

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 PROFESSORS
TYLER ANBINDER, GARRETT EPPS,
AND AVIAM SOIFER AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICI CURIAE*¹

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SUMMARY OF THE ARGUMENT

If any political party in this country's history were to have proposed the position the Government now advocates before this Court, it would have been the Know Nothings. They did not.

A few lessons are evident from the history of the Know Nothing movement of the 1850s—the most successful movement for the restriction of immigrant rights in American history. First, the Government's arguments before this Court directly echo the Know

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Nothings' position with respect to Catholic and Irish immigrants. Specifically, the Government argues that temporarily present noncitizens are unable to establish "complete" political allegiance to the United States because this class of noncitizens retains allegiance to their country of origin. Compare that to the Know Nothings' positions. They believed that Catholic immigrants would never renounce their allegiance to the Pope, meaning they lacked the requisite allegiance to the United States. Likewise, the Know Nothings expressed deep concern that Irish immigrants were unwilling to assimilate into American society, instead, choosing to live with other Irish immigrants, retaining their cultural values.

Second, despite amassing significant political power to pursue their anti-immigrant agenda, the Know Nothings accepted the settled rule of birthright citizenship and never proposed limitations for the children of certain classes of immigrants, even the children of those they deemed to be subject to deportation. That the most ardent and politically powerful anti-immigrant organization was not proposing such limitations underscores just how well-accepted birthright citizenship in America was at the time. Indeed, despite believing that Catholic immigrants retained allegiance to the Pope, the Know Nothings did not advocate any limits on birthright citizenship based on the type of supposed allegiance that the Government now contends is historical fact. Instead, the Know Nothings believed that anyone born and raised in the United States, no matter their parentage or religion, could become good American citizens.

ARGUMENT

Despite making arguments that mirror positions taken by the Know Nothing movement, the Government asks the Court to adopt a position that even the Know Nothings—the most successful, most extreme anti-immigrant political movement in American history—never sought: to restrict birthright citizenship based on the political allegiance of a child’s parent. A review of the history of the Know Nothings makes clear that the idea of birthright citizenship as applicable to all children born on American soil was uncontroversial, even to the most zealous and successful foes of immigrants’ rights of the nineteenth century. This only underscores that the Government’s view finds no support in history or tradition.

I. The Know Nothings Were Remarkably Successful in Their Pursuit of Anti-Immigrant Policies

Now considered as something of a historical footnote, the Know Nothings were hardly a fringe movement. In the fall of 1854, for example, the Know Nothings prevailed in capturing several Congressional seats in each of the Midwestern states, and in Pennsylvania they won nearly half of the twenty-five Congressional contests and a majority of the legislative races. TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S*, at 61–64 (1992). In New York, the Know Nothings captured only a third of the legislative seats, but more than half of the congressional delegation. *Id.* at 83–87. In fact, the further north and east one looked,

the better the Know Nothings performed in elections. In Connecticut, they were victorious in every congressional race and captured the governor's mansion and supermajorities in both legislative chambers. *Id.* at 127. The same was true in Rhode Island and New Hampshire. *Id.* Know Nothings also eventually elected governors in Delaware, Maryland, Kentucky, and California. *Id.* at 194.

But the Know Nothings' crowning achievement was their historic victory in Massachusetts. There, in 1854, the Know Nothings carried all eleven congressional races, every seat in the upper house of the legislature, and 99% of the seats in the house of representatives, a landslide unsurpassed in Massachusetts history before or since. *Id.* at 92–94. On the national level, about half of the 234 members of the House of Representatives of the Thirty-Fourth Congress that convened in December 1855 were at one point members of the Know Nothing movement, which by then had begun calling itself the American Party. *Id.* at 197.

The American Party used its political power, solidified in these elections, to pursue a wide-ranging agenda aimed at combating what they perceived as an existential threat posed by immigrants. In particular, Know Nothings sought to curb the growing power of foreign-born Catholics. Their religion, the Know Nothings believed, was so incompatible with American values that they were incapable of assimilation.

In New England, where the Know Nothings had total control of most state governments, their elected

representatives proposed placing restrictions on the Catholic Church, banning the foreign-born, or in some cases only Catholics from holding political offices, and quadrupling the period immigrants had to wait before becoming citizens and receiving the right to vote. *Id.* at 121, 137–38. In Massachusetts, where the Know Nothings wielded the most power, legislators banned the teaching of foreign languages in public schools and mandated state inspection of convents. *Id.* at 137. This last measure was adopted in the hopes of gathering evidence to substantiate the claim that cloistered “women religious” were commonly raped by priests and that the children resulting from these crimes were aborted and buried in mass graves on convent grounds. *Id.* at 115. Massachusetts even went so far as to deport several thousand Irish immigrants who had fled the Great Potato Famine because they remained indigent and therefore would become public charges, the only significant instance in the antebellum era when this rationale was used to deport immigrants who had entered the United States lawfully. HIDEKI HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY*, at 100–118 (2017). For these reasons, the Know Nothings are considered the most successful anti-immigrant political movement in our country’s history.

II. The Government's Rationale For Ending Birthright Citizenship Echoes Many Myths About Immigration Previously Promoted by the Know Nothing Movement

The Government's arguments before this Court bear significant similarities to views that the Know Nothings once supported. Specifically, the Government adopts the view that temporarily present noncitizens do not give up their political allegiances when they come to the United States. Similarly, the Know Nothings took issue with Catholic immigrants, who they believed were allegiant to the Pope above the United States, and Irish immigrants, who they believed were unwilling to assimilate into American society.

1. At the heart of the Government's position is the misguided belief that many of today's immigrants must have complete political allegiance to the United States. Specifically, the Government contends that the phrase "not subject to any foreign power" from the Civil Rights Act was incorporated into the Citizenship Clause such that birthright citizenship only extended to "children born here 'of parents not owing allegiance to any foreign sovereignty.'" Gov. Br. at 17 (quoting Cong. Globe, 39th Cong. Sess. 572 (1866)). By the Government's telling, birthright citizenship is inconsistent with political "allegiance to some other government." *Id.* at 18.

Thus, to acquire birthright citizenship, the Government argues that an individual must be someone

“[n]ot owing allegiance to anybody else”—meaning political allegiance—and that allegiance must be “full and complete.” *Id.* at 18. Under this view, children born of “parents who are domiciled elsewhere, and are only temporarily present in the United States,” are presumed to “owe primary allegiance to their parents’ home countries, not the United States.” *Id.* at 21. Any such child, lacking the requisite allegiance, thus could not acquire birthright citizenship.

2. The Government’s position on political allegiance is remarkably similar to the Know Nothings’ views about Catholic and Irish immigrants.

Consider Catholic immigrants first. Know Nothings, and many other nineteenth-century Americans as well, believed that Catholics would never give up their allegiance to the Pope because they had been indoctrinated to follow Catholic teachings and Papal instructions even if that contravened civil laws. Catholics “march and countermarch with the precision of regular soldiers, at the tap of the Popish drum,” wrote a Harrisburg newspaper. Anbinder, *supra*, at 114. The Pope, according to the Know Nothings, determined the stances of Catholic politicians and told Catholic citizens how to vote as well as which American laws to obey. Although the pontiff might seem to some too far away to pose a real threat to the American political system, Know Nothings insisted that Catholic priests carried out the Pope’s subversive schemes in the United States and made American Catholics “subservient to the nod of the Pope.” *Id.* at 115.

As a result, Know Nothings believed that Catholics were “not really Americans, but only residents in America,” as a Hartford newspaper that supported the Know Nothing movement claimed. *Id.* at 105.

Similarly, the Know Nothings believed that Irish immigrants were unwilling to assimilate into American society. In fact, the idea that certain immigrants resist assimilation—a myth that has been propagated for centuries—was a core talking point in the Know Nothing political playbook. The Irish, according to one Know Nothing, were “determined that neither themselves nor their children shall ever conform to American manners, American sentiments, or the spirit of American Institutions.” *Id.* at 107. The Irish “banded together” in enclaves like Five Points in New York, Kensington in Philadelphia, and the North End in Boston, the Know Nothings insisted, specifically to resist assimilation. *Id.*

3. Although Catholic and Irish immigrants became an integral part of this country, the Government, more than a 150 years later, seemingly repackages the Know Nothings’ concerns in its arguments before this Court.

Just as the Know Nothings were wary of Catholic immigrants’ allegiance to the Pope and Irish immigrants’ supposed resistance to joining American society, the Government contends that a child whose parent is from another country is automatically more politically allegiant to that country than to the United States. *See, e.g.,* Gov. Br. at 21–22, 28. According to the Government, such a child cannot have the

requisite connection to the United States needed to afford it the constitutional rights that come with birthright citizenship. *Id.* at 28, 31.

III. The Know Nothings Accepted the Settled Definition of Birthright Citizenship and Never Proposed Limiting It For Any Children of Any Class of Foreign-Born Person

Although mirroring some of the Know Nothings' viewpoints, the Government's ultimate position is one even the Know Nothings never put forth. As noted, the Know Nothings amassed the political power to enact their anti-immigrant agenda and believed that certain immigrants lacked allegiance to the United States and were unwilling to assimilate, but they never disputed the settled rule of citizenship by birth.

A review of the Know Nothings' policy platforms nationally and in *every* state shows that the organization never pursued *any* limitations on birthright citizenship.² For example, with the Know Nothings in power, Massachusetts never denied that the

² See *Village Record*, HARRISBURG HERALD (July 10, 1855), <https://perma.cc/82J9-9NFF>; *The Know-Nothing Council*, THE N.Y. TIMES (Aug. 31, 1855), <https://perma.cc/V96T-CLHZ>; *American National Seceders' Convention at Cincinnati*, THE N.Y. TIMES (Nov. 27, 1855), <https://perma.cc/WMV2-87CC>; *The Know-Nothing National Council*, THE N.Y. TIMES (Feb. 22, 1856), <https://perma.cc/5CPD-AP4Y>; PRINCIPLES AND OBJECTS OF THE AMERICAN PARTY (1855); THE KNOW NOTHING ALMANAC, OR TRUE AMERICANS' MANUAL (1855); PLATFORM AND PRINCIPLES OF THE AMERICAN PARTY (1855); Anbinder, *supra*, at 168–70, 180–81, 188, 196, 207, 247.

American-born children of Irish deportees were American citizens, even if they were born while their parents were public charges and therefore in violation of the requirements necessary to maintain their legal status in the United States. Similarly, the Know Nothings never adopted the view that Catholic immigrants' loyalty to the Pope barred their children from birthright citizenship. Birthright citizenship, as the Know Nothings understood it, did not require the political allegiance that the Government now advocates.

Thus, despite their core prejudices, the Know Nothings believed that anyone born and raised in the United States, no matter their parentage or religion, could become good American citizens. The Government's arguments before this Court, though adopting similar misgivings about the political allegiance of the identified classes of noncitizens, diverges from the Know Nothings' positions by advocating for a contrary and much more extreme view than the Know Nothings ever proposed. This Court should reject it as ahistorical and antithetical to even the most anti-immigrant views espoused by a significant political party.

CONCLUSION

Know Nothing lawmakers, judicial officers, and chief executives sought every imaginable restriction on immigrants in general and Catholic and Irish newcomers in particular. Even so, they accepted the settled rule of birthright citizenship, never proposing limitations for American-born children of any class of the foreign-born person, even those they viewed as

allegiant to the Pope or those who had broken the law and were subject to deportation.

And, although many Know Nothings became Republicans, the framers of the 14th Amendment rejected their nativist worldview. The Government's position today is far more punitive than any proposed by the Know Nothings, and it is a position that was deliberately rejected in the approval and ratification of the 14th Amendment. This Court should decline the Government's invitation to rewrite history to fit an anti-immigrant definition of birthright citizenship that even the Know Nothings did not put forth.

Respectfully submitted,

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