

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 AMICI CURIAE
CHARITABLE IRISH SOCIETY OF BOSTON AND
PIONEER NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICI CURIAE¹

The CHARITABLE IRISH SOCIETY OF BOSTON is the oldest Irish society in the Americas. Founded in 1737, the Society's mission was and remains to assist immigrants to this country transition to a new life in a free society governed by the rule of law, and to help them become American citizens if they choose. The Society's membership has included Revolutionary War heroes, such as General Henry Knox, attorneys promoting the rule of law including Robert Auchmuty, who joined with John Adams in defending the 29th Regiment in the Boston Massacre trial, and John F. Kennedy among many others.

PIONEERLEGAL, LLC (PIONEERLEGAL), doing business as Pioneer New England Legal Foundation (Pioneer NELF), is a nonprofit, nonpartisan legal research and litigation entity. PioneerLegal began operating under its new name, Pioneer NELF, after forming a strategic alliance with the New England Legal Foundation (NELF) in May 2025. Pioneer NELF seeks to continue its own work, as well as NELF's mission, by promoting open and accountable government, economic opportunity, freedom of speech, freedom of association, and education opportunities across the country, through legal action and public education.

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



SUMMARY OF ARGUMENT

The text, history and structure of the Citizenship Clause demonstrate conclusively that all persons born on U.S. soil are, from birth, American citizens. This was accepted law from the nation's founding until 1857 when Chief Justice Roger Brooke Taney authored *Dred Scott v. Sandford* either ignoring or overturning the law of *jus soli* which dated at least from Coke's description of *Calvin's Case* in 1608 and came to America with the common law. The framers of the 14th Amendment's Citizenship Clause, the Republican caucus of the Joint Committee on Reconstruction, crafted Section 1 in part to overturn *Dred Scott* and to restate the long-established principle that everyone born in America and subject to American law is a citizen from birth. The status of the child's parents, religion, skin color or language are irrelevant. Whether the child's ancestors came on the Mayflower in 1620 or were smuggled into America illegally on a pirate slave ship after 1808 makes no difference. The text speaks only of the child's place of birth. "All persons" means "all persons."

The precise issue raised by the Government now was addressed explicitly in the Senate debates in May, 1866, first in an exchange between Senators William Pitt Fessenden of Maine and Benjamin Wade of Ohio and again a week later in a more detailed and animated debate between Pennsylvania Senator Edgar Cowan, who opposed birthright citizenship, and California Senator John Conness, an Irish immigrant from County Galway, who supported it.

Although Cowan and Conness disagreed sharply on the wisdom of birth citizenship, they both acknowledged that the language of Section 1, if adopted, would apply even to children of parents from the most unwanted immigrant classes – for Conness, Chinese and for Cowan, Gypsies. What mattered then and what matters now is only where the child was born, not who the child’s parents were.

The only exceptions to birthright citizenship were children who were beyond the jurisdiction of American law at the time of their birth. They fall into three well defined categories: (1) children of diplomatic families who had diplomatic immunity, (2) children of invading armies who temporarily controlled American land; and (3) tribal Indians who maintained their sovereignty as *quasi* dependent nations.



ARGUMENT

The District Court correctly concluded that Executive Order 14160 (“EO 14160”) violates both the 14th Amendment Section 1 and 8 U.S.C. § 1401(a). *Barbara, et. al v. Trump, President of the United States, et. al*, 790 F.Supp.3d 80 (D.NH 2025). Both the Citizenship Clause in the 14th Amendment Section 1, and the statute passed pursuant to that Clause, guarantee that children born on American soil who are subject to American jurisdiction are American citizens from birth. Nothing else is needed. EO 14160 flatly flouts both the statute and the Citizenship Clause the statute applies and attempts to undermine the fundamental law as adopted by the People by simple

executive fiat. Nowhere in the Constitution is the President granted such sweeping executive power.

This brief addresses a single, narrow question: when drafted and adopted, was the Citizenship Clause understood to grant birthright citizenship even to children of unwanted or “illegal” immigrants? The answer is unequivocally “yes.” The text, history and structure of Section 1, and the arguments for and against it, all compel this conclusion. Crucially, a pointed debate in the Senate between John Conness of California, an Irish Immigrant from Galway, and Edgar Cowan, a states-rights politician from Pennsylvania, shortly before the final Senate vote on the Amendment, makes it clear that both proponents and opponents of the Amendment understood that, once adopted, citizenship would be based upon place of birth not parentage, lineage, allegiance, consent or family status.

Every court that has addressed this issue since *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), has upheld birthright citizenship. *See, Doe v. Trump*, 157 F.4th 36, 77 (1st Cir. 2025) and cases cited. For more than a century, this has been accepted doctrine by all three branches of government including the Executive Branch. 8 U.S.C. § 1401(a) (1952); U.S. Dept. of State Regulations Prescribed for the Use of Consular Service of the United States, ¶ 137 (1896); 22 C.F.R. § 79.137 (193); U.S. Dept. of State, 8 Foreign Affairs Manual, § 301.1-1(d) (2018) (“All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth”). As Judge Barron declared in *Doe v. Trump*, “the fundamental question” raised by

the scope of birthright citizenship is not difficult. 157 F.4th at 44. The Clause says what it means and means what it says.²

I. The Citizenship Clause is Simple and Direct.

It is hard to imagine how the framers of the 14th Amendment, the Joint Committee on Reconstruction,

² In 1872, the United States Government successfully contended that the doctrine of birthright citizenship, *jus soli*, governed a claim by Joseph Mogridge for civil damages arising out of the American Civil War. Mogridge was born in 1813 in the United States to British parents who were traveling in America during The War of 1812. The family returned to Britain and Mogridge claimed to be a British subject. Following the Civil War, Mogridge pursued a civil damage claim against the U.S. under the Treaty of Washington (1871) adopted to deal with claims of British subjects against the United States, and of American citizens against the British Government, arising from actions during the War. Article XII of the Treaty established a Mixed Commission to resolve all such disputes. Mogridge brought claims as a British subject against the U.S., which the U.S. denied claiming that, because Mogridge was born in the United States in 1813, he was an American citizen under the governing law of *jus soli* and could not bring before the Commission against his own government. In 1872, the Commission sided with the U.S. and dismissed Mogridge's substantial damage claim. 22 Mixed Comm'n on Brit. and Am. Claims No. 345 (Vol. 18, 1872) Counsel for the U.S., Robert Hale reported the case to Congress in 1874, explaining that the Commission accepted the U.S. position that Mogridge was an American citizen just by his birth while his parents were traveling in the country. "That is the recognized rule within the United States; it is specifically provided for . . . by the fourteenth amendment to the Constitution." 2 Cong. Rec. 3460 (1874). See, *Birthright Citizenship of Child Born to Enemy Alien Visitors*, John Vlahoplus and Michael Rosin, WASHINGTON UNIV. LAW REV. ONLINE <https://wustllawreview.org/2025/08/14/birthright-citizenship-of-child-born-to-enemy-alien-visitors/>

could have been any more clear on birthright citizenship. The first sentence is direct, succinct and declaratory:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens on the United States and the state wherein they reside.

U.S. Const. amend. XIV, § 1.

All persons born in the United States are citizens of the United States. Citizenship derives from birth on American soil. Everyone born in the United States is a citizen of the United States, if they are subject to the jurisdiction of U.S. law at birth. This is the birth equality that was promised in the Declaration of Independence but withheld from many in practice prior to the Civil War.

Three points bear emphasis. First, Section 1 speaks of “persons born,” not *to whom* they are born. A baby’s parentage does not dictate who is blessed with the rights and privileges of American citizenship. Instead, everyone born in America under the American flag is an American citizen, if they are subject to American jurisdiction. People are to be treated on their own merit, not on the merits of their parents. Feudal class separation and racial classifications that led directly to the Civil War were finally ended as part of the fundamental law.

Second, those not “subject to the jurisdiction” of the United States (and therefore not birthright citizens) fall into three distinct classes of people only: (1) children of diplomats and their families who enjoy diplomatic immunity; (2) children of Indians who lived on tribal lands where the reach of United States courts was restricted by treaty obligations with sovereign

Indian nations; and (3) children born to occupying armies whose nationality is governed by international law. Otherwise, all persons born in the United States are American citizens. Garrett Epps, “*The Citizenship Clause: A “Legislative History”*,” *AMERICAN UNIV. LAW. REV.*, Vol. 60, Issue 2 (2010) pp. 349–363.

Finally, the qualifying clause “subject to the jurisdiction thereof” reinforces the core concept that citizenship attaches to anyone born under the American flag on American soil. The text includes no qualifiers such as “exclusive” jurisdiction, “consent to allegiance” or correct parental lineage. Those who, like the Government, rely so heavily on these qualifiers would have the Court write provisos and exceptions into the Amendment that are not there and were not intended. Rather, children born in America, with only a few narrowly tailored exceptions, are American citizens.

Until 1857, it was commonly understood that free people born on American soil were, by birth, American citizens. *Lynch v. Clarke*, 3 N.Y. Leg. Obs. 236, 1 Sand. Ch.583, 633 (1844). Even manumitted slaves, if born on American soil, were citizens upon manumission, simply by their birth on this land. *State v. Manuel*, 20 N.C. 144, 4 Dev. & Bat. (Orig. Ed.) 20, 25 (1838); *see also, Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. 99, 155-156 (1830) (Story, J. dissenting) (the general principle of the common law is that allegiance and citizenship vested at birth and is perpetual). It was a principle based upon natural law that dated from Coke’s report of *Calvin’s Case*, 7 Coke Reports (1608) (“a person’s status was vested at birth and based upon the place at birth.”)

In *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), Chief Justice Taney ignored 250 years of settled law

by deciding that no Black person, whether slave or free, and no one of their descendants, could ever be citizens of America. Skin color and parentage prevented even people long free who were descended from slaves or who may have been descended from human beings who were later kidnapped into slavery, from American citizenship. In Taney's view, the Constitution was for White men only. Blacks, *Dred Scott* announced, were not intended to be included among The People vested with the rights and privileges of citizenship.

To the drafters of the 14th Amendment, Taney's *Dred Scott* decision was an anathema. Overturning that odious decision was one of the principal drivers behind Section 1. Joseph B. James, *The Framing of the Fourteenth Amendment*, UNIVERSITY OF ILLINOIS PRESS (1956) pp. 179-180. But erasing the *Dred Scott* stain was not the only reason behind the first section. It was also crafted to eliminate the racial and classed-based foundation on which the opinion rested. "Citizens thus defined were to be protected in their privileges and immunities as citizens of the United States in whatever state they might reside". *Id.* p. 180. From that point on, it would be understood that people born in America were born equal. See, Akhil Reed Amar, *Born Equal, Remaking America's Constitution, 1840-1920*, BASIC BOOKS, (2025), pp, 520-522.

II. Both Supporters and Opponents of the 14th Amendment Understood that the Citizenship Clause in Section 1 Granted Birthright Citizenship Even to the Children of Unwelcome Aliens.

The drafting history of the Citizenship Clause makes it perfectly clear that the framers intended to bestow American citizenship on almost everyone born

on American soil. Most believed that birth citizenship had been part of the common law for more than two centuries before the Civil War which, the Radical Republicans believed, had been caused, in part, by Taney's *Dred Scott* holding. The drafters on the Joint Committee on Reconstruction meant to restore birth citizenship by overturning *Dred Scott*, and the voters knew it.

Michigan Senator Jacob Howard, one of 13 lawyers on the 15-member Joint Committee on Reconstruction that wrote the 14th Amendment, introduced the first draft to the Senate on May 23, 1866. The initial draft of Section 1 had no citizenship clause; birth citizenship was presumed. It began, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Cong. Globe, 39th Cong., 1st sess. p.2764.

Howard yoked implied birth citizenship to the express Privileges or Immunities clause. He explained, "The first clause of this section relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States. . . . A citizen of the United States is held by the courts to be *a person who was born within the limits of the United States* and subject to their laws." Cong. Globe, 39th Cong., 1st sess. p.2765. (Emphasis added). Citizenship under the proposed Section 1 was determined by birth and geography as it had always been, at least before *Dred Scott*, in Howard's view.

Birthright citizenship and birth equality were not novel ideas to Howard or to the Committee. Those fundamental principles were rooted in the original Privileges and Immunities Clause of Article IV, Section

2, which was crafted “to put the citizens of the several States on equality with each other as to all fundamental rights.” *Id.* Howard asked rhetorically, “And how did they antecedently become citizens of the United States?” People became citizens, Howard explained “[b]y birth or naturalization. *They became such in virtue of national law, or rather natural law which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country.* Such persons were, therefore, citizens of the United States *as were born in the country* or were made such by naturalization.” *Id.* (Emphasis added).

Senator Benjamin Franklin Wade of Ohio, himself a lawyer, was not satisfied. Like Howard, Wade regarded birthright citizenship as “settled” both by the Civil Rights Act of 1866 and by longstanding practice and understanding: “I have always believed that every person, of whatever race of color, who was born within the United States, was a citizen of the United States,” Wade declared. Even so, he urged an amendment to Section 1 to make birthright citizenship clear “beyond all cavil for the present and for the future.” Cong. Globe, 39th Cong., 1st sess. pp.2768-69. Wade foresaw the very assault the present Administration now makes and urged the Committee to strengthen the language of Section 1 to guard against such attacks.

Wade addressed directly the precise question now before this Court: whether children born to foreign parents traveling in this country temporarily were American citizens, simply by being born on American land. His exchange with fellow Committee Member (and co-chair) Maine Senator William Pitt Fessenden is especially telling. Fessenden asked, “Suppose a person is born here of parents from abroad, temporarily

in this country.” Wade’s response was emphatic: “Most assuredly they would be citizens of the United States unless they went to another country and expatriated.” Cong. Globe, 39th Cong., 1st sess. pp.2769. The only exception to this rule were children of foreign ministers because, by legal fiction, they reside “near” not “in” the United States. *Id.*³

On May 30, Howard presented an amended Section 1 with the Citizenship Clause that was ultimately adopted. Wade’s suggested language protecting birth citizenship had been strengthened by the Republican Caucus of the Committee in the week since Ben Wade voiced his concerns. The revised Section 1 now included an explicit declaration of birthright citizenship: “All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside.” Cong. Globe, 39th Cong., 1st sess. p.2890. No equivocations, ambiguities or cloudy language.

Introducing the more robust Section 1, Howard pronounced, “This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.” His short simple explanation of

³ The sterile pages of the *Congressional Globe* do not reveal whether this exchange was extemporaneous or staged to emphasize the point that children born under the American flag were to be citizens regardless of the intentions or condition of their parents. Whether intended or not, Fessenden’s question and Wade’s direct answer made the point clearly to everyone in the Chamber.

a short simple Citizenship Clause left no doubt about his meaning or the Clause's reach.

Harkening back to the May 23 Wade – Fessenden exchange, Howard explained that birthright citizenship would not extend to children of foreign ambassadors, but everyone else was included:

This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country.

Id.

Howard's exception for children of diplomatic families reflected Chief Justice Marshall's holding in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812). There, the Chief Justice recognized that to participate in the international community every sovereign nation was compelled to grant immunity to diplomats from foreign countries. Immunity came from a legal fiction that diplomats never actually left their own jurisdictions when visiting a host country. *Schooner Exchange*, 11 U.S. (7 Cranch) at 137-39. Hence, they are not "subject to the jurisdiction" of the host country while engaged in diplomatic endeavors.

The awkward attempt of some opponents of birth citizenship to insert the preposition "[or]" after "aliens," which Howard did not say, only highlights what Howard

did in fact declare: that children born on American soil are American citizens, except for children of accredited foreign diplomats. Any other reading ignores Howard's plain reference to foreign diplomats who enjoyed diplomatic immunity. James C. Ho, *Defining "American" Birthright Citizenship and the Original Understanding of the 14th Amendment*, THE GREEN BAG, Summer 2006, Vol. 9, No. 4. 367, 372.

After he finished his introduction, Howard dismissed a suggestion from Wisconsin Senator James R. Doolittle, who was well on the road to supporting Andrew Johnson's "restoration" policy. Doolittle suggested that the citizenship clause be further amended to exclude "Indians not taxed," from those children entitled to birth citizenship. Howard rejected the suggestion: "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States." Referring, certainly, to Chief Justice Marshall's decisions in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Howard explained that Indians on tribal lands "are regarded, and always have been regarded in our legislation and jurisprudence, as being *quasi* foreign nations." Cong. Globe, 39th Cong., 1st sess. p.2890 (emphasis original). See, Gregory Ablavsky & Bethany Berger, "Subject to the Jurisdiction Thereof": *The Indian Law Context*, NEW YORK UNIV. LAW REV., Vol. 100 (October 2025).

It was now clear that birthright citizenship under Section 1 did not include children of foreign diplomats or tribal Indians. Both were not "subject to the juris-

diction” of the United States.⁴ That left only children of temporary sojourners, and offspring of unwanted or unpopular foreigners to be debated – the very issue Fessenden and Wade addressed on May 23.

III. The Cowan – Conness Debate

Pennsylvania Senator Edgar Cowan, an Andrew Johnson supporter who had voted against the Civil Rights Act, and who ultimately was one of 11 to vote against the final draft of the 14th Amendment, demanded to know whether there were any limits to birth citizenship. Recognizing the close tie between birthright citizenship and the Privileges or Immunities Clause in Section 1, Cowan understood that if birthright citizenship were granted to all children of alien parents, they would be entitled to the Privileges or Immunities of American citizens including the right to buy real estate, travel, and live where they pleased. That meant racial equality for more than just the Freedmen, and it worried Cowan greatly.

Cowan aimed directly at California Republican Senator John Conness and went right for the jugular: “Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania citizen? If so, what rights do they have?” Cong. Globe, 39th Cong., 1st sess. p.2890.

Cowan laid out his understanding of Section 1 in stark terms. If the children of yellow Chinese and dark-skinned Gypsy immigrants were vested with full American citizenship simply by being born in America,

⁴ Senator George Henry Williams of Oregon, also a member of the Joint Committee, reiterated these points later on May 30. Cong. Globe, 39th Cong., 1st Sess. p. 2897.

they would have the Privileges and Immunities that accompanied citizenship – even though their parents could not become citizens under the Act to Establish a Uniform Rule of Naturalization (March 26, 1790) 1 Stat. 103 as amended by the Naturalization Law of 1802, ch. 28, § 1, 2 Stat. 153, 153–54. Naturalization was limited to “free White persons.” Gypsies and Chinese need not apply.

The Citizenship Clause when tied to the Privileges or Immunities Clause that followed hard by, would guarantee the hated Gypsies the right to buy and hold property and many other rights that the Commonwealth of Pennsylvania claimed the power to withhold from this despised group. Cong. Globe, 39th Cong., 1st sess. p.2890. Probably looking right at Conness, Cowan warned the Senate that if Pennsylvania could not control its Gypsies, California would have a bigger problem with Chinese. Latching on to the rising tide of xenophobia in California against Chinese immigrants, Cowan assumed California would want the same protection against Chinese immigrants as Pennsylvania claimed over the Romani.

Cowan asserted that “aliens and others who acknowledge no allegiance, either to the State or to the General Government, “may be limited and circumscribed” in holding property and exercising other rights – which, if Section 1 were adopted, would no longer be the case. *Id.* He continued:

I have supposed . . . if [the State] were overrun by another and a different race, it would have the right to absolutely expel them. I do not know that there is any danger to many of the States in this Union; but is it proposed that the people of California are to remain

quiescent while they are overrun by a flood of immigration out of house and home by Chinese?

Id. at 2891.

California and Pennsylvania would lose the right to exclude these races, Cowan recognized, if Section 1 were adopted. The children of these unwanted races would be American citizens, vested with the Privileges and Immunities of all Americans, including the right to travel, buy property and maybe far more rights than that. See James, *Framing of the Fourteenth Amendment* p. 180 (“Statements of framers [of the Fourteenth Amendment] indicate that these broad terms, “privileges and immunities,” were to embrace those guaranteed by the first eight amendments, and other basic liberties recognized in the common law.”) After condemning all Gypsies of his home state, “the Zingara,” he called them, Cowan demanded:

Are these people, by constitutional amendment, to be put out of the reach of the State in which they live? I mean as a class. *If the mere fact of being born in the country confers that right, then they will have it; and I think it will be mischievous.*

Cong. Globe, 39th Cong., 1st sess. p.2891.

Cowan finished by baiting California Senator Conness, who faced political challenges from Asian immigrants similar to those Cowan feared from Central European migrants of darker skin and different ways. Granting citizenship to children of Gypsies or Chinese, Cowan was sure, threatened the states, especially California:

There is a race in contact with this country which, in all characteristics except that of simply making fierce war, is not only our equal but perhaps our superior. I mean the yellow race: The Mongol race. They outnumber us largely. Of their industry, their skill, and their pertinacity in all worldly affairs, nobody can doubt. . . . They may pour in the millions upon our Pacific coast in a very short time. Are the States to lose control over this immigration? Is the United States to determine that they are to be citizens?

Id.

Cowan answered his own question:

If I desire the exercise of my rights I ought to go to my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions, and not thrust myself in upon a society of other men entirely different from myself. Therefore, I think before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians not taxed, because I look upon Indians not taxed as being much less dangerous and much less pestiferous to society than I look upon Gypsies.

Id.

Cowan closed with a not-so-thinly veiled political threat to Conness: "I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow citizens regard them." *Id.*

Conness rose to the challenge. He had immigrated from Galway with his large family in 1833, residing in New York until the Gold Rush drew him to California in 1849. He knew first-hand the face of bigotry and relished a fight. Conness went right to the point:

[The Citizenship Clause] relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law (in the Civil Rights Act of 1866); now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so. I voted for the proposition to declare 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.*

Id. (Emphasis added).

In these four sentences, Conness summed up the plain meaning and impact of the Citizenship Clause. Children born in America were Americans. Period. Parentage did not matter. Class did not matter. Race did not matter. Religion did not matter. Allegiance was not mentioned. Consent was not required. But equality did matter, and that was what Section 1 was all about.

Conness explained to the Senate how Chinese people had been abused in California since the Gold Rush. Their property had been stolen routinely, and they had been beaten and killed with no help from the State. Instead of protection, the state legislature saddled them with more burdens. California had levied taxes

on them, only, based on their race like poll taxes and miners' taxes, and tried to prohibit Chinese immigration. Cong. Globe, 39th Cong., 1st sess. p.2891. Recounting the history of *People v. Hall*, 4 Cal. 399 (1854), Conness reminded the Senate that White "road agents" from States later to join the rebellion had murdered peaceful Chinese on the highways of California in broad daylight with impunity because the only witnesses to the crimes were Chinese who were not allowed, to testify in court under California law. Cong. Globe, 39th Cong., 1st sess. p.2892. Section 1 would end that abuse because the right to testify in court was one of the recognized Privileges and Immunities of American citizenship.

Perhaps with tongue in cheek, Conness dismissed Cowan's fear of an "invasion" of Gypsies or Chinese as unfounded. "The only invasion of Pennsylvania within my recollection was an invasion very much worse and more disastrous to the State. And more to be feared than that of Gypsies. It was an invasion of rebels which this amendment, if I understand it aright, is intended to guard against and to prevent the recurrence of." *Id.*

Hinting at his own immigrant experience, and foreshadowing dark strategies echoing well in the future, Conness wondered whether Cowan and other opponents of birthright citizenship were simply using xenophobia for political gain. "Why all this talk of Gypsies and Chinese?" Conness wondered. "I have lived in the United States for now many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life. . . . It must be that the Gypsy element is to be added to our political agitation . . ." *Id.*

Summing up, Conness reiterated his understanding of the meaning and application of the Citizenship Clause and embraced it. “We are entirely ready to accept the provision 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 equal protection before the law with others. *Id.*”

The exchange between Conness and Cowan is revealing. Cowan opposed the Citizenship Clause because, as he explained, it would give birthright citizenship to children of any people, even unwanted and despised immigrants, whose children might one day own property and even get involved in the government if this clause were adopted. Conness reassured the Senate that Cowan’s fears were unfounded; the descendants of Chinese or Gypsies, as hated as they were, presented no threat to the country.

While they disagreed sharply on the policy of the Citizenship Clause, Cowan and Conness agreed wholeheartedly on its meaning. The proposed Citizenship Clause was, in Conness’s words, “a simple declaration” that “*human beings born in the United States shall be regarded as citizens of the United States*, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens.” *Id.* (Emphasis added). History “confirms that the Citizenship Clause applies to children of aliens.” Ho, *supra*, *Defining America*, p. 373.

That the first federal law creating the concept of “illegal aliens” was not enacted until the Chinese Exclusion Act of 1882, 8 U.S.C. §§ 262 *et. seq.*, does not help the Government’s argument one iota. The Citizenship Clause speaks to the child’s birth location,

not the legality of the mother's presence on American soil. As Cowan's snide remarks make clear, the framers were very aware of unwanted immigrants and specifically addressed the citizenship of their children – whether or not the parents were wanted on American soil. Nor does it make sense that Congress could undermine the Constitutional provision of birthright citizenship by a mere statute making some parent's existence in America a criminal violation.

There were in fact human beings on American land illegally in 1866. When President Thomas Jefferson signed An Act Prohibiting the Importation of Slaves, ch.22, 2 Stat. 426 (1807) the Transatlantic slave trade did not cease – it went underground. Testimony indicates that perhaps 15,000 enslaved people each year were smuggled into America illegally between the 1808 Act and 1860. William Jay, *A View of the Action of the Federal Government, In Behalf of Slavery*. (<https://catalog.hathitrust.org/Record/009583255>). During the debates on the 14th Amendment, no one suggested that the children of these formerly enslaved people could not be citizens even though their parents were in America illegally.

IV. Conness and the Electorate

After the proposed 14th Amendment complete with the Citizenship Clause in Section 1 passed both houses by the required 2/3rds majorities, supporters gave speeches across the country urging adoption. Section 1 was discussed by proponents such as future Presidents James Garfield, and Rutherford B. Hayes, and the powerful Carl Schurz, who explained that that Section 1 granted all persons born in the United States citizenship and clothed them with the privileges and immunities guaranteed by the constitution and com-

mon law. James, FRAMING THE FOURTEENTH AMENDMENT, pp. 162-163. The people and the legislatures knew what the vote was about.

Senator Conness knew, too, that his support for the Citizenship Clause and for legal equality for the children of Chinese immigrant parents would get back to California, just as Cowan had predicted. He was not afraid. Conness was willing to risk his Senate seat for supporting birthright citizenship and equality. Responding to Cowan's threat, Conness declared, "I am quite aware that what I shall say will go to California, and I wish it to do so. Cong. Globe, 39th Cong., 1st sess. p.2892.

Conness understood and accepted the political risk. Virulent anti-Chinese sentiment had been growing at least since Governor John Bigler's Message on Chinese Immigration in 1852 when he sought severe restrictions on Chinese "coolies" immigrating to California. *Letter of Daniel Cleveland, Esq. to Hon. J. Ross Browne*, U.S. Minister to China, July 27, 1868, p.5. Fear and hatred of Chinese immigrants was rampant in California and growing. In 1856, Reverend William Speer, who was ministering to the Chinese immigrants in the state, published "*An Humble Plea to the Legislature of California on behalf of the Immigrants From the Empire of China*" requesting legislation to protect Chinese immigrants from extortion, theft and lynching. By 1866, the situation had become more ominous for the Chinese immigrants and their supporters. See, William Speer, D.D. THE OLDEST AND NEWEST EMPIRE: CHINA AND THE UNITED STATES, S.S. Scranton & Co. (1870) Ch. XX (detailing the rapid rise of nativist crime against Chinese immigrants in the 1850s and 1860s).

Conness's political base, the Union Party, split over the 14th Amendment, with the Union Democrats rejoining their former party in 1867 to oppose the Amendment. Conness was not even nominated for reelection. He was forced out of the Senate when his term ended in 1869, replaced by Democrat Eugene Casserly. John Denning, *A Fragile Machine: California Senator John Conness*, California History, Vol. 85, No. 4 (2008) p. 49. Conness had sacrificed his political career for something he held more dear: human equality guaranteed in America's fundamental law.

California became the only pre-Civil War free state to reject the 14th Amendment, driven by fear of Chinese immigration and citizenship guaranteed by the express words of Section 1. Kevin Waite, Op. Ed., *Early California lawmakers also preached resistance-but against immigration*, LOS ANGELES TIMES, August 3, 2018. California did not in fact ratify the amendment until 1959. AJR 32, adopted May 6, 1959.



CONCLUSION

Both the framers and the ratifiers understood and accepted the plain meaning of the Citizenship Clause. Howard had explained that citizenship as defined in Section 1 was an integral part of the Privileges or Immunities Clause which follows immediately thereafter. All persons born in America are vested with the privileges and immunities of American citizens by virtue of their birth on American soil, with only a few, well defined exceptions. Immigrant

status is not one of the exceptions to birthright citizenship and was never meant to be one of them.

The drafters knew and intended to include birthright citizenship in the country's fundamental law as demonstrated by Senator Wade's May 23 comments and Jacob Howard's introductory remarks in the Senate the following week. The people understood the significance of the Clause, and of Section 1 in its entirety as shown by their reaction, pro and con, at the polling place in 1867 and in ratification votes in the legislatures across the country. The debate between Senators Cowan and Conness was a microcosm of the debate nation-wide and proves that legislators on both sides of the issue, while disagreeing on its wisdom, accepted its meaning. Faithful Originalism and Textualism compel the conclusion that the Citizenship Clause means what it says.

“Constitutional analysis must begin with the language of the instrument.” *Dobbs v. Jackson Women's Health Organization*, 597, U.S. 215, 234 (2024), quoting *Gibbons v. Ogden*, 9 Wheat. 1, 186-189 (1824). The language of Section 1 is clear. Birth under the flag confers citizenship and this has been accepted by every court to address the issue for more than a century. Article V provides a process for altering that policy for those who seek a different means of defining American citizenship.

The text of the Citizenship Clause is clear and unambiguous. It guarantees citizenship to all people born on American soil and subject to the country's laws. Citizenship is not dependent, limited or restricted by the child's parents, nor does citizenship depend on the blessing of any politician. EO 14160 violates the text, structure and expressed purpose of both the Citizenship Clause of the 14th Amendment, Section 1,

and 8 U.S.C. § 1401(a), the statute adopted to implement the Constitutional mandate. The District Court's Opinion and Ruling should be affirmed.

Respectfully submitted,

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February 26, 2026