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

BRIEF FOR *AMICUS CURIAE* FEDERATION FOR AMERICAN IMMIGRATION REFORM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Federation for American Immigration Reform ("FAIR") is a nonprofit corporation and membership organization that was founded in 1979 and has its principal place of business in Washington, D.C. FAIR's mission is to advocate for immigration policy that is in America's best interest. FAIR has been involved in more than 100 legal cases since 1980, either as a party or *amicus curiae*, with the aim of advancing this mission.

INTRODUCTION

On January 20, 2025, President Donald J. Trump signed an executive order entitled "Protecting the Value of United States Citizenship" ("EO"). This order provides that:

> United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under

1. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to its preparation or submission.

> the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.

Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025). It then directs the relevant federal agencies to "take all appropriate measures to ensure that the regulations and policies of their respective departments and agencies are consistent with this order, and that no officers, employees, or agents of their respective departments and agencies act, or forbear from acting, in any manner inconsistent with this order." *Id.* at 8449-50. Plaintiffs challenged the EO, alleging, *inter alia*, that the order violates the Citizenship Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

This Court should rule for Petitioners. The sweeping invalidation of the EO by the court below rested on a glaring legal error. As applied to children of illegal aliens and tourists—the vast majority of its applications—the EO accords with binding precedent of this Court.

Plaintiffs and the court below read the phrase "subject to the jurisdiction" as used in the Citizenship Clause to confer citizenship on all persons born in the United States, except those whose parents are foreign diplomats or members of foreign armies. This Court has not so interpreted the Citizenship Clause. Rather, this Court has held that only children born in the United States to parents who, at the time, were permitted by the United States to reside here are citizens at birth by virtue of the Citizenship Clause.

Not only did this Court so hold, but it was right to do so. The American idea of citizenship, as opposed to the historical British idea of a subject, has always involved the notion of mutual consent between the individual and the nation, with the consent of the nation typically being expressed through its political branches. Under Plaintiffs' view, the political branches not only have not consented to the citizenship of children of illegal aliens, but they have prohibited the necessary condition of that citizenship: the presence of the parents. An interpretation that forces citizenship on the nation against its will should be disfavored.

ARGUMENT

The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend. XIV, § 1. Contrary to Plaintiffs' and the lower court's view, in the central case on birthright citizenship, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), this Court held that, to have citizenship at birth under the Citizenship Clause, one must be born in the geographic confines of the United States to parents who, at the time of one's birth, were permitted by the United States to reside in this country.

I. To be "subject to the jurisdiction" of the United States under the Citizenship Clause, one must be permitted by the United States to reside here.

A. To be within the allegiance and protection of the United States, one must be permitted by the United States to reside here.

At issue in *Wong Kim Ark* was whether a son born to Chinese subjects lawfully residing in the United States was a citizen at birth under the Citizenship Clause. The Court found that he was, beginning its discussion in general terms:

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is *within the allegiance and the protection, and consequently subject*

to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 7 Rep. 6a, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher's Case in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H.R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; *United States v. Carlisle*, 16 Wall. 147, 155; *Calvin's Case*, 7 Rep. 6a; Ellesmere on Postnati, 63; 1 Hale P.C. 62; 4 Bl. Com. 74, 92.

Id. at 693-94 (emphasis added). The Court then added an important proviso, applicable to the particular facts of the case:

> Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, 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*; and are "subject to the jurisdiction thereof," in the same sense as all other aliens [lawfully] residing in the United States.

Id. at 694 (emphases added) (citing, *inter alia, Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893)). *See, e.g., The Concise Oxford Dictionary of Current English* 825 (7th ed. 1919) (defining "so long as" as "with the proviso, on the condition, that"). Here, then, the Court held that persons such as Wong Kim Ark's parents—and thus children born to them in the United States—were within the allegiance and protection of the United States "so long as they are permitted by the United States to reside here"—meaning, provided that they were so permitted.

One reason the Court added this proviso is that, at the time, other Chinese persons—laborers who had overstayed their permission to be in the country, or who failed to obtain requisite certificates of residence—were subject to deportation under the 1882 Exclusion Acts and their 1892 amendments, *Fong Yue Ting*, 149 U.S. at 724, and thus, for the Court, were not within the allegiance and protection of the United States. Indeed, the Court's holding continues to comport with common sense, since an illegal alien, lawfully subject to apprehension, detention,

and removal at all times, can hardly be said to be within the "protection" of the United States, as the phrase "allegiance and protection" has always been understood. *See, e.g., Minor v. Happersett*, 88 U.S. 162, 165-66 (1874) ("The very idea of a political community, such as a nation is, implies an association of persons for *the promotion of their general welfare.* Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.") (emphasis added).

When the Court issued its ruling, no law prohibited aliens of any nationality other than Chinese from residing here. *See* Amanda Frost, *"By Accident of Birth": The Battle over Birthright Citizenship After United States v. Wong Kim Ark*, 32 Yale J.L. & Human. 38, 47 (Summer 2021); Chinese Exclusion Act, Pub. L. 47-126, 22 Stat. 58 (1882). But, of course, it is wholly against the tenor of *Wong Kim Ark* to imagine that the requirement was only applicable to the Chinese—that only *Chinese* persons, if excluded, would be outside the allegiance and protection of the United States, while those of other nationalities who might be excluded, if Congress had passed a law excluding them, would somehow remain within the nation's allegiance and protection. Needless to say, the Court was far from observing any such distinction of race or nationality.

B. To be subject to the jurisdiction of the United States, one must be within the allegiance and protection of the United States.

For the Court, being "subject to the jurisdiction" of the United States under the Citizenship Clause meant not merely being subject to the laws of the United States,

but being subject to the nation's political jurisdiction, and "owing it direct and immediate allegiance." *Wong Kim Ark,* 169 U.S. at 680 (citing *Elk v. Wilkins*, 112 U.S. 94, 101-102 (1884)):

> The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the Fourteenth Amendment, is *Elk* v. *Wilkins,* 112 U.S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.
>
> That decision was placed upon the grounds, that the meaning of those words was, "not merely subject in some respect or degree to the jurisdiction of the United States, *but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.*"

Id. at 680 (emphasis added). Thus, for the Court, being subject to the jurisdiction of the United States

required both being "completely subject to their political jurisdiction" and "owing" the United States "direct and immediate allegiance." Quite obviously, those outside the allegiance and protection of the United States altogether—such as excluded Chinese laborers then, or illegal aliens today—cannot be said to meet the requirement of owing the United States "direct and immediate allegiance." Nor can they be said to be "completely subject" to the "political jurisdiction" of the United States. Therefore, they cannot be "subject to the jurisdiction" of the United States under the Citizenship Clause.

C. *Wong Kim Ark*'s permission requirement was a holding of the Court.

Not to regard the Court as holding the permission of the nation to reside here to be a prerequisite for being subject to the jurisdiction of the United States for Citizenship Clause purposes would be to truncate the reasoning the Court gave for its judgment, ignore the precedents it cited, and make nonsense of its opinion. For example, the Court would then have left open the possibility (which it explicitly foreclosed) that those residing in the country while being prohibited from doing so were within the allegiance and protection of the United States, or the possibility that one could be *outside* of the nation's allegiance and protection but still owe it "direct and immediate allegiance," as required for being subject to its jurisdiction.

The Court's proviso requiring permission to reside is clearly part of its holding, not dicta, because that proviso was part of the rule of law the Court stated and applied when considering the particular facts of the case. *See,*

e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 1065 (2005) (defining a holding as consisting of "those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment"). These facts were that Wong Kim Ark's parents were not merely resident aliens, but Chinese subjects residing in the United States at a time when some Chinese, uniquely among nationalities, were excluded from the country. The Court's rule that aliens residing in this country, provided that they had permission to do so, were subject to its jurisdiction was based on these facts, and that rule entails the Court's judgment that Wong Kim Ark was born a citizen. *See Wong Kim Ark*, 169 U.S. at 705 ("*For the reasons above stated*, this court is of opinion that the question [of whether a person with Wong Kim Ark's particular birth and parentage was a citizen] must be answered in the affirmative.") (emphasis added).

And, of course, this Court may set forth a standard as part of its holding in a case even when it finds that the standard has been met in that case. For example, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that a federal court hearing habeas corpus must consider whether there was legally sufficient evidence to support a conviction, not just whether there was some evidence, even though it found that the prosecution had met the former, higher standard. Likewise, *Wong Kim Ark* did not leave open the question of whether those born in this country to persons who did *not* lawfully reside in the country were citizens by birth under the Citizenship Clause merely because it was undisputed that Wong Kim Ark's parents lawfully resided here. Rather, the standard the Court announced and applied was part of its holding,

even though Wong Kim Ark met that standard. Any view of "holding" that is more restrictive, at least if applied to this Court, would rob the Court of its ability to set forth general principles of law to guide lower courts in any case where the general principle it discerned, and relied on to reach its judgment, happened to be met. *See* Antonin Scalia, *ESSAY: The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) (arguing for the desirability of this Court's deciding cases using broad rules, in order to bind lower courts and itself).

Of course, Plaintiffs' and the lower court's reading of *Wong Kim Ark*, in which the holding of the case was that (outside of listed exceptions) all resident aliens, with or without permission to reside here, are subject to the jurisdiction of the United States, also entails the Court's judgment. But that rule *contradicts* the Court's statement that Chinese aliens residing here, provided they had the permission of the nation to do so, were subject to the jurisdiction, because this latter statement implies that Chinese aliens residing here without permission were not subject to the jurisdiction, whereas Plaintiffs' and the lower court's rule implies that they were so subject. The contradiction can only be resolved by reading the permission-to-reside requirement as a proviso to the Court's earlier statements about resident aliens in general, so that the rule of *Wong Kim Ark*, stated in full, is that (outside of listed exceptions) resident aliens, so long as—that is, if and only if—they are permitted by the United States to reside here, are subject to the jurisdiction of the United States.

It is true that the Court in *Wong Kim Ark* stated, in dicta, that "jurisdiction" had a unitary meaning in the

Fourteenth Amendment. 169 U.S. at 687. It is also true that "jurisdiction" for purposes of the Equal Protection Clause of that amendment has long been held to be merely geographical. *Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). To draw the conclusion that *Wong Kim Ark* held that "jurisdiction" for purposes of the Citizenship Clause was merely geographical, however, would be to ignore not only the Court's permission-to-reside requirement, but also the Court's conditioning of being subject to the jurisdiction of the United States on being within the "allegiance and protection" of the United States, *Wong Kim Ark*, 169 U.S. at 693; owing the nation "direct and immediate allegiance," *id.* at 680; and being "completely subject to" its "political jurisdiction," *id.* Then and now, an illegal alien may be within the borders of a state, and therefore within its geographical jurisdiction, while still being lawfully subject to arrest and deportation at all times, and therefore clearly not be within the "allegiance and protection" of the United States in any meaningful sense, nor owe it "direct and immediate allegiance," nor be "completely subject" to its "political jurisdiction." It may be that the *Wong Kim Ark* Court believed, erroneously, that those in the country without permission enjoyed no constitutional protection, *see Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (implying that aliens in the country without permission were not "entitled . . . to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person or property, and to their civil and criminal responsibility"), *cited in Wong Kim Ark*, 169 U.S. at 694, and thus believed that "jurisdiction" did not have a merely geographical meaning in any part of the Fourteenth Amendment. That proposition, of course, is fully consistent with the Court's

permission-to-reside requirement. It is not necessary to support that requirement, however, and the Court did not rely on it solely, if at all.

II. Plaintiffs' interpretation forces citizenship on the nation.

United States citizenship has always been thought to be based on mutual consent. Thomas Jefferson, for example, insisted on the right of an American citizen to expatriate, in contrast to the British view, responsible in part for the impressment crisis, that a British subject could not renounce that status. In an 1806 letter to Treasury Secretary Albert Gallatin, President Jefferson wrote: "I hold the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken from him even by the united will of every other person in the nation." "From Thomas Jefferson to Albert Gallatin, 26 June 1806," *Founders Online*, National Archives, available at: https://founders.archives.gov/documents/Jefferson/99-01-02-3910 (last visited Jan. 23, 2026). *See, e.g., Shanks v. Dupont*, 28 U.S. 242, 252 (1830) (noting "[t]he unyielding severity with which the courts of Great Britain have adhered to" the maxim "*nemo potest exuere patriam* [no one can renounce his country]"); Troy Bickham, *The Weight of Vengeance* 31 (2012) (noting that the British view of perpetual allegiance led to the largescale impressment of American seamen by the British before the War of 1812). As the Expatriation Act of 1868 declared: "[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Act of July 27, 1868, ch. 249, pmbl., 15 Stat. 223, 223. In a recent case, the U.S. Court of Appeals for the

Tenth Circuit explicated this American idea of citizenship by consent:

> Early American attitudes toward what we now call citizenship developed in the context of English law regarding the relationship between monarch and subject. "England's law envisioned various types of subjectship, . . . all [of which] mirrored permanent hierarchical principles of the natural order." James H. Kettner, *The Development of American Citizenship, 1608-1870* 8 (1978). "The conceptual analogue of the subject-king relationship was the natural bond between parent and child." *Id.* Due to concerns that were "preeminently practical," "colonial attitudes slowly diverged from those of Coke and his English successors," with "little attention [ ] paid to doctrinal consistency." *Id.* at 8-9. Animating this divergence were not only practical considerations but also the emerging American maxim that "the tie between the individual and the community was contractual and volitional, not natural and perpetual." *Id.* at 10. The colonists "ultimately concluded that all allegiance ought to be considered the result of a contract resting on consent." *Id.* at 9. "This idea shaped their response to the claims of Parliament and the king, legitimized their withdrawal from the British empire, . . . and underwrote their creation of independent governments." *Id.* at 10. A model of citizenship based on consent is imbued in our founding documents.

Fitisemanu v. United States, 1 F.4th 862, 867 (10th Cir. 2021).

The required consent must be, to some extent, mutual. The nation must consent to a foreigner's becoming a citizen, and in extraordinary cases can even withdraw its consent from a given naturalized citizen (if its consent resulted from fraud), and thus revoke his citizenship. 8 U.S.C. § 1451(a) (authorizing United States district courts to revoke and set aside an order admitting a person to citizenship and to cancel a certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation).

Historically, as today, the consent of the nation to citizenship has typically been expressed by the political branches of the federal government:

> [O]ne aspect of the nation's approach to American citizenship in the territories was always clear: it was not extended by operation of the Constitution. While "there was no consistent policy to define the nationality status of the inhabitants of U.S. territories and possessions," citizenship generally came from some kind of *ad hoc* legal procedure—"treaties, acts of Congress, administrative rulings, and judicial decisions"—rather than as an automatic individual right guaranteed by the Constitution. Charles Gordon et al., 7 *Immigration Law and Procedure* § 92.04[1][a] (2020). . . . In 1898, the United States acquired significant overseas territories in the wake

> of the Spanish-American War. There was quickly a practical necessity to determine the citizenship status of the inhabitants of these territories. *See Boumediene v. Bush*, 553 U.S. 723, 756, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008). Congress filled the void. Ever since, every extension of citizenship to inhabitants of an overseas territory has come by an act of Congress. *See Tuaua v. United States*, 788 F.3d 300, 308 n.7, 415 U.S. App. D.C. 369 (D.C. Cir. 2015). Without such an act, no inhabitant of an overseas territory has ever been deemed an American citizen by dint of birth in that territory.

Fitisemanu, 1 F.4th at 868-69.

Under Plaintiffs' view, however, not only are the children of illegal aliens citizens despite the lack of consent to their citizenship by the political branches, they are citizens even though the political branches have prohibited the necessary condition for their citizenship, the presence of their parents. On Plaintiffs' view, the citizenship of this class of individuals is forced upon the nation against its political will. Given the centrality of mutual consent in the American idea of citizenship—and also because a citizen of the United States is no mere subject, but shares in the sovereignty of the people over this country, *see* U.S. CONST. Preamble—this interpretation is to be disfavored.

The interpretation reached by the Court in *Wong Kim Ark*, properly understood, avoids this drastic infirmity. Under this holding, Congress at least consents to the citizenship of children of aliens permitted to reside here

by permitting those aliens to reside here. The political branches are not cut off, as they are under Plaintiffs' interpretation, from any say in who shall be a citizen.

III. The lower court's facial invalidation of the EO should be reversed.

It follows from *Wong Kim Ark* that the EO has innumerable valid applications, including to children born to illegal aliens, tourists, and others not permitted by the United States to reside here. The court below was therefore wrong in its wholesale conclusion—amounting to a facial invalidation—that the EO contradicts the Citizenship Clause. *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also AFSCME Council 79 v. Scott*, 717 F.3d 851, 857-858 (11th Cir. 2013) (applying the rule of *Salerno* to a facial challenge to an executive order). In light of *Wong Kim Ark*'s holding that, to have birthright citizenship under the Fourteenth Amendment, one's parents must have been permitted by the United States to reside here at one's birth, the EO is far from invalid on its face.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: January 27, 2026

Respectfully submitted,

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