

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 First Circuit

**AMICUS CURIAE BRIEF OF GERARD N.
MAGLIOCCA IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

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SUMMARY OF ARGUMENT

The Thirty-Ninth Congress’s explicit recognition of birthright citizenship for the native-born children of gypsies belies the Government’s claim that allegiance or domicile is required by the Citizenship Clause.² Gypsies paradigmatically lacked allegiance or a domicile and were long considered illegal aliens in England. Nonetheless, the native-born children of gypsy parents were treated as subjects of the Crown. And in 1866 Congress rejected Senator Edgar Cowan’s argument that native-born gypsy children should be excluded from birth citizenship because their parents owed “no allegiance” and “have no homes.” No President can impose those requirements without violating the Constitution’s original public meaning and longstanding practice.

¹ This brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus curiae or its counsel has made a monetary contribution toward the brief’s preparation or submission.

² This brief uses the word “gypsies” because that was the term used when the Fourteenth Amendment was ratified. Today these people are generally called “Romani” or the “Roma people.”

ARGUMENT

I. Gypsy children born in England were treated as subjects of the Crown even though their parents were illegal aliens.

Gypsies were illegal aliens in England for centuries. *See* 4 William Blackstone, COMMENTARIES *165. Laws enacted in the 16th century and still on the books in Blackstone's day barred gypsies (then called "Egyptians") from remaining in the Realm on pain of death and imposed a fine on anyone who helped them enter. *See* An Act for the Punishment of Certain Persons Calling Themselves Egyptians 1554, 1 & 2 Phil. & M., ch. 4 (Eng); An Act Concerning Egyptians 1530, 22 Hen. 8, c. 10 (Eng.).

Nevertheless, native-born gypsy children were treated as subjects of the Crown. Blackstone said that "[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."³ 1 William Blackstone, COMMENTARIES *361-62. He made no exception for children born to aliens who were gypsies, even though the *Commentaries* talked about these "outlandish" people at some length.⁴ *See* 4 William Blackstone, COMMENTARIES *163-66. Instead, he stated that a gypsy could be a "natural-born subject or stranger [in other words, an alien]." *Id.* at *166.

Blackstone's discussion drew in part on a 1563 Act of Parliament that expressly distinguished the native-

³ The common-law exceptions were discussed by this Court in *Wong Kim Ark*. *See United States v. Wong Kim Ark*, 169 U.S. 649, 682-86 (1898). No exception for gypsies was mentioned.

⁴ Outlandish in this context literally meant "out of the land" or foreign.

born children of gypsies from their illegal alien parents. See An Act for the Punishment of Vagabonds Calling Themselves Egyptians 1563, 5 Eliz. 1, ch. 20 (Eng.); David Cressy, *GYPSIES: AN ENGLISH HISTORY* 73 (2018) (stating that historians often misdate the Act as enacted in 1562). The 1563 Act stated that “scruple and doubt” had arisen about “whether such persons as being born within this Realm of England or other of the Queen’s Highness Dominions” were punishable “in like manner as others of that sort are, being strangers borne and transported into this Realm.”⁵ *Id.* at § 1 New legislation was therefore desirable “[f]or the voiding of all doubts and ambiguities in that behalf.” *Id.*

After reiterating the criminal penalties that applied to gypsy aliens, the Act stated that the law “shall not extend to compel any person or persons born within any of the Queen’s Majesty’s Dominions to depart out of this Realm of England or Wales.” *Id.* at § 4. Instead, native-born gypsies were required “to leave their said naughty idle and ungodly life and company and to place themselves in some honest service or to exercise themselves at home with their parents or elsewhere honestly in some lawful work, trade, or occupation.” *Id.*

The 1563 Act treated native-born gypsy children as subjects of the Crown.⁶ Blackstone explained that one of a subject’s basic rights was that “no power on earth, except the authority of parliament, can send

⁵ I have modernized the spelling in the statute for ease of reading.

⁶ My research has uncovered no English statute, case, or commentary denying a native-born gypsy any right of a subject.

any subject of England *out of* the land against his will.” 1 William Blackstone, COMMENTARIES *133. Consistent with this principle, the Act affirmed that native-born gypsies could not be deported. *See* An Act for the Punishment of Vagabonds Calling Themselves Egyptians 1563, 5 Eliz. 1, ch. 20 (Eng.) at §4. But the Act also treated native-born gypsies like all other subjects by punishing them for vagrancy. *See id.*; *see also* An Act for the Punishment of Rogues, Vagabonds, and Sturdy Beggars, 1597, 39 Eliz. 1, ch. 4 (Eng.) (listing “Egyptians” among the vagrant categories).

Accordingly, the law of England treated the native-born children of illegal aliens as subjects. Moreover, Blackstone’s discussion of gypsies would have been familiar to lawyers when the Fourteenth Amendment due to the ubiquity of the *Commentaries* for legal training in that era.

II. The Thirty-Ninth Congress affirmed that native-born gypsy children were birthright citizens even though their parents lacked allegiance or a domicile.

When asked whether native-born gypsy children would be birthright citizens under the proposed Civil Rights Act of 1866, Senator Trumbull replied: “Undoubtedly.” *See* Cong. Globe, 39th Congress, 1st Sess. 498 (1866) (statement of Sen. Trumbull). President Andrew Johnson unsuccessfully vetoed the Act in part because “the people called gypsies” would be birthright citizens. Andrew Johnson, “Veto Message,” (Mar. 27, 1866), *in* 8 MESSAGES AND PAPERS OF THE PRESIDENTS 3608 (James D. Richardson, ed. 1897); *see* Civil Rights Act of 1866, ch. 31, § 1; 14 Stat. 27. One contemporary newspaper scoffed at the

President's veto: "The objection to a man's citizenship on the ground that his parents were Gypsies would pass for about as much as the objection that his uncle was an astrologer or that his grandmother was a witch." "The Veto Message," Chicago Tribune, Mar. 29, 1866 at 2.

The objection to birthright citizenship for gypsy children was renewed when the Fourteenth Amendment was debated. See U.S. Const., amend XIV, § 1. Senator Edgar Cowan stated:

[B]efore we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians not taxed, because I look upon Indians not taxed as being much less dangerous and much less pestiferous to society than I look upon Gypsies.

Cong. Globe, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

Senator Cowan then asserted that gypsy native-born children did not deserve American citizenship because of their parents' itinerant lifestyle. He said that his state should have the power:

of expelling a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own—an *imperium in imperio*; who pay no taxes; who never perform military service

who do nothing, in fact, which becomes the citizen.

Id. Senator Cowan added that gypsies were people who “have no homes, pretend to own no land, live nowhere, settle as trespassers wherever they go, and whose sole merit is a universal swindle . . .” *Id.*

Congress did not accept Senator Cowan’s argument that native-born gypsy children should be denied birthright citizenship. The only Senator who responded was dismissive: “The only invasion of Pennsylvania within my recollection was an invasion very much worse and more disastrous to the State, and more to be feared and more feared, than that of Gypsies. It was an invasion of rebels [at Gettysburg].” *See id.* at 2892 (statement of Sen. Conness).

More important, neither an allegiance nor a domicile requirement can be squared with the fact that native-born gypsy children were “undoubtedly” birthright citizens pursuant to the Civil Rights Act of 1866 and the Citizenship Clause.

Start with allegiance. Gypsies were traditionally a self-governing community that lived outside of the law. *See* Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the ‘Gypsies’*, 103 Yale L.J. 323 (1993). Blackstone called them “a strange sort of commonwealth among themselves.” 4 William Blackstone, COMMENTARIES *165. Senator Cowan called them an *imperium et imperio*. *See* Cong. Globe, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan). In no sense could gypsies be described as bearing allegiance to the United States in 1868. Yet their children born here were birthright citizens.

Gypsies also quintessentially lacked a domicile. The most common adjective used in connection with them was some form of “wandering.”⁷ This was how Blackstone and Senator Cowan described them. *See* 4 William Blackstone, COMMENTARIES *165 (calling gypsies “wandering imposters and jugglers”); Cong. Globe, 39th Cong., 1st Sess. 2891 (statement of Sen. Cowan) (stating that gypsies “have no homes” and “wander in gangs”); *see also* Cong. Globe, 31st Cong., 1st Sess. 1889 (1850) (statement of Rep. Ewing) (comparing free blacks to “the wandering Gypsies who once overspread modern Europe”); *cf.* Cong. Globe, 39th Cong., 1st Sess. 246 (1866) (statement of Rep. Davis) (discussing “Pennsylvania and her Gypsy gangs, that are perpetually vibrating between her plains and mountains”). Another authoritative antebellum source defined gypsies as “vagabonds” that are “strolling about.” *See* Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 449 (Chauncey A. Goodrich ed., 1848). In no sense could gypsies be thought of as having a domicile when the Fourteenth Amendment was ratified. Yet their children born here were birthright citizens.

In sum, the deliberate inclusion of native-born gypsy children within the Citizenship Clause, glossed by the English precedents, is fatal to the argument that either allegiance or a domicile is required for birthright citizenship.

⁷ This is still true. *See* Gypsy, Merriam-Webster, www.merriam-webster.com/dictionary/Gypsy (stating one definition as “a person who wanders or roams from place to place”).

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

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