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 TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF FEDERAL INDIAN LAW SCHOLARS GREGORY ABLAVSKY AND BETHANY BERGER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici have a scholarly interest in, and expertise on, the history of federal Indian law. Gregory Ablavsky is the Marion Rice Kirkwood Professor of Law at Stanford Law School and Professor of History by Courtesy at Stanford University. Bethany Berger is Professor of Law and the Allan D. Vestal Chair at the University of Iowa College of Law. They are both editors and co-authors of Cohen's Handbook of Federal Indian Law as well as authors of numerous articles on the history relevant to this case.[2] They submit this brief to correct distortions of the history and law regarding Native peoples by Petitioners and their amici in this case. They write in their own capacities and not on behalf of their respective institutions.

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Relevant work includes Gregory Ablavsky & Bethany Berger, *"Subject to the Jurisdiction Thereof": The Indian Law Context*, 100 N.Y.U. L. Rev. Online 201 (2025); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015); Gregory Ablavsky, *Structural Federal Indian Law After* Brackeen, 67 Ariz. L. Rev. 291 (2025); Bethany R. Berger, *Birthright Citizenship on Trial*: Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 Cardozo L. Rev. 1185 (2016); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Calif. L. Rev. 1165 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court stated 128 years ago that the unique status of Indians born into Indian tribes[3] has "no tendency to deny citizenship to children born in the United States of foreign parents … not in the diplomatic service of a foreign country." *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898). The reason for this ruling was clear: Indians' *sui generis* status as members of quasi-sovereign nations within the borders of the United States. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence," this Court also explained nearly two centuries ago, "marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

As a result, Indians' unique status and complex history defy extrapolation to this case. Petitioners and their amici nonetheless attempt to shoehorn Indians into their argument notwithstanding tribes' distinctiveness. Jurisdiction cannot mean subject to ordinary law, they argue, because Indians were supposedly always subject to the full panoply of U.S. laws. Pet. Br. 37-38. Therefore, they argue, jurisdiction must supposedly demand something more: a

[3] The word "Indian" is a term of art within federal Indian law, and we use it in this brief with that context in mind. At the time of the Fourteenth Amendment's ratification the standard term was "Indians in tribal relations" to capture tribal citizenship, but we omit those extra words in our references. Likewise, we use the term of art "Indian tribe," while recognizing the multiplicity of terms tribes have used to self-identify.

heightened degree of "allegiance" to the United States, which the children of certain immigrants purportedly lack.

Beyond being misplaced, this foray into federal Indian law is also superficial and ill-informed. "[E]ven more than other domains of law, 'the intricacies and peculiarities of Indian law demand an appreciation of history.'" *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986) (Blackmun, J., dissenting) (quoting Felix Frankfurter, *Foreword* to *A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 Rutgers L. Rev. 345, 356 (1956)). As this brief demonstrates, the actual history of federal Indian law makes Petitioners' belabored reasoning unnecessary. Simply put, jurisdiction in the context of Indians meant jurisdiction in the ordinary sense of the word: subject to the ordinary reach of U.S. law and courts. This straightforward reality undercuts Petitioners' attempt to disregard Indians' uniqueness and co-opt their history into justifying novel exclusions from the Citizenship Clause for the children of immigrants.

First, Petitioners' efforts to focus on the abstract scope of congressional power over Indian tribes—a hotly contested question in the nineteenth century—distract from the more pertinent history: from the Founding up through the Reconstruction Congress, Indians were *not*, in fact, subject to ordinary U.S. laws and courts. Instead, Indians occupied a jurisdictional status unlike that of any other class of persons, reflecting the sovereignty of tribal governments even within the territorial boundaries of the United States. The United States did not legislate the internal affairs of Indians or adjudicate crimes between them.

Instead, Congress dealt with Indian tribes through treaties, as it did with other sovereigns.

Second, the *Framers* of the Citizenship Clause understood "subject to the jurisdiction therefore" to signify whether ordinary U.S. law encompassed Indians. Debates about whether Indians were included in the Citizenship Clause reveal disagreement about the extent of federal constitutional power over Indian tribes, but agreement that "jurisdiction" hinged on making and enforcing laws over Indians. By contrast, when the Framers used the term "allegiance" it was not in the sense of loyalty or fealty. Instead, the Framers viewed "allegiance" in the common-law sense, as the flipside of legal jurisdiction: an obligation to obey the laws of the United States.

Third, contrary to Petitioners' argument, the Court in *Elk v. Wilkins* did not articulate a theory of "political jurisdiction" that could justify excluding the children of non-Indians from the Clause. 112 U.S. 94 (1884). Rather, *Elk* reiterated the continued independence of members of Indian tribes from the ordinary scope of U.S. laws and courts. And to the extent there is any doubt, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), definitively rejected the notion that *Elk*'s holding or reasoning could serve to deny birthright citizenship to children of immigrants. As the Court explained, apart from those common-law exceptions for children of ambassadors and invading armies, Indians are the "single additional exception" to birthright citizenship. *Id.* at 693.

Petitioners' attempts to dragoon federal Indian law into supporting their position are historically

flawed and distort the unique status of Indian tribes. The Court should find the challenged Executive Order unconstitutional.

ARGUMENT

I. In The Years Leading Up To Ratification Of The Citizenship Clause, Indians Were Not Subject To Ordinary U.S. Laws And Courts.

Petitioners claim that the United States always exercised unqualified jurisdiction over Indian tribes. Pet. Br. 37-38. Petitioners then argue that interpreting the term "jurisdiction" in the Citizenship Clause to refer to ordinary legal jurisdiction cannot explain the longstanding exclusion of Indians from birthright citizenship. Pet. Br. 37. This claim is historical fiction. From the Founding to the eve of Reconstruction, the unique status of Indian tribes placed them beyond the ordinary reach of U.S. law. This history provides key context for debates over Indian status during the Clause's framing.

The limits on jurisdiction over Indians reflected the United States' recognition of tribal sovereignty. The U.S. Constitution excluded "Indians not taxed" from congressional representation and gave Congress the power to "regulate Commerce … with the Indian tribes" as with foreign nations and the states. U.S. Const. art. I, §§ 2, 8 cl. 3. Under U.S. law, they were "domestic dependent nations"—sovereign entities with powers of self-governance, despite "resid[ing] within the acknowledged boundaries of the United States." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17

(1831).[4] The United States regulated its relationship with tribes through treaties, as it did with other sovereigns. But such treaties no more made Indians subject to ordinary U.S. law than contemporaneous treaties with France or Spain placed their residents under ordinary U.S. law.

Indeed, the historical record is replete with statements that Indians were *not* "subject to the laws and authority of the United States," *cf.* Pet. Br. 37, often in nearly those exact words. Executive and congressional officials repeatedly said so. *See, e.g.*, Letter from Am. Comm'rs to Brit. Ministers (Sept. 9, 1814), *in* 3 American State Papers: Foreign Relations 716 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) ("Indians residing within the United States are so far independent that they live under their own customs, and not under the laws of the United States"),[5] H. Comm. on Public Lands, Exchange of Lands with the Indians (Jan. 9, 1817), *in* 2 American State Papers: Indian Affairs 123-24 (Walter Lowrie & Walter S. Franklin eds., 1834) ("Those tribes have been recognized so far, as independent communities … to have a right to govern themselves without being subject to the laws of the United States"); H. Comm. on Indian Affairs, Florida Indians (Feb. 21, 1823), *in id.* at 408 (Indians are "without the pale of our laws"); Sec'y of War John C. Calhoun, Condition of the Several Indian

[4] Because Indian tribes "reside[] within" the United States, they could not be seen as "foreign nations." *Id.* at 17. Hence the "distinct appellation" given: "domestic dependent nations." *Id.* at 17-18.

[5] The American commissioners at the Treaty of Ghent included John Quincy Adams, Henry Clay, and Albert Gallatin.

Tribes (Feb. 8, 1822), *in id.* at 275-76 ("We have always treated them as an independent people … independent of our laws and authority").

Courts of the era, including this Court, also stressed that tribal law, not U.S. law, governed Indians. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 146-47 (1810) (Johnson, J., concurring) ("We legislate upon the conduct of strangers or [U.S.] citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people"); *Goodell v. Jackson*, 20 Johns. Cas. 693, 710 (N.Y. 1823) (Chancellor Kent) (Oneida Indians are not state citizens because they "have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs."); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832) ("[Congressional] acts to regulate trade and intercourse with the Indians … manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is *exclusive*" (emphasis added)).

Historical practice also reflected the immunity of Indians on Indian lands from ordinary U.S. law. Under the Founding-era understanding, Indians were not subject to general federal laws. Letter from the Att'y Gen. to the Sec'y of the Treasury (June 19, 1795) ("[A]ll laws of Congress … are in their operation coextensive with the Territory of the United States, and obligatory upon every person therein, *except independent Nations & Tribes of Indians residing on Indian lands*"). They were not subject to state and local laws, a long-standing position that the Supreme

Court reaffirmed against repeated challenges, including as Congress was debating the Fourteenth Amendment. *See Worcester*, 31 U.S. at 561 (holding that "the laws of Georgia can have no force" within Cherokee territory); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866) (finding a federally recognized tribe to be "a 'people distinct from others'… separated from the jurisdiction of Kansas"). They were not subject to federal taxes. *See* 12 Op. Att'y Gen. 208, 210 (1867) ("Our internal revenue service has not in any instance or for any purpose been extended over the Indian country"). Nor were they subject to federal jurisdiction for crimes by one Indian against another. Act of June 30, 1834, § 25, 4 Stat. 729, 733.

Petitioners grasp at historical straws to show that tribes were in fact subject to U.S. law. But even their scant evidence does not support their argument.

Petitioners and their amici all seize on a single statute, the General Crimes Act of 1817, to establish the supposedly sweeping federal jurisdiction over Indians.[6] The law established federal court jurisdiction to hear certain crimes committed by Indians against non-Indians. Act of Mar. 3, 1817, §§ 1-2, 3 Stat. 383. But Petitioners misunderstand the law's context and import.

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[6] Petitioners correctly observe that Congress "regulate[d] interactions between Indians and non-Indians" through legislation enacted under the Indian Commerce Clause. Pet. Br. 38. But they neglect to note that, other than the General Crimes Act, those statutes exclusively regulated "citizen[s] and inhabitant[s] of the United States," not "Indians." *See, e.g.*, Act of July 22, 1790, § 5, 1 Stat. 137, 138.

In the early republic, U.S. treaties with nearly every major tribe within its borders required the extradition of Indians for crimes committed against non-Indians "to be punished according to the laws of the United States."[7] But in 1816, a federal court in Tennessee dismissed a prosecution against two Cherokee men extradited for the killing of a non-Indian man passing through Cherokee territory.[8] La. State Gaz., Nov. 20, 1816, at 3. The court ruled that, notwithstanding the extradition provision of the Treaty of Holston, no statute established federal court jurisdiction to try the case. *See id.*; *United States v. Bailey*, 24 F. Cas. 937, 937 (C.C.D. Tenn. 1834) ("The court decided against the jurisdiction on the ground that there was no law of the United States, which 'makes the facts as charged and laid in said indictment a crime, affixes a punishment and declares the court which shall have jurisdiction of it.'"). The 1817 Act remedied this omission. *Id.*

A statute establishing federal court jurisdiction to try extradited criminals for crimes that treaties stipulated would be punished under U.S. law does not show that Indians were otherwise subject to federal law. Indeed, the same Congress that enacted the Act

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[7] *See* Treaty of Holston, Cherokee Nation-U.S., art. X, July 2, 1791, 7 Stat. 39; *see also* Treaty of Fort Clark, Osage Nation-U.S., art. IX, Nov. 10, 1808, 7 Stat. 107; Treaty of New York, Creek Nation-U.S., art. VIII, Aug. 7, 1790, 7 Stat. 35; Treaty of Fort Harmar, U.S.-Wyandot Nation et al., art. V, Jan. 9, 1789, 7 Stat. 28; Treaty of Fort Harmar, Six Nations-U.S., sep. art., Jan. 9, 1789, 7 Stat. 33.

[8] This opinion was not published, but contemporaneous newspaper accounts recorded the reasoning.

also concluded that Indians "govern themselves *without being subject to the laws of the United States*." 2 American State Papers: Indian Affairs 124 (1834) (emphasis added). Moreover, the United States continued to include extradition provisions in Indian treaties ratified after 1817[9]—which under Petitioners' reading would be complete surplusage.

Ignoring the actual reality of jurisdiction, Petitioners claim snippets of dicta from two mid-nineteenth-century cases, *Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1855), and *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846), establish that Congress had broader constitutional authority than it exercised. But making the outer bounds of constitutional power the relevant test for "subject to the jurisdiction thereof" conflicts with both the exception for children of diplomats, and the statements of the Framers of the Citizenship Clause. *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (explaining that immunity of foreign ministers arose from comity-based agreement); Cong. Globe, 39th Cong., 1st Sess. 2895 (1866) (Sen. Howard) (declaring it "useless" to debate the hypothetical scope of jurisdiction); *infra* 19.

The emphasis on abstract authority also obscures the fact that neither *Mackey* nor *Rogers* exercised jurisdiction over, or applied to U.S. law to, Indians. The

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[9] *See, e.g.*, Treaty of Dancing Rabbit Creek, Choctaw Nation-U.S., art. VI, Sept. 27, 1830, 7 Stat. 333; Treaty of Fort Laramie, Northern Cheyenne and Northern Arapaho-U.S., art. I, May 10, 1868, 15 Stat. 655.

sole question in *Mackey* was whether a District of Columbia law requiring full faith and credit to probate documents issued by other domestic jurisdictions encompassed the Cherokee Nation. 59 U.S. at 102. The Court found that it did, affirming that "[t]he Cherokees are governed by their own laws." *Id.* Petitioners extract a few words from the opinion to claim it establishes U.S. authority over Cherokee people. Pet. Br. 38. In context, however, the quoted phrase merely reiterated the holding of *Cherokee Nation v. Georgia* that the tribal territories were not foreign because they were geographically within the United States: "The Cherokee country, we think, may be considered a territory of the United States …. In no respect is it a foreign State or territory, as it is within our jurisdiction and subject to our laws." *Mackey*, 59 U.S. at 104; *see Cherokee Nation*, 30 U.S. at 17. But the claim that the United States regulated Cherokee *territory* was uncontroversial, reflecting its long-standing practice of governing non-Indians there. *See, e.g.*, Act of July 22, 1790, 1 Stat. 137.

United States v. Rogers, meanwhile, concerned federal jurisdiction over the murder of one white man by another. 45 U.S. 567 (1846). The men had naturalized as Cherokee citizens and the defendant argued this made them "Indians," for purposes of the law *prohibiting* the exercise of federal criminal jurisdiction over crimes committed by "Indian[s]" against "Indian[s]." *Id.* at 571 (interpreting Act of June 30, 1834, § 25, 4 Stat. 729, 733). The Court found that the men were not Indians as the statute defined it. *Id.* But Chief Justice Taney's opinion continued far beyond the narrow statutory interpretation issue to opine on

the federal government's "power over this unfortunate race." *Id.* at 572. Taney mused that "the Indian tribes residing within the territorial limits of the United States are subject to their [U.S.] authority," and "Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian." *Id.* (quoted, in part, by Petitioners at Pet. Br. 38).[10]

Petitioners' reliance on Taney's dicta is misleading. This focus once again shifts attention away from whether Indians were *in fact* subject to U.S. law and onto Petitioners' preferred inquiry of whether Congress constitutionally *could* legislate over Indians. But even this question of the full scope of constitutional power was highly unsettled and contentious. Taney's views departed from the Founding-era understanding, Gregory Ablavsky, *Structural Federal Indian Law After Brackeen*, 67 Ariz. L. Rev. 291, 309-13 (2025), and many commentators of the time sharply disputed his claims. *See* 10 Reg. Deb. 4763 (1834) (John Quincy Adams) ("What constitutional right had the United States to form a constitution and form of government for Indians?"); S. Rep. No. 41-268, at 9 (1870) ("[A]n act of Congress which should assume to

[10] Taney's views on federal power in *Rogers* anticipated his similar reflections in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). There, Taney observed, "[T]he course of events has brought the Indian tribes within the limits of the United States under subjection to the white race … [we] legislate to a certain extent over them." *Id.* at 404. This legacy further diminishes *Rogers*' probative value given that the drafters of the Fourteenth Amendment's Citizenship Clause expressly sought to overrule *Dred Scott*.

treat the members of a tribe as subject to the municipal [that is, domestic] jurisdiction of the United States would be unconstitutional and void.").

More importantly, whatever the scope of Congress's theoretical authority, Congress did not legislate over Indians, instead maintaining federal recognition of tribes' independence and self-governance. Many at the time argued that Congress *should* regulate Indians through statute. But the Committee on Indian Affairs concluded, in 1834, "It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians." H.R. Rep. No. 23-474, at 13 (1834). Then, in 1846, when the Commissioner of Indian Affairs sought to use *Rogers* to persuade Congress to extend criminal jurisdiction over crimes between Indians, Congress refused. Bethany R. Berger, *"Power Over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 Wm. & Mary L. Rev. 1957, 2015-16 (2004). Indeed, in 1854, Congress inserted an *additional* exclusion prohibiting federal criminal jurisdiction over Indians committing crimes against non-Indians who had already been punished under the laws of their tribes. Act of Mar. 27, 1854, § 3, 10 Stat. 269, 270.

Rather than grapple with the lack of ordinary jurisdiction over Indians on the eve of ratification, Petitioners turn to cases decided decades *after* the Fourteenth Amendment had been drafted and ratified. *See* Pet. Br. 38 (citing cases from 1886, 1921, and 2023). But, as described below (*infra* 24-25, 29-30), the late nineteenth century witnessed significant

shifts in federal Indian law. These cases are thus a particularly poor guide to textual meaning in 1866.

The history prior to 1866 is clear. Whatever the theoretical scope of congressional power—which remained contested—Indians were not in fact subject to ordinary U.S. jurisdiction. Ordinary federal, state, and local law did not apply to Indians. Even federal criminal jurisdiction over crimes by Indians against non-Indians implemented treaties with tribes. Instead, as commenters of the era repeatedly said, Indians were governed by tribal law. These realities provided the key background for the subsequent debates over the Citizenship Clause.

II. Reconstruction Debates Over Indian Status Demonstrate That "Jurisdiction" Meant Subjection To U.S. Laws And Courts

In the debates over the Fourteenth Amendment's Citizenship Clause, the only sustained discussion of the words "subject to the jurisdiction thereof" concerned a dispute over Indian status. While this debate surfaced continued disagreement over the extent of federal constitutional authority over Indian tribes, it reveals consensus on the only question relevant here. Jurisdiction, for the Framers, meant subjection to U.S. law and courts. As Senator Trumbull's Judiciary Committee put it, Indians "have never been subject to the jurisdiction of the United States in the sense in which the term jurisdiction is employed in the fourteenth amendment" because they were excluded from "the operation of our laws, and the jurisdiction of our courts." S. Rep. No. 41-268, at 9-10 (1870). This history again militates against Petitioners' efforts to

wedge a broader exclusion of the children of immigrants into the unique history of Indian tribes. *See* Pet. Br. 14-18.

A. The Framers of the Citizenship Clause understood "jurisdiction" to mean subjection to U.S. law.

Everyone in the Reconstruction Congress agreed that birthright citizenship should not extend to Indians. Involuntary citizenship would be inconsistent with the unique sovereign status of tribal nations. But the Framers of the Citizenship Clause actively debated whether Senator Howard's proposed language—"all persons born in the United States, and *subject to the jurisdiction thereof*"—achieved that aim. *See* Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (emphasis added). The sides disagreed about the answer. But they agreed that jurisdiction involved subjection to law—that is, whether ordinary U.S. law reached Indians.

In the Civil Rights Act of 1866, § 1, 14 Stat. 27, Congress had explicitly excluded "Indians not taxed" in order to avoid "natural[izing] all the Indians." Cong. Globe, 39th Cong., 1st Sess. 498 (1866). This phrase borrowed from article I of the U.S. Constitution, which recognized tribal independence by excluding "Indians not taxed" from the population for purposes of apportioning representatives and taxes. The statute as enacted therefore extended citizenship to "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." § 1, 14 Stat. 27.

When Senator Howard proposed the Citizenship Clause, providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" would be citizens, Senator Doolittle urged Congress to make the exclusion of Indians explicit by adding the language "excluding Indians not taxed." *Id.* The ensuing debate focused entirely on the legal jurisdiction over Indians. Advocates for and against the addition agreed that the phrase "subject to the jurisdiction thereof" referred to subjection to law.

The Senators who advocated for expressly excluding "Indians not taxed" from the Citizenship Clause argued that Indians were *already* subject to U.S. law. Senator Doolittle claimed that Indians were "[s]ubject, first, to its military power; second, subject to its political power; third, subject to its legislative power." Cong. Globe, 39th Cong., 1st Sess. 2896. Senator Hendricks asserted that whether Indians were "subject to the jurisdiction" of the United States entailed the question whether "we may extend our laws over the Indians and compel obedience, as a matter of legal right, from the Indians." *Id.* at 2894. Differently put: "[i]f the Indian is bound to obey the law he is subject to the jurisdiction of the country." *Id.* Senator Johnson argued that while the United States had "been in the habit of" making treaties with tribes, "the question as to the authority to legislate [over Indians] is one, I think, about which … the courts would have no doubt." *Id.* at 2893. Likewise, Senator Hendricks argued that while Congress "regulate[s] our intercourse with [Indians] to a large extent by treaties … we need to not treat with an Indian. We can make him obey

our laws, and being liable to such obedience he is subject to the jurisdiction of the United States." *Id.* at 2895.

Those on the other side of the debate agreed that "subject to the jurisdiction thereof" signified subjection to U.S. law. But they denied that that the Indians were subject to that law.[11] Senator Howard, for example, declared that "jurisdiction, as here employed" meant "the same jurisdiction as in extent and quality as applies to every citizen of the United States now." *Id.* at 2895. "Certainly," he continued, "gentlemen cannot contend that an Indian belonging to a tribe … is subject to this full and complete jurisdiction." *Id.* As an example, he noted "[t]he 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.* Senator Trumbull agreed: one could not sue Indians in court, tax their property, interfere with tribal regulations, or govern them through ordinary legislation. *Id.* at 2894. He concluded, "[w]e do not exercise jurisdiction over them. It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens …." *Id.* at 2893.

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[11] Many of the Amendment's drafters also objected to using "Indians not taxed" in the Citizenship Clause. Senator Trumbull complained that it is a "very indefinite expression," Cong. Globe, 39th Cong., 1st Sess. 2893 (1866), and that he was "not willing to make citizenship in this country depend on taxation," *id.* at 2894.

For these Senators, the limits on jurisdiction over Indians were, like the limits on jurisdiction over foreign ministers, a product of the relationship between sovereigns. When pressed on the hypothetical extent of U.S. authority over Indians, Senator Trumbull responded, "I suppose [the United States] would have the same power that it has to extend the laws of the United States over Mexico." Cong. Globe, 39th Cong., 1st Sess. 2894. But in his view, "it would be a breach of good faith on our part to extend the laws of the United States over the Indian tribes with whom we have these treaty stipulations, and in which treaties we have agreed that we would not make them subject to the laws of the United States." *Id*. For his part, Senator Howard argued that one "takes great liberties with the Constitution in speaking of the Indian as a subject of the United States." *Id.* at 2895. He pointed to the Indian Commerce Clause as a "full and complete recognition of the national character of the Indian tribes," proving that they had "always been regarded, even in our ante-revolutionary history, as being independent nations." *Id.*

Similarly, Senator Williams likened the limits on jurisdiction over Indians to those over the children of ambassadors—although "within the geographical limits of the United States," neither group was fully subject to its jurisdiction. *Id.* at 2897. And if there were "any doubt" about Indian status under the Citizenship Clause, Williams stated, it was "entirely removed" by Section Two of the Fourteenth Amendment, which excluded "Indians not taxed" from enumeration for apportionment. *Id.*

While skeptical of their opponents' broad vision of federal constitutional authority, these Senators also denied that the hypothetical extent of congressional power was the test for "subject to the jurisdiction thereof." Indians were not included in the Citizenship Clause because of the reality that, as Senator Trumbull said, "We do not exercise jurisdiction over them." *Id*. Likewise, Senator Howard declared, it is "useless" to further speculate about whether the federal government *could* exercise greater power over Indians. *Id.* at 2895. He continued, that "[w]e have always recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains." *Id*. This "jurisdiction of the [Indian] nation," he continued, "intervenes and ousts what would otherwise be perhaps a right of jurisdiction of the United States." *Id.*

In the end, the members of Congress rejected the proposal to add the phrase "excluding Indians not taxed" to the Citizenship Clause by an overwhelming margin: 30 to 10. Cong. Globe, 39th Cong., 1st Sess. 2897. The exchanges leading up to that decision reveal disagreement about the extent of constitutional federal authority over Indians. But they demonstrate complete unanimity over the only question relevant to this case. For the lawmakers adopting the Citizenship Clause, "jurisdiction" meant subjection to U.S. law.

Following Ratification of the Fourteenth Amendment, the Framers confirmed this understanding of jurisdiction. In 1870, the Senate Judiciary Committee—then chaired by Senator Trumbull—delivered a report on the "effect of the Fourteenth Amendment to

the Constitution upon the Indian tribes of the country." S. Rep. No. 41-268, at 1 (1870). The Committee confirmed that it had not conferred birthright citizenship on Indians, explaining that Indians "have never been subject to the jurisdiction of the United States *in the sense in which the term jurisdiction is employed in the fourteenth amendment*." *Id.* at 9 (emphasis added). Indians, the report explained, were "not otherwise subject to the control of the United States than is consistent with their character as separate political communities." *Id.* at 9-10. Every source of law "united to exempt the Indian … from the operation of our laws, and the jurisdiction of our courts." *Id.*

B. The only "allegiance" relevant to the Framers was the flip-side of jurisdiction: the legal obligation to obey

Petitioners ignore the debates showing that "subject to the jurisdiction thereof" meant subjection to U.S. laws and courts. Petitioners posit instead that Indians were excluded from the scope of the Citizenship Clause because they lacked "primary allegiance" to the United States government, in the sense of a reciprocal bond or subjective affiliation. *See generally* Pet. Br. 20-21; *see also* Br. of Am. Eric Schmitt (describing "primary allegiance" as "the kind of enduring 'allegiance' to America that is owed only by those who have made this country their *lawful and permanent home*"). Petitioners' primary evidence for this claim is a quote from Senator Trumbull's remarks about Indians and "allegiance." Again, historical evidence refutes their claim. The debates show that Trumbull used "allegiance" consistently with the common-law

understanding of the term, as the flipside of jurisdiction: one who owes "allegiance" to a government has an unqualified obligation to obey its laws and authority.

Restoring the full context to Senator Trumbull's remarks makes this meaning plain.[12] When Senator Trumbull stated that "[i]t cannot be said of any Indians who owes allegiance, partial allegiance if you please, … that he is 'subject to the jurisdiction of the United States," all of his examples concerned limits to the reach of U.S. law. One could not "sue a Navajoe

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[12] Trumbull stated:

> "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means. Can you sue a Navajoe Indian in court? … We make treaties with them, and therefore they are not subject to our jurisdiction…. If we want to control the Navajoes, or any other Indians of which the Senator from Wisconsin has spoken, how do we do it? … Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty? …
>
> It cannot be said of any Indians who owes allegiance, partial allegiance if you please, … that he is 'subject to the jurisdiction of the United States.' Would the Senator from Wisconsin think for a moment of bringing a bill into Congress to subject these wild Indians with whom we have no treaty to the laws and regulations of civilized life? Would he think of punishing them for instituting among themselves their own tribal regulations? … We do not exercise jurisdiction over them. It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens …."

Cong. Globe, 39th Cong., 1st Sess. 2893.

Indian in court"; or "think for a moment of bringing a bill into Congress to subject these wild Indians with whom we have no treaty to the laws and regulations of civilized life," or "think of punishing them for instituting among themselves their own tribal regulations," or make "arrangements with the Indians" except "by means of a treaty." Cong. Globe, 39th Cong., 1st Sess. 2893. These examples, of course, all demarcate limits on the scope of jurisdiction over Indian tribes.

Petitioners also emphasize Senator Howard's quote that the Citizenship Clause only included those who were subject to the "full and complete jurisdiction" of the United States, claiming that this required "primary allegiance." Pet. Br. 18; *see* Cong. Globe, 39th Cong., 1st Sess. 2895. But Howard equated "full and complete jurisdiction" with the ordinary panoply of regulatory authority: "[the power] exercised by Congress, by the executive, or by the judicial department." Cong. Globe, 39th Cong., 1st Sess. 2895. He simply did not see Indians as falling within the full extent of that authority. *Supra* 18.

* * *

In short, the debates over Indian status during and soon after Ratification confirm that "subject to the jurisdiction thereof" meant subjection to ordinary U.S. laws and courts.

III. *Elk v. Wilkins* Reaffirmed Indians' Unique Jurisdictional Status And *Wong Kim Ark* Made Clear That *Elk* Could Not Be Used To Deny Citizenship To The Children Of Immigrants.

Petitioners rely on developments in Indian law after the ratification of the Citizenship Clause to argue that the Clause somehow allows exclusion of children of foreign parents. Pet. Br. 38 (citing cases between 1921 and 2023). This is not just inconsistent with any plausible theory of constitutional interpretation. It also ignores this Court's own statements in *Elk v. Wilkins*, 112 U.S. 94 (1884) and *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

It is true that the Court decided these cases as the United States was exercising more federal power over Indian affairs than the Framers asserted in 1866. But *Elk v. Wilkins*, 112 U.S. 94 (1884), emphasized the continuing independent sovereignty of tribal nations and the exceptional jurisdictional status of Indians under U.S. law. And when opponents of birthright citizenship claimed *Elk* somehow meant that a child born in the United States to Chinese immigrant parents was not a citizen, this Court shut them down. *United States v. Wong Kim Ark* announced that *Elk* "had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country." 169 U.S. at 682. Yet Petitioners today try, as the government did in *Wong Kim Ark*, to deploy the unique status of Indians and tribes to limit constitutional citizenship for children

of immigrant parents. The attempt is even less persuasive the second time around.

A. *Elk* reinforces the legal independence of Indian tribes, notwithstanding further expansions of federal authority.

As the Ratification debates previewed, factions within the United States government in the post-War Reconstruction era sought to assert greater authority over Indian tribes. And in the 1870s and 1880s, the federal government took strides in this direction: Congress, in an appropriations rider, ended the practice of treaty-making despite serious questions about the rider's constitutionality. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified at 25 U.S.C. § 71); *see also* Cong. Globe, 41st Cong., 3d Sess. 1822 (1866) (quoting Sen. Davis: "I deny the power of the Congress of the United States to expunge [the treaty-making power] from the Constitution"); *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring) (calling the measure "constitutionally suspect").

Still, the legal independence of Indian tribes persisted. Congress rejected efforts to extend federal criminal jurisdiction over crimes between Indians or to impose U.S. citizenship on Indians against the will of their tribes. *See* Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* at 134-36 (1994) (discussing the sustained, abortive campaign by the Bureau of Indian Affairs to persuade Congress to expand criminal jurisdiction over Indian crime in the 1870s); Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United

States v. Wong Kim Ark, 37 Cardozo L. Rev. 1185, 1201 (2016) (discussing rejection of citizenship bills in the 1870s). And Congress's exercise of legislative power with respect to Indian tribes took the form of "treaty substitutes": either codifying prior agreements with tribes or explicitly requiring tribal consent for enactment. *See* 1 Indian Affairs: Law and Treaties 1-32 (Charles J. Kappler ed. 1904).

It was in this climate that the Court decided *Elk*. John Elk argued that although born as a member of an Indian tribe, he became a citizen under the Fourteenth Amendment when he separated from his tribe and "completely surrendered himself to the jurisdiction of the United States." 112 U.S. at 98-99. The Court rejected Elk's bid for citizenship, holding that Indians could not self-naturalize as Elk claimed. *Id.*

In the course of the decision, the Court reinforced the independent legal status of Indians. Echoing *Cherokee Nation v. Georgia* (*supra* 5-6), the Court recognized that tribes were not "strictly speaking, foreign States" because they resided "within the territorial limits of the United States." 112 U.S. at 99. Yet Indian tribes remained "alien nations, distinct political communities, with whom the United States might and habitually did deal … through treaties … or through acts of Congress." *Id.* In other words, while the United States had altered its form of "deal[ing]" *with* Indian tribes, the United States still did not rule *over* them. Indian tribes retained their sovereignty, distinctness, and powers of self-governance.

Petitioners quote eight times (Pet. Br. 2, 3, 11, 13, 14, 15, 18, 21) an excerpt from *Elk* that, they claim,

supports their interpretation of the term "jurisdiction." In the excerpt, the Court states that "subject to the jurisdiction thereof" means "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." 112 U.S. at 102. But the *reasons* the Court gave for viewing Indians as beyond the "complete[]" jurisdiction of the United States all relate to the independent sovereignty of Indian tribes. As discussed above, the Court referenced the fact that Indians retain a distinct jurisdictional status based on the "alien though dependent power" of the tribes. *Id.* The children of Indians could therefore no more be "subject to the jurisdiction of the United States" than children born on foreign soil or children of ambassadors—who equally fall outside the ordinary reach of United States law. *Id.*

Nor did the Court use the phrase "direct and immediate allegiance" to signify loyalty or fealty. *Contra* Pet. Br. 18-19. Rather, like Senator Trumbull in the debates over ratification (*supra* 21-22), the Court used the phrase to mean being subject to the government's full legal authority. That is clear from the examples the Court gave. The Court relied on the fact that "Indians and their property, [are] exempt from taxation by treaty or statute of the United States, [and] could not be taxed any state." *Elk*, 112 U.S. at 99-100. Moreover, "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Id.* In other words, it was because tribal sovereignty limited ordinary U.S. jurisdiction that Indians born within tribes lacked complete "allegiance" to the United States.

The sources the Court cited as showing that Indians do not owe "direct allegiance" to the United States also emphasize the limited extent of United States jurisdiction over Indians. For example, the Court highlighted the unique legal tradition of respecting Indian independent sovereignty, like the Commerce and Treaty Clauses and cases like *Cherokee Nation* and *Worcester*. *See* 112 U.S. at 100. The Court also cited *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which just the year before had rebuffed federal attempts to assert jurisdiction over crimes between Indians. *See* 112 U.S. at 100. The Court further noted that Section 2 of the Fourteenth Amendment had recognized this separate political status by excluding "Indians not taxed" from its apportionment clause. *Id.* at 102. This evidence demonstrates that the Court cannot possibly have shared Petitioners' view that Indians were "completely subject" to ordinary U.S. law at this time. *Contra* Pet. Br. 17-18, 37-38.

B. In *Wong Kim Ark*, the Court held that Indians are among a discrete set of exceptions to birthright citizenship that may not be expanded any further.

Elk hinged on the *sui generis* status of tribes and their citizens. *United States v. Wong Kim Ark* reinforced this view by rejecting the government's attempt to extend *Elk*'s reasoning to the children of immigrants. The decision—authored by the same person, Justice Horace Gray—held that *Elk* "concerned *only* members of the Indian tribes within the United States, and had *no tendency* to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in

the diplomatic service of a foreign country." 169 U.S. at 682 (emphasis added). In short, the Indian exception from birthright status rests on the exceptional history and status of Indian tribes—and cannot be used by analogy to deny citizenship to any other class of persons.

In *Wong Kim Ark*, the government argued that a man born in San Francisco to non-citizen Chinese parents did not count as a citizen under the Fourteenth Amendment. The status of Indians was central to the government's argument: Wong Kim Ark's lawyers noted that "[i]n the briefs of the appellant the greatest reliance seems to be placed upon the case of *Elk v. Wilkins*." Brief of the Appellee at 15, *Wong Kim Ark*, (No. 449).

The Court, however, made crystal clear that *Elk* had no application beyond the unique status of Indians. As in *Elk*, the *Wong Kim Ark* Court emphasized the constitutional provisions that made Indians and tribes distinct: tribes were included among "foreign nations" and the "several states" in the Commerce Clause, and the Apportionment Clause excluded "Indians not taxed." 169 U.S. at 680-81. The Court also quoted *Elk*'s statements that tribes were "distinct political communities," although "within the territorial limits of the United States." *Id.* at 681. After carefully tracing the common law origins of birthright citizenship, the Court underscored the ordinary rule that "the jurisdiction of every nation within its own territory is exclusive and absolute, and … that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent." *Id.* at 686. The

Court recognized that for the United States, those exceptions to the "fundamental rule of citizenship by birth within the territory" had been limited to a discrete set: "children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and … *the single additional exception* of children of members of the Indian tribes owing direct allegiance to the several tribes." *Id.* at 693 (emphasis added). Underlining the point, the Court went on to proclaim that "all other persons" were included in the scope of the Citizenship Clause. *Id.*

Petitioners thus misplace their extensive reliance on language from *Elk* (at Pet. Br. 2, 3, 11, 13, 14, 15, 18, 21) that the Court in *Wong Kim Ark* strictly cabined to Indians.

* * *

Elk and *Wong Kim Ark* affirmed that the Indian exception from the Citizenship Clause derived from the unique status of Indians—based on a relationship between the United States and Indian tribes "unlike that of any other two people in existence," *Cherokee Nation*, 30 U.S. at 16.

To be sure, significant shifts have taken place in federal Indian law since the Fourteenth Amendment's ratification. Congress abrogated *Elk*'s limitation on naturalization in the 1887 General Allotment Act, providing that any Indian who had either received an allotment or "voluntarily taken up … his residence separate and apart from any tribe of Indians … and has adopted the habits of civilized life" was

a U.S. citizen. Dawes Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388, 390. By 1924, Congress would statutorily extend citizenship to all Indians born in the United States. Act of June 2, 1924, ch. 233, 43 Stat. 253, codified at 8 U.S.C. § 1401(b).

These developments came as part of the so-called assimilation era of federal Indian law. *See Cohen's Handbook of Federal Indian Law* § 2.08 (2024). The legacy of this era remains fraught. Congress routinely violated prior commitments to tribal sovereignty and asserted greater power over Indians. *Id.* The legitimacy of the era's doctrinal innovations was, and remains, contested. *See Veneno v. United States*, 607 U.S. ----, 146 S. Ct. 52 (2025) (Gorsuch, J., dissenting from the denial of cert.). Nonetheless, even at the time, the Court affirmed Indian tribes' distinct jurisdictional status. *See United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (recognizing tribes as "a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."); *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that tribes enjoyed inherent power to prosecute their members). Modern decisions have further recognized the distinct jurisdictional and self-governing status of Indians and their governments.

But adjudicating the "complex" and "anomalous" relationship between Indian tribes and the United States, *Kagama*, 118 U.S. at 381, is irrelevant to this case. The relevant history is much more straightforward. The discussion of Indian status during the debates over the Citizenship Clause show that "subject

to the jurisdiction thereof" signified ordinary subjection to U.S. law and courts. Far from supporting Petitioners' view of the scope of the Clause, that history demonstrates the unconstitutionality of the Executive Order.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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