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 SOCIETY FOR THE RULE OF LAW INSTITUTE AND FORMER WHITE HOUSE LAWYERS, SENIOR GOVERNMENT OFFICIALS, FEDERAL JUDGES, GOVERNORS, AND MEMBERS OF CONGRESS WHO WERE APPOINTED OR NOMINATED BY REPUBLICAN PRESIDENTS, OR ELECTED AS REPUBLICANS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Originally founded in 2018 by lawyers and jurists who served at the highest levels of government in previous Republican Administrations, *amicus* Society for the Rule of Law Institute is a nonpartisan, nonprofit organization dedicated to bringing a traditionally conservative legal perspective to the defense of the Constitution and the rule of law.

Individual *amici* are former White House lawyers, senior government officials, federal judges, governors, and members of Congress who were appointed or nominated by Republican presidents, or who were elected as Republicans. *Amici* include senior officials who served in one or more of the Administrations of Presidents Nixon, Ford, Reagan, George H.W. Bush, George W. Bush, and Trump, in positions that included Counsel to the President and other Executive Office of the President lawyers, Department of Justice leaders, Executive Branch agency heads and senior appointees, and independent agency officials. *Amici* also include retired federal judges appointed by Republican presidents, as well as former governors and members of Congress elected as Republicans.

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[1] The full list of *amici* is set forth in the Appendix to this brief. No counsel for a party to this case authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

Collectively, *amici* have decades of government experience spanning the last fifty years. Their interest in this case lies in properly construing and preserving core principles of our Constitution that guided *amici*'s government service, including the Take Care Clause and the separation of powers.

SUMMARY OF ARGUMENT

Executive Order 14,160 rewrites settled law in defiance of the Fourteenth Amendment, this Court's prior rulings, the enactments of Congress, and prior executive practice. The Order is a brazen attempt by the President to assert power that the Constitution denies him and instead entrusts to the other two branches. While Presidents have become increasingly powerful Executives, the Constitution still does not permit them to remake settled law by personal diktat.

1. This Order does not fill an interpretive gap. Nor could it, for there is no gap to fill. As this Court held 128 years ago in *United States v. Wong Kim Ark,* 169 U.S. 649, 693 (1898), the Fourteenth Amendment "affirms the ancient and fundamental rule of citizenship by birth within the territory" with only "the exceptions or qualifications (as old as the rule itself)" pertaining to the children of foreign diplomats and enemies, and the "single additional exception" relating to Indian tribes. This Court has repeatedly reaffirmed that settled legal principle, including as to the specific populations at issue here. *See, e.g.*, *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985) (noting that the U.S.-born child of aliens who illegally entered the United States "was a citizen of this country").

Congress also has repeatedly codified this understanding of the Fourteenth Amendment, most

recently in the Immigration and Nationality Act (INA), ch. 477, § 301(a), 66 Stat. 163, 235–36 (1952) (codified as amended at 8 U.S.C. § 1401(a)). In enacting § 1401(a), Congress unambiguously adopted the reasoning of *Wong Kim Ark*. Read as a whole, moreover, the INA establishes a statutory scheme that rests upon the principle of birthright citizenship. The Order here thus defies the Constitution itself, this Court's prior rulings, and Congress's statutory enactments.

The Order also radically breaks with prior executive practice. For example, executive immigration regulations and guidance have long made clear that children born in the United States are birthright citizens, regardless of their parents' immigration status. Likewise, in appearances before this Court, prior Solicitors General have repeatedly conceded the citizenship of U.S.-born children of aliens illegally or temporarily present in the United States. And the Office of Legal Counsel (OLC) has concluded that "apart from . . . extremely limited exceptions, there can be no question that children born in the United States of aliens are subject to the full jurisdiction of the United States." *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 Op. O.L.C. 340, 342 (1995) (hereinafter *Dellinger Opinion*). As stated in that OLC opinion by Assistant Attorney General Dellinger, proposed congressional legislation that "purports to deny citizenship by birth to persons within the jurisdiction of this country is unconstitutional on its face." *Id.* at 341. So too is the Executive Order here.

2. This is not, then, a case in which the President exercises his "authority and responsibility" to answer "questions left open by Congress that arise

during [a] law's administration." *Util. Air Regul. Group v. EPA*, 573 U.S. 302, 327 (2014). Rather than filling an interpretive gap, Executive Order 14,160 makes new law. But this is a power denied to the President by our Constitution. By attempting to make law, rather than interpret it, the President disregards his duty to "take Care that the Laws be faithfully executed" and violates his oath to uphold the Constitution. U.S. Const. art. II, §§ 1, 3. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

That the President has acted as a "lawmaker" here is shown by his disregard for existing law. It is also shown by the language and structure of the Order itself, which—like the order at issue in *Youngstown*—bears features "like that many of many statutes." *Id.* at 588. By "direct[ing] that a presidential policy be executed in a manner prescribed by the President," *id.*, the Order reads like an exercise of "unchecked Presidential policymaking." *Learning Resources, Inc. v. Trump*, No. 24-1287, slip op. at 10 (U.S. Feb. 20, 2026) (Roberts, C.J.). In issuing the Order, moreover, the President did not follow any of the internal executive order review processes in place since 1933. It is therefore unsurprising that the Order did not so much as mention, much less seek to distinguish, any of the unbroken authorities that it contravened. This is not simply a procedural default: it reflects that the Order neither engages with nor faithfully executes the law, but is instead the President's *ipse dixit* promulgation of new law.

3. Issuance of this Order not only exceeds the President's own powers: it also violates the

Constitution's separation of powers twice over by encroaching upon the authority of Congress and of this Court. Congress—not the President—possesses the exclusive power "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Further, Section 5 of the Fourteenth Amendment declares that Congress—not the President—"shall have power to enforce, by appropriate legislation, the provisions of this article," including the Citizenship Clause. U.S. Const. amend. XIV, § 5. Finally, it is the province of this Court—not the President—"to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Youngstown established that, even in matters of national security, executive power reaches "its lowest ebb" when the President acts in direct conflict with the express or implied will of Congress. 343 U.S. at 637 (Jackson, J., concurring). But in this Order, that power strikes rock bottom. Here, the President has acted not only without any constitutional authority of his own, but also in direct conflict with the express will of Congress *and* the rulings of this Court. This case thus asks whether the President can arrogate to himself *both* the legislative power to make the law and the judicial power to interpret the law. Thus, the danger to our Republic lies not just in the result here, but in the method by which it was achieved. The Order provides a blueprint by which any President may purport to "reinterpret"—but really rewrite—any constitutional provision or statute by Executive Order, no matter how this Court had previously interpreted the law. Having imposed his will by fiat, the President can then dare this Court or Congress to try to catch up with, and seek to limit, the new law he has made.

That is what happened here. Executive Order 14,160 purports to establish a new rule of American citizenship. But amid the ashes of the Civil War and in the wake of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Framers of the Fourteenth Amendment proposed—and the American people ratified—a contrary precept: the "ancient and fundamental rule of citizenship by birth within the territory" that has since formed a cornerstone of our constitutional order. *Wong Kim Ark*, 169 U.S. at 693.

No single official may rewrite the Constitution—not even the President. *See* U.S. Const. art. V. Nor may he rewrite a statute. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998). This Court should reaffirm these fundamental principles by rejecting the President's lawless claim to sweeping authority to rewrite our Constitution and our laws.

ARGUMENT

I. Executive Order 14,160 flagrantly contradicts the settled meaning of the Fourteenth Amendment.

Executive Order 14,160 conflicts with the text of the Citizenship Clause of the Fourteenth Amendment, this Court's prior rulings regarding that Clause, Congress's subsequent enactments, and the actions of all prior Executives in compliance with those rulings and enactments. For more than a century, this Court, Congress, and presidents of both parties have understood and agreed that American citizenship depends on birth, not blood. The Order accordingly does not "fill gaps" in existing law because there are no gaps to fill. Neither the Court, nor Congress, nor

prior Executives have "left open" the meaning of the Citizenship Clause. *Util. Air Regul. Grp.*, 573 U.S. at 327. The consistent practice of all three branches demonstrates that, in this case, both constitutional and statutory law foreclose "the exercise of *any discretion*" by the President: "all that is shut out by the direct and positive command of the law." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614 (1838) (emphasis added).

A. Through the Fourteenth Amendment, the American people adopted the *jus soli* rule.

English common law treated all people born within the territory of the sovereign as natural-born citizens. *See* 1 William Blackstone, *Commentaries on the Laws of England* (1768) at *354; *see also id.* at *361–62 ("The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."). The common-law rule carried with it only limited exceptions, which covered circumstances like the children of foreign diplomats and children born to enemy forces during hostile occupation. *See Wong Kim Ark,* 169 U.S. at 682–86; *see also The Schooner Exch. v. McFaddon,* 11 U.S. (7 Cranch) 116, 136–47 (1812) (Marshall, C.J.); *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254–55 (1819) (Story, J.).

Far from disrupting the *jus soli* rule, the Reconstruction Congress's passage—and the American people's ratification—of the Fourteenth Amendment enshrined that rule to repudiate *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Deviating from the (even by then) long-settled

American rule of birthright citizenship, *Dred Scott* infamously denied the citizenship of free Black people born in the United States. In dissent, Justice Curtis pointed out the departure from *jus soli*, stating:

> At the Declaration of Independence, and ever since, the received general doctrine has been, *in conformity with the common law*, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States . . . .

Id. at 576 (emphasis added).

The American people rejected *Dred Scott* on the battlefields of the Civil War, in the halls of the Reconstruction Congress, and across the states that ratified the Fourteenth Amendment. The resulting Citizenship Clause thus unambiguously settled that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1, cl. 1. The Framers of the Amendment sought "to put citizenship beyond the power of *any governmental unit* to destroy." *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (emphasis added). They unequivocally achieved this objective, making clear that *all* children born within the United States become American citizens—with only the limited exceptions previously recognized at common law. The President's unilateral attempt to redefine citizenship by Executive Order thus plainly defies the Fourteenth Amendment.

B. The Supreme Court confirmed this interpretation of the Fourteenth Amendment in *Wong Kim Ark*.

In *Wong Kim Ark*, this Court confirmed that the Fourteenth Amendment "affirms the ancient and fundamental rule of citizenship by birth within the territory" with only the "exceptions or qualifications (as old as the rule itself)" for children of foreign diplomats and occupying enemies and the "single additional exception" relating to Indian Tribes. 169 U.S. at 693. The Court found the evidence supporting this construction of "subject to the jurisdiction thereof" to be "irresistibl[e]," including Secretary of State Daniel Webster's description of the United States's jurisdiction:

> [I]ndependently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be . . . .

Id. at 693–94 (quoting H.R. Exec. Doc. No. 32-10, at 4 (1851)).

Chief Justice Fuller's dissent reinforces that *Wong Kim Ark* rejected exactly the radical reinterpretation of the Citizenship Clause that

Executive Order 14,160 seeks to impose. Fuller criticized the majority for applying the English common-law rule, under which "allegiance sprang from the place of birth regardless of parentage and supervened at the moment of birth, [so] the inquiry *whether the parents were permanently or only temporarily within the realm was wholly immaterial*." *Id.* at 718 (Fuller, C.J., dissenting) (emphasis added). By holding, over Fuller's dissent, that the Fourteenth Amendment affirmed this "ancient and fundamental" common-law rule, the six-justice *Wong Kim Ark* majority long ago made clear that an Order like the one at issue here would be, and is, unconstitutional.

This Court has repeatedly followed *Wong Kim Ark,* building a substantial body of precedent on which all three branches have relied. *See, e.g.*, *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957) (noting that a U.S.-born child of aliens who exceeded their "limited lawful stay" was "of course, an American citizen by birth"); *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985) (noting that a U.S.-born child of aliens who illegally entered the United States "was a citizen of this country").[2] The Court has thus

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[2] *See also, e.g.*, *Agosto v. INS*, 436 U.S. 748, 759–60 (1978) (holding that a petitioner who claimed birth in the United States to Italian parents had adequately stated a claim to United States citizenship in spite of "confusion and uncertainty surrounding" his parentage); *Rogers v. Bellei*, 401 U.S. 815, 817 (1971) (noting that a plaintiff's mother was "born in Philadelphia . . . and thus [she] was a native-born United States citizen" without any reference to her parentage); *INS v. Errico*, 385 U.S. 214, 215 (1966) (noting that a child born in the United States to aliens

repeatedly exercised its "emphatic[] . . . province and duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Executive Order 14,160 unconstitutionally invades that province, casting aside 128 years of precedents without so much as a suggestion that they even exist.[3]

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admitted based on false representations "acquired United States citizenship at birth"); *Hirabayashi v. United States*, 320 U.S. 81, 96 (1943) (explaining that "approximately two-thirds" of the persons of Japanese descent in the western United States during World War II were "citizens *because born in the United States*" (emphasis added)); *Perkins v. Elg*, 307 U.S. 325, 328 (1939) (describing *Wong Kim Ark* as holding that "a child born here of alien parentage becomes a citizen of the United States" and applying that rule); *Morrison v. People of State of California*, 291 U.S. 82, 85 (1934) ("A person of the Japanese race is a citizen of the United States if he was born within the United States."); *Mackenzie v. Hare*, 239 U.S. 299, 306 (1915) (explaining that the fact that "under the Constitution of the United States every person born in the United States is a citizen thereof . . . must be conceded").

[3] The Order defies this Court's precedents in another respect as well. The Government seeks to justify the Order—after the fact—by asserting a novel distinction between "political jurisdiction"—which the Government claims temporarily-present aliens do not fall within—and other forms of jurisdiction, including criminal jurisdiction—to which the Government claims such aliens are nonetheless subject. Pet'r. Br. at 14–15. But this would require the phrase "subject to the jurisdiction thereof" to bear two distinct meanings that the Constitution nowhere expresses.

C. Congress codified *Wong Kim Ark*—twice.

Congressional enactments separately foreclose the President's purported new exclusions from birthright citizenship. Congress has adopted the *Wong Kim Ark* Court's interpretation of the Fourteenth Amendment twice: first in the Nationality Act of 1940 and then in the 1952 INA, which amended and reorganized other provisions of federal immigration and citizenship law. Both statutes declared, in identical language, that "[t]he following *shall be* nationals and citizens of the United States at birth: . . . a person born in the United States, and *subject to the jurisdiction thereof*," unmistakably following the Citizenship Clause. Immigration and Nationality Act § 301(a) (emphasis added) (codified at 8 U.S.C. § 1401(a)); Nationality Act of 1940 § 201(a).

The Court has long presumed that Congress intends to incorporate prior Supreme Court interpretations of the language it later enacts. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction."). In addition, a "statutory term is generally presumed to have its common-law meaning," *Evans v. United States*, 504 U.S. 255, 259 (1992)

Even more critically, it rests on a reading of those words contrary to all prior decisions of this Court that have found "political" and "criminal" jurisdiction to be inextricably linked. *See Wong Kim Ark*, 169 U.S. at 682-86.

(citation omitted). And here, "subject to the jurisdiction thereof" had a clear "common-law meaning," as set out in *Wong Kim Ark* and other decisions of this Court.

The statutory backgrounds of both enactments confirm that Congress intended to adopt *Wong Kim Ark* and reaffirm *jus soli*. The Nationality Act of 1940 enacted into law draft legislation proposed by an interagency committee convened by President Roosevelt. *See* H. Comm. on Immigration and Naturalization, 76th Cong., *Report Proposing A Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code With Explanatory Comments*, at iii (Comm. Print 1939). The report recommended the language that later became 8 U.S.C. § 1401(a), explaining it as "in effect a statement of the common-law rule, which has been in effect in the United States from the beginning of its existence as a sovereign state." *Id.* at 7. The report then explained that this "accords with the provision in the [F]ourteenth [A]mendment," as interpreted in *Wong Kim Ark*. *Id.* Finally, the report noted that although Wong Kim Ark's parents were "domiciled in the United States . . . the same rule [of birthright citizenship] is *also applicable to a child born in the United States of parents residing therein temporarily*." *Id.* (emphasis added).

The 1952 INA—which reenacted the 1940 Act's citizenship provision without alteration—expressed the same understanding. The House Judiciary Committee's report on the bill, for example, once again explicitly endorsed both *Wong Kim Ark* and *jus soli*. *See* H.R. Rep. No. 82-1365, at 25 (1952); *see also* Br. *Amici Curiae* of Citizenship Law Scholars at 22–24.

Likewise, the language and structure of the nationality provisions of the INA make clear that Congress understood and built upon *jus soli* as the fundamental principle of U.S. citizenship. Thus, for instance, the INA does *not* automatically confer U.S. citizenship on all children born abroad of an American citizen parent. 8 U.S.C. § 1401(c)–(e), (g)–(h). In contrast, the INA *does* grant citizenship to "a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States." 8 U.S.C. § 1401(f). The INA thus incorporates the reasoning of *Wong Kim Ark* and the principle of *jus soli* . The President's Order is therefore doubly illegal—it violates not only the Constitution, but also Congress's considered decision to provide for *jus soli* by statute.

D. The Executive Branch has respected *Wong Kim Ark* for decades.

The Executive Branch has consistently accepted and enforced *Wong Kim Ark*'s interpretation of "subject to the jurisdiction thereof." Indeed, as shown above, by proposing the language that became § 1401(a), the Executive expressly adopted the Court's ruling on the meaning of the Citizenship Clause. *See supra* Part I.C. And the Department of State has issued passports based on *jus soli* since 1896—long before § 1401 and even before *Wong Kim Ark*. *See* U.S. Dep't of State, Regulations Prescribed for the Use of the Consular Service, ¶ 137 (1896); U.S. Dep't of State, Regulations Governing the Consular Service of the United States, ¶ 137 (1926); 22 C.F.R. § 79.137 (1938);

see also Br. *Amici Curiae* of Citizenship Law Scholars at 10–11.

Similarly, immigration regulations and Executive Branch guidance—under Presidents of both parties—have long recognized the citizenship of children born in the United States regardless of their parents' immigration status. For example, State Department regulations explicitly state that a "child born in the United States *is born subject to the jurisdiction of the United States* and is a United States citizen if the parent is not a 'foreign diplomatic officer.'" 8 C.F.R. § 1101.3 (1982) (emphasis added); *see also* 8 C.F.R. § 101.3(b) (stating the same as a regulation of the Department of Homeland Security). The Foreign Affairs Manual (FAM)—the basic organizational directive of the State Department—has also explicitly embraced the *Wong Kim Ark* Court's reading of the Fourteenth Amendment. *See* 8 FAM 301.1-1 ("Pursuant to [*Wong Kim Ark*] . . . [a]cquisition of U.S. citizenship generally is not affected by the fact that the parents may be in the United States temporarily or illegally."); *see also* Br. *Amici Curiae* of Citizenship Law Scholars at 14 & n.8 (discussing State Department opinions on individual citizenship issues).

The Department of Justice has long taken the same position. The Office of Legal Counsel, for instance, maintained in a public opinion that "apart from . . . extremely limited exceptions, there can be no question that children born in the United States of aliens are subject to the full jurisdiction of the United States." *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 Op. O.L.C. 340, 342 (1995) ("Dellinger Opinion"). That opinion was issued in response to draft legislation

that, like Executive Order 14,160, would have denied birthright citizenship to children born of parents who were not citizens or lawful permanent residents. *Id.* at 341. The opinion concluded that such legislation would be "unconstitutional on its face" and remarked that it would "flatly contradict our constitutional history and our constitutional traditions." *Id.* The opinion has never been publicly rescinded by any of the Administrations of both parties that have followed, and even now remains available on the Department of Justice website. *See* Dellinger Opinion, *available at* https://www.justice.gov/olc/opinion/legislation-denying-citizenship-birth-certain-children-born-united-states (last visited Feb. 25, 2026). Its conclusions apply with equal force here: the Order is "unconstitutional on its face."

Further, in numerous submissions to this Court, prior Solicitors General—under both Republican and Democratic Administrations—have repeatedly conceded the citizenship of children born in the United States to illegally or temporarily present aliens. *See, e.g.*, Brief for the Respondent, *U.S. ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957), 1957 WL 87025, at *7 (recognizing the birthright citizenship of a U.S.-born child of alien seamen); Brief for the Petitioner, *INS v. Errico*, 385 U.S. 214 (1966), 1966 WL 100686, at *5–6 (acknowledging the citizenship of a child born to aliens admitted through misrepresentation); Brief for the Petitioner, *INS v. Rios-Pineda*, 471 U.S. 444 (1985), 1985 WL 669850, at *4–5 (accepting the birthright citizenship of a child born to alien parents who entered the United States

without inspection).[4] Even the first Trump administration ultimately declined to violate the sacrosanct command of the Citizenship Clause—despite President Trump stating, on the eve of the 2018 midterm elections, that he would issue an executive order ending birthright citizenship. Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. Times (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html.

II. By issuing Executive Order 14,160, the President violated his oath of office and failed to faithfully execute the laws.

As shown above, Executive Order 14,160 defies the plain text of the Fourteenth Amendment, this Court's authoritative interpretation of that text, subsequent congressional codifications of that interpretation, and prior executive precedents and regulations. By so doing, this Order not only violates entrenched constitutional and statutory rights, but also represents an unconstitutional—and dangerous—arrogation of power that exceeds the President's authority and breaches his constitutional duties.

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[4] The exception to constitutional birthright citizenship for Indian tribes has been filled by statute. *See* 8 U.S.C. § 1401(b).

A. Executive Order 14,160 constitutes lawmaking, not execution of the laws.

On January 20, 2025, President Trump swore—for the second time—an oath to "faithfully execute the Office of the President" and to "preserve, protect and defend the Constitution." U.S. Const. art. II, § 1, cl. 8. By taking that Oath, the President took on a duty to faithfully execute the laws of the United States—a duty so foundational to our system of government that the Framers saw fit to repeat it in constitutional text. *See* U.S. Const. art. II, § 1, cl. 8 ("[H]e shall take the following Oath . . . I will faithfully execute the Office of the President"); *id.* at art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed."). The President's duty to "take Care" entails "limitation, subordination, and proscription." Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2182–83 (2019). The Take Care Clause both defines and limits presidential power. It constrains the President's discretion and requires him to respect "any applicable statutory or constitutional limits." Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743, 1763 (2019). In brief, the Oath and Take Care Clause make clear that the President is constrained by law, not just his "own morality."

As show**n** above, Executive Order 14,160 attempts to jettison the longstanding rule—enshrined in the Fourteenth Amendment—that persons born on U.S. soil are birthright citizens. The Order purports to replace that constitutional rule of *jus soli* with a new one devised by the President. The "policy of the United States," the Order claims, is now to deny citizenship to

persons born of unlawfully present or temporarily resident aliens. Exec. Order No. 14,160, 90 Fed. Reg. at 8449.

In essence, the Order attempts to seize for the President the power to decide who is a citizen of the United States. The Order cites "the authority vested in [the President] by the Constitution and the laws of the United States of America." *Id.* But beyond this rote language, neither the Order nor the President's submissions before this Court furnish any authority—whether from the Constitution or federal statutes—granting the power the Order claims. Neither the Constitution nor the laws of the United States grant the President the interpretive power he seeks to exercise. Congress, after all, "makes policy" for the United States by legislating. The Constitution requires President Trump to follow such policy faithfully. It does not allow him to alter it by fiat.

To be sure, the President's duty to execute the laws entails an "authority and responsibility" to answer "questions left open by Congress that arise during the law's administration." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014). But as shown above, there are no questions regarding birthright citizenship "left open" by the Fourteenth Amendment, this Court's rulings, and Congress's enactments regarding birthright citizenship. Moreover, even where the Take Care Clause requires such gap filling, "it does not include a power to revise clear statutory terms" or rewrite the Constitution. *Id.*

As this Court held in *Youngstown Sheet & Tube Co. v. Sawyer*, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. 579, 587 (1952). This Court has

reaffirmed time and again that "there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). Needless to say, the Constitution no more permits the President to amend or repeal its own provisions.

The Order thus violates the Take Care Clause in multiple respects. Far from filling gaps in existing law, it seeks to make new law—which the Order calls "policy." And the law it attempts to make directly offends the Fourteenth Amendment, this Court's prior rulings regarding that Amendment, and Congress's separate enactments.

B. The Order's language and structure reinforce that it impermissibly seeks to make new law.

Setting aside its outright defiance of all prior law, the Order's language and structure themselves demonstrate that the President seeks to act as a "lawmaker," thereby usurping Congress's exclusive authority. *Youngstown*, 343 U.S. at 587–88.

As was the case in *Youngstown*, the first section of the Order, "like that of many statutes, sets out reasons why the President believes certain policies should be adopted." *Id.* at 588. It explains that "United States citizenship is a priceless and profound gift" that, in the President's view, "does not automatically extend" to certain U.S.-born persons. Exec. Order No. 14,160, 90 Fed. Reg. at 8449. Section 2 of the Order directs executive agencies to apply this new presidential policy definition when administering federal law. In doing so, it "proclaims th[is] polic[y] as rules of conduct to be followed." *Youngstown*, 343 U.S.

at 588. Section 3 then mimics a statute by authorizing senior executive officials, including the Secretary of State, the Attorney General, and the Secretary of Homeland Security, to "take all appropriate measures" to conform departmental regulations and policies with the Order. Exec. Order No. 14,160, 90 Fed. Reg. at 8449–50. In other words, it directs executive branch officials to execute the law as provided by the President, not Congress.

Similarly, like legislation that makes prospective law, section 2(b) of the Order announces an effective date—it applies only to children born thirty days after the date of the Order. *See id.* But announcements of longstanding constitutional principles are not typically subject to implementation periods stated in the language of legislation. If the Order solely interpreted and executed existing law, it would apply immediately. But because it *changes* the law, to reflect a "policy" unilaterally determined by the President, the Order delays its effects for thirty days.

In short, the Order adopts new presidential policy that rejects existing law in favor of a prospective rule of conduct mandating compliance; it then authorizes "a government official to promulgate additional rules and regulations consistent with the policy proclaimed." *Youngstown*, 343 U.S. at 588. These collective characteristics, *Youngstown* instructs, are evidence of an unconstitutional usurpation of Congress's legislative function. A President acts unconstitutionally when he issues a presidential order that "does not direct that a congressional policy be executed in a manner prescribed by Congress" but instead "directs that a presidential policy be executed in a manner prescribed by the President." *Id.*; *see also Learning Resources Inc.*

v. Trump, No. 24-1287, slip op. at 10 (U.S. Feb. 20, 2026) (Roberts, C.J.) (declining to read a statute to replace "longstanding executive-legislative collaboration over [] policy with unchecked Presidential policymaking").

C. The process through which the Order was issued also shows that it is not a faithful execution of the laws.

Beyond its text and structure, the procedure by which the Order was issued illustrates that the President failed to uphold his oath and duty to faithfully execute the laws. Since 1933, Presidents have followed an internal review process for preparing and issuing executive orders. *See* Andrew Rudalevige, *The Contemporary Presidency: Executive Orders and Presidential Unilateralism*, 42 Presidential Stud. Q. 138, 148–49 (2012). The most recent update to the executive-order process, issued in 1962, has guided both Democratic and Republican Administrations alike. *See* Exec. Order No. 11,030, 3 C.F.R. 610 (1959–1963); *see also* 1 C.F.R. pt. 19 (2023). Under this standard process, the Director of the Office of Management and Budget (OMB) first reviews a draft order, including an explanation of its nature, purpose, background, and effect, and its relationship to any other laws. 1 C.F.R. § 19.2(a). If the OMB Director approves the proposed order, the Attorney General and the Office of Legal Counsel (OLC) review the order's form and legality. 1 C.F.R. § 19.2(b); 28 C.F.R. § 0.25(b). This longstanding, two-layered review helps to ensure that executive action faithfully executes the laws enacted by Congress and abides by the Constitution that the President has sworn to uphold.

Publicly available information confirms what the timing of the Order itself suggests: the Trump Administration ignored these longstanding procedures when issuing Executive Order 14,160. The *New York Times* has reported that President Trump's transition team omitted Department of Justice vetting of day-one executive orders—including Executive Order 14,160. Charlie Savage, *Trump Sidelines Justice Dept. Legal Office, Eroding Another Check on His Power*, N.Y. Times (Apr. 4, 2025), https://www.nytimes.com/2025/04/04/us/politics/trump-office-of-legal-counsel-doj.html. And, as shown above, the Order directly contradicts a previous OLC opinion without explanation, suggesting OLC could not have reviewed it for form or legality. Jack Goldsmith & Bob Bauer, *The Trump Executive Orders as "Radical Constitutionalism,"* Am. Enterprise Inst. (Feb. 3, 2025), https://www.aei.org/op-eds/the-trump-executive-orders-as-radical-constitutionalism/; *cf. Dellinger Opinion*, 19 Op. O.L.C. at 342.

Generations of Presidents and their closest legal advisors designed the standard executive-order review process to identify and assess existing Supreme Court decisions, congressional enactments, and executive practices that might run counter to a proposed order. Plainly, that vetting process did not occur here. The President's decision to abrogate this nearly century-long norm of internal legal review confirms that, in issuing the Order, the President sought to change, or ignore, the law, not to faithfully execute it.

III. Executive Order 14,160 violates the separation of powers.

In issuing the Order, the President has not only exceeded his own constitutional powers: he has also violated the separation of powers twice over by encroaching upon the constitutional powers of both Congress and this Court. *Youngstown* established that, even in matters of national security, executive power reaches "its lowest ebb" when the president acts in direct conflict with the express or implied will of Congress. 343 U.S. at 637 (Jackson, J., concurring). But in this Order, that power hits rock bottom: for here, the President has acted both without any constitutional authority of his own and in direct conflict with the express will of Congress *and* the rulings of this Court.

While Congress cannot, of course, contravene the Fourteenth Amendment's establishment of birthright citizenship, the Constitution grants Congress—not the President—exclusive power "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Section 5 of the Fourteenth Amendment declares that Congress—not the President—"shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. And it is the province of this Court, not the President, "to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. The Order ignores, and doubly offends, this careful allocation of power under the Constitution.

A. The Order directly conflicts with the express will of Congress.

The Citizenship Clause sets the constitutional baseline for birthright citizenship without abrogating Congress's Article I power over the naturalization of those not entitled to birthright citizenship. It declared "existing rights and affirm[ed] . . . existing law . . . as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States." *Wong Kim Ark*, 169 U.S. at 688. At the same time, it left naturalization "to be regulated, as it had always been, by [C]ongress in the exercise of the power conferred by the [C]onstitution." *Id.* Longstanding precedent affirms that the Constitution vested Congress *alone* with the power to set the terms of naturalization. More than two hundred years ago, this Court declared: "That the power of naturalization is exclusively in [C]ongress does not seem to be, and certainly ought not to be, controverted . . . ." *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817). After *Wong Kim Ark*, this Court reasserted that "[t]he [C]onstitution has conferred on [C]ongress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this [C]ourt to be so." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 160 (1892).

The Fourteenth Amendment also expressly gives Congress alone the "power to enforce" its protections—including the Citizenship Clause—"by appropriate legislation." U.S. Const. amend. XIV, § 5. This confirms the legislative branch's exclusive province over the "policy" governing United States citizenship beyond the constitutional floor. And Congress has repeatedly exercised its authority to

extend citizenship to groups not understood to be covered by the Citizenship Clause. *See, e.g.*, 8 U.S.C. § 1401(b) (providing citizenship to members of Indian tribes); 8 U.S.C. § 1402 (providing citizenship to persons born in Puerto Rico).[5]

Because the Constitution assigns Congress the sole authority to set the terms of naturalization and to extend (but not limit) the Citizenship Clause's baseline of birthright citizenship, the President may not impose alternative requirements for either form of citizenship. Just as the President possesses no concurrent power to establish rules of naturalization, he lacks unilateral authority to alter the statutory meaning of citizenship.

Congress enacted § 1401(a) in order to codify the understanding of birthright citizenship articulated in *Wong Kim Ark*. But even putting Congress's intent to the side, the language and structure of § 1401 as a whole establish *jus soli* as the central principle of American citizenship. *See supra* Part I.C. The President's Order seeks not to execute § 1401's settled statutory definition but to unilaterally supplant it. But when his power is at its lowest ebb—or, as here, nonexistent—the President can neither unilaterally impose citizenship standards incompatible with Congress's settled definition nor seize Congress's exclusive power to define citizenship for himself.

Executive Order 14,160 reflects an even more aggressive form of presidential overreach than the

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[5] Congress has also provided statutory birthright citizenship to certain persons born in the Canal Zone, 8 U.S.C. § 1403(a), the Republic of Panama, *id.* at § 1403(b), the U.S. Virgin Islands, *id.* at § 1406, and Guam, *id.* at § 1407.

Court rejected in *Youngstown.* Unlike President Truman's steel-seizure order, this Order does not operate at the margins of statutory silence or expressly delegated emergency authority. It attempts to override a settled statutory rule enacted under an exclusively legislative power.

Justice Jackson warned in *Youngstown* that a "[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." 343 U.S. at 638 (Jackson, J., concurring). Even in the context of a national emergency prompted by world war, the *Youngstown* Court refused to allow the President to displace clear congressional will. Then, as now, the President was required to act "under the law," not in violation of it. *Id.* at 655.

Jackson's warning applies with special force today. Executive Order 14,160 seeks to override Congress's law to redefine the bounds of the most fundamental aspect of American personhood: citizenship. But the President cannot simply dictate a different rule because he disagrees with the one Congress enacted. Sustaining such executive usurpation would effectively disable Congress from exercising its express constitutional authority over citizenship and permit the President to vest himself with legislative authority at will.

The President has no legislative power to override or modify the plain meaning of a statute. *See Clinton*, 524 U.S. at 438. In seeking to deny citizenship to children born in the United States and subject to the jurisdiction thereof—that is, to Americans—the Order unconstitutionally conflicts with clear congressional will.

B. The Order further undermines the separation of powers by encroaching on this Court's authority to interpret the law.

The President acts here in defiance of the express will of Congress *and* the express decisions of this Court. By doing so, the Order poses more than an ordinary interpretive dispute. Indeed, the Order does not even acknowledge this Court's prior controlling decisions, far less seek to distinguish them. Instead, the Order seeks *sub silentio* to override the authority of this Court no less than that of Congress.

It is fundamental law that when constitutional text, precedent, statute, and historical practice clearly align, as they do here, an incompatible exercise of executive power must yield. Chief Justice Marshall long ago recognized that where constitutional interpretation concerns the allocation of authority amongst the political branches, longstanding government practice carries substantial interpretive weight. In considering "doubtful question[s]" involving "the respective powers of those who are equally the representatives of the people," constitutional interpreters "ought to receive a considerable impression from" the "practice of the government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819). The settled practice here all runs in one direction. For more than a century, this Court has upheld *Wong Kim Ark*'s understanding of birthright citizenship; Congress has legislated against that backdrop; and the Executive has faithfully executed that law out of constitutionally mandated respect for both. Executive Order 14,160 stands alone in

attempting to shatter this entrenched interbranch consensus.

This Court directed in *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014), that "'long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).[6] Where, as here, Congress has repeatedly legislated on a particular understanding of the Constitution and the Executive has consistently administered the law in accordance with that understanding, courts must apply the settled constitutional meaning. "An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded." *McCulloch*, 17 U.S. (4 Wheat.) at 401. This President's attempted unilateral revision cannot withstand *Youngstown* and longstanding historical practice.

Justice Jackson, writing in *Youngstown*, recognized the interpretive value of long-established practice. "While the Constitution diffuses power the

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[6] Even a practice as new as "twenty years [old] 'on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" *Noel Canning*, 573 U.S. at 524 (quoting *State v. South Norwalk*, 77 Conn. 257, 264 (1904)). That logic applies *a fortiori* to the executive practice of adhering to *Wong Kim Ark*'s definition of citizenship, which is more than a century old. *See supra* Part I.D.

better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." 343 U.S. at 635 (Jackson, J., concurring). Justice Frankfurter's *Youngstown* concurrence likewise argued that "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned" acts as a "gloss" on Article II executive power, shaping its meaning beyond mere text. *Id.* at 610–11 (Frankfurter, J., concurring). Here, that gloss confirms that the President acted in disregard of all prior executive practice and in defiance of this Court and Congress.

C. Allowing the Order to stand would set a dangerous precedent.

Justice Jackson presciently urged the Court not to "confound[] the permanent executive office with its temporary occupant." *Id.* at 634 (Jackson, J., concurring). This Court should not "lose sight of enduring consequences upon the balanced power structure of our Republic" to allow a single Executive to sidestep the Constitution, the judiciary, Congress, and the considered judgment of past presidents to serve short-term political aims. *Id.*

This is no ordinary Executive Order. It *makes* law—and does so in direct defiance of the Constitution, Congress, this Court, and prior Executives. If allowed to stand, it will provide a blueprint for all future presidents. Every president could hastily issue Executive Orders that claim to "interpret" the law—even where the Constitution has assigned exclusive authority to Congress and even where the Court has already construed the provision—

in open defiance of clear legislative and judicial commands.[7] Then, they can dare the Court and Congress to catch up. Executives will always win this game, even though it is contrary to our most fundamental constitutional principles. As Justice Jackson warned in *Youngstown*:

> The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. *The Executive, except for recommendation and veto, has no legislative power.* The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be

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[7] No version of unitary executive theory allows a president to ignore constitutional structure. *See* Caleb Nelson, *Special Feature: Must Administrative Officers Serve at the President's Pleasure?*, N.Y.U. L. Democracy Project (Sep. 29, 2025), https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure.

> under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

343 U.S. at 654–55 (Jackson, J., concurring) (emphasis added).

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to affirm the judgment below.

Respectfully submitted,

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APPENDIX

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