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 AMICUS CURIAE PROFESSOR AKHIL REED AMAR IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

AKHIL REED AMAR IS a constitutional scholar and historian who seeks to aid this Court in its efforts to practice principled constitutional decision-making and faithful originalism. In previous briefs to this Court, he has advanced, and today he once again advances, positions that he has taken as an academic long before any partisan or narrowly political implications could have been known.

SUMMARY OF ARGUMENT

This case presents this Court a perfect opportunity to reaffirm first principles of text, history, structure, and precedent.

First, President Trump's E.O. 14160 defies the plain letter and spirit of the Fourteenth Amendment's first sentence, one of the crown jewels of our Constitution. In lieu of the Constitution's grand guarantee of equal birthright citizenship, E.O. 14160 substitutes ad hoc rules pulled out of thin air. Constitutional birthright citizens are citizens because of *where* they are born, not *to whom* they are born. The Amendment is *geographic*, guaranteeing equal citizenship to those born *on* American soil and "*under* the flag," as countless Reconstruction Republicans, led by once and

[1] No party or party's counsel authored or financially supported any of this brief.

future Vice Presidents Hannibal Hamlin and Schuyler Colfax, put the point time and again in the Amendment's drafting and ratification process. These touchstones—the soil and the flag—cleanly explain both the scope and the limits of the Constitution's grand birthright-citizenship guarantee. *When a baby is born in America and an American flag flies above the cradle, that baby is a birthright citizen*. All major Republican leaders who carried the banner of President Abraham Lincoln during his tenure and after his death —including Hamlin, Colfax, Edward Bates, Salmon P. Chase, and William Seward—shared this vision.

"Parent," "parents," "domicile"—these words appear nowhere in the Amendment. If the Amendment pivoted on any of these omitted words, as some have claimed, enormous questions would have arisen in the Amendment's drafting and ratification process. How and when would parentage and domicile be determined? How could a parentage test ensure the rock-solid, bullet-proof citizenship of all American-born children of American slaves? (In the 1860s, many enslaved parents were African-born and never-naturalized aliens, some of whom were, technically, *illegal* aliens, having been smuggled into America after 1807 by pirate slave-traders.) No discussion of such topics in fact occurred. That silence powerfully confirms that the Amendment means just what it says: All persons born inside the juridical U.S.A. and lacking diplomatic immunity—all persons *born under the flag*—are born equal citizens. It did not matter in 1868, and it does not matter today, whether an American newborn's mother or father or both or neither is a U.S. citizen or even a domiciliary; or whether either parent is Black or White or Yellow or a so-called "Gypsy," or was ever

a slave. Like the Thirteenth Amendment that precedes it, the Fourteenth disdains hereditary-based status. No one born in America is born a slave; and all born squarely on the soil and under the flag are born equal citizens.

Second, President Trump violates the Constitution's structure by trying to legislate enormously consequential citizenship policies in the absence of any constitutional provision or congressional enactment authorizing such presidential adventurism, and indeed in defiance of both the letter and spirit of a landmark 1952 congressional statute.

Third, E.O. 14160 flouts not one, but two of this Court's most venerable cases—*United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Both cases faithfully followed core precepts of the Constitution itself. By remaining true to these cases, the Court today would also remain true to originalism.

In the spirit of candor, amicus offers below blunt answers to the big questions raised by this case.

ARGUMENT

I. What Is the Plain Meaning of the Citizenship Clause?

The text means what it says—no more, no less: "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." The key initial preposition, *in*, is *geographic*. The text says nothing whatsoever about the family *to whom* a baby is born. The refining jurisdictional clause essentially means that a baby must be born "under the flag," as Reconstruction Republicans put the point at every turn. The word "under" was (and still is) synonymous with "subject to," and "the flag" was (and still is) a helpfully concrete stand-in for the more abstract word "jurisdiction." Here, then, is the simple and commonsense test that the Amendment codifies and that 1860s Republicans repeated *ad infinitum*: *On the day a baby is born, does American soil lie below, and does an American flag fly above?*

Thus, House Speaker (and future vice president) Schuyler Colfax declared that "every person . . . born under our flag . . . shall have a birthright in this land of ours."[2] Lincoln's first vice president, Hannibal Hamlin, likewise proclaimed that "every child born under our flag shall be an American citizen."[3] For a representative smattering of similar statements proclaiming that all persons born under the flag are

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[2] CINCINNATI COM., Aug. 7, 1866.

[3] N.Y. DAILY HERALD, Oct. 6, 1866.

birthright citizens, see July 2 Public Letter of Speaker Colfax, N.Y. TIMES, July 16, 1866 ("born under our flag") (widely reprinted elsewhere); FRANKFORT COMMONWEALTH, July 3, 1866 ("born under the flag"); GOLD HILL DAILY NEWS (Nev.), Aug. 17, 1866 (same); TIFFIN WEEKLY TRIB. (Ohio), Aug. 16, 1866 ("Every child born under our flag . . . becomes, by the very fact of its birth beneath our flag, a citizen"); PITTSBURGH COM., Sep. 26, 1866 (speech of General Granville Moody) ("citizenship . . . for every one born under our flag"); JACKSON DAILY CITIZEN (Mich.), Nov. 3, 1866 (speech of Rep. James M. Ashley) ("born under its flag"); N.Y. DAILY HERALD, Oct. 16, 1866 (another Hamlin speech) ("every man born under that flag shall be an American citizen"); DAILY BEE (Cal.), June 30, 1868 (Fourteenth Amendment "declares all persons born under the flag citizens of the United States"); and DAILY MORNING CHRON. (D.C.), Oct. 28, 1868 (yet another Colfax speech) ("born under the flag"). *See also* CARTHAGE GAZETTE, May 3, 1866 (April 1866 speech of Illinois Governor Richard J. Oglesby in Jacksonville) (discussing citizenship "by virtue of . . . birth under the flag"). *Cf.* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 381 (2005) ("The amendment . . . ma[de] clear that everyone born under the American flag . . . was a free and equal citizen."); *id.* at 351, 382, 391, 439n* (similar).[4]

Here, too, the basic preposition—"under"—was *geographic* and *place-based*, not hereditary and blood-based. Certain *territorial* enclaves located inside the general geographic perimeter/footprint of the United

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[4] Full quotations will soon be forthcoming in amicus's *SCOTUSblog* column.

States fell under a different flag—most notably, quasi-sovereign Indian lands, foreign embassies, and land occupied and administered under international law by foreign armies. These enclaves lay outside the full guarantee of constitutional birthright citizenship.

Textual analysis must heed not just what the text says, but also what it does not say.[5] Nowhere does the text use the word "parent," "parents," or "domicile." Had it done so, the Amendment's framers and ratifiers would have needed to wrangle over countless complexities, large and small, raised by these words.[6] *No such debates in fact unfolded in 1866-1868—precisely because these words and concepts were no part of the Amendment's letter or spirit*.

If birthright citizenship depended on one's parentage, then would both parents matter or just one? If one, which one? Millions of persons born in the United States before the 1860s were born slaves because of the slave status of their *mothers*, regardless of the status of their fathers. Contrariwise, a watershed 1855 federal statute conferred citizenship on certain babies born outside the United States if such babies were born to certain American-citizen *fathers*, regardless of the status of the babies' mothers.[7] Had the Fourteenth Amendment's Citizenship Clause been

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[5] *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (rejecting a claim because "the Constitution says absolutely nothing about it").

[6] *Cf. Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 893-99 (2009) (Roberts, C.J., dissenting) (rejecting a claim that raised countless complexities).

[7] Naturalization Act of 1855, § 1, 10 Stat. 604.

blood-based, rather than soil-based, the Amendment surely would have addressed the parentage issue specifically and textually, as had the 1855 statute.

If birthright citizenship depended additionally on the *allegiance* of one's parent or parents, as some modern commentators have claimed, then would the parental-allegiance test focus on whether the parent/parents *objectively owed allegiance* in the eyes of the government, or instead (or additionally?) on whether the parent/parents *subjectively accepted the duty of allegiance*? What if a parent or parents professed but did not practice allegiance? What about a parent or parents who professed and practiced allegiance even though the U.S. government had not required such allegiance? What about children of Confederate rebels?[8] What if one parent was staunchly loyal? What about a parent of uncertain subjective allegiance at the time a baby was born? What about a baby born to a parent believed to be allegiant on the date of the baby's birth but later determined to have been nonallegiant on that date?

And how about children born to American slave-mothers? Did such mothers objectively owe or subjectively accept allegiance to a government that enslaved them? Many antebellum theorists saw slaves as enemy aliens—held in bondage by force—even if such "aliens" were American-born.[9] Also, countless American slave-mothers were born in Africa. Some had been "legally"

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8 *See* Samarth Desai, *Birthright Citizenship: A Test Case*, VOLOKH CONSPIRACY (Feb. 18, 2025), http://bit.ly/4qpFSGK.

9 AKHIL REED AMAR, BORN EQUAL: REMAKING AMERICA'S CONSTITUTION, 1840-1920, at 47-48 (2025) [hereinafter "BORN EQUAL"].

imported to America in the late 1700s and early 1800s. Others had been illegally pirated to America after Congress prohibited the international slave trade in 1808. (This fact was common knowledge in 1866-1868; President Lincoln had famously hanged an illegal slave trader, Nathaniel Gordon, in 1862.[10]) How could exclusion of any babies born to American slaves be squared with the Amendment's central and oft-avowed purpose of citizenizing all American-born slave children?

Procedurally, how would allegiance be determined for any given parent? How could any process sensibly work given the Amendment's obvious aim of providing a clean and ironclad rule of birthright citizenship at the moment of birth itself?

To repeat: Virtually none of these questions was seriously debated in the Fourteenth Amendment's drafting and ratification process precisely because the text said nothing about parents—or their allegiance or their domicile, for that matter. The text focuses on the baby, not the parents. The text pivots on the baby's birth-place and not the baby's birth-parentage. The Amendment is a classic affirmation of *jus soli*, not *jus sanguinis*—the law of the soil and not the law of the blood.

The text is not only clear but also clean. Almost any legal line can occasionally raise close questions, but virtually all close questions raised by the Citizenship Clause focus on geographic issues that are central to the metes and bounds of the American constitutional system more generally, and that thus tend to generate decisive answers with implications far beyond birthright

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10 *See id.* at 435-36, 494.

citizenship: Where does America end, and, say, Canada or Mexico begin? In 1860s parlance, which places do and do not operate "under the American flag?" Were enemy forces to occupy some part of American soil and hold it under a foreign flag, where would the edge of occupation lie under well-recognized international law? In the 1860s, what were the precise edges of a given *quasi*-sovereign Indian enclave occupied by a tribe that was a recognized American treaty-partner?[11]

By contrast, parentage opens a Pandora's box, and implicates devilish questions not always defined by uniform federal law operating in other contexts. Who are a baby's parents? What if a mother is married to one man, but another man is the biological progenitor? What if there are disputes about biological parentage? What if a baby's biological father is unknown? What about foundlings? In today's world, what about a baby born from Woman A's egg and Man B's sperm, who issues from the womb of Woman C and is also claimed by Humans D, E, and F (A's, B's, and C's respective lawful spouses)?

II. What Is the Big Idea?

Birth Equality. All Americans born under the flag are born equal citizens.

Three great historical rivers converged in the mid-1860s to produce this mighty constitutional text. A careful tracing of these three rivers confirms the

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[11] In 1871, the U.S. permanently stopped making treaties with Indian tribes. *See* 16 Stat. 544, 566. In the Indian Citizenship Act of 1924, Congress extended birthright citizenship to babies born on tribal lands. 43 Stat. 253.

plain meaning of, and the big idea animating, the Citizenship Clause.[12]

The first river was Lincolnian. Its high alpine source was the Declaration of Independence, as Lincoln and many northern Americans came to read its grandest phrase: "all men are created equal." As Lincoln understood this idea in the 1850s, it was universal, Euclidian. But for Lincoln early on, this grand phrase was not especially civic, not citizen-focused.

In any truly just society anywhere, Lincoln insisted, all persons are born equally *free*. No one is born a slave or born a master. All are created equal—not necessarily in all things, but definitely in "life, liberty, and the pursuit of happiness." Although the Declaration of 1776 did not immediately guarantee the abolition of slavery, Lincoln insisted that the Declaration pointed America in precisely this antislavery direction, giving Americans everywhere a moral north star, so that slavery could be put on a path of ultimate extinction.

Early northern-state constitutions codified the Declaration's grand created-equal clause in a series of world-changing "born equal" clauses that marked the world's first great abolition movement. The movement launched with the Pennsylvania Constitution of 1776, drafted by a convention presided over by Declaration draftsman Benjamin Franklin, and the Massachusetts Constitution of 1780, drafted by a convention presided over by Declaration draftsman John Adams. The born-equal clauses of these watershed state constitutions

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12 *See* BORN EQUAL, *supra* note 9, at 1-19, 297-309, 344-56, 363-75, 413-76, 501-50; Akhil Reed Amar, *America's Equal Citizenship Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/700.

brought about the complete abolition of slavery in both states—immediately in Massachusetts and more gradually in Pennsylvania. By 1861, fifteen of the nineteen free states had born-equal clauses in their state constitutions, constitutions that provided strong precursors to the opening birthright-citizenship language of the Civil Rights Act of 1866 and its companion Fourteenth Amendment.

For Lincoln in the 1850s, birth equality meant equal freedom everywhere, not necessarily equal racial citizenship anywhere. "I am not in favor of Negro citizenship," Lincoln proclaimed in the fourth Lincoln-Douglas debate in 1858.

But as president in the midst of a great Civil War, Lincoln changed course. In September 1862, he issued a preliminary emancipation proclamation promising freedom for millions of Southern slaves. On January 1, 1863, he went further in his final emancipation proclamation, inviting freed slaves to join the Union army. With this decisive pivot, Lincoln stopped conceiving of American slaves as *hereditary aliens* fit for mass voluntary exodus to Africa, the supposed land of their forefathers. He now began to see them as *equal birthright Americans*, entitled not just to equal freedom but to equal citizenship. Shortly before his assassination, Lincoln went further, laying the groundwork for equal voting rights for Blacks.

But Chief Justice Roger Taney's malodorous opinion in *Dred Scott* threatened Lincoln's expanding vision of birth equality. Taney proclaimed that no American Black could ever be a citizen—even if such a Black were born free or became free. Taney embraced a blood-based vision: Just as slave status was hereditary—based on the status of a baby's mother—so too

citizenship status for Taney was essentially hereditary. No Black American *descended* from slaves or from the slave race, said Taney, could ever be a citizen.[13]

By late 1862, Lincoln's administration openly began to push back against blood-based and hereditary-caste-like citizenship rules. Sidestepping *Dred Scott*, Lincoln's Attorney General Edward Bates in November 1862 issued a landmark opinion basing American citizenship on *soil* and not *blood*. Birthright citizenship, asserted Bates in an official response to an inquiry from Treasury Secretary (and future Chief Justice) Salmon P. Chase, generally depended on where a person was born. All free folk born under the American flag were birthright citizens. "Every person born in the country," wrote Bates, "is, at the moment of birth, prima facie a citizen . . . without any reference to race or color, or any other accidental circumstance."[14] In an earlier memo to Secretary of State William Seward, Bates was absolutely emphatic on the precise question at the heart of today's dispute: "*Children born in the United States of alien parents, who have never been naturalized, are native-born citizens of the United States*."[15] In official correspondence in 1864, Seward himself echoed Bates: "*[T]he children of foreigners born here are citizens of the United States*."[16] Chase,

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[13] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403, 407, 411-12 (1857).

[14] Edward Bates, Att'y Gen., *Op. of Att'y Gen on Citizenship* (Nov. 29, 1862).

[15] Memorandum from Edward Bates, Att'y Gen., to William Seward, Sec'y of State (Sep. 1, 1862) (available online) (emphasis added).

[16] Letter to Minister to Venez. (Jan. 25, 1864) (available online) (emphasis added).

too, enthusiastically echoed Bates's opinion: "*[A]ll free persons born in the United States or naturalized of whatever color, are citizens of the United States.*"[17]

At war's end, Reconstruction Republicans in Congress squarely sided with the party's leading lights—Lincoln, Bates, Chase, and Seward—in a watershed 1866 Civil Rights Act that opened as follows: "[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."[18]

But would a mere executive memo and a simple congressional statute suffice? What if the Supreme Court tried to resurrect Taney's *Dred Scott* opinion and declare the memo and the statute unconstitutional? What if some future president tried to rescind the memo or ignore the statute?

In the late 1860s, America adopted a constitutional amendment to settle the matter conclusively. The Amendment opened with language echoing and tweaking the watershed statute: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." This of course is the very sentence at the heart of today's case.

A second great historical river feeding the eventual Fourteenth Amendment flowed through English common law. Under rulings going back centuries, including most famously *Calvin's Case* in 1608, 77 Eng. Rep.

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17 James P. McClure, et al., eds., *Circumventing the Dred Scott Decision: Edward Bates, Salmon P. Chase, and the Citizenship of African Americans*, 43 CIV. WAR HIST. 279, 279 (1997) (emphasis added).

18 Civil Rights Act of 1866, 14 Stat. 27.

377, English jurists had made clear that a baby born on English soil was almost invariably born an English subject, even if her parents were, say, French folk sojourning in England. A high-profile antebellum New York opinion, *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844), relied on English jurisprudence to hold that a baby born in New York to noncitizen parents was indeed a birthright New York citizen. Bates himself relied on *Lynch* and also relied on venerable English caselaw, including *Calvin's Case*.[19]

A third river involved the imperative political needs of the Republican Party after 1865. Slavery's abolition meant that the three-fifths rule that previously had applied to slave apportionment would now swell into a five-fifths rule for newly freed slaves; thus, unless other changes were made, the former Confederate states would re-enter Congress with even more seats than before. Republicans decided that if ex-Confederate states were to count Blacks at a full five-fifths, then Black men in these states needed to be enfranchised. Republican leaders also understood that newly enfranchised freemen would likely vote for the party that had voted for them—namely, the Republican Party, Lincoln's party, the party that had won the war and now needed to win the peace.

To secure reliable Black voting in the South, Republicans needed bulletproof rules guaranteeing Black birthright citizenship—soil-based rules, clean and clear rules that focused on where a person was

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[19] English jurisprudence had been an awkward inheritance for some Southern antebellum Whites. Only after American slavery was abolished did America closely approximate England, which had never experienced widespread slavery on its home soil.

born and not fuzzy rules focusing on parentage or parental allegiance or parental domicile. *Republicans never aimed to allow ex-Confederate states to deny the vote to various Black men because these men had been born to slave mothers or slave fathers who in turn had been born in Africa. Countless American freedmen were indeed born to enslaved parents who themselves were not citizens when their babies were born.* Many of these parents were not only African-born and never-naturalized aliens; they were African-born and never-naturalized *illegal/undocumented* aliens, having been smuggled into America after 1807 in violation of American law prohibiting international slave importation. Republicans aimed to citizenize the children of all such aliens—no ifs, ands, or buts.[20]

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[20] Professor Lash has recently emphasized that illegal-alien slaves in America circa 1866 had typically come to the U.S. *unwillingly*. *See* Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2026). But here is a conversation that never unfolded in 1866-1868: Prominent person X said that a baby born on the soil and under the flag needed to have a parent who was herself/himself either a lawful citizen or an alien lawfully and permanently present; prominent person Y then countered that such a rule would make no sense for aliens illegally smuggled into the U.S. through no fault of their own; and then Y or prominent person Z discussed the myriad birthday-adjudication complexities that would arise if the voluntariness of the parents' presence on American soil were the key question. Contra Lash, *the letter and spirit of the Birthright Citizenship Clause clearly focused on the baby, not the parent.*

True, Congressman John Bingham once said—in a passage Lash quotes eight times—that "every human being born within the jurisdiction of the United States of *parents* not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen." CONG. GLOBE, 39th Cong., 1st Sess.

III. What Does the Phrase "Subject to the Jurisdiction" Mean and What Does It Not Mean?

As previously explained and as well-elucidated in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), it essentially means "under the flag" and codifies ancient English and British common law, as adapted to America.

A baby born on American soil under an American flag is typically subject to ordinary American law in the ordinary way—subject, that is, to American *jurisdiction*. Modern examples of such laws include vaccine laws and birth-certificate laws.

As an island, England had long prided itself on the special rules that applied to English soil.[21] At

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1291 (Mar. 9, 1866) (emphasis added). Lash fails to highlight that Bingham immediately corrected himself, referring later in the very same sentence to "any man born within the jurisdiction of the United States, not [himself!—with no reference to parents] owing a foreign allegiance." *Id.* In any event, Bingham's misstatement sharply deviated from: (1) the text of the bill he was trying to expound, which said nothing of *parents*; (2) ancient British common law governing children of foreign sojourners born in Britain; (3) the Bates memo that Bingham was essentially seeking to codify; and (4) Bingham's own statements on later occasions, *see, e.g.*, *infra* p. 20. The Bingham misstatement of course also deviates sharply from E.O. 14160, which accepts the birthright citizenship of babies born to green-card holders who, as foreign nationals, do indeed owe allegiance to foreign sovereignties.

[21] For example, Blackstone's COMMENTARIES gushed that the "spirit of liberty is so deeply . . . rooted even in our very soil, that a slave or a negro, the moment he lands in England . . . becomes a freeman," at least with regard to "the protection of the laws." 1 BLACKSTONE, COMMENTARIES *126-27.

least since the early 1600s, and perhaps much earlier, all babies born on English soil were generally seen as English subjects by birth, even if born to alien parents merely passing through England. The largest numerical exception to birthright status in England was likewise *territorial*: various babies born behind occupied enemy lines were not automatically birthright English subjects. For broadly similar reasons, the Fourteenth Amendment also withheld birthright citizenship from those born on quasi-sovereign Indian land. Section Two of the Amendment refers in closely related language to "Indians not taxed."

Also, in both England and America, those born as children of foreign diplomats did not automatically enjoy birthright status. This tiny wrinkle was conceptualized in several ways. First, a diplomat and his child were seen as floating human chunks of foreign soil, with partial or total diplomatic immunity from America's laws.[22] Second, a baby born to a diplomat was treated as if she were born inside the embassy—foreign soil under a foreign flag, akin to foreign-occupied territory or a foreign public vessel.[23] Third, this wrinkle could be understood as a *force-majeure* concession to non-English, non-American regimes that would have reacted with anger, perhaps war, had the children of their diplomats been treated as English or American

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[22] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1124 (Mar. 1, 1866) (statement of Rep. Burton Cook); *id.* at 2897 (May 30, 1866) (statement of Sen. George Williams).

[23] *See id.* at 2769 (May 23, 1866) (statement of Sen. Benjamin Wade) (elaborating the "fiction of law" underlying the wrinkle); H. W. HALLECK, INTERNATIONAL LAW 209 (1861) (discussing the "fiction of extraterritoriality").

subjects or citizens rather than in effect, personal extensions of, say, the King of France or the Tsar of Russia.

The diplomat's-child wrinkle generated very little discussion in the mid-1860s. For starters, the wrinkle was well-settled in England. By contrast, excluding children of lawful foreign sojourners born in America from birthright citizenship—the very rule propounded by E.O. 14160—would have sharply broken with English common law. Had such a radical rule been urged in the mid-1860s, it would have precipitated massive discussion and pushback. Also, the diplomat's-child wrinkle was numerically trivial. It "could hardly be applicable to more than two or three or four persons," declared Republican Senator Benjamin Franklin Wade.[24] Moreover, the diplomat's-baby wrinkle nicely avoided several of the thorny issues raised by American-born children of foreign sojourners more generally. On the *how-many parents* and the *which-parent* questions: Obviously, the status of the *diplomatic* parent would govern. On the *who's-your-daddy* question: Obviously, the wrinkle applied only to babies *claimed* by a diplomat.

Twenty-first-century immigration skeptics invoke the "subject to the jurisdiction" clause as if it captured and solved several modern-day policy objections to the plain letter and spirit of the Fourteenth Amendment's general birthright command. But these skeptics in fact twist the jurisdiction clause into a pretzel, torturing it to carry meanings that its words and history cannot bear.

First, immigration skeptics dislike "rewarding" illegal/unauthorized immigrants by citizenizing their

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24 CONG. GLOBE, 39th Cong., 1st Sess. 2769 (May 23, 1866).

American-born children. But as amicus has repeatedly stressed, *the text—both the main "born in" birthright guarantee and the jurisdiction-clause refinement—is about the baby, not the parent*. If *parents* have broken the rules, then America can lawfully impose harsh civil and criminal sanctions on *them*. America also has many economic and diplomatic tools to sanction those who aid and abet illegal/unauthorized immigrants, both inside and outside America. But America may not punish children for the wrongs of their parents. Decitizenizing is indeed attempted punishment, precisely because the legal baseline of the Fourteenth Amendment clearly makes babies born on American soil under the American flag American citizens, regardless of who their parents are or what their parents have done.

Second, modern immigration skeptics stretch the occupying-army analogy beyond recognition. The key concepts here are *occupying* and *army*. Even if one thinks that, say, Houston or LA or Minneapolis is being "invaded" by aliens, these cities are emphatically not being *occupied* by foreign *forces*, as these latter two italicized words were understood in pre-1860s international-law scenarios—involving, for example, British troops in certain parts of America in the 1810s, and American troops in certain parts of Mexico in the 1840s.

Third, immigration skeptics dislike so-called "birth tourism"—whereby persons lawfully in the United States as students, sojourners, etc., give birth to babies in the U.S. Here, too, the U.S. government may properly respond by limiting the noncitizen parents in myriad ways. But the government cannot decitizenize American-born children.

In sum: The words "subject to the jurisdiction" simply have nothing to do with the policy concerns of modern immigration skeptics.

When asked whether a precursor statute to the Fourteenth Amendment, which had a more broadly worded "jurisdiction" clause, would citizenize "the children of Chinese [aliens] and [proverbially roaming, nondomiciliary, so-called] Gypsies born in this country," Republican Senator Lyman Trumbull replied with a single emphatic word that speaks volumes: "*Undoubtedly*."[25] Representative John Bingham used similarly robust language on the campaign trail in 1867: "If a man is not a citizen of the country in which he was born, in God's name of what country is he a citizen?"[26]

IV. What Do This Court's Relevant Fourteenth Amendment Precedents Say?

Beginning with *Wong Kim Ark*, a long line of Supreme Court precedents tightly aligns with the arguments and evidence that amicus presents today.

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[25] CONG. GLOBE, 39th Cong., 1st Sess. 498 (Jan. 30, 1866) (emphasis added); *see also id.* at 2891 (May 30, 1866) (statement of Sen. John Conness) (defending, in a similarly emphatic statement, the plain meaning of the Fourteenth Amendment's birthright-citizenship guarantee to American-born babies of Chinese aliens).

[26] SUMMIT CNTY. BEACON, Sep. 26, 1867. For a brilliant analysis of proverbially nondomiciliary and, in England, illegal-alien "Gypsies" more generally, and a great discussion of why the so-called "Gypsy" example is uniquely powerful in refuting various theories underlying E.O. 14160, see Gerard N. Magliocca, *Without Domicile or Allegiance: Gypsies and Birthright Citizenship*, 49 HARV. J.L. & PUB. POL'Y 539 (2026).

The Court's rule and rationale in *Wong Kim Ark* are clear as day:

> [B]y the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, . . . *every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.* The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established. . . . In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of *citizenship by birth within the dominion was reaffirmed in the most expl[i]cit and comprehensive terms.*

169 U.S. at 658-75 (emphases added).

Because many other briefs have already covered and many more will likely continue to cover *Wong Kim Ark* and its progeny[27] in detail, amicus shall simply

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[27] *See, e.g., Weedin v. Chin Bow*, 274 U.S. 657, 660, 670 (1927); *Morrison v. California*, 291 U.S. 82, 85 (1934); *Hirabayashi v. United States*, 320 U.S. 81, 96-97 (1943); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957); *INS v. Errico*, 385 U.S. 214, 215-16 (1966); *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982); *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985); *see also Trump v. CASA, Inc.*, 606 U.S. 831, 885-86 (2025) (Sotomayor, J., dissenting) (collecting cases).

underscore three key points that deserve special mention.

First, *Wong Kim Ark* deserves extra precedential weight because it is an originalist decision strongly rooted in the Fourteenth Amendment's text and enactment history, and also in centuries-old English caselaw and high-profile antebellum American caselaw that informed that Amendment. *Cf. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264-65, 278 (2022).

Second, the author of the dissent, Chief Justice Melville Fuller, had been a staunch Democrat in the 1860s who had consistently opposed Lincoln's Republican Party. Republicans had pushed through the Fourteenth Amendment in a sharply polarized vote. Not a single congressional Democrat voted for the Amendment when it cleared the House and Senate in 1866.[28] Fuller was thus never the best source for a faithful account of the Amendment's letter and spirit.[29]

Third, although the great John Marshall Harlan joined Fuller's dissent, Harlan himself had stumbled badly in one notable passage of his otherwise admirable *Plessy v. Ferguson* dissent, authored only two years before *Wong Kim Ark*. Because this *Plessy* passage was plainly wrong on the law, and because it also hints at possible anti-Asian bigotry on Harlan's part, today's Court should think twice before invoking Harlan on the specific birthright-citizenship issue now before the Court.

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[28] BORN EQUAL, *supra* note 9, at 516, 697 n.31; AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 399 (2012).

[29] BORN EQUAL, *supra* note 9, at 553.

Harlan in *Plessy* claimed that "there is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race."[30]

Not true. Imagine two ethnic-Chinese persons—that is, two members of "the Chinese race," in Harlan's phrase—one male and one female, each born in Africa in 1850. (There were in fact countless ethnic Chinese in Africa in this era.) Imagine further that these two persons migrated to America in 1871, married each other in 1872, and naturalized in 1873. Congress's Naturalization Act of 1870 quite expressly authorized our hypothetical newlyweds to naturalize as "aliens of African *nativity*"—as pointedly distinct from persons of "African *descent*," addressed separately in the 1870 Act.[31] Thus, *contra* Harlan, American law circa 1896 did permit "those belonging to" the "Chinese race" to "become citizens of the United States."

Now imagine that our hypothetical couple gave birth to a baby born in San Francisco in 1876, America's centennial year. As an American-born child of two naturalized American citizens, our centennial baby would have undoubtedly been a birthright citizen under *any definition* of the Fourteenth Amendment (even President Trump's!). Surely the Fourteenth Amendment contains no *racial* bar as such, *contra* Harlan.

Harlan faltered in this key *Plessy* passage; his closely related dissenting vote in *Wong Kim Ark* should thus be sharply discounted.

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[30] 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

[31] Naturalization Act of 1870, 16 Stat. 254 (emphasis added).

V. What Do Leading Fourteenth Amendment Scholars Say?

The overwhelming consensus of expert scholars strongly supports amicus's claims that the Fourteenth Amendment's first sentence means what it says; that the refining phrase "subject to the jurisdiction" has virtually nothing to do with an American-born baby's parents' allegiance or domicile or immigration status or law-abidingness; and that *Wong Kim Ark* got it right. Amicus does not today impugn the good faith of the handful of scholars who have taken a contrary position. But as a scholar who has studied the Fourteenth Amendment for decades, amicus candidly reports to this Court that much of the contrarian scholarship is plainly wrong.

VI. What Should the Court Make of the Solicitor General's Petitioner Brief?

Petitioner ignores what the Amendment *says*—its obvious focus on geography, with its words "in" and "jurisdiction."

Petitioner ignores what the Amendment *omits*—words such as "parents," and "domicile." Petitioner reads these elephantine words into the Amendment based on mousehole-size snippets wrenched from context.

In an unintentionally self-defeating footnote, Pet.Br.18 n.4, Petitioner quotes Senator Lot Morrill and Representative John Broomall, and strongly implies that these two emphasized the allegiance of a baby's parents. In fact, both men focused entirely on the baby's allegiance, not the parents'. Petitioner's Broomall quote indeed says it all: "What is a citizen but a human being who by reason of *his being born within*

the jurisdiction of a Government owes allegiance to that Government?"[32] Morrill said the same thing in the very sentence preceding the one quoted by Petitioner: "[E]very man, *by his birth*, is entitled to citizenship, and . . . owes allegiance to the country *of his birth*."[33]

Petitioner also relies on a verbal slip in which Congressman Bingham carelessly used the word "parents." Pet.Br.17. *But see supra* note 20.

Petitioner likewise quotes a *private* letter *allegedly* by Senator Trumbull using the word "parents"—a letter at odds with what Trumbull said emphatically and *publicly* on the Senate floor, in an important exchange unmentioned by Petitioner.[34]

In a misleading and garbled passage, Pet.Br.24, Petitioner quotes a stray question posed by Senator William Fessenden to Senator Benjamin Wade on May 23, 1866,[35] and then uses this quote to imply that the "subject to the jurisdiction" language aimed to exclude from citizenship American-born children of foreign sojourners generally. Wrong. The "subject to" verbiage was first introduced *six days* and *one hundred* CONGRESSIONAL GLOBE pages after Fessenden's stray question, and had nothing to do with Fessenden or with the

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[32] CONG. GLOBE, 39th Cong., 1st Sess. 1262 (Mar. 8, 1866) (emphasis added).

[33] *Id.* at 570 (Feb. 1, 1866) (emphasis added).

[34] *Compare* Pet.Br.24; *with* CONG. GLOBE, 39th Cong., 1st Sess. 498 (Jan. 30, 1866).

[35] CONG. GLOBE, 39th Cong., 1st Sess. 2769.

general issue of American-born children of foreign visitors.[36]

Again: In pointedly omitting the words "parents" and "domicile," the Reconstruction Congress aimed to codify the sweeping birth-equality precepts of the Lincoln Administration, as articulated by Bates, Chase, and Seward, backed by a high-profile state-court ruling and centuries of English jurisprudence tracing back to 1608. Had the Amendment aimed to repudiate these grand precursors, such a repudiation would have raised elephant-sized problems and generated a massive debate. But such a great debate never happened.

Petitioner's brief instead presents the Court an artful pastiche of misleading, misinterpreted, and/or atypical shards.[37]

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[36] *Id.* at 2869 (May 29, 1866) (statement of Sen. Howard) (introducing the final version of the Citizenship Clause). Contra Petitioner: Wade never introduced a standalone citizenship clause as such; nor was any Wade-authored language ever agreed to; nor did the "subject to" language directly revise a previously agreed-upon Wade-authored citizenship clause. Rather, long after the Wade-Fessenden exchange, Howard added a single two-part Citizenship Clause restating basic soil-based principles ("born in") and longstanding under-the-flag limits and wrinkles ("subject to"). These longstanding wrinkles and limits had nothing whatsoever to do with American-born children of alien travelers.

[37] In confronting something as vast as the Fourteenth Amendment, one can always find some careless, confused, or contrarian statements by someone. *Cf. Murphy v. Smith,* 583 U.S. 220, 228 n.2 (2018) (Gorsuch, J.) (finding Petitioner's legislative-history snippets insufficient to overcome the enacted text and surrounding context).

More generally, Petitioner misses the Amendment's grand vision of birth equality under the flag. At the margins, Petitioner aims to make our Constitution more heredity-based, more caste-like.

On a different front: Petitioner nowhere confronts—nowhere even mentions—this Court's celebrated decision in *Youngstown*, which forbids presidents from ruling by executive fiat and also obliges presidents to heed valid congressional statutes. Petitioner tries to sidestep these issues by claiming that the 1952 Immigration and Nationality Act (INA) mirrors the Fourteenth Amendment as Petitioner now misconstrues that Amendment, more than 150 years after the Amendment's enactment and nearly 75 years after the INA's passage. But of course in 1952, Congress built upon the Amendment as definitively glossed by this Court in *Wong Kim Ark* and its progeny. Even were *Wong Kim Ark* today thought by Petitioner or Petitioner's amici to be erroneous, Congress thought otherwise in 1952 and legislated on that basis.[38] Petitioner points to no substantial contemporaneous evidence suggesting that Congress, the legal community, or the public at large in 1952 generally rejected *Wong Kim Ark* or that Congress aimed to sneak into its own statutory language a hidden time bomb set to explode decades later.

And speaking of *Wong Kim Ark* . . . Petitioner fails to carry the heavy burden of showing, as a matter of

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[38] *See* Vikram David Amar & Jason Mazzone, *Why the 1952 Immigration and Nationality Act Requires the Supreme Court to Invalidate President Trump's Birthright Citizenship Executive Order in Any Event*, JUSTIA (Feb. 11, 2026), https://bit.ly/4aEoMiJ.

stare decisis doctrine, that *Wong Kim Ark* and the long line of cases building on this landmark precedent are clearly wrong on originalist grounds. *See Dobbs*, 597 U.S. at 268, 269-70, 278. Nor does Petitioner adduce any other compelling reason for the Court today to abandon this well-settled and well-respected line of cases.

VII. How Does President Trump's Executive Order Fare Under *Marbury* and *Youngstown*?

Miserably. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154-73 (1803), the Court stood up to the president even more than it stood up to Congress. Back then, President Jefferson was acting unconstitutionally by refusing to recognize one single American's vested commission. Today, President Trump is acting unconstitutionally by refusing to recognize millions of future Americans' vested citizenship rights.

Even worse, President Trump is trying to do this with no congressional statute authorizing his actions and indeed in defiance of the clear language of the 1952 INA, 8 U.S.C. § 1401(a), guaranteeing citizenship to any "person born in the United States, and subject to the jurisdiction thereof."

Assume *arguendo* that the Fourteenth Amendment —either standing alone or as glossed by *Wong Kim Ark*—somehow did not citizenize all babies born in America under the flag. The 1952 statute itself surely did just that—not just because of the plain meaning of § 1401(a) standing alone, and not just because the statute obviously incorporates *Wong Kim Ark*, but also because any other reading makes a hash of the INA's overall linguistic structure. Several sections of the 1952 INA featured detailed rules regarding "father[s]" and

"mother[s]" of various babies born beyond America's soil and flag,[39] but § 1401(a) pointedly omitted these words and counterpart words such as "parent." President Trump offers no substantial evidence that Congress, the executive branch, the judiciary, or the American people *in 1952* generally thought that the INA's words meant anything close to the rules he is now laying down by executive decree. And while Congress has modified many other sections of the naturalization code since 1952, Congress has never reworded the iconic § 1401(a).

VIII. What Should the Court Make of the Various Lines Drawn in E.O. 14160?

The details of E.O. 14160 are made-up and slapdash. This is what pure diktat looks like.

Even were it somehow proper to penalize American-born children of aliens *illegally* present in the U.S., what part of the Fourteenth Amendment or the 1952 Act says that American-born children of aliens who hold *lawful* visitor visas or *lawful* student visas or *lawful* immigrant visas or *lawful* business visas are somehow lesser than American-born children of aliens who have green cards? Why does the E.O. use different language in describing "father[s]" and "mother[s]?" *See* § 2(a).[40] Why must a father be "biological?" *See* § 4(b).

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[39] *See* 8 U.S.C. §§ 1101(b), 1403(a), 1403(b). For later-enacted provisions making similar parental distinctions, see, for example, 8 U.S.C. § 1409(a)(1)-(4).

[40] For example, a nontemporary alien mother with asylum or refugee status is apparently treated differently from a nontemporary alien father with such status. *See* USCIS, *Implementation Plan* (July 25, 2025).

DNA tests did not exist in the 1860s, and background legal understandings in that era would generally have treated the legal husband of the mother as the legal father, regardless of biology.

If today's president can make up rules one way, can tomorrow's president reverse everything? Can tomorrow's president go even further in the opposite direction? What about the president after that, and so on? Would voting rights for federal elections swing wildly back and forth every few years?

IX. Why Should the Court Decide the Big Constitutional Question of Birthright Citizenship When Off-Ramps Are Available?

A ruling that strikes down E.O. 14160 simply on the *Youngstown* ground that the president cannot unilaterally dictate citizenship rules (Justice Jackson's Category 2) or on the *Youngstown* ground that a president cannot defy the clear 1952 congressional statute (Justice Jackson's Category 3) would fail to do full justice to relevant rightsholders—in other words, would fail to fully remedy the gross constitutional violation that E.O. 14160 attempts.

Imagine a little girl named Sandra Ruth Marshall born in El Paso or Brooklyn on July 4, 2026, to two parents who are not green-card holders or citizens. Sandra Ruth Marshall is entitled to know from the very beginning of her life not just that she is an American citizen, but also that she is a *constitutional birthright citizen*. She is entitled to know that not even a future congressional statute can deprive her of her vested constitutional right should Congress one day try to retroactively repeal the 1952 Act.

The scope and depth of this right should be declared by this Court—*Marbury*-style, *Brown*-style—not just for Sandra Ruth Marshall's benefit but also for the benefit of all the rest of us, so that we, too, may fully understand our constitutional rights, responsibilities, and relationships. Citizenship rights are not merely individual rights against government. Citizenship creates horizontal rights and relations among and between citizens themselves. Tellingly, the Fourteenth Amendment speaks of "citizens" in the plural, even though this plural created a grammatical glitch. (The text speaks of "the state" in which "they"—the "citizens"—"reside" even though, of course, different citizens reside in different states, with an *s*.) Citizenship involves more than liberty (bodily freedom from forced deportation) and equality. Citizenship also implicates civic fraternity. American citizens rightly owe each other special respect and can rightly claim from each other special solicitude.

X. Why Is This the Most Important Case of the Century (So Far)?

Three reasons.

First, this case is uniquely easy. The central constitutional issue of equal birthright citizenship is clear; plus, there is no executive authority to act unilaterally here; plus, the President's gerrymandered E.O. clearly violates a congressional statute of long standing, a statute that *no* court has *ever* read to mean anything *remotely close* to E.O. 14160. Proverbially, hard cases make bad law. Easy cases can make even worse law if they err. Gross error in an easy case leads to corrosive public cynicism and indeed threatens the

very rule of law. A wrong ruling in this case would be eerily reminiscent of *Dred Scott v. Sandford*.

Second, this case is uniquely fundamental. A wrong ruling would not just be egregious. It would be enormous. The basic issues at stake go to the very foundation of the Constitution. At root, citizenship is the right to have rights, and the right to belong. All constitutional issues are important, but few rival the constitutional issues in this case: Who is an American? May a president ignore the Constitution itself? May a president defy valid congressional statutes and make himself a dictator of all law?

Third, a correct ruling in this case would give this Court a once-in-a-lifetime opportunity. This is a unique *Marbury*-meets-*Youngstown*-meets-*Brown*-meets-*Nixon Tapes* moment. America and the world need to see what amicus sees: that the Court is not merely a group of politicians in robes.

Amicus thus hopes the Court will not just rule the right way in this case, but will do so for the best and deepest reasons—ringingly—and will also do so unanimously, at least in outcome, and ideally in exposition.

CONCLUSION

Today is not the day for this Court to go small in saying what the law is. Today is a day for this Court to proudly proclaim that all persons born on American soil and under the American flag are *Americans*—truly, are *citizens*; are *birthright* citizens; are *equal* citizens; and indeed are *constitutionally* equal birthright citizens.

Respectfully submitted,

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