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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

The question presented is whether Executive Order No. 14,160 complies on its face with the Citizenship Clause and with 8 U.S.C. 1401(a), which codifies that Clause.

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## INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs.

Cato Institute scholars have published extensive research on immigration and constitutional law. This case interests the Cato Institute because it concerns a contested exercise of executive power, a challenge to birthright citizenship, and the proper interpretation of the Fourteenth Amendment.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

On January 20, 2025, President Trump signed Executive Order No. 14,160. In a nutshell, the goal of this Executive Order was to prevent a particular class of persons from acquiring American citizenship—namely, persons born in the United States to parents without permanent immigration status. Exec. Order No. 14,160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (Jan. 29, 2025).

This Executive Order contravenes the Fourteenth Amendment. That Amendment guaranteed citizenship to persons "born or naturalized in the United States" and "subject to the jurisdiction thereof." U.S. CONST. amend. XIV, § 1. It thereby settled "the great question of citizenship and remove[d] all doubt as to what persons are or are not citizens of the United States." CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

The Executive Order is powerless to alter long-settled law that correctly interpreted the Constitution. Petitioners argue that the word "jurisdiction" in the Amendment's five-word phrase "does not mean mere regulatory jurisdiction"; rather, Petitioners insist that citizenship cannot be granted without political jurisdiction or "lasting ties to create allegiance" to the United States. Cert. Br. 16–17. Petitioners' theory is apparently that political jurisdiction can only be established by domicile or by "lawful, permanent residence within a nation, with intent to remain." Cert. Br. 16–17. But that argument is incompatible with the ordinary meaning of the Fourteenth Amendment, which unambiguously promises

citizenship to those who satisfy the dual qualifications of § 1. *See* U.S. CONST. amend. XIV, § 1. In *Wong Kim Ark*, this Court confirmed that reading: "the status of citizenship [is] to be fixed by the place of nativity, irrespective of parentage." *United States v. Wong Kim Ark*, 169 U.S. 649, 690 (1898) (quoting Children: Born in the United States Generally Citizens, 2 WHARTON DIGEST, ch. 7, § 183, at 394).

An examination of the purpose of the Fourteenth Amendment confirms the ordinary meaning of the text. The Fourteenth Amendment was meant to extend its broad protections to "all persons," with only narrow exceptions rooted in the common law. U.S. CONST. amend. XIV, § 1. "All persons" includes the children of temporary visitors and aliens. A decision that narrowed the reach of the Fourteenth Amendment based on a myopic view of its purpose would repeat the missteps of the *Slaughter-House Cases* and would strip the Amendment of many of its important protections. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

The Executive Order cannot supersede the Fourteenth Amendment. The president's power to issue an order "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The Executive Order is therefore without legal force, and it cannot effect any policy that extinguishes Fourteenth Amendment rights.

## ARGUMENT

### I. THE TEXT OF THE FOURTEENTH AMENDMENT GUARANTEES BIRTHRIGHT CITIZENSHIP.

"The text of a law is the law." Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017). Judicial interpretation of the Constitution's text requires examination of its original public meaning. And the original public meaning of the Fourteenth Amendment guarantees birthright citizenship. The Executive Order cannot break the Fourteenth Amendment's promise.

#### A. The Court Should Focus on the Original Public Meaning of the Fourteenth Amendment.

The Constitution "separated the judicial from the legislative power and, in so doing, sought to differentiate sharply the functions performed by these two distinct branches." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 57 (2001). It thereby granted the legislative branch "the power to make the law." *King v. Burwell*, 576 U.S. 473, 498 (2015). It provided the judiciary a "more confined" role: to interpret the law. *Id.*; *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 94 (2012) ("Judicial amendment flatly contradicts democratic self-governance."). As one Justice of this Court has explained, the separation of powers requires judges to "follow the law as written, regardless of whether we like the result." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 780 (2020) (Kavanaugh, J., dissenting); *see also Evans v. Jordan*, 8 F. Cas. 872,

873 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815).

What does it mean to follow the law as written? The answer has evolved over time. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 12 (Grant Huscroft & Bradley W. Miller eds., 2011). Initially, courts and scholars focused on the Framers' intentions. *Id.*; ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 10 (1984). As explained by Edwin Meese, "The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution." Edwin Meese III, Att'y Gen., Speech to American Bar Association 1 (July 9, 1985).

Criticism followed. For instance, the Constitution "authorize[d] the enactment of texts, not the enactment of intentions." Jay Mitchell, *Textualism in Alabama*, 74 ALA. L. REV. 1089, 1098 (2023); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012). Intentions can be misrepresented, *Textualism in Alabama*, *supra*, at 1098; in addition, it is challenging to draw inferences that rest on collective intent, in part because "the legislative process is . . . riddled with compromise." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112–13 (2010). Furthermore, the Framers could not have anticipated all possible applications of a given text, so it is reasonable to deny that they had particular intentions with respect to some particular application of a text. Paul Brest, *The Misconceived Quest for the Original*

*Understanding*, 60 B.U. L. REV. 204, 214 (1980). Finally, the Framers expected the Constitution to be interpreted according to its "express language," not according to their (or anyone's) intentions. H. Jefferson Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885, 903 (1985).

Other critics of original intent have proposed an alternative interpretive method, "original expected applications," that examined how the Framers would have applied the Constitution's text to future cases. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–96 (2007); *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION 145 (1997); *see* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 587–89 (1998). But this strategy also has downsides. First, "[t]he meaning of the constitutional text is not the same thing as expectations about how that meaning will be applied." Lawrence B. Solum, *Original Public Meaning*, 2023 MICH ST. L. REV. 807, 819 (2023). Second, such applications are presumably not binding because they are not in the enacted text. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3 (2011). Third, the Framers' application could err if they misunderstood the relevant facts. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1664 (2017); Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 261 (2018) ("originalism is not committed to . . . the absolutely insane idea that the false beliefs of the framers about facts bind us today").

In light of such criticisms, advocates of originalism now often use a more sophisticated method of

interpretation: a search for the "original public meaning" of the text. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *supra*, at 22; Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987). The original public meaning "is the meaning that is made accessible to the public by the constitutional text." Solum, *Original Public Meaning*, *supra*, 821.

This approach has many advantages. First, relying on the text promotes stability. Mitchell, *Textualism in Alabama*, *supra*, at 1096. It prevents judges from creating the law and ensures that citizens can rely on it. *Id.* at 1096–97; *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 434 (2024). This means that it is "more compatible" with a democratic system because it prevents judges from reading their political values into the law. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989). It also ensures that lawmakers are not deprived of their legal authority. *See* STEVEN D. SMITH, FICTIONS, LIES, AND THE AUTHORITY OF LAW 35 (2021). Perhaps most importantly, this approach emphasizes the interests of the public, not the interests of public officials—who are ultimately only trustees of and agents for the people. "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

### B. The Original Public Meaning of the Fourteenth Amendment Guarantees Birthright Citizenship.

The Fourteenth Amendment provides, "All 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. The Fourteenth Amendment therefore "contemplates two sources of citizenship, and two only: birth and naturalization." *Wong Kim Ark*, 169 U.S. at 702.

The word "and" in the Fourteenth Amendment creates a conjunctive list, meaning all requirements must be met. *See United States v. Palomar-Santiago*, 593 U.S. 321, 326 (2021). Thus, children of temporary visitors and aliens must satisfy two requirements to qualify as U.S. citizens: They must (1) be born in the United States and (2) be subject to the jurisdiction of the United States. *See* U.S. CONST. amend. XIV, § 1. These are two distinct tests: It is possible to pass one and fail the other. *See, e.g.*, *Wong Kim Ark*, 169 U.S. at 682 (noting that children born of diplomats in the United States are not citizens).

The Court should interpret the Fourteenth Amendment according to its ordinary meaning at the time it was ratified. *See Heller*, 554 U.S. at 576; *see United States v. Rabinowitz*, 339 U.S. 56, 69–70 (1950) (Frankfurter, J., dissenting). At the time of the Fourteenth Amendment's ratification, the word "subject" meant "[t]o bring under the control, power, dominion or action of." *Subject*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865); *see Subject*, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE (1879) ("An

individual member of a nation, considered as owing obedience to its laws."). "Jurisdiction" meant "the legal power or authority of hearing and determining causes." *Jurisdiction*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865); *see Jurisdiction*, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE (1879) ("The authority of government; the sway of a sovereign power."). Accordingly, the Fourteenth Amendment guaranteed citizenship to those who are born in the United States and who are under its authority. *See* U.S. CONST. amend. XIV, § 1; *Subject*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865); *Jurisdiction*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865).

Speeches and writings of the time confirm this interpretation. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE 100 (Philadelphia, Carey, Lea & Blanchard 1836); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 236 (2d ed. 1829); John Sherman, Speech of the Hon. John Sherman at Mozart Hall (Sept. 28, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY 39, 39 (Cin. Com. 1866); George F. Edmunds, Speech of Hon. George F. Edmunds, of Vermont in the Senate of the United States 6 (April 14, 1871) ("[the Fourteenth Amendment] declared that every person born within the territory of the United States was a citizen of the nation"). Senator Benjamin Eggleston, for example, asserted that "the children born here of parents coming to our shores from Germany, Ireland, and other countries, should never be denied the rights or character of citizens by any law of the land" in an 1866

speech. Benjamin Eggleston, Speech of the Hon. Benjamin Eggleston at Madisonville (Sept. 25, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY, *supra*, at 37.

A holding by this Court to the contrary would mark a radical change in the law and buck settled precedent. In the landmark case of *Wong Kim Ark*, this Court upheld the citizenship of a child born in the United States to Chinese subjects. *Wong Kim Ark*, 169 U.S. at 652, 704–05. The Court found that "[s]ubject to the jurisdiction thereof" excluded Native American Tribes as well as those in "two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State." *Id.* at 682. But all others fall under the "fundamental rule of citizenship by birth." *Id.* at 688.

Subsequent cases have recognized the citizenship of children born in the United States to noncitizens. *See, e.g.*, *Immigr. & Naturalization Serv. v. Rios-Pineda*, 471 U.S. 444, 446 (1985) (noting that a child born of noncitizens unlawfully present in the United States was "a citizen of this country"); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957) (recognizing a child born in the United States of illegally present noncitizens was "of course, an American citizen by birth"); *Immigr. & Naturalization Serv. v. Errico*, 385 U.S. 214, 215 (1966) (noting that a child born to noncitizen parents who fraudulently came to the United States "acquired United States citizenship at birth"); *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982) ("no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United

States was lawful, and resident aliens whose entry was unlawful").[2]

The President's Executive Order cannot be squared with the ordinary meaning of the Fourteenth Amendment. The Fourteenth Amendment granted citizenship to those born in the United States and under its authority. *See* U.S. CONST. amend. XIV, § 1; *Subject*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865); *Jurisdiction*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865). Children of unlawfully or temporarily present aliens are often born in "territory under permanent U.S. sovereignty." *See* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 435 (2020). In fact, ending birthright citizenship would mean about 255,000 children every year born in the United States would lose their U.S. citizenship. Jennifer Van Hook et al., *Repealing Birthright Citizenship Would Significantly Increase the Size of the U.S.*

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[2] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), summarizes a few of the Court's previous holdings that are less relevant in this context but were more relevant to the Fourth Amendment issues that case was contemporaneously examining. In *Verdugo-Urquidez*, the Court noted that those previous opinions "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country." Notably, *Verdugo-Urquidez* explains *one* way that people may be accorded certain constitutional rights, but it certainly does not explain the *only* way that people may be accorded such rights. The Court in *Verdugo-Urquidez* was considering whether a *citizen and resident of Mexico* with *no connection to the United States* had Fourth Amendment rights when his residences were searched in Mexico, *id.* at 274–75, and it would be error to understand *Verdugo-Urquidez* as modifying how the Fourteenth Amendment applies to persons born in the United States.

*Unauthorized Population*, MIGRATION POL'Y INST. (May 2025).[3]

The United States also has "the legal power or authority of hearing and determining causes" related to such children. *See Jurisdiction,* AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865); *Wong Kim Ark*, 169 U.S. at 652 (deciding the citizenship status of a child born of two aliens); *Shaughnessy*, 353 U.S. at 73 (recognizing a child born in the United States of illegally present noncitizens as an American citizen); *Lynch v. Clarke*, 1 Sand. Ch. 583, 638, 683 (N.Y. Ch. 1844) (holding that a U.S.-born child of noncitizens domiciled in Ireland was a citizen and could inherit property). The jurisdiction of the United States over such children is settled. Therefore, children born in the United States to temporary visitors and aliens are citizens of the United States as a matter of the ordinary meaning of the text of the Fourteenth Amendment.

### C. Petitioners' Arguments Do Not Overcome the Ordinary Public Meaning of the Text.

The president's attempts to save his Executive Order are unavailing. Petitioners have tried to reshape the Fourteenth Amendment by suggesting that "subject to the jurisdiction thereof" requires "political jurisdiction"—which Petitioners define as "lasting ties to create allegiance" to the United States. Cert. Br. 16; Pet. Br. 11. Petitioners then theorize that "children of temporarily present aliens are not completely subject to the United States' political jurisdiction and so do not become citizens by birth." Pet. Br. 11. But this chain of reasoning has weak links:

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[3] Available at https://tinyurl.com/h9k4tdsd.

as *Wong Kim Ark* tells us, "Birth and allegiance go together." *Wong Kim Ark*, 169 U.S. at 662 (quoting *United States v. Rhodes,* 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) (Swayne, Cir. J.)).

Petitioners also misread *Wong Kim Ark* in a second respect—by arguing that parentage determines "the domicile (and hence allegiance) of a child." Pet. Br. 21. That argument serves as the ground for Petitioners' theory that "Children of alien parents who are domiciled elsewhere, and are only temporarily present in the United States, owe primary allegiance to their parents' home country"—and therefore are not citizens. Pet. Br. 21. Petitioners' argument fails because citizenship does not depend on the child's parents; rather, it depends on the child's birthplace. *Wong Kim Ark*, 169 U.S. at 690 ("the status of citizenship [is] to be fixed by the place of nativity, irrespective of parentage" (quoting WHARTON DIGEST, *supra*, at 394)).

Petitioners also contend that the text of the Fourteenth Amendment does not explain several well-known exceptions to its citizenship guarantee. Pet. Br. 37–40. More precisely, Petitioners argue that the text fails to explain three exceptions to the Fourteenth Amendment's guarantee: children of a hostile occupation, children of foreign government officials, and children of Native Americans. This claim sidesteps the relevant perspective in play here—namely, that of the reasonable person who is aware of the law. *See* A MATTER OF INTERPRETATION, supra, at 17. The reasonable person who is aware of the law would have understood the phrase "subject to the jurisdiction thereof" to exclude these three well-known exceptions.

First, those who live in conquered territory do not thereby acquire new citizenship from the conqueror. WHEATON, *supra*, at 106. Second, obvious practical considerations exempt foreign government officials from some parts of the Fourteenth Amendment. *Id.*; *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 138–39 (1812) ("without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad"); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 739 (2012). Finally, Native Americans had long been understood to have some degree of separation from the jurisdiction of the federal government. *Haaland v. Brackeen*, 599 U.S. 255, 310 (2023) (Gorsuch, J., concurring); *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) ("Indians born within the territorial limits of the United States . . . are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."); Ing, *supra*, at 730.[4] Practical administrative concerns, rather than large and theoretical issues, drive these three exceptions and exclude them from the public meaning of "jurisdiction."

[4] Today, Native Americans born in the United States are citizens by statute. 8 U.S.C. § 1401(b).

## II. THE PURPOSE OF THE FOURTEENTH AMENDMENT CONFIRMS THE ORDINARY PUBLIC MEANING OF THE TEXT.

"The clear and central purpose of the Fourteenth Amendment was to eliminate *all* official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (emphasis added). That is why "the opening words, 'All persons born,' are general . . . restricted only by place and jurisdiction, and not by color or race." *Wong Kim Ark*, 169 U.S. at 676. The Fourteenth Amendment should not be misinterpreted, as it was in the *Slaughter-House Cases*, to exclude those the Fourteenth Amendment was meant to protect. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases - Freedom: Constitutional Law*, 70 CHI.-KENT L. REV. 627, 627 (1994).

### A. The *Slaughter-House Cases* Improperly Narrowed the Purpose of the Fourteenth Amendment.

Five years after the Fourteenth Amendment was ratified, this Court handed down its decision in the *Slaughter-House Cases*, 83 U.S. 36, which upheld the constitutionality of a Louisiana law that created a private monopoly on the sale and slaughter of livestock in New Orleans. Writing for a 5-4 majority, Justice Miller found the law to be a valid public health measure that did not deprive New Orleans butchers "of the right to exercise their trade." *Id.* at 60. Undertaking the Court's first analysis of the Fourteenth Amendment's Privileges or Immunities Clause, Justice Miller concluded that it was meant to protect only rights of national—as opposed to state—

citizenship, and that those rights did not include the right to earn a living in a marketplace free of state-chartered monopolies. *Id.* at 74, 78–79.

Justice Samuel Miller's decision was guided by his conviction that the Fourteenth Amendment could not possibly have been meant to "radically change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." *Id.* at 78. Nonetheless, the consensus of modern scholarship is that Justice Miller was quite mistaken: This radical change was exactly what the Fourteenth Amendment was designed to accomplish. *See* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 116–17 (2011). John Bingham, the chief author of Section One of the Fourteenth Amendment, "envisioned federal citizenship as a guarantee that certain fundamental rights of citizens should be uniform throughout the United States, and that states should be unable to deprive federal citizens of those rights." Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 718–19 (2003). It isn't much of an overstatement to say that "'everyone' agrees" that the Court incorrectly interpreted the Fourteenth Amendment when it narrowed the Privileges or Immunities Clause. Aynes, *supra*, at 627; Randy E. Barnett & Evan D. Bernick, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 175 (2021) ("Justice Miller employed a purposivist methodology to limit what the minority claimed to be the original meaning of the text").

After looking at the history and purpose of the Reconstruction Amendments, the Court in the *Slaughter-House Cases* also suggested that the

"Framers intended the Equal Protection Clause to protect African-Americans–but no other groups–from discrimination." Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1063 (2009); *Slaughter-House Cases*, 83 U.S. at 81. The Court expressly doubted "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, [would] ever be held to come within the purview of" the Equal Protection Clause. *Slaughter-House Cases*, 83 U.S. at 81. As a result, "the enduring legacy of the *Slaughter-House Cases* and *Strauder*" is "[t]he idea that the Equal Protection Clause condemns racial classifications while permitting other forms of discrimination." Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1277 (2017).

Subsequent cases relied on the *Slaughter-House Cases* to the Nation's detriment. For example, the Court failed to strike down an Illinois rule barring women from practicing law. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1873). The Court reasoned: "[U]nless we are wholly and radically mistaken in the principles on which [the *Slaughter-House Cases*] are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government." *Id.*

If the Court relies on the cramped account of purpose that the *Slaughter-House Cases* imply, the Fourteenth Amendment will fail to achieve its text's promise: to protect "all persons." U.S. CONST. amend. XIV, § 1; *See Slaughter-House Cases*, 83 U.S. at 74, 81. Women, other races, or other people born in the U.S.

are not excluded from the Fourteenth Amendment's protections. *Wong Kim Ark*, 169 U.S. at 694 ("To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States."). It was improper to narrow the scope of the Fourteenth Amendment in the past; it would be improper to do so in the present.

### B. The Fourteenth Amendment's Purpose Was Intentionally Broad.

"When the letter is clear, it controls." Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 52 (2018). This means the purpose cannot displace the text. *See K Mart Corp. v. Cartier*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) ("The principle of our democratic system is not that each legislature enacts a purpose"). However, the purpose can play a supportive role: It can provide circumstantial evidence of the original public meaning. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013).

Petitioners have suggested that the purpose of the Fourteenth Amendment was narrow in scope—more precisely, that its purpose was only to protect the rights of black people in the wake of the *Dred Scott* decision. Pet. Br. 2. The evidence shows otherwise.

The purpose of the Fourteenth Amendment was demonstrably broader. The evidence at hand supports

the ordinary meaning of the text: to protect "all persons." U.S. CONST. amend. XIV, § 1; CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) ("the privileges and immunities "cannot be fully defined in their entire extent and precise nature"); CONG. GLOBE, 39th Cong., 1st Sess. 2398 (1866) (statement of Rep. Phelps) ("'Privileges and immunities' are a much broader and more comprehensive term [than civil rights], and may, by definition, include suffrage, jury duty, and eligibility to office."). As the spokesman for the Fourteenth Amendment in the Senate explained, "[The Fourteenth Amendment] will . . . forever disable [the states] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard). The upshot of all of this is that the authors of the Fourteenth Amendment intended to write it expansively. *See Textualism and the Fourteenth Amendment*, *supra*, at 1248 ("one must confront rather than ignore the Amendment's failure to mention race—and its failure to distinguish racial discrimination from other discriminatory practices"); *see* M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737, 748 (2017). And the proper reading of its expansive language shows that it protects "[a]ll persons born . . . in the United States," including the children of temporary visitors and aliens. *See* U.S. CONST. amend. XIV, § 1. In contrast, the cramped reading of the Fourteenth Amendment's language that Petitioners urge would contravene the text's ordinary meaning as well as its purpose.

## III. THE ORIGINALIST ANALYSIS PROVIDED BY AN *AMICUS* IN SUPPORT OF PETITIONERS IS FLAWED.

Professor Ilan Wurman's amicus brief, Br. for Ilan Wurman as Amicus Curiae Supporting Pet'rs [hereinafter Wurman Br.], attempts to support Petitioners' position through originalist argument. The Wurman brief begins with a controversial account of the common law of birthright citizenship; it then suggests, more briefly and cautiously, that its own historical account may be in tension with an interpretation of the Fourteenth Amendment that provides for birthright citizenship.

The Wurman brief deserves plaudits for the candid way that it highlights the weaknesses of its own argument. The brief suggests that illegally present aliens would "likely have fallen outside of the scope of the rule" of birthright subjectship, Wurman Br. 2, but that "the case of temporary sojourners is more difficult." *Id.* With respect to antebellum American law, the brief describes a purported split of authority that appears to undercut its own position. Wurman Br. 18–20. The most forceful evaluation the brief provides for its own side of the argument is that its preferred interpretation of the common law is "likely consistent" with a relatively narrow reading of the scope of the Fourteenth Amendment. Wurman Br. 25–31. But its reading of the Fourteenth Amendment relies on an unusual form of originalism that appears to sidestep both original public meaning and the contemporaneous public statements of lawmakers. See *infra.* In short, the Wurman brief makes a modest case that children who are unlawfully present in the United States may lack birthright citizenship. The bulk of its argument is that it is *logically possible* that there is no

guarantee of birthright citizenship in such cases under the Fourteenth Amendment. But, of course, the argument that a theory *might possibly* be true is far afield from any argument that it *is* true.

The vast majority of Wurman's brief describes his own perspective on the common-law rules of citizenship, Wurman Br. 3–25, in play long before the ratification of the Fourteenth Amendment in 1868. That perspective is faint-hearted. Wurman contends that whether "temporary sojourners" were included in the rule of birthright citizenship under American law is "at best unsettled." Wurman Br. 18. Wurman is careful to note that contemporaneous judicial opinions, legal treatises, and newspaper editorials supply evidence for his view that is at best equivocal: Judicial opinions "reflected three possibilities: that children born to temporary visitors were birthright citizens; that such children were not birthright citizens; or that such children could elect U.S. citizenship by renouncing their parents' allegiance upon reaching the age of majority." Wurman Br. 20. Wurman then describes the perspective of two different antebellum American treatises on the question, both of which appear to be conjectural or hypothetical. When Justice Story's treatise discussed the birthright citizenship of the children of temporary sojourners, it added that such children make for a "reasonable qualification" to the common-law rule—but then noted that this exception was not "universally established." Wurman Br. 21 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 48 (1834)). Similarly, Henry St. George Tucker's treatise provided the traditional rule of birthright citizenship, but added that making an exception for the children of temporary sojourners "would be sufficiently obvious," given the

"principles of natural reason." Wurman Br. 21 (quoting HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 57 (1836)). Wurman also notes that the newspaper editorials he supplies "tend to show" that the application of the common-law birthright rule to temporary visitors was "contested." Wurman Br. 25.

Wurman then claims that the Fourteenth Amendment was "intended to have identical effect" to the Civil Rights Act of 1866 and that the phrase "subject to the jurisdiction thereof" therefore "likely" had similar effect to the common-law rules in effect before 1868. Wurman Br. 25. This argument requires unpacking, because it relies on a controversial and peculiar understanding of how that phrase in the Fourteenth Amendment should be read. In order to make his argument, Wurman draws an analogy to U.S. jurisdiction over Indians: Indians were subject to what might be called partial or incomplete jurisdiction. For instance, the U.S. had jurisdiction over crimes committed within tribal territory if one of the parties involved wasn't a tribal member. Wurman Br. 25–26. However, as Wurman explains, some of the drafters of the Fourteenth Amendment noted that Indians were not subject to (in the words of those drafters) "full and complete jurisdiction." Wurman Br. 26 (quoting CONG. GLOBE, 39th Cong. 1st Sess. 2895 (May 30, 1866) (Sen. Howard)). Senator Jacob Howard of Michigan explained that, with respect to Indians, the nature of federal jurisdiction was incomplete: "United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe." *Id.*

Wurman's central contention is that the Fourteenth Amendment's text "likely had similar legal

effect," Wurman Br. 25, to that of his account of the common-law rule of temporary sojourners. Wurman Br. 3–7. But that claim rests on two shaky foundations. First, as explained above, the evidence is equivocal at best for Wurman's account of the application of the common law rule of birthright citizenship in the American context. Second, Wurman's view—that the Amendment's phrase "subject to the jurisdiction thereof" is best understood as possessing a peculiar and specific meaning that is not stated expressly in the Amendment's text—rests on a controversial interpretive practice. Wurman argues that because "jurisdiction" should be understood to have a peculiar and specific meaning—namely, a "full and complete jurisdiction"—those who live under incomplete or limited federal jurisdiction therefore cannot qualify for the Fourteenth Amendment's guarantees. But Wurman's contention—that the Amendment's phrase "subject to the jurisdiction thereof" is best understood as possessing the unusual and particular meaning that he proposes—is at odds with the Court's modern practice of attending to the original public meaning of the Constitution's language. *See supra* Part I.A.

Wurman's contention that the children of temporary sojourners did not fall under the "complete, municipal jurisdiction of the United States in the sense of the amendment," Wurman Br. 27, would come as a great surprise to some of Senator Howard's colleagues who helped to ratify it. Shortly after Senator Howard spoke to the full Senate about his proposed addition to the opening of Section 1 of the Fourteenth Amendment—which contained the "subject to the jurisdiction thereof" clause—Senator John Conness of California explained that "the

children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States." CONG. GLOBE, 39th Cong. 1st Sess. 2890–91 (May 30, 1866). In his response to questions from Senator Edgar Cowan of Pennsylvania about the citizenship of "the child of a Gypsy born in Pennsylvania," Senator Conness answered that the children of Chinese and Gypsy aliens "shall be citizens." *Id.* at 2890–92. He added: "We are entirely ready to accept the proposition proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others." *Id.* at 2892.

In short, the Wurman brief is commendable for its candor and for its caution—it is transparent in its hesitance to draw unjustified conclusions from evidence that its author concedes is equivocal. But the brief's idiosyncratic application of originalist methods weakens the force of its tentative findings. The Wurman brief's application of originalism is flawed primarily because it pays insufficient attention to original public meaning. A legislator's public statement that is not part of the text at issue can, at most, play a supporting role in ascertaining that meaning. Of course a legislator's contemporaneous comment about some portion of the text may be of interest, but it cannot be permitted to upstage the original public meaning of the text itself.

## CONCLUSION

In 1795, President Washington declared, "the constitution is the guide, which I never can abandon."

GEORGE WASHINGTON, WRITINGS OF GEORGE WASHINGTON 378 (Lawrence B. Evans ed., 1908). That guide, in its Fourteenth Amendment, guarantees citizenship to all persons born in the United States. Cases like *Slaughter-House* have encouraged public officials to ignore the Fourteenth Amendment's protections; this Court should not permit a president to diminish them further. The argument the Petitioners make for shrinking the protections of the Fourteenth Amendment is eccentric: It suggests that one can choose the jurisdiction that one is subject to in much the same way one might choose to join the Army or a private club. The odd implication of Petitioners' argument—that jurisdiction is, in some essential way, an optional matter of individual choice—carries with it an air of unreality. *Cf. United States v. Schneider,* 910 F. 2d 1569, 1570 (7th Cir. 1990) (some eccentric claims about the subjectivity of jurisdiction have "no conceivable validity in American law").

Our Constitution guarantees citizenship to all persons born in the United States. The president cannot ignore, rewrite, or abandon that promise by executive order. The Court should affirm the district court's decision.

Respectfully submitted,

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