Nos. 25-364, 25-365

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, et al., Appelants,

v.

WASHINGTON, et al., Appellees.

DONALD J. TRUMP, et al., Appellants,

v.

BARBARA, et al., Appellees.

BRIEF OF WILLIAM T. DICKSON AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae William T. Dickson is an attorney who has researched the issue of "birthright citizenship" and this Court's decision in the case of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) for several years. He is also a resident of the State of Texas which has borne much of the brunt of the massive wave of illegal immigration into this country over many years.

In the course of his research, he has become convinced that both the meaning of the phrase "subject to the jurisdiction thereof" in the Citizenship Clause of the Fourteenth Amendment ("Citizenship Clause") to the United States Constitution and this Court's holding in *Wong Kim Ark* have been misunderstood and misapplied for many years. Furthermore, that this Court's holding in *Chin Bak Kan v. United States*, 186 U.S. 193 (1902) as to the ruling in *Wong Kim Ark* has been completely ignored. The erroneous understanding of what *Wong Kim Ark* holds has permeated these proceedings.

Amicus also believes that the Petitioners' argument, like that of the Plaintiff/Appellees, is based on the erroneous belief that the holding in *Wong Kim Ark* was based on interpreting the Citizenship Clause. In fact, the holding in *Wong Kim Ark* was completely untethered to and independent of the Citizenship Clause and was based on a judicial invention of a special law to get around the Chinese Exclusion Act, 22 Stat. 58. To ensure the proper adjudication of the

two cases before the Court, *Amicus* submits his views to the Court.[1]

SUMMARY OF ARGUMENT

As noted above, the Petitioners' argument, like that of the Plaintiff/Appellees, is based on the erroneous belief that the holding in *Wong Kim Ark* was based on interpreting the Citizenship Clause. On page 4 of their Petition for Certiorari is the statement:

> *Wong Kim Ark* recognized that the Citizenship Clause guarantees U.S. citizenship not just to children of U.S. citizens, but also to children of aliens "enjoying a permanent domicil and residence" in the United States.

The Citizenship Clause is based on the status of the newborn child. ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof …") *Wong Kim Ark*, in contrast, granted birthright citizenship based on the status of the parents. Thus, the ruling in *Wong Kim Ark* is completely untethered to and independent of the Citizenship Clause.

By establishing a new basis for citizenship outside of the Citizenship Clause of the Fourteenth Amendment, the Court was purporting to exercise a power that the Constitution (Article1, Section 8, Clause 4) grants only to Congress, not this Court.

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[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than amicus curiae, has contributed money that was intended to fund preparing or submitting the brief.

Moreover, the dicta in *Wong Kim Ark* asserted that the English common law doctrine of *jus soli*, was carried over into American common law and then incorporated into the Citizenship Clause. Assuming *arguendo* that *jus soli* carried over into American common law after the American Revolution, Congress overturned such common law with the Civil Rights Act of 1866. And it was this statute that was incorporated into the Citizenship Clause.

Finally, none of the Plaintiff/Appellees have pled the facts required to establish standing to prosecute their claims. Even worse, some have affirmatively pled facts that establish that they lack the necessary standing.

ARGUMENT

I. CONGRESS OVERRULED ANY COMMON LAW BASIS FOR CITIZENSHIP

It is widely acknowledged that an important purpose of the Civil Rights Act of 1866 as well as the Fourteenth Amendment was to overturn the decision of this Court in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The basis of that decision was an assertion of common law.

Immediately after the conclusion of the Civil War, Congress drafted and submitted for ratification the Thirteenth Amendment abolishing slavery. Congress next moved to enact a statute to overrule the common law pronounced in *Dred Scott* to make it clear that the former slaves emancipated by the Thirteenth Amendment and their descendants were full-fledged citizens. Congress could have drafted a narrow, special statute that only granted citizenship to former

slaves and their descendants. However, Congress chose a different path. It enacted a broad, general statute that overruled the common law, not just for former slaves and their descendants, but overruled the common law with respect to the citizenship status of everyone. Thus, all common law court rulings on citizenship became moot after the statute was enacted.

Specifically, the Civil Rights Act of 1866, 14 Stat. 27, that overrode any common law to the contrary in the United States up to that date. This statute was also the "existing law" that was declared and affirmed by the Fourteenth Amendment. It stated:

> "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;" (Emphasis added.)

The English common law doctrine of *jus soli* held that anyone born in the King's realm was a subject of the King and owed the King perpetual allegiance. That duty of allegiance was permanent and indissoluble and could not be cancelled by any change of time or place or circumstances. The only exceptions to citizenship based on place of birth were children born to foreign diplomats or to the soldiers of invading armies. *U.S. v. Wong Kim Ark*, 169 U.S. 649, 706, 707 (1898), Dissent of Chief Justice Fuller citing Cockburn on Nationality 7 and Hall on Foreign Jurisdiction, etc., § 1.

Even if this English common law doctrine was also the common law in the United States after American independence, it was overruled by the Civil Rights Act of 1866.

In the case of *Rogers v. Bellei*, 401 U.S. 815 (1971) this Court reviewed the leading cases dealing with birthright citizenship. Beginning with *Wong Kim Ark,* the Court stated:

> Over 70 years ago, the Court, in an opinion by Mr. Justice Gray, reviewed and discussed early English statutes relating to rights of inheritance and of citizenship of persons born abroad of parents who were British subjects…The Court concluded that "naturalization by descent" was not a common law concept, but was dependent, instead, ***upon statutory enactment***
> *Rogers v. Bellei*, 401 U.S. at 828. (Emphasis added.)

The Court then discussed *Weedin v. Chin Bow,* 274 U.S. 657 (1927) stating:

> Later, Mr. Chief Justice Taft, speaking for a unanimous Court, referred to this "very learned and useful opinion of Mr. Justice Gray," and observed ""that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be ***no change in this rule of law except by statute***. . . ." *Weedin v. Chin Bow at 660.”” Rogers v. Bellei* at 828. (Emphasis added.)

This Court also stated in *Rogers v. Bellei* at 828-830:

> We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli,* that is, that the place of birth governs citizenship status ***except as modified by statute…***
> 3. Apart from the passing reference to the "natural born Citizen" in the Constitution's Art. II, § 1, cl. 5, we have, in the Civil Rights Act of April 9, 1866, 14 Stat. 27, the first ***statutory*** recognition and concomitant formal definition of the citizenship status of the native born:
>
> > *"[A]ll 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. . . ."*
>
> This, of course, found immediate expression in the Fourteenth Amendment, adopted in 1868…Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was "declaratory of existing rights, and affirmative of ***existing law,***" (Bold Emphasis added.)

Thus, it is beyond dispute that even if *jus soli* were the common law of the United States after American independence, Congress overruled that common law by statute with the enactment of the Civil Rights Act of 1866, and that statute was the existing law incorporated into the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution.

II. THE LAW OF ELK v. WILKINS IS NOT RESTRICTED TO MEMBERS OF INDIAN TRIBES.

The case of *Elk v. Wilkins*, 112 U.S. 94 (1884) dealt with John Elk who had been born as a member of an Indian tribe, or, as would be said today, as a "Native American." Obviously, Native Americans are native Americans. Having separated from his tribe and taken up residence in Omaha, Nebraska, he now claimed to be a U.S. citizen entitled to vote. This Court held otherwise, stating:

> The main object of the opening sentence of the Fourteenth Amendment was to settle the question…and to put it beyond doubt that ***all persons***, ***…owing no allegiance to any alien power***, should be citizens of the United States and of the state in which they reside…The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." 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*** and owing them direct and immediate allegiance.
> *Elk v. Wilkins*, 112 U.S. at 102. (Emphasis added.)

This holding settled the question of what "subject to the jurisdiction thereof" means as there are different types of jurisdiction. The separate Equal Protection Clause of the Fourteenth Amendment states that, "No state shall…deny to any person within its jurisdiction the equal protection of the laws." In the case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) this Court stated:

> These provisions are universal in their application to all persons within the ***territorial jurisdiction***, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo* at 369. (Emphasis added.)

The quotation above from *Elk v. Wilkins* makes it clear that "jurisdiction" in the Citizenship Clause meant that a person was a natural born citizen if they were born in the United States and were subject, not just to its narrow, legal, territorial jurisdiction, but to its complete *political jurisdiction* and *did not owe allegiance to another sovereign.*

With the prior law of the Civil Rights Act of 1866, the legislative record of the drafting of the Fourteenth Amendment, the *dicta* from the *Slaughterhouse Cases* [2]and finally the holding in *Elk v. Wilkins,* this was now settled law that has never been overruled.

In the subsequent case of *U.S. v. Wong Kim Ark,* 169 U.S. at 680-682, Justice Gray, who wrote

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[2] Both the legislative record and *Slaughter House Cases* are discussed in Petitioners' Brief.

both opinions, attempted to distinguish the two cases. However, nowhere in *Wong Kim Ark* did he say that *Elk v. Wilkins* was overruled. The outcome of *Elk v. Wilkins* depended on two facts and one rule of law. The two material facts were that John Elk was a member of an Indian tribe and such tribes were sovereigns. The controlling rule of law or *ratio decidendi* was that "***all persons***, …***owing no allegiance to any alien power***, should be citizens of the United States…"

III. U.S. v. WONG KIM ARK DID NOT ESTABLISH UNIVERSAL BIRTHRIGHT CITIZENSHIP

Only two years before *Elk v. Wilkins* was handed down, Congress enacted the Chinese Exclusion Act, 22 Stat. 58, that forbade the immigration of Chinese laborers and miners and prevented even lawful Chinese immigrants from becoming naturalized citizens, notwithstanding the Expatriation Act of 1868, 15 Stat 223. However, as originally enacted, the law was only for ten years. Then in 1892 it was strengthened and extended for another ten years until 1902. In 1902 the law was made permanent until it was repealed in 1943. In 1898, this Court issued *U.S. v. Wong Kim Ark.*

The decision contains a lengthy history of the English common law doctrine of *jus soli*, that held that anyone born in the King's realm was a subject of the King and owed the King perpetual allegiance. That duty of allegiance was permanent and indissoluble and could not be cancelled by any change of time or place or circumstances. The only exceptions to citizenship based on place of birth were children born to foreign diplomats or to the soldiers of invading

armies. *U.S. v. Wong Kim Ark*, 169 U.S. 649, 706, 707 (1898) Dissent of Chief Justice Fuller citing Cockburn on Nationality 7 and Hall on Foreign Jurisdiction, etc., § 1.

Petitioners discuss *Wong Kim Ark* extensively in their Brief but misconstrue what it really held. On page 32 they state, "But *Wong Kim Ark* concerned children of aliens with a lawful domicile in the United States…" On page 36 they state, "…its holding addresses only children of lawfully domiciled aliens."

In fact, the holding of *Wong Kim Ark*, 169 U.S. at 705 is much narrower and is not based on the Citizenship Clause. In *Chin Bak Kan v. United States*, 186 U.S. 193 (1902)[3] this Court stated:

> The ruling in *United States v. Wong Kim Ark,* 169 U. S. 649, was to this effect:
> "A child born in the United States, of parents of ***Chinese*** descent, who at the time of his birth are ***subjects of the Emperor of China***, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States."
> It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine ***the various facts on which citizenship depends under that decision.***

[3] This was a unanimous decision in which Justice Horrace Gray, the author of *Wong Kim Ark*, participated.

> By the law, the ***Chinese*** person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens, there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the ***mere assertion of citizenship***. The ***facts on which such a claim is rested must be made to appear.*** And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed. *Chin Bak Kan* at 200. (Emphasis added.)

Under the English common law doctrine of *jus soli*, it was irrelevant if the parents were in the King's realm temporarily or permanently domiciled there. It was irrelevant where the parents were from. It was irrelevant if the parents were in the King's realm legally or illegally. All that mattered were that the child was born in the King's realm and the parents were not diplomats or members of an invading army. As a result, the narrow, restrictive holding in *U.S. v. Wong Kim Ark* is inconsistent with *jus soli* and that means the 52 pages claiming that the U.S. adopted *jus soli* and incorporated it into the U.S. Constitution is mere *dicta* and not part of the holding or *ratio decidendi* of the decision.

Moreover, under the Citizenship Clause, citizenship is based on the status of the newborn child. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof …" *Wong Kim Ark*, in contrast, granted birthright citizenship based on the status of the parents. Thus, the ruling in *Wong Kim Ark* is completely untethered to and independent of the Citizenship Clause.

By establishing a new basis for citizenship outside of the Citizenship Clause of the Fourteenth Amendment, the Court was purporting to exercise a power that the Constitution (Article1, Section 8, Clause 4) grants only to Congress, not this Court.

An obvious question is why would the same justice who authored *Elk v. Wilkins* also author *Wong Kim Ark*? Throughout the majority opinion is a strong unhappiness with the obvious discrimination that was applied only against immigrants from China, either to keep them out altogether or, with certain categories, allow them to immigrate permanently but never allow them or their descendants to become naturalized citizens.

With its holding in *Elk v. Wilkins*, the Court stated and settled the general law (*legi generali*) under the Fourteenth Amendment's Citizenship Clause. With the Chinese Exclusion Act, Congress created a special law (*Lex specialis*) to keep Chinese immigrants out. With *Wong Kim Ark,* the Court created a special law to keep Chinese immigrants in, if they were born here to parents lawfully and permanently domiciled here.

In his opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) at 228, Justice Alito quoted from Justice Powell's dissenting description in and of *Roe v. Wade* as an "exercise of raw judicial power," *Roe v. Wade* 410 U.S 173 (1973)

at 222. In *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024), Chief Justice Roberts described the *Chevron Deference Doctrine* as "a judicial invention". The provision for 'birthright citizenship" for the children of Chinese parents who were subjects of the Emperor of China and lawful, permanently domiciled immigrants was a *judicial invention* created through an exercise of *raw judicial power*.

The *ratio decidendi* of *Wong Kim Ark* clearly falls under the doctrine *Expressio unius est exclusio alterius* ("the express mention of one thing excludes all others" or "the expression of one is the exclusion of others"). Because the Court was so careful to limit the effect of its holding in *Wong Kim Ark* to children of lawful, permanently domiciled immigrants from China who were subjects of the Emperor of China but not his diplomatic representatives, all other people are excluded from the coverage of the ruling.

In addition, the decision explicitly stated that it was only deciding the "single question" of the citizenship status of people born to parents who were of Chinese descent, subjects of the Emperor of China and lawfully and permanently domiciled in the United States and not diplomats. This Court has said, "…we reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions…The trial court…was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent."

Agostini v. *Felton*, 521 U. S. 203 (1997) at 236, 237, 238. (Emphasis added.)[4]

Thus, if a case concerns the citizenship status of children born in the U.S. whose parents are of Chinese descent, subjects of the Emperor of China and lawfully and permanently domiciled in the United States, *U.S. v. Wong Kim Ark* directly controls. But if a case concerns the citizenship status of a child or children whose parents are not of Chinese descent, not subjects of the Emperor of China and not lawfully and permanently domiciled in the United States, *Elk v. Wilkins,* which has never been overruled, controls. And *Elk v. Wilkins* says:

> The main object of the opening sentence of the Fourteenth Amendment was to settle the question…and to put it beyond doubt that all persons…***owing no allegiance to any alien power***, should be citizens of the United States and of the state in which they reside…
> *Elk v. Wilkins*, 112 U.S. at 102. (Emphasis added.)

[4] See also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") and *Loper Bright Enterprises v. Raimondo*. 603 U.S. 369 (2024) ("But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents…understandably continue to apply it…*Chevron* is overruled.").

IV. PLAINTIFF/APPELLEES LACK STANDING

This Court held in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) at 110:

> We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below. See *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 95 (1998) (" '[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'") (quoting *United States v. Corrick*, 298 U. S. 435, 440 (1936)).

As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing. A plaintiff must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Therefore, in a case like this where injunctive relief has been granted, specific facts must have been set forth by the plaintiffs to support standing and must have been "supported adequately by the evidence adduced at trial." Ibid. (internal quotation marks omitted). And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages). *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

As noted above, the claims of every plaintiff, but particularly the private and individual plaintiffs,

ultimately rest on their assertion of a claim of birthright citizenship under *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In *Chin Bak Kan v. United States*, 186 U.S. 193 (1902) this Court made it plain that to claim birthright citizenship under *Wong Kim Ark* the "*various facts on which citizenship depends*" under *Wong Kim Ark* that "*must be made to appear"* are that the parents of the child born in the U. S. are:

1. Of Chinese descent;
2. Are subjects of the Emperor of China[5];
3. Have a permanent domicile and residence in the United States;
4. Are there carrying on a business[6];
5. Are not employed in any diplomatic or official capacity under the Emperor of China.

Thus, to have standing to prosecute a claim of birthright citizenship under *Wong Kim Ark*, the Plaintiff/Appellants must plead and prove that the parents of the claimants meet all five of these requirements. Not only have they not done so, but in

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[5] The last Emperor of China abdicated on February 12, 1912, thus ending both the Qing dynasty and the imperial tradition altogether, after more than 2100 years.

[6] Under the Chinese Exclusion Act, 22 Stat. 58, laborers and miners were barred from entering the United States. However, teachers, merchants, and professional persons were allowed to enter and establish a permanent domicile. Thus, the fact that Wong Kim Ark's parents were operating a business meant that their presence was not a violation of the Chinese Exclusion Act, which is to say they were in the country legally.

some cases they have pled facts that defeat a claim of standing.

In Case No. 25-365 the class representative petitioners are, "Barbara" from Honduras with an asylum application pending, "Susan" mother of "Sarah" from Taiwan, currently present in the U.S. on temporary student visa, and "Mark" father of "Mathew" who is from Brazil and who is in the process of applying for lawful permanent status.

Barbara, from Honduras with an asylum claim pending, thus fails to meet *Wong Kim Ark* requirements 1. (being of Chinese descent), 2. (being a subject of the Emperor of China), and 4. (being permanently domiciled in the U.S.).

Susan, being from Taiwan, would meet *Wong Kim Ark* requirement 1. (being of Chinese descent), but fail to meet *Wong Kim Ark* requirement 2. (being a subject of the Emperor of China). Furthermore, being present on a temporary student visa, she fails to meet *Wong Kim Ark* requirement 4. (being permanently domiciled in the U.S.).

Mark being from Brazil and "in the process" of applying for lawful permanent status" fails to meet *Wong Kim Ark* requirements 1. (being of Chinese descent), 2. (being a subject of the Emperor of China), and 4 (being permanently domiciled in the U.S.).

When the Citizenship Clause and *Wong Kim Ark* are properly understood, none of the Plaintiff/Appellees have standing to prosecute their claims.

CONCLUSION

All of the claims made in the District Courts were ultimately based on a claim that this Court in *United States v. Wong Kim Ark* held that the

Fourteenth Amendment created a right to universal birthright citizenship. In fact, that case only held that there was birthright citizenship when the parents:

1. Are of Chinese descent;
2. Are subjects of the Emperor of China;
3. Have a permanent domicile and residence in the United States;
4. Are in the Country legally;
5. Are not employed in any diplomatic or official capacity under the Emperor of China.

Because none of the Plaintiff/Appellees have pled or proven that they or the people they represent meet these requirements, they lack standing to prosecute their claims.

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