the parallel cases, as well as the three dissenting Justices in *CASA*, 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 recognize in English feudal law of children born to diplomats or soldiers in occupying armies. *See, e.g.*, App.33a; *CASA*, 606 U.S. at 884-85. In doing so, they ignore the critical fact of Wong Kim Ark's parents' lawful and permanent domicile. In one of the parallel cases, the Ninth Circuit erroneously described that critical fact as merely incidental, incorrectly asserting that "domicile did not play a significant role in the Court's analysis of the Citizenship Clause's requirements." *Washington v. Trump*, 145 F.4th 1013, 1030 (9th Cir. 2025). This characterization 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 reliance on such *dicta* by the lower court here and elsewhere, and by the dissenters in *CASA*, 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 court's treatment of *Wong Kim Ark* as controlling on an issue not addressed in that decision is simply incorrect.

B. Subsequent References to *Wong Kim Ark* By This Court Are Likewise *Dicta*

The *CASA* dissenters claimed that this Court "has repeatedly reaffirmed *Wong Kim Ark*'s holding" of near-universal birthright citizenship. *CASA,* 606 U.S. at 885-86. But the passing references are also *dicta* in four of the cases they cite, and a non-binding assumption in the fifth.

In *Morrison v. California*, for example, Justice Cardozo, for the Court, stated in passing that a "person of the Japanese race is a citizen of the United States if he was born within the United States." *Morrison v. California*, 291 U.S. 82, 85 (1934) (citing *Wong Kim Ark*). This passing reference to *Wong Kim Ark* does not even correctly state the purported holding of *Wong Kim Ark* as the *CASA dissenters* asserted it to be, for it ignores the exceptions of children of diplomats and invading armies that even they acknowledge. Moreover, the very next sentence in the case states that "[h]e is a citizen, even though born abroad, if his father was a citizen…." *Id.* There is absolutely no discussion of whether Mr. Doi, the individual of Japanese ancestry who was one of the criminal defendants in the case, was a citizen by birth in the

United States, birth abroad to a citizen father, or not a citizen at all. Instead, the case addressed whether California's statutory requirement shifting the burden of proving citizenship to a criminal defendant comported with due process. Such *dicta*, if it can even be described as rising to that level, does not remotely qualify as a *holding* reaffirming what the *CASA dissenters* assert to be the holding of *Wong Kim Ark*.

The *CASA* dissenters also relied on statements in four other mid- to late-20th century cases. *CASA,* 606 U.S. at 884-85 (citing *Hirabayashi v. United States*, 320 U.S. 81, 96-97 (1943); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957); *INS v. Errico*, 385 U.S. 214, 215-16 (1966); and *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985). So do Respondents. Resp. Br. in Opp. To Cert, at 31 (citing *Hintopoulos* and also *Rios-Pineda* and *Errico* as the cases cited in *Doe v. Trump*, 157 F.4th 36, 77 (1st Cir. 2025)). Although all four include statements by the Court regarding the birth citizenship of children born in the United States, in none of the cases are those statements a binding holding.

The Court in *Hirabayashi*, for example, stated that approximately two-thirds of persons of Japanese descent subject to the challenged curfew order were "citizens because born in the United States." *Hirabayashi*, 320 U.S. at 90, 96. But this statement must be viewed in light of the case's context and the status of Hirabayashi's parents. Both parents appear to have become domiciled in the United States prior to the time of his birth. The Supreme Court decision itself acknowledges that Hirabayashi "was born in Seattle in 1918, of Japanese parents who had come from Ja-

pan to the United States, and who had never afterward returned to Japan." *Hirabayashi*, 320 U.S. at 84. The Densho Encyclopedia, a well-respected authority on Japanese-American ancestry, reports that Hirabayashi's father emigrated to the United States in 1907, more than a decade before Hirabayashi's birth, and that his mother followed in 1914, still four years before his birth. Cherstin M. Lyon, "Gordon Hirabayashi," Densho Encyclopedia (2024) .[4] This evidence and acknowledgement by the Court strongly suggests that Hirabayashi's parents, like Wong Kim Ark's parents, had established permanent domicile in the United States prior to his birth. The Court's general statement about the citizenship of the larger group, made without analyzing the jurisdictional requirement for that group, is best understood as *dicta* simply applying the established holding of *Wong Kim Ark* regarding children born of parents lawfully domiciled in the United States, not as an extension of automatic citizenship to children of temporary or unlawful aliens.

Hintopoulos and *Rios-Pineda* likewise involved statements about the citizenship of children born in the United States. *See Hintopoulos*, 353 U.S. at 73 (the child is, of course, an American citizen by birth"); *Rios-Pineda*, 471 U.S.at 446 ("By that time, respondent wife had given birth to a child, who, born in the United States, was a citizen of this country."). But in both cases, the statements are pure *dicta.*

The issue in *Hintopoulos* was whether the parents could be deported even if the child was an American

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[4] Available at https://encyclopedia.densho.org/Gordon_Hirabayashi/.

citizen, as the Court stated ("assumed" would be the more appropriate word) was the case. Had the Court responded negatively to that question, then whether or not the child was in fact a citizen would have been necessary to decide, as the statute at issue required that the potential deportee have a close familial relationship with a U.S. citizen. But the Court upheld the deportation order anyway, despite its statement about the child being a citizen.

So, too, with *Rios-Pineda*. The Attorney General's decision not to suspend deportation was expressly premised on the statutory discretion afforded to the Attorney General, which could be exercised without "consider[ing] whether the threshold statute eligibility requirements [such as close familiar relationship to a citizen] are met." *Id*. at 449 (citing *INS v. Bagamasbad*, 429 U.S. 24 (1976)). The citizenship status of the child—a statutory prerequisite—was therefore not at issue in the case, and the Court's statement about the child's citizenship is therefore the purest form of *dicta*. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 399 ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used").

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* discussed above. But the statements are not a binding holding for another reason. The citizenship of the children was not contested, and the Court conducted no analysis whatsoever of whether children born to immigrants in the country illegally (in *Errico*, by making a material misrepresentation on his 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.

Moreover, even if otherwise, these cases show that, at most, the more expansive reading of *Wong Kim Ark* advanced by Respondents and by the *CASA* dissenters had begun to take root by the 1950s—more than a half century after the *Wong Kim Ark* decision and more than 80 years after adoption of the Fourteenth Amendment. They tell us little, therefore, about the original public meaning of the Fourteenth Amendment, particularly when the *obiter dictum* statements stand in such stark contrast to this Courts decisions in *The Slaughter-House Cases* and *Elk v.*

Wilkins, discussed below, that were issued in much closer proximity to the adoption of the Amendment.

There is also this Court's footnote reference to *Wong Kim Ark* in *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982), cited by the *CASA* dissenters and by the Ninth Circuit in *Washington v. Trump*. 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."). The difference in language between the two clauses therefore supports rather than undermines the Government's argument that the Citizenship Clause requires complete jurisdiction, not merely partial or territorial jurisdiction such as renders someone subject to U.S. law while present in the United States.

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

Although the lower court in this case simply rested on what it viewed as the unambiguous text of

the Citizenship Clause and its expansive view of the holding in *Wong Kim Ark,* other lower courts finding a substantial likelihood of success on the merits for various groups of Plaintiffs have cited 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," or that it is correct.

i. Mischaracterization of *Gardner v. Ward*

In *Washington v. Trump,* 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." *Washington*, 145 F.4th at 1031. 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 reliance on *Lynch v. Clarke* by the *CASA* dissenters and by the Ninth Circuit in *Washington v. Trump* fares no better. *See CASA*, 606 U.S. at 883; *Washington*, 145 F.4th at 1031 (both 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).[5] 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).

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

iii. Misunderstanding of Senator Conness's Remarks on Citizenship

The *CASA* dissenters quoted Senator Conness's statement during congressional debates over the Fourteenth Amendment "that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law." *CASA*, 606 U.S. at 883. Similarly, the Ninth Circuit in *Washington v. Trump* quoted Senator Conness's statement about "children of all parentage whatever" becoming citizens to suggest that the Amendment provided a sweeping rule of birthright citizenship divorced from parental allegiance. *Washington,* 145 F.4th at 1032 (quoting Cong. Globe, 39th Cong., 1st Sess. 2891 (1866)). Read in context, however, just the opposite is the case. Senator Conness's statements 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 views of the Ninth Circuit and the *CASA* dissenters, 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).

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 the rejection of *jus soli*'s 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 which was a key component of the English feudal rule of *jus soli*.

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 v. Trustees of Sailor's Snug Harbor,* 28 U.S. (3 Pet.) 99 (1830), the Court considered the citizenship of a person born in New York near the time of

the Declaration of Independence. In the opinion of the Court delivered by Justice Thompson, the Court held that the son's "election and character followed that of his father," who had remained loyal to Britain. *Id*. at 126. This was true, according to the majority opinion, even if he had been born in the period between the Declaration of Independence and the British occupation of New York two months later. *Id.* at 124.[6] 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 126.

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 ...

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[6] Dissenting on this point, Justice Story contended that if Inglis had been born in New York after the Declaration but before the British occupation, he would have been a citizen. *Id.* at 164. But his position in that case is driven in part by the "perplexing state of affairs" due to the revolutionary war. *Id.* at 159. In the same opinion, Justice Story also recognized that "birth within the allegiance of a foreign sovereign, does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign," *id.* at 156, which is what he described as a "reasonable qualification" to the general rule of birthright citizenship in his *Conflict of Laws* treatise a few years later. *See infra* at 20.

there *have been doubts*." *Id.* at 167-68 (emphasis added).

In his *Commentaries on the Conflict of Laws*, Justice Joseph Story had previously described the "doubts" recognized by this Court in *Happersett* as follows: 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." Joseph Story, *Commentaries on the Conflict of Laws* § 48, at 48 (1834). Although he acknowledged that "[i]t would be difficult … to assert, that in the present state of public law such a qualification is universally established"—some courts, such as the New York trial court in *Lynch* continued to follow the old English rule, as that state's constitution required—Story's "reasonable qualification" of not extending birth citizenship to temporary visitors was followed by those who adopted the 1866 Civil Rights Act and drafted and proposed the Fourteenth Amendment.

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.

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).

The congressional understanding of this "not subject to any foreign power" limitation also expressly tracked the distinction between permanent residents and temporary visitors. House Judiciary Committee Chairman James F. Wilson, introducing the Civil Rights Bill, explained that relying on the "general law relating to subjects and citizens recognized by all nations" leads to the conclusion that "every person born in the United States is a natural born citizen … except … children born … to temporary sojourners or representatives of foreign governments." Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (remarks of Rep. Wilson).

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 without 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 dur-

ing 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 the "complete jurisdiction" required by the Amendment 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 Respondents' and the *CASA* dissenters' 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).[7] 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 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

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

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.[8]

CONCLUSION

The President's Executive Order is grounded on the original meaning of the Fourteenth Amendment's Citizenship Clause, which required that one be subject to the complete jurisdiction of the United States and not subject to any foreign power. It therefore correctly concludes that the children born to those subject only to a partial or territorial jurisdiction, such as is the case with temporary visitors and even more so with those who have entered the country illegally, are not automatically citizens by virtue of the Citizenship Clause. This Court should uphold the Executive Order and return to the branch of government to which it was assigned, namely, the Congress, pursuant to its power over naturalization, U.S. Const. Art. I, § 8, cl.

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[8] 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. The *CASA* dissenters' reliance on current regulations that deem birth in the United States as sufficient to prove citizenship, *CASA*, 606 U.S. at 886, ignores the prior regulation's requirement for information about parental status.

4, the political decision of how far above that constitutional floor, if at all, citizenship should be offered.

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