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 OF CITIZENSHIP LAW SCHOLARS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici Kristin Collins, Gerald Neuman, and Rachel Rosenbloom are legal scholars with expertise in United States citizenship and immigration law. Amici have a professional interest in ensuring that the Court is properly informed with respect to the history and

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

meaning of the territorial birthright citizenship statute, 8 U.S.C. §1401(a), and its importance to this case.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has followed a rule of territorial birthright citizenship since the early days of the republic, first as a matter of common law and then as a matter of statutory and constitutional law. In *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), this Court recognized the expansive reach of the Fourteenth Amendment's Citizenship Clause, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. For well over a century, federal courts have regularly applied *Wong Kim Ark* irrespective of the domicile or immigration status of a child's parents.

Territorial birthright citizenship—also known as *jus soli*—is also guaranteed by federal statute. Title 8 U.S.C. §1401(a) provides that "[a] person born in the United States, and subject to the jurisdiction thereof," shall be a "citizen[] of the United States at birth." The Executive Branch officials who drafted this language

[2] Amici submit this brief as individuals. Their institutional affiliation is for informational purposes only and does not indicate any institutional endorsement of the positions advocated in the brief.

and the legislators who enacted it, first in the Nationality Act of 1940 and then in the Immigration and Nationality Act of 1952, did so with a clear understanding that they were codifying near-universal birthright citizenship, subject only to a few narrow, well-defined exceptions. Congressional actions, Executive Branch practice, and legislative history all show that the 1940 and 1952 Acts codified this consensus meaning.

The phrase "subject to the jurisdiction thereof," used in the 1940 and 1952 Acts, is a legal term of art. Under well-established principles of statutory interpretation, the phrase must be given a particular meaning—specifically, its meaning at the time Congress enacted it. *See, e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 275 (1994). Therefore "[t]he real question is … what was the prevailing understanding of this term of art under the law that Congress looked to when codifying it." *George* v. *McDonough*, 596 U.S. 740, 752 (2022) (quotation marks omitted).

This brief draws on amici's scholarly expertise to answer that question. We consider the text, structure, purpose, and legislative histories of the 1940 and 1952 Acts; other relevant congressional actions; the regulations and practices of relevant Executive Branch agencies; and other pertinent sources of "the prevailing understanding" of "the law that Congress looked to." *George*, 596 U.S. at 752. We highlight, among other things, a history of dense interaction between the Executive Branch and Congress concerning relief from deportation granted to parents without lawful immigration status to prevent harm to their citizen children, who were understood to be citizens based on their birth in the United States.

The materials considered in this brief show, first, that in enacting the 1940 and 1952 Acts, Congress enacted a statutory rule with a particular meaning—adopting the contemporary, prevailing view of territorial birthright citizenship and, further, extending it beyond the established scope of the Citizenship Clause to children born in the unincorporated territories of Puerto Rico, the U.S. Virgin Islands, and Guam. Second, these materials demonstrate a prevailing whole-of-government understanding in 1940 and 1952 that children born in the United States to temporary visitors and unauthorized immigrants were citizens by birth. Neither the domicile nor lawful presence of the parents was relevant. Congress adopted this consensus meaning in the 1940 Act, and reinforced that consensus by recodifying the same provision in the 1952 Act.

Amici agree with Respondents that the Executive Order is unconstitutional under the Citizenship Clause. Section 1401(a) provides an independent basis for decision because Executive Order 14,160 cannot repeal Congress's statutory guarantee.

Part I of this brief shows that under well-settled principles of statutory interpretation, what matters is the meaning of the statutory terms when Congress enacted the 1940 and 1952 Acts. Part II then describes the history preceding the 1940 Act. That includes the years-long development, consideration, and enactment of the statute. The history also includes the practice of suspension of deportation and its legislative authorization in the Alien Registration Act of 1940 by the same Congress that enacted the Nationality Act. One key predicate of suspension was the recognition that children born in the United States to parents unlawfully present in the country were citizens. Taken together, the history described in Part II demonstrates a whole-of-government

consensus at the time of the 1940 Act's enactment that territorial birthright citizenship was subject only to narrow, well-defined exceptions, none of which turned on the parents' domicile or lawful presence in the United States. Part III then describes the history following the 1940 Act and preceding the 1952 Act. It includes legislative history specific to the 1952 Act. It also includes the practice of suspension of deportation in that intervening period for parents of citizen children, including children born in the U.S. Virgin Islands.

ARGUMENT

I. THE TEXT OF SECTION 1401(a) MUST BE INTERPRETED BASED ON ITS MEANING AT THE TIME OF ENACTMENT

Section 1401(a) provides that persons "born in the United States, and subject to the jurisdiction thereof," "shall be nationals and citizens of the United States at birth." 8 U.S.C. §1401(a). Congress first used those words in the Nationality Act of 1940. Twelve years later, it recodified the same language in the 1952 Immigration and Nationality Act ("INA"). There is no dispute in this case about the meaning of "born in the United States"; instead, this case concerns the meaning of the phrase "subject to the jurisdiction thereof."

The relevant principles of statutory interpretation are well established. First, it is a "cardinal rule of statutory construction" that when Congress uses a legal term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA* v. *Cooper*, 566 U.S. 284, 292 (2012); *see also Lackey* v. *Stinnie*, 604 U.S. 192, 199-200 (2025) (same). "Or as Justice Frankfurter colorfully put it, 'if a word is obviously

transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (citation omitted). As is clear on section 1401(a)'s face, the phrase "subject to the jurisdiction thereof" reflects the inclusion of the same phrase in the Fourteenth Amendment's Citizenship Clause, so this canon applies here. *See United States* v. *Kozminski*, 487 U.S. 931, 944-945 (1988) (interpreting the statutory term "involuntary servitude" that Congress "borrowed" from the Thirteenth Amendment).

Evidence of the cluster of ideas attaching to a legal term of art can be found in judicial decisions and legislative history, as was the case in *Taggart* v. *Lorenzen*, 587 U.S. 554, 561 (2013) (judicial decisions), *Greenwich Collieries*, 512 U.S. at 274-276 (judicial decisions and legislative history), and *Kozminski*, 487 U.S. at 945-948 (same). That evidence also can be found in regulations and other Executive Branch materials, as in *George*, 596 U.S. at 746-748; *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 320-322 (2012) (borrowed language may be interpreted according to its "uniform construction by … a responsible administrative agency").

Second, when interpreting a statute, courts look to the prevailing meaning of the statutory language "at the time Congress enacted the statute." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). For example, when interpreting the term "burden of proof" in the Administrative Procedure Act in *Greenwich Collieries*, this Court looked to the history preceding the APA and "presume[d] that Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment." 512 U.S. at 275. Likewise, when interpreting the term "punitive damages" in the Federal

Tort Claims Act in *Molzof* v. *United States*, this Court looked to established legal sources at the time Congress "enacted the Tort Claims Act in 1946." 502 U.S. 301, 308 (1992). The same was true in *Kozminski* when this Court interpreted the term "involuntary servitude" in 18 U.S.C. §1584, a phrase taken from the Thirteenth Amendment. There, this Court looked to the "understanding of the Thirteenth Amendment that prevailed at the time of §1584's enactment." 487 U.S. at 945; *see also id.* at 948 ("[T]his was the scope of that constitutional provision at the time §1584 was enacted."). Here, as in other contexts, the time-of-enactment principle protects statutes from amendment "outside the legislative process reserved for the people's representatives." *Bostock* v. *Clayton County*, 590 U.S. 644, 655 (2020).

In Parts II and III, we describe the historical evidence, which makes clear that in 1940 and 1952, there was a settled understanding that territorial birthright citizenship was subject to only narrow, well-defined exceptions—captured in the phrase "subject to the jurisdiction thereof"—and did not turn on the domicile or lawful presence of a child's parents in the United States.

II. THE NATIONALITY ACT OF 1940 CODIFIED THE SETTLED RULE OF TERRITORIAL BIRTHRIGHT CITIZENSHIP, WHICH DID NOT TURN ON THE DOMICILE OR LAWFUL PRESENCE OF THE CHILD'S PARENTS

Congress first enacted the language of 8 U.S.C. §1401(a) as section 201(a) of the Nationality Act of 1940 ("1940 Act" or "Nationality Act"), Pub. L. No. 76-853, 54 Stat. 1137, 1138.[3] The text of the 1940 Act, decades of practice leading up to its enactment, Executive Branch

[3] Section 201(a) replaced the birthright citizenship provision of the 1866 Civil Rights Act.

and congressional action in a related immigration context, and the history of the development, consideration, and enactment of the 1940 Act demonstrate two important points. First, in the 1940 Act, Congress did not simply insert the Citizenship Clause into the United States Code. Rather, it enacted a specific territorial birthright citizenship rule, both reflecting the then-settled understanding of territorial birthright citizenship and extending it beyond the Citizenship Clause. Second, the history demonstrates that under the settled, consensus understanding that Congress enacted, neither the domicile nor lawful presence of a child's parents was relevant to the child's birthright citizenship.

A. The Text And Structure Of The Nationality Act

We begin with the statute. Section 201(a) was not an empty gesture transplanting the Citizenship Clause into the United States Code for symbolic effect, as the Government suggests. Pet. Br. 44. Rather, Section 201(a) was an integral part of the 1940 Act's comprehensive scheme for regulating citizenship at birth in the continental United States and territories; citizenship at birth for foreign-born children of American parentage; naturalization; and expatriation. Careful delineation of these different modes of gaining and losing citizenship was essential to the operation of the statute and the functioning of American nationality law.

The statutory text and scheme demonstrate that Congress exercised its authority to grant citizenship beyond the requirements of the Citizenship Clause. For example, section 101(d) defined the "United States" to include the unincorporated territories of Puerto Rico and the Virgin Islands. 54 Stat. at 1137. Thus, in declaring persons "born in the United States, and subject to

the jurisdiction thereof" to be citizens, section 201(a) addressed not only the continental United States and incorporated territories of Alaska and Hawaii, to which the Citizenship Clause was understood to apply, but also Puerto Rico and the Virgin Islands. *Id.* at 1137-1138. This extension to Puerto Rico was one of the 1940 Act's several extensions of birthright citizenship *beyond* the established constitutional floor. Some of these extensions were novel, and some recodified previously enacted statutes.[4]

The 1940 Act also contained several sections outlining how citizenship could be acquired at birth by American parentage (*jus sanguinis*) for children born "outside the United States." 1940 Act §§201(c)-(e), (g), (h), 54 Stat. at 1138-1139. In addition, the Act included a chapter setting out the substantive and procedural laws governing naturalization, often creating stricter standards. *Id.* §§301-347, 54 Stat. at 1140-1168.

Clarifying how individuals acquired U.S. citizenship—at birth and by naturalization—was important to the functioning of the 1940 Act, including its provisions concerning loss of nationality, or expatriation. The Act significantly expanded the grounds on which a U.S.

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[4] This Court had suggested that the Citizenship Clause did not extend to the unincorporated territories. *Downes* v. *Bidwell*, 182 U.S. 244, 249-251 (1901) (Brown, J., opinion). While Congress first extended birthright citizenship to the U.S. Virgin Islands in 1927, *see* Act of Feb. 25, 1927, Pub. L. No. 69-640, §3, 44 Stat. 1234, 1235, extending the general birthright citizenship rule codified in section 201(a) to Puerto Rico was new. Separately, the 1940 Act declared the citizenship of persons "born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe," 1940 Act §201(b), which was not constitutionally required under *Elk* v. *Wilkins*, 112 U.S. 94 (1884). *See* 54 Stat. at 1138; *see also* Indian Citizenship Act of 1924, Pub. L. No. 68-176, ch. 233, 43 Stat. 253.

citizen could be involuntarily expatriated. *See* 1940 Act §401, 54 Stat. at 1169. Those differed somewhat between at-birth and naturalized citizens. *See id.* §§402, 404, 54 Stat. at 1169-1170. It was therefore essential to make clear who acquired citizenship at birth and who was required to naturalize. In short, the 1940 Act's broad grant of birthright citizenship for children born in the United States was an integral part of an intricate set of provisions clarifying the rules governing the acquisition and loss of U.S. citizenship.

In delineating that statutory grant of birthright citizenship within this comprehensive citizenship statute, Congress used the phrase "subject to the jurisdiction thereof"—the same phrase used in the Citizenship Clause. In doing so, Congress "knew and adopted the cluster of ideas attached to" those borrowed words at the time. *Cooper*, 566 U.S. at 292; *see generally* Part I. As we show in the rest of Part II, at the time of the 1940 Act, the settled understanding was that "subject to the jurisdiction thereof" referred to the narrow exceptions outlined in *Wong Kim Ark*—not to domicile or lawful presence.

B. History Leading Up To The 1940 Act

In the decades preceding the 1940 Act, the federal government repeatedly demonstrated that it understood territorial birthright citizenship to cover all U.S.-born children, with limited exceptions captured by the phrase "subject to the jurisdiction thereof." Children of foreign diplomats, children born to alien enemies in hostile occupation, and—unique to our country—children of members of Native American Tribes were not subject to the jurisdiction of the United States and, therefore, not birthright citizens under the Fourteenth Amendment.

This recognition can be found, for example, in 1896 State Department consular regulations governing the issuance of U.S. passports, which provided: "The circumstance of birth within the United States makes one a citizen thereof, even if his parents were at the time aliens, provided they were not, by reason of diplomatic character or otherwise, exempted from the jurisdiction of its laws." U.S. Dep't of State, *Regulations Prescribed for the Use of the Consular Service* ¶137 (1896). That regulation remained in force for decades, and the Department repeated this explanation in its revised regulations in the 1920s and again in their first codification in the Code of Federal Regulations in 1938. *See* U.S. Dep't of State, *Regulations Governing the Consular Service of the United States* ¶137 (1926); 22 C.F.R. §79.137 (1938).

To be sure, in *Wong Kim Ark*, the Executive Branch argued for an interpretation of "subject to the jurisdiction" that would exclude far more people from birthright citizenship than the well-established common law exceptions. U.S. Br. 39, 48-51, *Wong Kim Ark*, No. 449 (U.S. Oct. Term 1896), 169 U.S. 649 (1898). This Court, however, rejected that interpretation.

Addressing the common law, this Court found that the "fundamental principle" of birthright citizenship was "birth within the allegiance" of the sovereign—a principle that "embraced all persons born within the king's allegiance, and subject to his protection." *Wong Kim Ark*, 169 U.S. at 655. The principle that one must be "subject to the jurisdiction" of the king served to exclude "the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions." *Id.* These children "were not natural-born subjects" at common law, the Court explained, because they were "not born within the allegiance, the obedience, or the

power, or, as would be said at this day, within the jurisdiction, of the king." *Id.*

This Court characterized the Fourteenth Amendment's Citizenship Clause in the same way:

> The real object of the fourteenth amendment of the constitution, in qualifying the words 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.

Wong Kim Ark, 169 U.S. at 682.[5] As to all other persons, "the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents," applied. *Id.* at 688.

For a brief period after *Wong Kim Ark*, a Bureau of Immigration manual concerning the Chinese exclusion laws attempted to add a parental domicile qualification for the U.S.-born children of Chinese noncitizen

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[5] The Court also acknowledged an exception for children "born on foreign public ships," noting that it too was an exception "as old as the rule [of citizenship by birth] itself." *Wong Kim Ark*, 169 U.S. at 693.

parents.[6] But by 1910—over a quarter century before the Nationality Act—the Bureau of Immigration had removed these references from its manual, instead broadly listing "Chinese persons shown to have been born in the United States" as exempt from the Chinese exclusion law. U.S. Dep't of Labor, *Treaty, Laws, and Rules Governing the Admission of Chinese* 31 (1912) (printing regulations approved April 18, 1910).[7]

In 1921, Richard Flournoy—an eminent State Department citizenship law expert, and later the State Department's lead representative on the interdepartmental committee that drafted the Nationality Act (*see infra* Part II.D)—published a law review article explaining that neither the common law nor the Fourteenth

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[6] The manual's 1907 edition stated that the U.S.-born child of Chinese parents who had "a permanent domicile and residence" in the United States at the time of birth was exempt from the Chinese exclusion law. U.S. Dep't of Labor & Commerce, *Treaty, Laws, and Regulations Governing the Admission of Chinese* 33 (1907).

[7] The Government offers only one government source from this period, asserting that in 1910 "the Department of Justice" expressed a narrow interpretation of *Wong Kim Ark*. Pet. Br. 36-37. The quoted language comes from a "brief" written for Assistant Attorney General Brown by his assistant. *See* Spanish Treaty Claims Comm'n, Dep't of Justice, *Final Report of William Wallace Brown, Assistant Attorney-General* 32, 124 (1910). Brown enclosed the brief as an appendix, not as a statement of the Justice Department's position, but because the work had not "been elsewhere published" and, he thought, could "be of much value to the Government." *Id.* at 32. The brief's author argued for limiting *Wong Kim Ark* but conceded that the decision "is generally taken and considered as settling the rule for the United States, that all children born within the territory of the United States, except Indians and the children of foreign ministers, are citizens of the United States." *Id.* at 147. He also acknowledged that the Spanish Treaty Claims Commission itself, "the State Department," and "some opinions of attorneys-general have taken the same view." *Id.* at 124, 147.

Amendment distinguished "between persons born in the country of alien sojourners and those born of domiciled aliens." Flournoy, *Dual Nationality and Election*, 30 Yale L.J. 545, 552-553 (1921).

The State Department's actions on individual citizenship issues during this period were consistent with this understanding. In 1930, for example, a question arose concerning the citizenship of a child born on Ellis Island to an "alien mother [who] was never admitted into the United States under the immigration laws." Memorandum of the Off. of Solicitor for Dep't of State (Feb. 6, 1930) (quoted in 3 Hackworth, *Digest of International Law* 10 (1942)). The State Department's legal opinion observed that "the mother was physically present on territory of the United States" when the child was born, and that therefore the child was born subject to the jurisdiction of the United States under *Wong Kim Ark* because the mother did not belong "to any one of the classes of aliens referred to by Mr. Justice Gray as enjoying immunity from the jurisdiction of the United States." *Id.* The State Department did not impose any additional requirement relating to parental domicile or immigration status.[8]

Congress likewise took actions in the early twentieth century treating birth in the United States as dispositive of citizenship, irrespective of parental immigration status or domicile. For instance, the Immigration Act of 1924 established a quota system that gave special

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[8] *Accord* 8 Whiteman, *Digest of International Law* 125 (1967) (quoting 1938 State Department correspondence explaining that French consul's child born in New York was a U.S. citizen because consuls lacked diplomatic status and were "subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside" (quoting *Wong Kim Ark*, 169 U.S. at 679)).

treatment to certain relatives of U.S. citizens who filed petitions on their behalf. If the petitioning citizen was "a citizen by birth," the only information specified as necessary to support that status was "the date and place of his birth." Pub. L. No. 68-139, §9(b)(2), 43 Stat. 153, 157 (1924). We describe other relevant examples involving congressional immigration relief and Congress's enactment of the suspension of deportation provision in Part II.C.

Federal courts similarly described the Citizenship Clause without regard to parental domicile or immigration status. In 1934, this Court observed 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). Other courts made similar remarks, taking the territorial birthright principle as a given. *See, e.g.*, *Ex parte Lopez*, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (noting, while the status and length of residence of petitioner's parents were unknown, "[t]hat persons born in the United States (as was petitioner) are citizens of the United States need not be discussed").

C. Relief From Deportation For Noncitizen Parents Of U.S.-Born Citizen Children

From 1934 to 1940, the Executive Branch repeatedly sought statutory authorization to grant relief from deportation in hardship cases—including cases where deporting noncitizen parents based on their unauthorized presence would impose an undue hardship on their "native-born American-citizen children." 80 Cong. Rec. 5952 (1936). As the Immigration and Naturalization Service advocated for this authority to suspend deportation, it made clear to Congress that the authority would benefit noncitizen parents of citizen children. For example, INS Commissioner Daniel MacCormack told a Senate

Committee that deportations of both parents of citizen children were "not an uncommon thing." *Deportation of Criminals, Preservation of Family Units, Permit Non-criminal Aliens to Legalize Their Status, Hearings on S. 2969 Before the S. Comm. on Immigr. & Naturalization*, 74th Cong. 16 (1936).

Some legislators and officials were sympathetic. Others less so. But all agreed that children born to unlawfully present parents were citizens because of birth on U.S. soil. In 1937, for example, the House of Representatives debated whether to grant immigration officials discretion to suspend deportation in hardship cases. Representative Thomas Jenkins, a self-described restrictionist, opposed that bill because it offered potential relief on long-term residence grounds even when immigrants had no family ties. He argued that a necessary (but not sufficient) reason for amnesty would be having "a wife, or a child who is an American citizen." But "[i]t must be a child born on American soil. Any child, it makes no difference who its parents are, who is born on American soil has the right to American citizenship." 81 Cong. Rec. 5561 (June 10, 1937).

Even absent a regularized, statutory process, Congress sometimes intervened in particular cases to prevent deportation through private bills of relief.[9] In recommending this discretionary relief and in granting it, the Executive Branch and Congress routinely took the citizenship of U.S.-born children as a given, notwithstanding their parents' immigration status or domicile. For example, in 1939, Congress passed a private bill,

[9] A private bill grants relief—here from deportation—to specific individuals. For more examples, *see* Neuman, *Lessons for Birthright Citizenship from Suspension of Deportation* 7 n.31, 9 n.42 (Dec. 31, 2025) (Draft), https://ssrn.com/abstract=5991454.

53 Stat. 1529 (1939), cancelling a deportation order for Isabel Perez y Pacios, a Spanish citizen who "fraudulently gained" admission to the United States and then overstayed her temporary admission, H.R. Rep. No. 76-1107, at 2 (1939). In setting forth the case for relief, the House Committee on Immigration and Naturalization considered that she and her unlawfully present husband now had "two American-born children." *Id.*

Another example comes from May 1940, when Congress passed a private bill granting legal permanent residency to Morris and Lena Hoppenheim and their two Canadian-born daughters, who had come to New York for a visit but never left, settling in Brooklyn without obtaining immigration visas. As the House Committee on Immigration and Naturalization described the facts, the Hoppenheims' "third child, born in the United States, is an American citizen." H.R. Rep. No. 76-773, at 1 (1939). Given the "distinct hardship" deportation would cause, *id.* at 2, Congress granted the family private relief, 54 Stat. 1267 (1940).

Just one month later, in June 1940, Congress passed the "suspension of deportation" provision of the Alien Registration Act of 1940. Pub. L. No. 76-670, §20, 54 Stat. 670, 671-673. This provision—a precursor of today's cancellation of removal, 8 U.S.C. §1229b(b)—authorized the Attorney General to suspend a deportation "if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." 54 Stat. at 672. In the case of a citizen child, the grant of authority to suspend deportation of an unlawfully present parent confirms that Congress did not view territorial birthright citizenship as contingent on the parents' domicile or lawful presence in the United States.

Four months later, in October 1940, the same Congress that granted the Hoppenheims relief from deportation and that enacted the suspension-of-deportation provision in the Alien Registration Act passed the Nationality Act and its territorial birthright citizenship provision.

D. The Development, Consideration, And Enactment Of The 1940 Nationality Act

The birthright citizenship provision in the Nationality Act codified the broad understanding of birthright citizenship that was well-established in judicial, Executive Branch, and prior legislative practice. Specifically, in section 201(a), Congress used the phrase "subject to the jurisdiction" to codify the narrow, common-law exceptions described in *Wong Kim Ark*—not to require the parents of the U.S.-born child to be domiciled or lawfully present in the United States.

The Nationality Act was the culmination of a nearly decade-long project. In the early 1930s, "the American law on nationality, including naturalization and denationalization, was expressed in a large number of provisions scattered throughout the statute books." *Perez* v. *Brownell*, 356 U.S. 44, 52 (1958), *overruled on other grounds by Afroyim* v. *Rusk*, 387 U.S. 253 (1967). At Congress's request, *see id.* (citing 86 Cong. Rec. 11943), President Roosevelt designated an interdepartmental committee of the Secretary of State, the Attorney General, and the Secretary of Labor "to review the nationality laws of the United States, to recommend revisions, … and to codify those laws into one comprehensive nationality law for submission to" Congress. Exec. Order No. 6115, *Revision and Codification of the Nationality Laws of the United States* (Apr. 25, 1933).

The Secretaries transmitted the committee's proposed legislation to Congress in June 1938, together with a detailed explanatory report. *See* H. Comm. on Immigr. & Naturalization, 76th Cong., *Nationality Laws of the United States: Message from the President of the United States*, pt. 1 (June 13, 1938) (Comm. Print) ("Transmittal Report"). Section 201(a) of that proposed legislation was identical to the section enacted by Congress in 1940. The Transmittal Report explained that the proposed section 201(a) "is in effect a statement of the common-law rule" and "accords with the provision in the fourteenth amendment to the Constitution of the United States that 'all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States.'" *Id.*, pt. 1, at 7. The Transmittal Report then specifically explained:

> According to [*Wong Kim Ark*], the words "subject to the jurisdiction thereof" had the effect of barring certain classes of persons, including children born in the United States to parents in the diplomatic service of foreign states and persons born in the United States to members of Indian tribes. This case related to a person born to parents who were domiciled in the United States, but, according to the reasoning of the court, which was in agreement with the decision … in *Lynch v. Clarke*, 1 Sandf. Ch. 583, the same rule is also applicable to a child born in the United States of parents residing therein temporarily. In other words, it is the fact of birth within the territory and jurisdiction, and not the domicile of the parents, which determines the nationality of the child.

Id.

Congress included this Transmittal Report in the legislative record. *See To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearing on H.R. 6127 (superseded by H.R. 9980) Before the H. Comm. on Immigr. & Naturalization*, 76th Cong. 405-692 (1940). During months of public hearings, Congress also discussed the implications of the legislation. For example, when one member of Congress asked whether the U.S.-born child of a French couple in the U.S. on visitor's visas would be a U.S. citizen, others answered in the affirmative. *Id.* at 246. Those discussions, even when they concerned other issues—such as expatriation of citizens who had moved abroad—made clear that all accepted territorial birthright citizenship as a given. *See, e.g.*, *id.* at 37-38, 48, 52, 98.

After these hearings, Congress adopted the interdepartmental committee's proposed section 201(a) without change. Neither the Government nor its amici cite, nor are we aware of, anything in the legislative record that indicates that Congress had an understanding of "subject to the jurisdiction" that was different from the whole-of-government understanding of that phrase reflected in the Transmittal Report.

Indeed, the Nationality Act's structure confirms that Congress (like the interdepartmental committee) understood territorial birthright citizenship to be an integral part of the nationality code it was adopting. For example, as described in Part II.A, the 1940 Nationality Act was a comprehensive code intended to clarify the rules governing the acquisition and loss of U.S. citizenship: *jus soli*, *jus sanguinis*, acquisition of citizenship for people residing in U.S. territories, naturalization, and expatriation.

Given the legislative history and Congress's objective of enacting a comprehensive nationality code, it is difficult to believe that Congress would have omitted from section 201 the U.S.-born children of parents unlawfully present in the country (or not domiciled in the United States) without addressing them elsewhere in the statutory scheme. It did not do so because, consistent with the settled understanding, Congress understood section 201(a) to grant birthright citizenship to those children.[10]

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[10] One of Petitioners' amici contends that "for nearly 100 years" after the Fourteenth Amendment's adoption, Congress and the Executive Branch "recognized that more than birth alone was necessary for automatic citizenship." That assertion rests on inferences drawn from just three examples—the Indian Citizenship Act of 1924, Mexican repatriation during the Great Depression, and a (mis-cited) passport regulation. *See* Brief of Amicus Curiae Claremont Institute's Center for Constitutional Jurisprudence 26-29 (Jan. 27, 2026) (capitalization omitted). None of those inferences is warranted.

Wong Kim Ark itself noted that members of Native American Tribes were not considered "subject to the jurisdiction of" the United States. *See* 169 U.S. at 681-682. The enactment of the Indian Citizenship Act thus fully accords with *Wong Kim Ark*'s description of the exceptions captured by the phrase "subject to the jurisdiction thereof" in the Citizenship Clause.

The history of Mexican repatriation during the Great Depression contradicts the "negative inference" the amicus urges, Claremont Br. 27-28. While many U.S.-born children of Mexican nationals were removed to Mexico in the 1930s, those who were able to prove birth in the United States were recognized as U.S. citizens. Guzmán, *"I Want to Return to My Country": Ethnic Mexicans Request the Right to Return During the Great Depression*, 44 Journal of Am. Ethnic History 100, 103 (2025). In some cases, the U.S. consulate in Mexico helped them "confirm and obtain proof of their citizenship status," encouraging them to provide birth certificates or baptismal records that showed their "place of birth" in the United

III. The 1952 Immigration And Nationality Act Recodified The Settled Rule Of Territorial Birthright Citizenship

Congress enacted the INA in 1952. *See* Pub. L. No. 82-414, 66 Stat. 163. As relevant here, the INA recodified verbatim the territorial birthright citizenship provision enacted in 1940, *id.* §301(a)(1), 66. Stat. at 235, while broadening the definition of "United States" to include the unincorporated territory of Guam too, *id.* §101(38), 66 Stat. at 171. The fact that Congress readopted the same language without change is reason enough to presume that Congress intended no substantive change in the law. *See Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957). The legislative history of the INA, as well as Legislative and Executive Branch actions from 1940 to 1952 regarding suspension of deportation, further confirm the whole-of-government consensus that birthright citizenship extended to the children of temporary visitors and unauthorized immigrants.

States. *Id.*at 109-110. Their parents' immigration status was irrelevant.

Finally, the passport regulation (mis)cited by amicus cannot support the asserted inference either. We presume amicus intended to cite 22 C.F.R. §33.23 (1938). That regulation applied to any "native citizen" (i.e., *jus soli* and *jus sanguinis*), not just those born in the United States, as is clear from the regulation's reference to applicants "born abroad." *Id.* §33.23(f). It required information potentially relevant to varying scenarios of acquisition and loss of citizenship. In the *jus sanguinis* context, the father's period of U.S. residence and date of naturalization were obviously relevant. The companion regulation, concerning naturalized citizens' passport applications, was similarly broad in scope, requiring information that would clearly not be dispositive for many applicants. *See, e.g.*, *id.* §33.24(f) (requiring "name of the applicant's father, and whether or not he is an American citizen, place of his birth, place of his present residence, and if naturalized, date and place of his naturalization").

A. The Recodification Of Territorial Birthright Citizenship

As with section 201(a) of the 1940 Act, the consideration and enactment of the 1952 recodification of that provision demonstrates the same broad understanding of the territorial birthright citizenship rule.

In 1950, the Senate Judiciary Committee reported on its "general investigation of our immigration system," a precursor to the passage of the INA. S. Rep. No. 81-1515, at 1 (1950). The Committee characterized parents' national origin and immigration status as "immaterial" to citizenship at birth, noting that "[t]he only exception … is that the person must be subject to the jurisdiction of the United States," which has been "interpreted to exempt children born in the United States to parents in the diplomatic service of a foreign state." *Id.* at 685. While this exception "[f]ormerly … included" the children of tribal members, "these persons are now by law citizens at birth." *Id.*; *see also* Nationality Act of 1940, §201(b), 54 Stat. at 1138.

The House materials reflect a similar understanding. A 1952 House Judiciary Committee report on the proposed bill noted that "[t]he bill carries forward substantially those provisions of the [1940 Act], which prescribe who are citizens by birth." H.R. Rep. No. 82-1365, at 76 (1952). Elsewhere, the report endorsed the same reading of *Wong Kim Ark* that the Nationality Act drafters embraced, explaining: "In sustaining Ark's citizenship the Court held that the fourteenth amendment … is but declaratory of the common-law principle unreservedly accepted in England since Calvin's case … and in the United States since the Declaration of Independence, that all persons, regardless of the nationality of

their parents born within the territorial limits of a State are *ipso facto* citizens of that State." *Id.* at 25.

B. Suspension Of Deportation Of Noncitizen Parents Based On Hardship To Their U.S.-Born Citizen Children

Between 1940 and 1952, the Executive Branch and Congress repeatedly communicated on issues related to deportation, nationality, and citizenship. Much of this concerned the suspension-of-deportation process created in the Alien Registration Act of 1940, §20, 54 Stat. at 671-673. To refresh, that statute established a discretionary process for the Attorney General to suspend deportation if it would cause "serious economic detriment" to a spouse, parent, or minor child who was a citizen or legally resident in the United States. *See supra* Part II.C.

The 1940 Alien Registration Act required the Attorney General to report the facts for each suspension to Congress. *See* §20(d), 54 Stat. at 672. If Congress passed a resolution of disapproval, the Attorney General would be required to deport the person. *See id.* If Congress did not disapprove, the Attorney General would cancel the deportation proceedings and grant lawful permanent residence. *See id.* In 1948, Congress amended the statute, requiring Congress to affirmatively approve the Attorney General's recommended suspensions. *See* Act of July 1, 1948, Pub. L. No. 80-863, 62. Stat. 1206.

From 1940 to 1952, Congress reviewed and commonly allowed the Attorney General's suspension of deportation for temporary visitors and unauthorized immigrants based upon harm to their U.S.-born citizen children. In these cases, the Executive Branch and Congress demonstrated their shared understanding that such children were born "subject to the jurisdiction" of

the United States and citizens based on birth on U.S. soil. For example:

- Jan and Mary Zarycki, a Polish couple, entered the country unlawfully in 1930, and in 1933 had a child in New York. In 1941, the Attorney General suspended the parents' deportation to avoid serious hardship to their "*citizen minor child*." *Facts and Pertinent Provisions of Law in Cases of Certain Aliens*, H.R. Doc. No. 77-47, at 24-25 (1st Sess. 1941) (emphasis added).

- Dimytro and Ludwiga Iwasiuk, Polish citizens, entered the country unlawfully in 1924. In 1941, the Attorney General suspended Dimytro's deportation to avoid "serious economic detriment to his three children, all minors and *native-born citizens* of the United States." *Id.* at 82 (Dimytro) (emphasis added); *accord id.* at 83 (Ludwiga).

- Trinidad Lopez and Petra Gonzalez de Lopez, a Mexican couple, "last entered the United States February 1, 1927, by crossing the Rio Grande in a skiff, at which time they were not inspected." The Attorney General suspended their deportation based on hardship to four of their children, "all of whom are American citizens." *Facts and Pertinent Provisions of Law in Cases of Certain Aliens*, H.R. Doc. No. 77-541, at 58 (2d Sess. 1942).

- Stanislav and Marija Andrycich, citizens of Yugoslavia, were smuggled into the country between 1928 and 1930. They had two children while in the United States. In 1943, the Attorney General found that deporting either parent would cause a "serious economic detriment to *the citizen children*." *Aliens Whose Deportation Has Been*

> *Suspended for More than 6 Months*, H.R. Doc. No. 78-144, at 12 (1st Sess. 1943) (emphasis added).

These examples are illustrative; there are many other cases reflecting the same reasoning.[11] Congress did not veto any of those decisions.

The trend continued after the 1948 amendment. As before, a common ground for relief was the hardship that would result to the parents' U.S.-born citizen children. This included situations where the parents entered without inspection. For example, on May 27, 1952 (a month before enacting the INA), Congress issued a concurrent resolution approving the suspension of deportation of Kansaku and Rui Shiroyama. S. Con. Res. 66, 82d Cong., 66 Stat. B44 (1952). The Shiroyamas came to California in 1928, entering without inspection. They then had three children in the United States. Noting that "[t]heir *citizen children* make their home with them and are dependent on them for support," the INS concluded that

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[11] *See, e.g.*, *Facts and Pertinent Provisions of Law in Cases of Certain Aliens*, H.R. Doc. No. 77-541, at 364 (2d Sess. 1942) (suspending deportation of Charles and Jean Haker, who entered from Manitoba without visas in 1925 and "[s]ince their arrival in the United States … have had born to them six children, native citizens of this country").

For more examples, *see* Neuman, *Lessons for Birthright Citizenship from Suspension of Deportation* (Dec. 31, 2025) (Draft), https://ssrn.com/abstract=5991454. The article describes suspensions in several categories, including children born to (1) unlawfully present parents (pp.15-23); (2) parents with temporary lawful presence (pp.23-30); (3) Japanese Peruvian parents interned during World War II (pp.30-35); and (4) parents unlawfully present in the U.S. Virgin Islands (pp.35-45). The appendices provide suspension decisions and other primary sources concerning some of the examples discussed.

their deportation "would result in a serious economic detriment to their minor children."[12]

The post-1948 suspensions also included parents of U.S.-born children who were temporary visitors at the time of birth. For example, in 1950 Congress approved the suspension of deportation of Mexican citizens Gregorio Fierro and his wife Sanjuana Carrillo. S. Con. Res. 44, 81st Cong., 64 Stat. A291 (Mar. 1, 1950). Carrillo entered the United States unlawfully while Fierro, after initially entering unlawfully, reentered on a temporary agricultural visa. Carrillo gave birth to one child in 1947, during the time of her husband's temporary visa. The Justice Department concluded that deporting Carrillo and Fierro would cause "serious economic detriment" to their "*minor citizen children*"—including the child born in 1947—and recommended suspension on that basis.[13]

Strongly illustrating the breadth of the birthright citizenship rule, Congress did the same in post-1948 suspensions for Japanese Peruvians who were brought temporarily to the United States for internment as enemy aliens during World War II. Quite a few had children during internment and were spared deportation because of their children's citizenship. For example, Harukichi (Jose) Watanabe and Oyobu (Rosa) Watanabe were Japanese nationals brought from Peru to the United States for internment as enemy aliens and treated as unlawfully present. In 1946, while they were detained in Crystal City, Texas, they had a child. The INS issued an order suspending the Watanabes' deportation in 1951 because

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[12] Neuman, *Lessons for Birthright Citizenship*, at 17 & App. 1(5) (emphasis added).

[13] Neuman, *Lessons for Birthright Citizenship*, at 28 & App. 1(12) (emphasis added).

their "*child is a citizen of the United States by birth* and is completely dependent upon the respondents for support," and "deportation of the respondents would result in serious economic detriment to their *minor citizen child*."[14] Congress approved the suspension by concurrent resolution in 1952, around the same time it adopted the INA. *See* S. Rep. 82-1673 (2d Sess. 1952); 98 Cong. Rec. 7786 (1952); 98 Cong. Rec. 9418 (1952).

An especially relevant series of suspensions concerned children born in the Virgin Islands. As noted, the Virgin Islands were not considered to be covered by the Citizenship Clause; birthright citizenship there was thus a creature of statute. Neither the Executive Branch nor Congress treated that statutory grant of citizenship differently in these suspension-of-deportation cases.

For example, Ellice Alexander Rabsatt and Esridge Minovie Rabsatt, both born in the British Virgin Islands, lived in the U.S. Virgin Islands without having been admitted for permanent residence. Three of their children were born in the U.S. Virgin Islands. The INS concluded that deportation of either parent would result in "serious economic detriment" to their minor citizen children. Congress approved suspension of deportation. S. Con. Res. 40, 81st Cong., 63 Stat. 1234 (1st Sess. 1949). The same happened with Dorothy Joyce Todman and Joseph Emanuel Todman, natives of the British Virgin Islands, who by 1952 had had four children born in the U.S. Virgin Islands, all treated as United States citizens. The INS concluded that deportation would cause "serious economic detriment" to the four citizen children and recommended suspension. Congress approved suspension

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[14] Neuman, *Lessons for Birthright Citizenship*, at 28 & App. 1(16) (emphasis added).

in 1953 as a pending case under pre-INA law. S. Con. Res. 25, 83d Cong., 67 Stat. B55 (1st Sess. 1953).[15]

As with the pre-1948 suspensions, the list of post-1948 suspensions goes on.[16] In each case described here, Congress approved a suspension that had been recommended based on harm to a U.S.-born citizen child. And in each of these cases, it was the child's birth on U.S. soil, standing alone, that made them a citizen—notwithstanding their parents' temporary or unlawful presence in the country.

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Perhaps no case better illustrates the consensus understanding around the time Congress recodified the birthright citizenship statute than that of Anastasios and Elizabeth Hintopoulos. The Hintopouloses were temporarily admitted in 1951 but overstayed their admission after they learned Elizabeth was pregnant. After their child was born, the Hintopouloses disclosed their unlawful presence to authorities and sought suspension of deportation to avoid "serious economic detriment" to their minor U.S. citizen child. *See U.S. ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 73-74 (1957) (citing 8 U.S.C. §155(c) (1946)).

Over eight years of federal proceedings, their child was unquestioningly regarded as a U.S. citizen even though the parents' unauthorized presence was central to the case. While this Court ultimately found that the married couple failed to show they were entitled to

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[15] Neuman, *Lessons for Birthright Citizenship*, at 38-39 & App. 2(2)-2(3).

[16] *See generally* Neuman, *Lessons for Birthright Citizenship*, at 9, 17, 19, 22, 26-33, 39-42.

relief, all nine Justices took it for granted that their child was a citizen at birth. The majority said so expressly: "the child is, of course, an American citizen by birth." *Shaughnessy*, 353 U.S. at 73. So did the dissent: "The citizen is a five-year-old boy who was born here and who, therefore, is entitled to all the rights, privileges, and immunities which the Fourteenth Amendment bestows on every citizen." *Id.* at 79-80 (Douglas, J., dissenting).[17] This was the consensus understanding of territorial birthright citizenship that all three branches of government shared in the 1950s and that Congress recodified in 1952.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted.

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[17] The Attorney General and Congress ultimately granted them relief in 1959. *See* Deportation Suspensions, S. Con. Res. 21, 86th Cong., 73 Stat. B12 (1959).