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 *AMICUS CURIAE* NEUTRAL PRINCIPLES SUPPORTING RESPONDENTS AND AFFIRMANCE

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QUESTION PRESENTED

Whether Executive Order No. 14160, Protecting the Meaning and Value of American Citizenship (Jan. 20, 2025), complies on its face with the Citizenship Clause and with 8 U.S.C. §1401(a), which codifies that Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Regulation

Treaties

Treatise

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case presents a straightforward question of constitutional interpretation: whether the Fourteenth Amendment's definition of citizens as including "[a]ll persons born * * * in the United States, and subject to the jurisdiction thereof" means what its plain and ordinary language says, or whether it is limited by a variety of unexpressed and unsupported conditions and qualifications, as claimed by the President. Notwithstanding the attempts at muddying the waters and injecting non-textual policy concerns or political considerations, the original public meaning of the words and phrase "subject to the jurisdiction" of the Unites States were well known and understood at the time of the Fourteenth Amendment and cannot be so easily evaded by a unilateral stroke of the President's pen.

Because adherence to the constitutional text and adherence to consistent neutral methods for interpreting that text are essential to the rule of law and judicial legitimacy, this case is of particular concern to *amicus curiae* Neutral Principles. *Amicus* is a nonprofit, nonpartisan organization dedicated to preserving and advancing coherent, consistent, and neutral legal principles in order to promote the legal and judicial legitimacy essential to our constitutional system. As jurists and scholars such as Judge Bork,

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission.

Professor Wechsler, and many others before and since have recognized, the unprincipled exercise of judicial power in pursuit of particular results is unsustainable and illegitimate. Since the 1980s, conservative scholarship and jurisprudence have demonstrated that such neutral principles can best be found in a faithful and unbiased adherence to the original public meaning of the text of the Constitution, and, when necessary, relevant history and tradition that may help resolve any ambiguities in that text. But it is *always* the ratified text that comes first and takes precedence. Past or even subsequent practice that is inconsistent with the constitutional text cannot supplant, expand, or limit the original public meaning of that text.

In this case, however, the language of the Fourteenth Amendment is familiar and straightforward, the meaning of the words and phrases well-established at the time, and the history and tradition overwhelmingly consistent with that plain original public meaning. Any isolated supposed inconsistencies, alternative citizenship regimes used in the past, potentially unanticipated outcomes, policy arguments, or political agendas cannot be allowed to overcome such text and consistent history without abandoning the very neutral principles that give the courts and the Constitution legitimacy.

SUMMARY

The Citizenship Clause defines as citizens "[a]ll persons born * * * in the United States, and subject to the jurisdiction thereof." U.S. Const. amend. XIV, §1, cl. 1. For purposes of this case, which involves persons "born in the United States," only the meaning of the second qualification, "subject to the jurisdiction thereof," is at issue. Fortunately, that phrase and its component parts involve simple, well-known language that, in whole and in parts, had easily understood meaning. Applying the neutral principles of relying on text, ordinary meaning, and contemporaneous usage yields a straightforward answer: at a minimum, all persons physically *present* in the United States at birth are "subject to the jurisdiction of" the United States unless the United States has previously ceded such jurisdiction (with all the consequences thereof) by treaty, statute, or the like.

Both before, during, and since the 1860s, "jurisdiction" overwhelmingly referred to the lawful authority of a government's courts and laws over persons and things within its reach, whether through physical presence or other contacts. To be "subject to" such authority or laws meant (and continues to mean) that those courts could lawfully attach you as a party and pass judgement over you in criminal or civil proceedings. Presence within the territorial domain of a court or other governmental entity was almost always *sufficient* for a person to be subject to the jurisdiction of such entity (though it was not always necessary).

Under those settled public meanings, anyone physically present in the United States who is amenable to American legal process and bound by American law is "subject to the jurisdiction" of the United States. That covers almost everyone born here (and hence physically present at birth), including children of temporary visitors and unlawful entrants. The only exception—and hence the need for the further qualification of jurisdiction—is persons falling within narrow, well-recognized categories such as diplomats and their families given immunity via positive law placing them outside domestic legal authority.

The President's contrary reading, Pet.Br.18, rests on selectively adding to the Fourteenth Amendment's text an unwritten phrase—"not subject to any foreign power" to exclude persons otherwise and indisputably within the power and authority of the nation's laws and courts. But the historical record does not support such editorial license. In the decades leading up to 1868, Congress, treaty-makers, and courts used "subject to the jurisdiction" to describe, at minimum, territorial, legal authority—often in contexts that explicitly contemplate dual or overlapping jurisdiction based on both territorial and non-territorial grounds for authority over persons. That territorial presence conferred jurisdiction of persons without negating non-territorial grounds for the authority of others negates the suggestion of an implied requirement of *exclusive* U.S. jurisdiction. Adding the President's narrowing gloss to the more expansive words actually chosen would make scores of period sources nonsensical. The only plausible inference from that

history is the obvious and consistent one: the text meant what it says and encompassed all persons over whom the United States could exercise lawful power and authority—those "subject to" United States law and tribunals. The relevant history and the text of the Constitution does not require or permit an elastic inquiry into complementary or overlapping jurisdiction or the supposed political loyalty (of the parents, no less, rather than of the newborn that is the object of the Fourteenth Amendment's definition). It defines as citizens all those who are physically present in the United States at birth and not otherwise exempt or immune from the power and authority of U.S. law and tribunals. U.S. Const. amend. XIV, §1, cl. 1. That simple and original public meaning of the Fourteenth Amendment cannot be narrowed by Executive Order.

Finally, the President's "allegiance" theory, Pet.Br.14-15, is not only linguistically unmoored, it is in deep tension with our legal tradition. From the Founding forward, American courts have exercised civil and criminal jurisdiction over aliens and others whose "primary allegiance" was not to the United States. And the government itself prosecutes unlawful aliens every day on the premise that they are fully subject to our laws and courts. That reality underscores the core point: jurisdiction is about lawful authority and power of the governmental entity in question over persons within its territory or reach, not the professed, implied, or even heartfelt loyalty of the object or target of that authority and power. Where persons were deemed to be beyond the reach of U.S. jurisdiction despite being physically present here, it was because of some statute, treaty, or accepted

common law practice that exempted or immunized such persons—diplomats, foreign nationals protected by specific treaties, captured enemy combatants—from U.S. laws and tribunals, not merely because they were citizens of foreign nations. Because the President's Order conflicts with the Constitution's text as originally understood—and with the stable, administrable line that "subject to the jurisdiction" historically supplied—the Court should affirm.

ARGUMENT

This case boils down to a dispute over the meaning of a single phrase—"subject to the jurisdiction" of the United States—as it appears in the first sentence of the Fourteenth Amendment. In resolving this dispute, this Court should be guided by neutral principles.

This Court's recent jurisprudence has been at pains to emphasize and reiterate that legitimate constitutional rulings must derive from the original public meaning of the text of the Constitution, not from penumbras, emanations, or other Rorschach-test manifestations of the policy views of the judicial or even political branches. Recent cases re-focus on the text of the Constitution, as originally and publicly understood and, where necessary, informed by the history and tradition that sometimes reflects (and sometimes may circumscribe) that original public meaning. See *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 22-25 (2022) (applying the text of the Second Amendment and looking to history and tradition to evaluate any claimed limits on the scope of such textual commands); *Kennedy* v. *Bremerton Sch.*

Dist., 597 U.S. 507, 536 (2022) ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule[.]").

This Court has emphasized that, when interpreting the Constitution, it is "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia* v. *Heller*, 554 U.S. 570, 576-577 (2008) (cleaned up). Put another way, any reading "that renders the document a 'secret code' loaded with hidden meanings discernible only by a select priesthood * * * is generally an unlikely one." William Baude & Michael Stokes Paulsen, *The Sweep & Force of Section Three*, 172 U. Pa. L. Rev. 605, 722 (2024).

I. The Original Public Meaning of the Fourteenth Amendment's Phrase "Subject to the Jurisdiction" of the United States Plainly Meant Being Answerable to this Nation's Laws and Courts.

Applying the neutral principles of textualism, original public meaning, and where necessary, history and tradition to the phrase "subject to the jurisdiction" is not difficult: One need only unpack what the prevailing understanding of the words "jurisdiction" and being "subject to" such jurisdiction was around the time the Fourteenth Amendment was drafted and ratified. Legal dictionaries published in the 1860's consistently connected the word "jurisdiction" to the authority of a court to hear a case. For example, Bouvier defined it as the "power constitutionally

conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into execution."[2] Likewise, Wharton defined it as "legal authority; extent of power; declaration of the law."[3] Burrill, too, defined jurisdiction as the "[a]uthority to judge, or administer justice; power to act judicially; power or right to pronounce judgment," but also noted that it can take on a "more general sense," namely the "power to make law; power to legislate or govern; [or the] power or right to exercise authority."[4]

The phrase "subject to" is a standard legal connector that marks subordination: it means *governed by, constrained by, placed under, or made legally liable to* some identified power, rule, authority, or condition. See, *e.g.*, *Wilkes* v. *Dinsman,* 48 U.S. 89, 90 (1849) (equating an obligation to "comply with" laws with being "subject to" those laws); *Bank of U.S.* v. *Halstead,* 23 U.S. 51, 56, 61 (1825) (using the phrases "property made *subject to* execution" and "lands * * * *liable to* be taken and sold on execution" interchangeably).

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[2] John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 554 (1st ed. 1839) (defining "jurisdiction"), https://tinyurl.com/sa2hnusf.

[3] J.J.S. Wharton, *Law-Lexicon: Or, Dictionary of Jurisprudence* 442 (2d ed. 1860) (defining "jurisdiction"), https://tinyurl.com/mrfpf66t. Wharton concedes that the jurisdiction of a particular court "may be limited" by various factors, including the amount in controversy or the subject matter of a particular case, but that did not change the word's underlying meaning. *Id.*

[4] Alexander M. Burrill, *A Law Dictionary and Glossary* 112-113 (1860) (defining "jurisdiction"), https://tinyurl.com/4mpk7fn8.

The 39th Congress used the phrase in this way literally hundreds of times in dozens of statutes enacted in 1866 and 1867.[5] See, *e.g.*, Act of March 21, 1866, ch. 38, §9, 14 Stat. 10, 11 (disabled soldiers in an asylum remain "subject to the rules and articles of war"); Act of April 5, 1866, ch. 25, 14 Stat. 13 (Smithsonian library "subject to the same regulations as the library of Congress"); Act of March 2, 1867, ch. 176, 14 Stat. 517 (discharge of bankrupt individuals was "subject to the order of the court").

Against this legal backdrop, the original public meaning of Section 1 of the Fourteenth Amendment becomes clear: a person is "subject to the jurisdiction" of the United States if they are *governed by, constrained by, placed under* American judicial process and hence "subject to" American law at the time they were born in the United States.

Physical presence has been sufficient to establish jurisdiction over an individual since the earliest days of the Republic. Indeed the First Congress, as part of the Judiciary Act of 1789, made physical presence *the* hallmark of federal jurisdiction: "[N]o person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought * * * against an inhabitant of the

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[5] This includes the Civil Rights Act of 1866 which extended citizenship to all persons born in the United States and *not subject to any foreign power*. Act of April 9, 1866, ch. 31, 14 Stat. 27. ("That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."). That Congress later chose broader language for the Fourteenth Amendment excluding such limitations is, of course, quite telling.

United States, by any original process in any other district than that whereof he is an inhabitant, *or in which he shall be found* at the time of serving the writ." Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, 79; *see also Picquet* v. *Swan*, 19 F. Cas. 609, 614 (C.C.D. Mass. 1828) (Judiciary Act "contemplates no effective exercise of jurisdiction by the circuit court, except in cases where the party defendant is an inhabitant of, or found within, such district, at the time of serving the writ"). In an early jurisdiction case, Justice John Mashall even went as far as to say that "the principles of equity give a court jurisdiction wherever the person may be found," even if the property at the heart of the case lies in another state. *Massie* v. *Watts*, 10 U.S. 148, 158 (1810); see also *Toland* v. *Sprague,* 37 U.S. 300, 327 (1838) (limiting even attachment of a person's property where "defendant is domiciled abroad, or not found within the district in which the process issues, so that it can be served upon him").

For better or for worse, the original public meaning of this part of the Fourteenth Amendment reaches almost everyone born in (and hence physically present in) the U.S. If someone checks that box not immunized from U.S. authority by statute, treaty, or the like, they are definitionally a U.S. citizen—full stop—regardless of whether their parents are from Anchorage or Ankara, Boulder or Bordeaux, or whether their parents have entered without permission or overstayed their visit. While one can debate the policy wisdom of a country granting automatic citizenship to almost every child born within its borders, regardless of their parentage, that is the policy choice and balance plainly enacted by the

Constitution. It is not for the President, Congress, or this Court to override or rebalance that constitutional choice. See *Bruen*, 597 U.S. at 23.

The President resists this obvious conclusion. He invokes legislative history to argue that "subject to the jurisdiction" of the United States *really* meant "not subject to any foreign power." Pet.Br.18.[6] But were that the case, the historical record would be littered with other examples of documents written prior to 1868 that equate the two terms and use them interchangeably. But a review of statutes, treaties, and caselaw[7] from the decades leading up the passage of the Fourteenth Amendment reveals that over and over again, "subject to the jurisdiction" meant simply being subject to the authority of courts and required to follow the law. It did not require or imply the absence of any further or overlapping obligations to also obey the laws of other countries to which you are connected.

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[6] The President's abuse of legislative history is worse than just "looking out over the crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983) (quoting Judge Harold Levanthal). Since most of the legislative history he relies on comes from the debates from the Civil Rights Act of 1866 not the Fourteenth Amendment, Pet.Br.17, it is more akin to looking over the kiss cam reel of a different crowd at a different stadium and picking out your friends.

[7] See *District of Columbia* v. *Heller*, 554 U.S. 570, 605 (2008) (Scalia, J.) (noting that the "examination of a variety of legal and other sources to determine the public understanding" of a phrase in a legal text "in the period" around its enactment is "a critical tool of constitutional interpretation.").

A. Statutes

The phrase "subject to the jurisdiction" appeared in three statutes passed by Congress during the two decades leading up to the ratification of the Fourteenth Amendment, with the latter two being passed by the very same Congress that proposed the Fourteenth Amendment. The first was an 1848 statute regulating the recovery of goods from wrecked ships "sunk in any river, harbor, bay, or waters, subject to the jurisdiction of the United States." Act of March 3, 1841, 5 Stat. 609. The other two both regulated steamships, imposing navigation laws and safety standards on "all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States." Act of July 25, 1866, ch. 234, §9, 14 Stat. 227, 228; Act of February 25, 1867, ch. 83, 14 Stat. 412. Both laws, however, exempted those ships "subject to the jurisdiction of a foreign power and engaged in foreign trade" *unless* they were "owned in whole or in part by a citizen of the United States." *Ibid*. Of course, the recognition that the United States could regulate—i.e., exercise jurisdiction over—vessels in its waters even where such vessels were *also* subject to the jurisdiction of a foreign power, is lethal to the President's argument. The statutory text reflects a contemporary understanding that being subject to the jurisdiction of the United States is not incompatible with overlapping foreign jurisdiction over persons and vessels. One can simply be subject to both, and jurisdiction need not be exclusive. Indeed, crimes and torts committed on any "ship or vessel, belonging to any citizen or citizens of the United States," even one subject to the jurisdiction of a foreign power, as

contemplated in the statute above, had been "cognizable and punishable" by American courts since at least 1825. Act of March 3, 1825, ch. 65, 4 Stat. 115.

B. Treaties between the United States and foreign nations

A number of bilateral treaties ratified by the United States prior to the Fourteenth Amendment include the phrase "subject to the jurisdiction" in ways that illustrate the non-exclusivity of jurisdiction.

For example, the 1860 treaty with Venezuela stated that the "citizens of the contracting parties shall * * * be at liberty to manage themselves their own business, subject to the jurisdiction of either party[.]"[8] The same was true of the 1864 treaty with Hayti[9] and the 1867 treaty with the Dominican Republic.[10] These treaties explicitly envision dual jurisdiction and legal authority over persons. An American living in Caracas or Porta Prince could still be tried in American courts for treasonous acts or other violations of U.S. law, even while being "subject to the jurisdiction" of the country he was physically located in for local crimes, torts, or contractual enforcement.

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[8] Treaty Between the United States and the Republic of Venezuela, Aug. 27, 1860, 12 Stat. 1143, 1144-1145 (proclaimed Sep. 25, 1861), https://tinyurl.com/4sfcpdcx.

[9] Treaty of Amity, Commerce, Navigation, and Extradition, U.S.-Hayti, Nov. 3, 1864, 18 Stat. 412, 413 (proclaimed July 6, 1865), https://tinyurl.com/yasvfasb.

[10] General Convention of Amity, Commerce, Navigation, and Extradition, U.S.-Dom. Rep., Feb. 8, 1867, 15 Stat. 473 (proclaimed Oct. 24, 1867), https://tinyurl.com/nhzud7ky.

C. Caselaw

Finally, the phrase "subject to the jurisdiction" appears over and over again in caselaw from this era. Using Westlaw, we reviewed every single federal or state judicial opinion using the phrase that was issued between January 1, 1860 and June 12, 1866—the day before the Fourteenth Amendment was approved by Congress and sent to the states for ratification. This search identified seventy-four instances[11] of the phrase appearing in sixty-eight opinions from thirty-one jurisdictions across twenty-two states.[12] Despite being written by a multitude of different judges, the opinions employed the phrase in a remarkably consistent fashion.[13] In 98.6% of the usages, it referred to the right of some government entity to exercise authority over particular people, property, land, money, or subjects.[14] Of these approximately 65% were explicitly invoking the authority of the courts.

Several of the cases reviewed specifically discuss parties who are subject to multiple jurisdictions at the same time, *Huggins* v. *People*, 29 Ill. 241 (1862); *Kelly*

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[11] This includes close variations such as "subject to its jurisdiction," "subject to our jurisdiction," "subject to federal jurisdiction," etc.

[12] The search returned an additional eleven cases where the phrase "subject to the jurisdiction" appeared, but outside the published opinion (i.e. in summaries, headings, etc.).

[13] Our analysis of each case can be accessed at https://tinyurl.com/4m5556dn.

[14] The only exception was *Polar Star Lodge* v. *Polar Star Lodge,* 16 La. Ann. 53 (1861), an 1861 case out of the Louisiana Supreme Court which suggested that a particular masonic lodge might be "subject to the jurisdiction and visitorial power" of another lodge.

v. *Crapo*, 41 Barb. 603 (N.Y. Sup. Ct. 1864); *Todd* v. *Kerr*, 42 Barb. 317 (N.Y. Sup. Ct. 1864), with the Pennsylvania Supreme Court going as far as to say that it was only "[t]houghtless men [who] sometimes allege that people cannot be subject to two sovereignties." *Fifield* v. *Insurance Co. of Pa.*, 47 Pa. 166, 171 (1864). While most of these cases involved different states or disputes about federal versus state jurisdiction, in *Whitford* v. *Panama Railroad Co.,* 23 N.Y. 465 (1861), the New York Court of Appeals alluded to the "practice which universally prevails, by which the courts of one country entertain suits in relation to causes of action which arise in another country, when the parties come here *so as to be made subject to their jurisdiction*." *Id.* at 471 (emphasis added). In such instances, foreign nationals invoked the jurisdiction of American courts to bring claims under foreign law without forsaking their foreign citizenship. See, *e.g., United States* v. *Percheman*, 32 U.S. 51, 54-55, 86-89 (1833) (Spanish subject litigating in U.S. court to confirm title "by virtue of a grant from the Spanish governor" in Spanish Florida.").

In addition, and notwithstanding the President's attempted conflation of "jurisdiction" with "allegiance," discussions of allegiance were almost completely absent. The word allegiance appeared in only four of the seventy-four cases, and was tied to the discussion of jurisdiction in only two.

Those two cases do not provide the President much support either. In *Lawrence* v. *Smith*, the Superior Court of Judicature of New Hampshire recognized that jurisdiction can be conferred by either a duty of allegiance or physical presence, with neither

negating the other. 45 N.H. 533, 536 (1864) (jurisdiction of political entities can be exercised over persons "owing them allegiance" *or* "subject to their jurisdiction by being found within their limits.") The existence of either condition was sufficient to confer jurisdiction; a combination of both was not *necessary*. The same is true of *The Prize Cases*, 67 U.S. (2 Black) 635, 674 (1863), where the Court expressly recognized the possibility of multiple, overlapping allegiances and jurisdictions.[15]

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In sum, the linguistic evidence is consistent and compelling: at the time the Fourteenth Amendment was written and ratified, the phrase "subject to the jurisdiction" simply meant being answerable to the judicial and legislative power and authority of a government entity. It did not—and often could not—mean "not subject to any foreign power." Children born on American soil to foreign parents who are either

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[15] That a government can often exercise its jurisdiction beyond its territorial borders confirms that overlapping jurisdiction is indeed possible. See, *e.g.*, U.S. Const. art. I, §8 (Congress's power to "define and punish Piracies and Felonies committed on the high Seas," which cases may be heard in federal courts). While this case focuses on territorial jurisdiction as the basis for citizenship of persons "born in the United States," persons "born" outside the United States but still subject to its jurisdiction would need to rely on a statute naturalizing them from the moment of birth. One could thus be a "natural born citizen" for Presidential qualification purposes even if not "born" in the United States by virtue of immediate statutory naturalization that is triggered by birth to U.S. citizens. Naturalization Act of 1790, ch. 3, 1 Stat. 103, 104. ("[T]he children of citizens of the United States that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens[.]").

here illegally or on temporary visas are therefore citizens per the Fourteenth Amendment unless for some reason, such as diplomatic immunity, they were not subject to American courts and American laws when they were born.

II. Adding the Atextual Requirement of No Foreign Allegiance to Limit "Subject to the Jurisdiction" of the United States Conflicts with the Long History and Tradition of Courts Hearing Cases Involving Parties with Limited or No Allegiance to the United States.

From the very beginning, American courts have exercised jurisdiction over individuals who were "subject to [a] foreign power" or who owed little or no political allegiance to the United States, such as aliens and slaves.

Aliens. One of the earliest actions taken by the First Congress was to grant federal courts jurisdiction over suits involving foreigners (and hence over the foreign parties themselves). The Judiciary Act of 1789 gave the federal "circuit courts * * * original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or equity where * * * an alien is a party." Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78. There is no shortage of cases—stretching back to the earliest days of our Constitutional system—that fall in this bucket, even though none of the aliens involved owed their so-called "primary allegiance" to the United States. See, *e.g.*, *Bradstreet* v. *Thomas,* 37 U.S. 59 (1838) (alien land claimant); *Mayor of New York* v. *Miln*, 36 U.S. 102

(1837) (foreign ship captain challenging the constitutionality of a New York immigration law); *Fisher* v. *Consequa,* 9 F. Cas. 120 (C.C.D. Pa. 1809) (breach of contract claim against Hong merchant).

Nor is it difficult to find cases where the courts exercised criminal jurisdiction over foreigners during this same time period. See, *e.g.*, *United States* v. *Randolph*, 27 F. Cas. 709 (C.C.W.D. Pa. 1853) (prosecution of British subject for forgery of a counterfeit citizenship certificate); *United States* v. *Malebran*, 26 F. Cas. 1145 (C.C.D.N.Y. 1820) (prosecution of foreigner for outfitting a slave ship). This includes cases where the criminal defendant was not even a resident, but instead here temporarily, *United States* v. *Ravara*, 2 U.S. 297 (C.C.D. Pa. 1793) (misdemeanor prosecution of Frenchman here on business).

Slaves. A similar story plays out with respect to slaves. While the *Dred Scott* decision asserted that slaves "owe[d] allegiance to the Government" by virtue of being "born in the country," like so much in that opinion, such a proposition is obviously a farce. *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 420 (1857).[16] It defies logic to assume that any country that allows individuals to be subject to the cruelty of slavery has

[16] And even were such reasoning true, it identifies the source of such allegiance as the *child's* birth within the country itself, regardless of whether the kidnapped, trafficked, and enslaved parents were born here or owed allegiance elsewhere. The U.S.-born children of unlawfully present aliens who chose to be here would have a far better likelihood of and claim to imputed allegiance to their country of birth than the children of slaves destined for their own slavery.

claim on their allegiance, as opposed to simply exercising power over them. Whatever bearing the supposed allegiance of slaves may have had on the elements of a charge for treason, see *Billy (fl. 1770s-1780s)*, *Encyclopedia Virginia* (Dec. 22, 2021), https://tinyurl.com/nhzaddhm (discussing cases addressing the allegiance of a slave as a predicate for treason charges), it is important to note that in none of the cases involving the allegiance of slaves was the court's ultimate jurisdiction over the person ever questioned. The question of allegiance—if it arose at all—went to the elements of a crime such as treason, not the authority of the court to decide the matter. And the prosecution of slaves was not limited to treason in times of war and rebellion. Prior to the passage of the Thirteenth Amendment, state and federal courts routinely tried slaves for all sorts of crimes: murder, larceny, forgery, rape, etc.[17]

Present Day. One great irony in this case is that while the President's *theory* of jurisdiction conflicts with this nation's history and tradition, his *exercise* of jurisdiction does not. Under this administration (and all others before it), undocumented immigrants are routinely indicted, tried and convicted in federal

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[17] See, *e.g.*, *United States* v. *Amy*, 24 F. Cas. 792 (C.C.D. Va. 1859) (Taney, C.J.) (explicitly rejecting the argument that federal courts do not have jurisdiction over cases against slaves and upholding the conviction); *United States* v. *Clark*, 2 Cranch C.C. 620 (C.C.D.C. 1825) (finding slave guilty of manslaughter); A.E. Keir Nash, *A More Equitable Past-Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. Rev. 197 (1970) (collecting state cases).

courts.[18] In the last three weeks alone, the President's own Justice Department has trumpeted the convictions of illegally present aliens for a variety pack of lurid crimes. Yet, according to the President in this case, none of those men—men *he* put behind bars—were "subject to the jurisdiction" of the United States to begin with if they were, as he claims, also "subject to a foreign power." And therein lies the rub. If he is right, the government's prosecution of such aliens is either completely extra-jurisdictional and illegal, or, against all evidence of language and history, the prosecution of crime and enforcement of law is not part of the sovereign's exercise of its jurisdiction at all.

Both options are absurd. It is far more coherent to conclude the these criminals were and are still "subject to the jurisdiction" of the United States simply by virtue of their presence here. That doesn't mean they owed "their primary allegiance" to the Red, White, and Blue. It doesn't mean they are not subject to a foreign power. It just means—as it has for the last 250 years—that they are subject to our laws and subject to our courts because there are *here* and do not have pre-existing immunity. The President's own prosecutorial record thus suggests that even he and his Justice

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[18] See, *e.g.*, Press Release, U.S. Atty.'s Off. S.D. Miss., *Mexican National Sentenced to a Total of 44 Years for Murder and Possessing a Firearm as an Illegal Alien* (Aug. 14, 2025), https://tinyurl.com/3u4amudv; Press Release, U.S. Atty.'s Off. C.D. Cal., *Mexican National Sentenced to 23 Years in Federal Prison for Producing, Distributing and Possessing Child Sexual Abuse Material* (Aug. 26, 2025), https://tinyurl.com/tk5jn7x7; Press Release, U.S. Atty.'s Off. S.D. Ga., *Illegal Alien Sentenced to Life in Prison for Murdering Whistleblower in Labor Conspiracy* (Apr. 10, 2013), https://tinyurl.com/wuwau8wj.

Department do not actually view their jurisdictional arguments seriously or consistently. And falling prey to such arguments would be the antithesis of applying neutral principles.

III. Jurisdiction Over Persons Physically Present in the Geography of a Nation Is the Default Condition Unless Statute, Treaty, or Common Law Specifically Exempted and Immunized them from United States Laws and Courts.

The territorial basis for a nation's jurisdiction over persons within its territory was well-understood at the time of the Fourteenth Amendment. In his *Commentaries on the Conflict of Laws*, Justice Story explained, "[E]very nation possesses an exclusive * * * jurisdiction *within its own territory*."[19] As a result, "the laws of every state affect, and bind directly * * * all persons who are resident within it, *whether natural born subjects, or aliens*." H.W. Halleck asserted the same, explaining in his 1861 treatise on international law that outside of a few narrow exceptions discussed below "all persons found within the limits of a government * * * *whether their residence is permanent or temporary, are subject to its jurisdiction*."[20]

The President and his *amici* attempt to dilute the meaning of "subject to the jurisdiction" of the United States by invoking familiar edge-case exclusions from U.S. citizenship for children born to ambassadors and

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[19] Joseph Story, *Commentaries on the Conflict of Laws* §18 (1st ed. 1834).

[20] Henry W. Halleck, *International Law* 164 (1861).

children born to invading armies. Those examples, however, ignore that the basis for such exclusions is not a hidden narrowing of what it meant in the 1800s to be subject to the jurisdiction of the United States. Rather, it was a function of well-established relinquishments of ordinary legal and judicial authority over such persons and their children. Accordingly, such examples are consistent with what it means to be subject to (or inversely immunized or exempt from) a country's jurisdiction.

A. The children of diplomats are specifically exempted from jurisdiction through the Vienna Convention on Diplomatic Relations and Congressional statutes.

In the earliest days of the Republic, foreign diplomats *were* "subject to the jurisdiction" of the United States: "the judicial power [of the United States] shall extend * * * to all Cases affecting Ambassadors, other public Ministers and Consuls." U.S. Const. art. III, §2. The First Congress, however, clarified the limits of such jurisdiction in the Judiciary Act of 1789, which limited such suits to those "consistent[] with the law of nations." Judiciary Act of 1789, ch. 20, 1 Stat. 73. This qualifier was important because the international principles known as the law of nations were not self-executing. Indeed, under the Constitution it fell to Congress to "define and punish * * * Offences against the Law of Nations." U.S. Const. art. II, §8.

The following year, Congress codified diplomatic immunity law as part of the Crimes Act of April 30,

1790. It made all forms of legal process, in any state or federal court, against "any ambassador or other public minister of any foreign prince or state" or member of their households "utterly null and void to all intents, construction and purposes whatsoever." Act of April 30, 1790, ch. 9, §25, 1 Stat. 112, 117. It was this statute—not a set of ephemeral principles drawn from the ether—that exempted foreign diplomats (and their children) from being "subject to the jurisdiction"—i.e., the courts and laws of the United States—when the Fourteenth Amendment was drafted and ratified. And it was therefore this statute that deprived the children born to diplomats in the United States of birthright citizenship once the Amendment was ratified.[21]

This portion of the Crimes Act remained good law for almost two-hundred years, until it was repealed and replaced by the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808, which complemented and implemented the provisions of the Vienna Convention on Diplomatic Relations of 1961, a multilateral treaty the Senate ratified in 1972.[22] It granted to members of all diplomatic missions to the United States and their families immunity from all "criminal jurisdiction" and all "civil and administrative jurisdiction" outside a few very narrow exceptions. Thus today, as in 1868, it is positive law—a treaty and statute—that prevent children of foreign

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[21] It is the very interplay of the "subject to the jurisdiction" condition and the legal exemption from such jurisdictions that explains the non-citizenship of diplomatic progeny.

[22] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227

diplomats born in the United States from inheriting birthright citizenship.

B. Specific statutes—in addition to the common law—treat enemy combatants as outside the jurisdiction of American courts.

Much has already been written by others about why the children born on American soil to enemy combatants are not "subject to the jurisdiction" of the United States. See, *e.g.*, James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the Fourteenth Amendment*, 9 Green Bag 2d 367, 370-372 (2006). Part of it is the very nature of war, which this Court has long recognized is not the exercise of authority under law, but "the exercise of force by the bodies politic, against each other, for the purpose of coercion." *The Prize Cases,* 67 U.S. at 652. As such, war "ignores jurisdiction, [as well as] penalties and crimes." *Id.*; see also *Fairfax's Devisee* v. *Hunter's Lessee,* 11 U.S. 603, 620 (1812) ("During the war, the property of alien enemies is subject to confiscation *jure belli,* and their civil capacity to sue is suspended"); *Wilcox* v. *Henry*, 1 U.S. (1 Dall.) 69, 71 (Pa. 1782) ("An Alien enemy has no right of action whatever during the war."); *Crawford* v. *The William Penn*, 6 F. Cas. 778 (C.C.D.N.J. 1815) (Washington, J.) ("The general rule of the common law of England is, that an alien enemy cannot maintain an action in the courts of that country, during the war, in his own name.").

But positive law also plays a role. Before the Declaration of Independence was even drafted, the

Continental Congress passed a resolution regulating the treatment of captured enemy soldiers, as well as "their women and children." IV J. Cont. Cong. 369-372. They were to be treated as "prisoners." No due process or habeas corpus was mentioned. A related law was passed during the War of 1812. Act of July 6, 1812, ch. 128, 2 Stat. 777. Such statutes incorporated principles from the law of war and put enemy combatants (and their offspring) firmly outside the judicial system.

These statutes and the backdrop of the common law make clear that any child born to an enemy combatant on American soil would not "be subject to the jurisdiction" of American courts, and therefore not eligible for birthright citizenship. But merely being physically present in the United States in violation of its immigration laws is a far cry from being an enemy combatant during wartime. And the United States is more than content to continue exercising civil and criminal jurisdiction over illegally present aliens and their U.S.-born progeny.

C. At the time of the Fourteenth Amendment, nations could and did give up jurisdiction over groups of foreign nationals by treaty.

Diplomatic practice during the 19th Century provides a third example of how through positive law a nation can cede otherwise existing of jurisdiction over a particular class of foreigners dwelling within its borders: the doctrine of extraterritoriality. At the time of the Fourteenth Amendment, western nations frequently negotiated for "extraterritorial" rights

through treaties with nations in Asia, Africa, and the Middle East. This meant that the citizens of the western nation (whether attached to the diplomatic mission or not) "were largely exempted from the application of local laws" as well as the authority of local courts. Mariya Tait Slys, *Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China* (Graduate Inst. Publ'ns 2014), https://tinyurl.com/2d9d8mye. Any serious crimes—as defined by their home country—as well as civil lawsuits would be tried instead by "consular courts" within the embassy.

On the eve of the Fourteenth Amendment, the United States had negotiated such partial or complete extraterritoriality agreements with at least eleven nations, including, *inter alia*: Japan (1857) and Madagascar (1867).[23] The treaty with Japan was perhaps the most explicit, stating clearly that "Americans, committing offences in Japan, shall be tried by the American Consul General or Consul, and shall be punished, according to American Laws."[24] Likewise, the treaty with Madagascar provided that "In regard to civil rights, however, whether of person or property, of American citizens, or in cases of criminal offences, they shall be under the exclusive civil and criminal jurisdiction of their own consul only,

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[23] Treaty Between the United States of America and the Empire of Japan, U.S.-Japan, June 17, 1857, 11 Stat. 723 (ratified and proclaimed June 30, 1858), https://tinyurl.com/5at9j6ps; Treaty Between the United States of America and the Queen of Madagascar, U.S.-Madagascar, Feb. 14, 1867, 15 Stat. 491 (proclaimed Oct. 1, 1868), https://tinyurl.com/5fpkmd64.

[24] U.S.-Japan Treaty, supra note 22.

duly invested with the necessary powers."[25] These provisions were also common in treaties negotiated by Great Britain and France. See David Todd, *Beneath Sovereignty: Extraterritoriality and Imperial Internationalism in Nineteenth-Century Egypt*, 36 L. & Hist. Rev. 105 (2018), https://tinyurl.com/y9avzrhk.

There are good reasons to believe that the drafters of the Fourteenth Amendment understood the doctrine of extraterritoriality. For starters, they were familiar with the consular court system existing at the time. Less than a month and a half after they passed the joint resolution proposing the Fourteenth Amendment, the same Congress passed an appropriations bill that included specific line items for consular courts in Siam, Japan, China, and Turkey. Act of July 25, 1866, ch. 233, 14 Stat. 224. And this was not the first time. Bills related to the consular court system had been passed by each of the previous three Congresses. See, *e.g.*, Act of January 24, 1865, 13 Stat. 422; Act of January 13, 1865, 13 Stat. 421; Act of June 20, 1864, ch. 136, 13 Stat. 137; Act of February 12, 1863, 12 Stat. 648; Act of February 4, 1862, 12 Stat. 335; Act of June 22, 1860, ch. 179, 11 Stat. 72.

Additionally, nine of the Senators who voted on the Fourteenth Amendment had also been part of the Senate in 1857 when they ratified the extraterritorial treaty with Japan.[26] This group included many of the

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[25] U.S.-Madagascar Treaty, supra note 22.

[26] Compare Biographical Directory of U.S. Congress, *Thirty-Ninth Congress: March 4, 1865 to March 3, 1867* (House Historian 2020), https://tinyurl.com/49f9m6y4 with Biographical Directory of U.S. Congress, *Thirty-Fifth Congress: March 4, 1857*

key figures in the debates over the Amendment including Lyman Trumbull, James R. Doolittle, Charles Sumner, and Benjamin Wade. Likewise, the vast majority of the Senators who were in the 39th Congress were still in the Senate the following year when they ratified the extraterritorial treaty with Madagascar.[27]

There is also the fact that many other treaties entered into by the United States did *not* include extraterritorial rights for Americans abroad. They instead contained provisions explicitly "leaving open and free" the "tribunals of justice" of both countries to the "citizens of each other" for "their judicial recourse, on the same terms which are usual and customary with the natives of that country." See, *e.g.*, Bolivia (1862), Ecuador (1853), Guatemala (1852).[28] But what's striking is that in each case, these provisions *immediately followed* a "subject to the jurisdiction" clause.

Subsequent history more explicitly demonstrates the interplay between consular jurisdiction on the one hand and being "subject to the jurisdiction" of another country on the other. For example, the 1882 treaty

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to March 3, 1859, (House Historian 2020), https://tinyurl.com/kbbpw83h.

[28] Treaty of Peace, Friendship, Commerce, and Navigation, U.S.-Bolivia, May 13, 1858, 12 Stat. 1003, art. XII (proclaimed 1862), https://tinyurl.com/yzwna9cs; Treaty of Peace, Amity, Commerce, and Navigation, U.S.-Guat., Mar. 3, 1849, 10 Stat. 873, art. XII, https://tinyurl.com/ycytu3sa.

with the Kingdom of Chosen (modern day Korea)[29] also contained an extraterritorial provision, but included a further provision for the lapse of such extraterritoriality:

> [W]henever the King of Chosen shall have so far modified and reformed the statutes and judicial procedure of his kingdom that, in the judgment of the United States, they conform to the laws and course of justice in the United States, the right of extraterritorial jurisdiction over United States citizens in Chosen shall be abandoned, and thereafter United States citizens, when within the limits of the Kingdom of Chosen, shall be *subject to the jurisdiction of the native authorities*.

Later treaties explicitly abrogating the United States' extraterritorial claims also used "subject to the jurisdiction" language to do so. For example, the 1920 treaty with Siam made Americans in that country "subject to the jurisdiction of Siamese Courts,"[30] and the 1946 treaty with China stated that Americans there would now "be subject to the jurisdiction of the Government of the Republic of China."[31]

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[29] Treaty of Peace, Amity, Commerce, and Nav., U.S.-Korea, art. IV, May 22, 1882, 23 Stat. 720, 721-22, https://tinyurl.com/56ueyzxm.

[30] Treaty Between the United States and Siam Revising Existing Treaties, Dec. 16, 1920, 42 Stat. 1928, https://tinyurl.com/2pzbxnbj.

[31] Treaty Between the United States of America and the Republic of China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.-China, Jan. 11, 1943, art. I, 57 Stat. 767, 768, https://tinyurl.com/y2wddahf.

While the United States has never granted another country the right to exercise extraterritorial jurisdiction within our borders, treaties in the other direction reflect the consistent public use and meaning of the phrase "subject to the jurisdiction of" a governmental body. While granting exemptions to the jurisdiction of the United States would seem spectacularly imprudent,[32] it is one of the few paths to narrowing the jurisdiction of the United States over persons born here, and hence limiting, consistent with the constitutional text, who is eligible for birthright citizenship.

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In this case the United States had not and has not ceded jurisdiction over illegally present aliens or their children. The category of persons at issue in this case were thus born here subject to the jurisdiction of the United States and thus are U.S. citizens. If the United States truly wanted to alter that outcome prospectively for persons not yet born, it could do so. As the examples above show, through statutes or treaties the government *can* divest itself of jurisdiction over certain classes of foreigners if it is willing to bear the consequences of such divestment.

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[32] A letter received by the Secretary of State from the America's Consulate General in Egypt just two years before the Fourteenth Amendment was proposed shows why this is the case. He noted that 1/3 of the 150,000 inhabitants of Alexandria were foreigners "excepted from the operation of the local laws" through extraterritorial treaties, making a "proper municipal government" impossible. Letter from Charles Hale to William H. Seward (Oct. 22, 1864), in *Foreign Relations of the United States, 1864, Part IV*, Doc. 444 (Off. of Historian, U.S. Dep't State), https://tinyurl.com/yhdrd9mm.

Such actions, of course, would come at a great cost. It would mean that those foreigners present in our country would be immune from American law. It would prevent the government from prosecuting and punishing the very cartels, murderers, sex traffickers, and other sundry criminals that seem to have taken up so much of its energy and attention. While Congress and the President together could theoretically narrow the class of persons subject to the jurisdiction of the United States, and hence the persons who might give birth to U.S. Citizens under the Fourteenth Amendment, they have not done so yet. The President cannot unilaterally redefine jurisdiction over persons present in the United States for one purpose while maintaining its historic meaning for other purposes that suit him. The Constitution has established the conditions for and definition of citizenship. The consequence of jurisdiction over persons is that their U.S. born offspring will be citizens. It cannot be undone or avoided merely because the President disagrees with the balance struck in the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the District of New Hampshire and declare the President's Executive an unconstitutional violation of the Fourteenth Amendment.

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