No. 25-365

In the Supreme Court of the United States

DONALD J. TRUMP, 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 OF KIRKWOOD INSTITUTE, INC., AND LEGAL SCHOLARS HANS A. VON SPAKOVSKY & AMY E. SWEARER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Executive Order No. 14160 complies on its face with the citizenship clause of the 14th Amendment and with 8 U.S.C. § 1401(a), which codifies that clause.

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STATEMENT OF INTEREST OF AMICI CURIAE

The Kirkwood Institute, Inc. is an Iowa nonprofit corporation that advocates for constitutional governance, the separation of powers, and the promotion of the rule of law.

Hans A. von Spakovsky is a legal scholar who has researched and written about numerous constitutional issues including the Citizenship Clause of the Fourteenth Amendment as understood and originally intended by its sponsors. He is a former Commissioner on the Federal Election Commission, as well the former Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. He served on President Donald Trump's Presidential Advisory Commission on Election Integrity. For identification purposes only, he is currently a Senior Legal Fellow at Advancing American Freedom. The views expressed in this brief do not necessarily reflect an institutional position taken by or on behalf of Advancing American Freedom.

Amy E. Swearer is a legal scholar whose research and scholarship on the Citizenship Clause of the Fourteenth Amendment has been extensively cited throughout recent litigation over the constitutional scope of birthright citizenship. For identification purposes only, she is currently a Senior Legal Fellow at Advancing American Freedom. The views expressed in this brief do not necessarily reflect an institutional position taken by or on behalf of Advancing American Freedom.

Amici[1] believe that the Citizenship Clause of the Fourteenth Amendment must be enforced according to its plain language, which must be given the same meaning and scope today as it was understood to have at the time of its ratification. The longstanding misinterpretation and misapplication of the Citizenship Clause endangers American liberty and freedom by improperly extending citizenship to the children of aliens who are not born "subject to the jurisdiction" of the United States within the original meaning of that phrase.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Fourteenth Amendment's Citizenship Clause declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend. XIV, § 1. The plain text of the Citizenship Clause states that mere birth on U.S. soil is insufficient to meet the requirements of birthright citizenship—a person must also be born "subject to the jurisdiction" of the United States.

Originalist analyses of the Citizenship Clause's legislative history conclusively show that its framers understood and intended this jurisdictional language to limit the scope of birthright citizenship far more significantly than the modern, mistaken academic consensus admits. *See* Robert E. Mensel, *Jurisdiction*

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[1] It is certified that the parties have filed a blanket waiver for the filing of amicus briefs, no party or their counsel authored this brief in whole or part, and that no person other than these amici, their counsel, made any monetary contribution to the preparation or submission of this brief.

in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment, 32 St. Louis U. Pub. L. Rev. 329 (2013); Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 Tex. Rev. L. & Pol. 135 (2020); Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 Notre Dame L. Rev. (forthcoming 2026) (on file with Notre Dame Law); Ilan Wurman, *Jurisdiction and Citizenship*, 49 Harv. J.L. Pub. Pol'y (forthcoming 2026).

These conclusions are further supported by an analysis of the language of citizenship, allegiance, and national jurisdiction commonly employed within the federal government during contemporaneous political battles over other interrelated aspects of citizenship. Debates over alien conscription and citizen expatriation provide compelling evidence that, at the time of the Fourteenth Amendment's ratification, both Congress and the Executive Branch operated under a uniquely American framework for understanding citizenship.

Modern claims about the Citizenship Clause that interpret its scope strictly through English common law ideals of temporary and location-based allegiance are incompatible with historical reality. The broader historical and political arc is most consistent with an interpretation of the Citizenship Clause that extends birthright citizenship only to the U.S.-born children of citizens or permanent resident aliens whose consensual integration into American society renders them subject to the United States' political jurisdiction to a more-than-nominal degree. The principles of

citizenship underlying Executive Order No. 14160 are consistent with the citizenship framework widely agreed by the Fourteenth Amendment's framers at the time of its ratification.

ARGUMENT

The 39th Congress did not draft and debate the language of the Citizenship Clause in a political vacuum. The Fourteenth Amendment's ratification was one of several crucial citizenship-related political battles waged within the United States government during and just after the Civil War. Like debates over the Citizenship Clause, wartime debates over alien conscription and post-war disputes over expatriation required members of Congress and the Executive Branch to resolve important questions about the meaning of political jurisdiction and allegiance, and the relationship of such concepts to American citizenship.

These broader political battles provide "additional and compelling evidence of contemporary understandings of citizenship, allegiance, and national political jurisdiction, as well as the theories upon which those understandings were constructed." Amy Swearer, *Interpreting the Citizenship Clause Within the Context of Contemporaneous Political Debates on Alien Conscription and Expatriation*, 2 Tex. A&M J. L. & Civil Gov. 73, 78 (2025). The political language used throughout them reflect the development, refinement, and widespread operation of a uniquely American framework on citizenship both immediately before and immediately after the time

Congress drafted and debated the language of the Fourteenth Amendment's Citizenship Clause.

This framework intrinsically connected American citizenship with factors like permanent domicile, lawful participation in the national body politic, and other voluntary acts demonstrating a level of citizen-like allegiance to the United States. Its employment during parallel citizenship debates makes it likely that when Congress added jurisdictional qualifiers to the Citizenship Clause, it conformed the Clause's meaning to that same framework.

I. Civil War Conscription Debates Evidence Widespread Agreement that Some, But Not All, Aliens Owe Citizen-Like Allegiance to the United States.

A. Citizenship and the Civil War

The legal and historical record fails to demonstrate that there existed within the antebellum United States a singular, consistent, and widely accepted *jus soli*-based conception of citizenship. This was, instead, a period in which the nature of American citizenship was both complicated and convoluted. Many Americans "still considered the states to be the primary object of political allegiance" and it was often unclear what national citizenship meant, if it meant anything at all. James H. Kettner, *The Development of American Citizenship, 1608–1870*, 285 (1978).

The Civil War ushered in "a sea change in the way Americans understood their citizenship." Erik Mathisen, *The Loyal Republic*, 116 (2018). Consistent with the arguments made in defense of Executive

Order No. 14160, historians and sociologists generally recognize that "[d]uring the 1860s, a distinctly American citizenship crystallized into a form that eventually integrated national rights and duties along with notions of loyalty and the embrace of American ideals." Christian G. Samito, *Becoming American Under Fire*, 2 (2009); *see also* Swearer, *Interpreting the Citizenship Clause*, at 80–82. One of the most significant processes through which the Civil War "sharpened the growing national consensus that citizenship, as a concept, was inextricably connected with allegiance to the United States government" was through the implementation of the nation's first military draft. Swearer, *Interpreting the Citizenship Clause*, at 82.

B. Debates Over the Enrollment Act of 1863

Just two years before Congress debated the Citizenship Clause, many of its same members intensely discussed the scope of the United States' political jurisdiction during debates over the Enrollment Act of 1863, 12 Stat. 731, which instituted the nation's first draft. Congress faced the unprecedented task of determining which, if any, of the nation's millions of non-citizen aliens were sufficiently subject to the political jurisdiction of the United States such that they might, like citizens, be liable for military conscription.

Of particular interest was the class of unnaturalized immigrants known as "declarant aliens," who had completed the first of the two legal steps required for naturalization. In exchange for filing their declaration of intent to become citizens,

declarant aliens enjoyed a number of special privileges and protections from which non-citizens were typically excluded. This included, at least in some states, the right to vote and hold public office.

The outbreak of war and President Lincoln's proclamation calling forth a 75,000-man militia from the states quickly sparked concerns from foreign governments and permanent resident aliens alike about non-citizen liability for state militia service. Swearer, *Interpreting the Citizenship Clause* at 85–86. Initially, "concerns about competing jurisdictional claims over U.S.-resident aliens were largely theoretically thanks to the federal government's unwillingness to assert meaningful political authority over them." *Id.* at 86. Throughout 1862 and early 1863, however, practical wartime realities increasingly forced the United States government to more seriously consider concepts like allegiance and political jurisdiction in ways that would ultimately shape and inform the language of the debate over the Citizenship Clause. *Id.* at 87–92. This came to a head in March 1863 with the introduction of legislation that, for the first time, sought to broaden the scope of draft liability to include certain classes of non-citizens.

Congressional debates over alien conscription reveal a nuanced understanding of concepts like allegiance and subjection to national jurisdiction, and their importance to American citizenship. Lawmakers did not always agree on whether aliens could ever alter their relationship with the United States to this degree, except by naturalization. Nor did they always agree on which specific voluntary actions might effectuate that change, and when. As a least common denominator, however, all seemingly recognized a

fundamental difference in status between temporarily present aliens who remained subjects of foreign powers and permanently domiciled aliens. *See* Swearer, *Interpretating the Citizenship Clause*, at Part 2.2. Moreover, "in resolving these questions, Congress understood that factors like long-term residency, participation in the national body politic, and availment of special legal privileges or protections not typically afforded to foreigners all played a role in the equation." *Id*. at 94.

In the end, Congress did in fact draw practical lines between aliens who owed a citizen-like allegiance to the United States and those who still owed paramount allegiance to a foreign sovereign. In doing so, its members did not view American theories of allegiance and political jurisdiction through some singular narrow lens of inherited common-law principles. Rather, in articulating theories of citizenship and allegiance, Congress appealed to and considered, among other things, longstanding republican ideals, newly emerging principles of international law, and the potential foreign policy implications of claiming citizen-like allegiance from any subset of alien.

Of note throughout the debates are Jacob Howard's persistent and strenuous objections to drafting non-citizens. Howard would later play a significant role in crafting and defending the citizenship language found in both the Fourteenth Amendment and its statutory predecessor, the Civil Rights Act of 1866, 14 Stat. 27. Modern debates over the meaning and scope of the Citizenship Clause center heavily on his statements in the congressional record.

A particularly significant source of disagreement between litigants and scholars is the meaning of

Howard's 1866 explanation that the Citizenship Clause's jurisdictional language would exclude "persons born in the United States who are foreigners, aliens, who belong to the families of embassadors or foreign ministers." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (Statement of Sen. Howard). Proponents of a more limited interpretation of the Citizenship Clause's scope have long argued that Howard's statement, though poorly worded, is best interpreted as endorsing a broad view of non-citizen exclusion—that is, Howard effectively meant that the jurisdictional language excludes "foreigners, aliens, [and those] who belong to the families of ambassadors." *See* Swearer, *Interpreting the Citizenship Clause*, at n. 81.

This interpretation is entirely consistent with Howard's well-documented views on the relationship of aliens to the United States government during debates over the Enrollment Act. Howard opposed making any non-citizen liable to the draft precisely because he believed that such a person remained "a foreigner, an alien, who owes no allegiance to this Government." Cong. Globe, 37th Cong., 3d Sess. 991 (1863) (Statement of Sen. Howard). This included declarant aliens, whom Howard still believed to be "persons who are subjects of foreign powers" despite their enjoyment of special rights and protections from the United States government. As he explained:

> I submit to the Senate that this is an attempt to subject to our laws and to our military service a class of persons who do not owe allegiance to us, and who do owe allegiance to other Governments, to kings, to

> queens, and to emperors in other parts of the world.
>
> . . . I have yet to learn that it is in the power of this Government to compel a foreigner, an alien, who owes no allegiance to this Government, to submit to perform military service. It is contrary, as I understand it, to the law of nations; it would be an encroachment on the rights of foreigners residing among us, and an affront to the nation to which they belong.

Id.

Howard conceded that declarant aliens might feel that they have a moral duty to voluntarily take up arms on behalf of the United States. Yet the United States government lacked the authority to compel such service because declarant aliens "are not citizens of the United States and do not owe allegiance to us, until they have become formally naturalized" through the process outlined in federal law. *Id*. at 991–92.

Importantly, Howard recognized that, under the common law, these aliens owed some level of "temporary allegiance" that might, in turn, come with certain obligations to the United States government. These non-citizens might "be required to assist in keeping the peace under their obligation of temporary allegiance as residents among us"—a reference to the long-accepted practice of compelling non-citizen residents to local militia service for limited purposes, like policing actions to maintain internal law and order. *Id*. at 992. But formal military conscription required allegiance of a fundamentally different quality—the permanent and undivided allegiance of the citizen.

Howard's view helps make sense of his later statements during debates over the language of the Citizenship Clause, but they did not win the day with respect to non-citizen conscription. The dominant view in support of expanding draft liability for aliens, however, still demonstrates a prevailing understanding that some—but not all, or even most—aliens owed the United States a citizen-like allegiance. Senator James R. Doolittle, for example, supported conscription for declarant aliens because, unlike "mere temporary residents," declarant aliens "are living under the protection of this Government, and enjoying all its rights and all its privileges." Cong. Globe, 37th Cong., 3d. Sess. 991 (1863) (statement of Sen. Doolittle). Senator James McDougall similarly supported conscription for declarant aliens, "on the premise that foreigners who acquire permanent domicile and avail themselves of special political privileges or protections constitute a distinct legal class more akin to citizens than to aliens." Swearer, *Interpreting the Citizenship Clause*, at 101.

Congress ultimately expanded conscription to include declarant aliens, as well as any non-declarant resident alien who had (consistent with the law in some states) exercised rights of citizenship by voting or holding public office. This expansion of draft liability "represented a dramatic redefinition of what it meant for a person to owe paramount allegiance to a nation." *Id*. at 104.

The practical lines drawn by Congress during the Civil War to delineate between aliens who owed the United States citizen-like allegiance and those who did not are remarkably similar to the practical lines drawn by Executive Order No. 14160. Moreover, the

reasons expressed for those lines are almost identical—in short, the nature of an alien's presence in the United States greatly affects the level to which he is subject to the nation's political jurisdiction. All aliens present in the United States are subject to and protected by its laws to some extent. But when aliens voluntarily create permanent ties to the United States and avail themselves of citizen-like privileges, they can rightly be said to owe the United States a citizen-like allegiance.

II. Post-Civil War Expatriation Policies Provide Contemporaneous Evidence of Views on Citizenship, Allegiance, and Political Jurisdiction.

Shortly after the Fourteenth Amendment's ratification, Congress passed the Expatriation Act of 1868, which granted the right of U.S. citizens who expatriate to change their citizenship. Expatriation Act of 1868, ch. 249, 15 Stat. 223. The Act did not, however, create procedures by which citizens could effectively expatriate or articulate any measure by which the United States government could determine that a person had effectively cast off his citizenship.

The earliest executive branch views on the issue appear to come in 1873 as a compilation of answers given by principal officers of each executive branch agencies in response to a series of questions issued to each of them by President Ulysses Grant. *See* U. S. Grant, *No. 496*, *The President to the Secretary of State*, in Opinions of the Principal Officers of the Executive Departments, and other Papers Relating to Expatriation, Naturalization, and Change of

Allegiance 9 (1873) ("Opinions of the Principal Officers"). Their answers give important insight into the operative political framework on citizenship and national jurisdiction, including how the executive branch understood what it meant to be "subject to the jurisdiction of the United States" for purposes of citizenship.

These executive branch officials consistently articulated the view that a minor's citizenship, political allegiance, and domicile followed that of the parents, and that reaching the age of majority was a necessary condition for independently claiming or changing ties of allegiance. *See generally* Swearer, *Interpreting the Citizenship Clause*, at Part 3. They recognized that the American legal structure viewed the concept of allegiance through a variety lenses, which caused a "great diversity and much confusion of opinion as to the nature and obligations of allegiance" within the United States. *Id*. at 113 (*quoting* Hamilton Fish, *No. 497, The Secretary of State to the President*, in Opinions of the Principal Officers, at 19–23).

And most importantly, they appear to have universally understood that "while domicile in a foreign country made a person 'amenable to its laws,' it did not of itself prove a change of allegiance or demonstrate a severance of binding ties to the United States government."

Particularly insightful are the responses given by Attorney General George Williams. Williams previously represented Oregon in the United States Senate, and as a member of the Joint Committee for Reconstruction had been intimately involved in drafting the Fourteenth Amendment. His 1867 statements on the Citizenship Clause's jurisdictional

language factor significantly into modern debates over the scope of birthright citizenship. In those original debates, Williams described how people similarly present in the United States can still be subject to its jurisdiction to different extents and explained his view that the phrase "subject to the jurisdiction thereof" meant only those who are "fully and completely subject to the jurisdiction of the United States." Cong. Globe, 39th Cong., 1st Sess. 2897 (1867) (statement of Sen. Williams).

Williams' later statements on expatriation as Attorney General reinforce and clarify his view. In response to whether a former U.S. citizen who had renounced his U.S. allegiance and "assumed the obligations of a citizen or subject of another power" could re-claim U.S. citizenship in any manner except legal naturalization, Williams explained:

> Section 1 of the fourteenth amendment of the Constitution declares that "all persons born or naturalized of the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." But the word "jurisdiction" must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent. Political and military rights do not pertain to them.

Id. at 50.

In this, Williams once again articulated a view of varying levels of jurisdictional subjection. A person's presence within the United States might render an alien subject to some limited extent of the nation's jurisdiction, but this was not the "complete jurisdiction" envisioned by the Citizenship Clause. Moreover, the "complete jurisdiction" required by the Citizenship Clause was intrinsically connected to the attachment of "political and military rights." Williams' understanding of the Citizenship Clause's jurisdictional element held some influence—an 1881 treatise on citizenship drew almost verbatim from Williams' response to President Grant. Alexander Porter Morse, *A Treatise on Citizenship, by Birth and by Naturalization* 248 (1881).

Other executive branch officials within the Grant Administration similarly analyzed the issue of expatriation by relating it back to their understanding of the political jurisdiction required by the Fourteenth Amendment for acquiring citizenship in the first place. Secretary of State Hamilton Fish, for example, explained:

> The fourteenth amendment of the Constitution makes personal subjection to the jurisdiction of the United States an element of citizenship. The avowed, voluntary, permanent withdrawal from such jurisdiction would seem to furnish one of the strongest evidences of the exercise of that right which Congress had declared to be the most natural and inherent right of all people.

Hamilton Fish, *No. 497. The Secretary of State to the President, in* Opinions of the Principal Officers, at 14.

Finally, the opinions implicate the unlawful nature of a person's attempted expatriation as a factor that fully complicates —if not outright defeats—one's unilateral ability to become fully subject to another nation's political jurisdiction. They commonly express an understanding that "that governments may regulate and limit the discretion of any person to exercise his or her right of expatriation and that attempts to change nationality 'in contempt of the laws' are invalid to work a true change of allegiance." Swearer, *Interpreting the Citizenship Clause*, at 116.

According to Fish, expatriation was contingent upon "actual emigration for a lawful purpose" and subject to the limitations of sound public policy. *See* Hamilton Fish, *No. 497, The Secretary of State to the President*, in Opinions of the Principal Officers, at 11–12. Secretary of the Treasury William A. Richardson, meanwhile, explained that an actual change of allegiance cannot occur except where a person acts "in good faith and for an honest purpose," in compliance with the laws of his chosen new home. *See* William A. Richardson, *No. 498, The Secretary of the Treasury to the President,* in Opinions of the Principal Officers, at 31. He also invoked an 1822 Supreme Court opinion by Justice Story, who wrote that expatriation required a good faith and bona-fide change of domicile. *Id*. at 25–26. As such, expatriation "can never be asserted as a cover of fraud or as a justification for the commission of crime against the country, or for a violation of its laws when this appears to be the intention of the act."

Id. (quoting *The Santissima Trinidad*, 20 U.S. 283, 348 (1822)).

CONCLUSION

Debates over alien conscription and expatriation provide compelling evidence about the framework for citizenship under which Congress operated when drafting the language of the Citizenship Clause. This framework tied citizenship to evidence of enduring ties to the nation, not just the minimal and temporary allegiance required under the common law. Executive Order No. 14160 employs an interpretation of birthright citizenship that is supported by and consistent with the principles of citizenship articulated within the political language common at the time of the Fourteenth Amendment's ratification.

Respectfully submitted,

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