

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Petitioners,)
v.) No. 25-365
BARBARA, ET AL.,)
Respondents.)
- - - - -

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6 v.) No. 25-365

7 BARBARA, ET AL.,)

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11 Washington, D.C.

12 Wednesday, April 1, 2026

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14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:04 a.m.

17

18 APPEARANCES:

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20 Justice, Washington, D.C.; on behalf of the
21 Petitioners.

22 CECILLIA D. WANG, ESQUIRE, San Francisco, California;
23 on behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-365, Trump versus Barbara.

General Sauer.

ORAL ARGUMENT OF GEN. D. JOHN SAUER

ON BEHALF OF THE PETITIONERS

GENERAL SAUER: Mr. Chief Justice, and may it please the Court:

The Citizenship Clause was adopted just after the Civil War to grant citizenship to the newly freed slaves and their children, whose allegiance to the United States had been established by generations of domicile here. It did not grant citizenship to the children of temporary visitors or illegal aliens, who have no such allegiance.

This conclusion reflects the original public meaning of the clause. When Congress used the term "not subject to any foreign power" in the Civil Rights Act of 1866, it rejected the British conception of allegiance. Senator Trumbull explained that "subject to the jurisdiction thereof" in the clause means not

1 owing allegiance to anybody else. And in 1884,
2 this Court recognized that "subject to the
3 jurisdiction" means owing direct and immediate
4 allegiance.

5 The clause thus does not extend
6 citizenship to the children of temporary visa
7 holders or illegal aliens. Unlike the newly
8 freed slaves, those visitors lack direct and
9 immediate allegiance to the United States. For
10 aliens, lawful domicile is the status that
11 creates the requisite allegiance, and the text
12 of the clause presupposes domicile.

13 For decades following the clause's
14 adoption, commentators recognized that the
15 children of temporary visitors are not citizens
16 and illegal aliens lack the legal capacity to
17 establish domicile here.

18 Unrestricted birthright citizenship
19 contradicts the practice of the overwhelming
20 majority of modern nations. It demeans the
21 priceless and profound gift of American
22 citizenship. It operates as a powerful pull
23 factor for illegal immigration and rewards
24 illegal aliens who not only violate the
25 immigration laws but also jump in front of

1 those who follow the rules.

2 It has spawned a sprawling industry of
3 birth tourism as uncounted thousands of
4 foreigners from potentially hostile nations
5 have flocked to give birth in the United States
6 in recent decades, creating a whole generation
7 of American citizens abroad with no meaningful
8 ties to the United States.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: General Sauer, before
11 we get into the broader national issues, would
12 you start with Dred Scott? Dred Scott was a
13 case about state citizenship. It was a
14 diversity case. The -- and, of course, we know
15 what Chief Justice Taney did with that.

16 How does the Citizenship Clause
17 respond specifically to Dred Scott and
18 answers -- or changes -- or corrects its answer
19 as to citizenship?

20 The other point is the Citizenship
21 Clause refers not just to national citizenship
22 but also to state citizenship. Are we to have
23 two different definitions for those? It's --
24 it's one word, citizens of the United States
25 and citizens of the state wherein you -- they

1 reside.

2 So, as you begin, I'd like you to go
3 back at the beginning and be more specific
4 about the answer. And I want you to explain
5 whether or not those two definitions are the
6 same or related and what state citizenship is
7 based on.

8 GENERAL SAUER: Thank you, Justice
9 Thomas.

10 I'll maybe start by addressing Dred
11 Scott, you know, as -- as you alluded to the
12 fact Dred Scott, you know, imposed one of the
13 worst injustices in the history of -- of this
14 Court and it led to the outbreak of the Civil
15 War. It's very clear, and this Court in all of
16 its early cases interpreting the Fourteenth
17 Amendment said, you know, the one pervading
18 purpose, the main object of the Citizenship
19 Clause, is to overrule dead -- Dred Scott and
20 establish the citizenship of the freed slaves.

21 And if you look at the debates in the
22 Congressional Record and the discussion
23 surrounding the adoption of the Citizenship
24 Clause, what you see is a very clear
25 understanding that the newly freed slaves and

1 their children have a relationship of domicile.
2 They do not have a relationship of any -- to
3 any foreign power. For example, there's a
4 comment where he says, look, people have been
5 here for five generations and no -- clearly
6 have no relationships to any foreign African
7 potentate, you know, are -- have a relationship
8 of allegiance to the United States.

9 And that reinforces our point that
10 allegiance is what the word "jurisdiction"
11 means. It doesn't mean regulatory jurisdiction
12 or -- or -- you know, or sort of being subject,
13 merely subject to the laws. They're talking
14 and they're thinking about it in those debates,
15 about allegiance.

16 Now, as to your second question, if
17 you look at the text of the clause, we believe
18 there -- it says, you know, born in the United
19 States, born or naturalized in the United
20 States and subject to the jurisdiction thereof
21 are citizens of the United States and the
22 states of which they reside. So there's a
23 constitutional guarantee that applies to both
24 federal or national and state citizenship.

25 And the key point we make there is

1 that that word "reside," if you look at, for
2 example, Section 1473 of Justice Story's
3 commentaries, was understood to mean domicile.
4 So, when they say "subject to the jurisdiction"
5 and then they go on to say you're a citizen of
6 the United States and the state in which they
7 reside, the very text of the clause itself
8 presupposes that the citizen is domiciled in
9 the United States. If they're present in a
10 state at all, they reside there. "Reside"
11 means domicile in the Constitution, and we
12 think that strongly supports our
13 interpretation. It's textual evidence of our
14 domicile-based theory of jurisdiction.

15 CHIEF JUSTICE ROBERTS: Well, starting
16 with that theory, you obviously put a lot of
17 weight on "subject to the jurisdiction
18 thereof," but the examples you give to support
19 that strike me as very quirky, you know,
20 children of ambassadors, children of enemies
21 during a hostile invasion, children on
22 warships, and then you expand it to a whole
23 class of illegal aliens are -- are here in the
24 country.

25 I'm not quite sure how you can get to

1 that big group from such tiny and sort of
2 idiosyncratic examples.

3 GENERAL SAUER: There are those sort
4 of narrow exceptions for ambassador, foreign
5 public ships -- "tribal Indians" is an enormous
6 one that they were very focused on in the
7 debates as well.

8 But what I'd do is invite the Court to
9 look at the intervening step, which is the
10 enactment of the Civil Rights Act of 1866.
11 And, there, they didn't say "subject to the
12 jurisdiction thereof." There, it says "not
13 subject to any foreign power." Now, if you go
14 back to Blackstone and Calvin's case, they say
15 it does not matter if you are subject to any
16 foreign power. If you are born in the king's
17 domains, you have this indefeasible duty of
18 allegiance to the king at any time.

19 So there's a clear repudiation in the
20 Civil Rights Act. The Civil Rights Act is this
21 breakwater which makes it very, very clear that
22 they are not thinking about allegiance in the
23 terms of, like, the British common law.
24 They've adopted the Republican conception of
25 allegiance. So it's from "not subject to any

1 foreign power," and then the debates just a
2 couple months later make it very clear that
3 they're re-codifying the same conception. They
4 were dissatisfied with the potential ambiguity
5 in the phrase "Indians not taxed" and they
6 adopted "subject to the jurisdiction thereof."

7 And one of the strongest statements of
8 this is Senator Trumbull's statement that I
9 quoted at the beginning where he says -- he's
10 asked, well, what does that mean, "subject to
11 the jurisdiction thereof." So he says it means
12 not owing allegiance to anybody else. That is
13 what it means.

14 And this Court picked up on that in
15 Elk against Wilkins when it says -- uses, you
16 know, completely subject to the political
17 jurisdiction, not merely regulatory
18 jurisdiction.

19 JUSTICE SOTOMAYOR: What do you do
20 with Wong Kim Ark's quote of Daniel Webster,
21 who said: "Independently of a residence with
22 intention to continue such residence,
23 independently of any domiciliation,
24 independently of the taking of any oath of
25 allegiance or renouncing any former allegiance,

1 it is well-known that by the public law, a
2 non-citizen, while he is here in the United
3 States, owes obedience to this country's laws."

4 Now the examples that Wong Ark Kim
5 used as exceptions are situations in which
6 there was not temporary allegiance to the
7 United States. The children of foreign
8 diplomats, whose only allegiance was to their
9 foreign -- to their foreign country, and/or
10 occupied territory residents, including those
11 citizens in Maine who had been occupied by the
12 British forces, the U.S. had no control over
13 them.

14 And the whole theory of the Indian
15 tribes was similar. The Indian tribes were
16 analogized to foreign diplomats. So what do we
17 do with that?

18 GENERAL SAUER: I'd say two things.
19 First, as to the Indian tribes, we think that's
20 a case that strongly supports us because, of
21 course, by 1866 and 1868, there was strong
22 understanding that the Indian tribes were
23 subject to the United States' regulatory
24 jurisdiction.

25 JUSTICE SOTOMAYOR: But not the same

1 way that temporary foreigners were, meaning
2 there was a real debate going on whether the
3 U.S. actually had jurisdiction over Indian
4 tribes. That's why our cases for the longest
5 time, until that was finally settled, said
6 absent some act of Congress, there is -- our
7 laws don't apply, U.S. laws don't apply, to
8 Indians on Indian lands, correct?

9 GENERAL SAUER: I believe you look at
10 the Rogers decision, for example, that we cite
11 in our brief, where -- where they say that they
12 are subject to the United States' regulatory --

13 JUSTICE SOTOMAYOR: That's later. I'm
14 talking at the time.

15 GENERAL SAUER: Yes, at the time. So,
16 as to 1817 --

17 JUSTICE SOTOMAYOR: All right. So
18 what do you do during the debates of the 1866
19 Civil Rights Act and of the Fourteenth
20 Amendment with the entire discussion of the
21 people who opposed the amendment who kept
22 saying we can't pass it because we're making
23 citizens of gypsies, who have no allegiance to
24 anybody, and we're now -- we're going to make
25 citizens of Chinese people, who can't be

1 citizens because we're not going to permit them
2 to be citizens.

3 What do we do with those debates and
4 the fact that the proponents of both acts said
5 everyone who's born in the U.S. will be
6 citizens?

7 GENERAL SAUER: First, as to that
8 particular exchange, page 2890 of the
9 Congressional Record from 1866, Senator Cowan
10 gives this virulently racist statement where he
11 says that. And what does he say right at the
12 beginning of that -- that sort of offensive
13 speech? He says -- he says, we can't have
14 children of gypsies, children of Chinese
15 immigrants, we can't have them become citizens,
16 and he says: "Have they any more rights than a
17 sojourner in the United States?"

18 So he's trying to persuade the
19 Republicans to his view by appealing to a
20 common understanding that sojourners do not
21 have children who become citizens.

22 JUSTICE SOTOMAYOR: He failed.

23 GENERAL SAUER: So there's powerful
24 evidence there that everybody understood this
25 to, you know, not sweep in the temporary

1 sojourner, and that's why you see for 40, 50
2 years, you see every commentator who addressed
3 the specific question of temporary presence
4 saying it's not covered by the clause,
5 including for decades after Wong Kim Ark.

6 JUSTICE ALITO: General, can I take
7 you back to the Chief Justice's question about
8 the specific exceptions to birthright
9 citizenship that everybody seems to agree were
10 recognized under the common law.

11 And it brings up an important
12 principle about how we interpret the law. When
13 particular problems pop up, lawmakers may enact
14 a general rule. When they do that, is the
15 application of that general rule limited only
16 to the situations that they had in mind when
17 they adopted the general rule, or do we say
18 they adopted a general rule, they meant for
19 that to apply to later applications that might
20 come up?

21 Justice Scalia had an example that
22 dealt with this situation. He imagined an old
23 theft statute that was enacted well before
24 anybody conceived of a microwave oven, and then
25 afterwards someone is charged with the crime of

1 stealing a microwave oven, and this -- this
2 fellow says: Well, I can't be convicted under
3 this because a microwave oven didn't exist at
4 that time.

5 And he dismissed that. There's a
6 general rule there and you apply it to future
7 applications. And what we're dealing with here
8 is something that was basically unknown at the
9 time when the Fourteenth Amendment was adopted,
10 which is illegal immigration.

11 So how do we deal with that situation
12 when we have a general rule?

13 GENERAL SAUER: Yeah, I strongly agree
14 with the way that you framed it, that there is
15 a general principle that's a broad principle
16 that's adopted in the phrase "subject to the
17 jurisdiction thereof."

18 And we submit that our theory of
19 allegiance and domicile-based allegiance is
20 what explains those specific exceptions that
21 everybody was aware of, but it is broad enough
22 to sweep in future situations. And, as you
23 pointed out, illegal immigration did not exist
24 then.

25 Now the problem of temporary visitors

1 did exist. And it's very interesting that as
2 you look at pages 26 to 28 of our brief,
3 commentators going from, you know, 1881 until
4 1922 are uniformly saying that children of
5 temporary visitors are not included.

6 Now that logic, we say, naturally
7 extends. It's really an a fortiori case. If
8 you have someone who enters illegally, by the
9 1880s, there are restrictions on immigration.
10 If you've entered illegally, it's kind of, you
11 know, a well-established principle of law going
12 back to the Code of Justinian that says you're
13 not allowed to be there, you cannot -- you
14 don't have the legal capacity to create
15 domicile there.

16 JUSTICE KAGAN: But I think, General
17 Sauer, that what you just said suggests that
18 you can't be arguing in the way Justice Alito
19 suggests because most of your brief is not
20 about illegal aliens. Most of your brief is
21 about people who are just temporarily in the
22 country, where there was quite clearly an
23 experience of, an understanding of, that they
24 were going to be temporary inhabitants.

25 And your whole theory of the case is

1 built on that group. You don't get to talking
2 about undocumented persons until quite later
3 and at much lesser, you know, I think it's like
4 10 pages to three pages or something like that.

5 So you can't really be going with
6 Justice Alito's theory. You must be saying
7 that there is a principle that developed --
8 that was there in -- at the time of the
9 Fourteenth Amendment, isn't that right?

10 GENERAL SAUER: We agree there's a
11 principle there at the Fourteenth Amendment.
12 It is the -- jurisdiction means allegiance.
13 The allegiance of a -- it is very strongly
14 reflected in 19th century sources. The
15 allegiance of an alien present in another
16 country is determined by domicile.

17 And that goes back to The Venus and
18 The Pizarro, it goes through the Koszta Affair
19 in 1853, it comes right up to Fong Yue Ting and
20 Lau Ow Bew that are decided shortly before Wong
21 Kim Ark. So that's the principle. That
22 principle clearly applies here. I also
23 respectfully disagree with that. I think --

24 JUSTICE KAGAN: Yeah, and I guess,
25 Mr. -- General Sauer, you know, where does this

1 principle come from, allegiance, domicile?
2 Allegiance, I think you point to a Lincoln
3 funeral speech as your primary example of where
4 this principle comes from.

5 It's certainly not what we think of
6 when we think of the word "jurisdiction." And
7 I appreciate that jurisdiction has many
8 meanings, but, you know, the first meaning is,
9 like, if you're subject to jurisdiction, you're
10 subject to the authority of.

11 One doesn't say, oh, what that means
12 is a certain kind of allegiance that
13 domiciliaries have and nobody else does. So
14 the text of the clause, I think, does not
15 support you. I think you're sort of looking
16 for some more technical, esoteric meaning.

17 And then the question comes, okay, if
18 the text doesn't support you, if there's a real
19 history of people using it that way, but as far
20 as I can tell, you know, at the time of the
21 Fourteenth -- you're -- you're -- you're using
22 some pretty obscure sources to get to this
23 concept.

24 GENERAL SAUER: Well, I take it
25 straight from the Framers' mouths. So, for

1 example, Senator Trumbull said -- was asked,
2 what does jurisdiction mean? It means subject
3 to the jurisdiction. He says, what does that
4 mean? He says, it means not owing allegiance
5 to anybody else. He is the principal framer of
6 the Civil Rights Act of 1866.

7 Representative Bingham, who's the
8 framer of the Fourteenth Amendment, is asked
9 what -- what does it mean in the Congressional
10 Record at page 1291, and he says, "within the
11 jurisdiction of the United States of parents
12 not owning allegiance to any foreign
13 sovereignty." And we've cited many, many
14 examples where the congressional debates
15 reflect that.

16 Then you referred to the oration of
17 George Bancroft. That's one of probably 16
18 sources where there's at least 13, counting
19 that one and the 12 treatises we cite at pages
20 26 to 28 of our brief.

21 There is over a dozen sources that
22 specifically address temporary sojourners in
23 the five decades after the enactment of the
24 amendment, and every single one of them says,
25 well, temporary sojourners, their children are

1 not included, including for two decades after
2 Wong Kim Ark. So --

3 JUSTICE GORSUCH: General, if -- if
4 domicile is the key linchpin to your argument,
5 and I take it that it is, do we look at how
6 domicile was understood in 1868, or do we look
7 at it and how it's understood today in context
8 of the INA?

9 GENERAL SAUER: The 1868
10 understanding. Now I'm not aware of a strong
11 difference between those, but --

12 JUSTICE GORSUCH: Well, here's where
13 I'm going with it. I'm just working within
14 your argument for a moment.

15 Today, you can point to laws against
16 immigration that are much more restrictive than
17 they were in 18- -- we really didn't have laws
18 like that, we do today, until maybe 1880. So,
19 if somebody showed up here in 1868 and
20 established domicile, that was perfectly fine
21 without respect to anything, any -- any
22 immigration laws. There they were.

23 And so why wouldn't we, even if we
24 were to apply your own test, come to the
25 conclusion that the fact that someone might be

1 illegal is immaterial?

2 GENERAL SAUER: I would first cite
3 Wong Kim Ark on that point because Wong Kim Ark
4 says you're --

5 JUSTICE GORSUCH: Well, I'm not sure
6 how much you want to rely on Wong Kim Ark.

7 (Laughter.)

8 GENERAL SAUER: But that -- that
9 statement -- there is a statement in there that
10 says so long as they are permitted to be here.
11 So Wong Kim Ark -- keep in mind that by the
12 time they decide nine -- nine -- Wong Kim Ark
13 in 1898 --

14 JUSTICE GORSUCH: I know, but
15 you're -- but that's 1898. Now I'm looking at
16 1868, you're telling me is when I should look,
17 in the test for domicile, and -- and -- and the
18 stuff you have about "unlawfully present" is
19 like Roman law sources you're going to, and --

20 GENERAL SAUER: First and Second
21 Restatements as well and --

22 JUSTICE GORSUCH: Yeah, but -- but --

23 GENERAL SAUER: -- and decisions of
24 this Court. Go -- sorry, go ahead.

25 JUSTICE GORSUCH: Yeah, but -- so it

1 wouldn't be the INA that would control whether
2 you're -- you're capable of having domicile; it
3 would be whatever the law was in 1868?

4 GENERAL SAUER: I -- well, I think
5 that this is addressed by my exchange with
6 Justice Alito from earlier, which is that this
7 concept, jurisdiction, baking in --

8 JUSTICE GORSUCH: So -- so --

9 GENERAL SAUER: -- allegiance and
10 domicile as applied to --

11 JUSTICE GORSUCH: -- so Congress could
12 continually restrict who may lawfully be
13 present more and more, and you would say that
14 would be incorporated into it even though
15 you're telling us to apply the original meaning
16 of 1868?

17 GENERAL SAUER: The original meaning
18 of "domicile."

19 JUSTICE GORSUCH: Okay.

20 GENERAL SAUER: And so the question is
21 did --

22 JUSTICE GORSUCH: Who -- who --

23 GENERAL SAUER: -- is there any
24 argument that the Framers intended to preclude
25 Congress from dictating who can and who cannot

1 establish a lawful domicile here? I don't see
2 any evidence of that in the Congressional
3 Record, so it's a natural extension.

4 JUSTICE GORSUCH: Whose domicile --

5 JUSTICE JACKSON: But --

6 JUSTICE GORSUCH: -- matters? I mean,
7 it's not the child obviously. It's --
8 you're -- it's the parents you'd have us focus
9 on. And, you know, what if -- is it the
10 husband? Is it the wife? What if they're
11 unmarried? Who -- whose domicile?

12 GENERAL SAUER: Well, in -- in the
13 Executive Order, it draws a distinction between
14 the mother and the father, and it's really the
15 mother's domicile, I think, that would matter
16 there because that's the first --

17 JUSTICE GORSUCH: Well, but 1868
18 matters, you're telling us. So what's --
19 what's the answer?

20 GENERAL SAUER: The 1868 sources talk
21 about parents. I'm not aware of them drawing a
22 distinction between mother or father, but they
23 say the domicile of the child follows the
24 domicile of the parents.

25 JUSTICE GORSUCH: And how are we going

1 to determine domicile? I mean, would we use
2 contemporary sources on what qualifies as
3 domicile in a state, or do we look in 1868, and
4 do we have to do this for every single person?

5 GENERAL SAUER: And, again, I don't
6 see a strong distinction between those because,
7 of course, domicile as a -- a high-level
8 concept has been pretty consistent over
9 centuries, which is lawful presence with the
10 intent to remain permanently. That --
11 domicile, when you've come to a new nation, you
12 say I'm here to stay, you become part of their
13 political community, and you become akin to a
14 citizen. And that's reflected very strongly in
15 the cases I cited before.

16 JUSTICE GORSUCH: And just to circle
17 back to Justice Kagan's point, it's striking
18 that in none of the debates do we have parents
19 discussed. We -- we have the -- the child's
20 citizenship, and the focus of the clause is on
21 the child, not on the parents. And you don't
22 see domicile mentioned in -- in the debates.

23 That -- the absence is striking.

24 GENERAL SAUER: I think the 19th
25 century sources would say a child, a newborn

1 child, lacks the capacity to form a domicile,
2 so they're imputed the domicile of their
3 parents. So I don't think they would have seen
4 a distinction between children and parents.

5 And I'd point out that their -- their
6 position, like ours, is forced to look at the
7 domicile of the parents because, if you look at
8 the exceptions that they accept, like --

9 JUSTICE GORSUCH: I'm talk -- I'm
10 talking about in --

11 GENERAL SAUER: -- tribal Indians and
12 so forth --

13 JUSTICE GORSUCH: -- I'm talking about
14 in the debates over the Fourteenth Amendment
15 and -- and the Civil Rights Act, it's striking
16 that these concepts aren't discussed in them.

17 GENERAL SAUER: I think domicile is
18 discussed. I mean, it's -- it's brought up in
19 many --

20 JUSTICE GORSUCH: Allegiance,
21 jurisdiction, complete jurisdiction.

22 GENERAL SAUER: Well, I mean, here's
23 just a few examples: Page 1679 of the
24 Congressional Record, President Johnson vetoes
25 the first version of the Civil Rights Act, and

1 he says, I'm -- I can't sign this because it
2 would extend alien -- citizenship to the
3 children of "all domiciled aliens and
4 foreigners, even if not naturalized."

5 And you have all the other sources
6 that we cited that say when it -- and this
7 goes -- I mean, this is a deeply rooted 19th
8 century understanding. It's reflected in *The*
9 *Venus*, it's reflected in *The Pizarro* in 1814
10 and 1817. It carries through the 19th century,
11 and this Court is talking about it in 1892 and
12 1893 when it's discussing the Chinese Exclusion
13 Act. Domicile is the key concept that creates
14 allegiance. That's a --

15 JUSTICE JACKSON: General -- General,
16 so can I --

17 JUSTICE BARRETT: General, you -- you
18 said in your reply brief that the children of
19 slaves who were brought here unlawfully, you
20 know, in -- in -- in defiance of laws
21 forbidding the slave trade, would, in fact, be
22 citizens.

23 GENERAL SAUER: Yes.

24 JUSTICE BARRETT: And you can imagine
25 that their parents were not only brought here

1 in violation of United States law but were here
2 against their will and so maybe felt allegiance
3 to the countries where they were from. And you
4 say that the purpose of the Fourteenth
5 Amendment was to put all slaves on equal
6 footing, newly freed slaves on equal footing,
7 and so they would be citizens.

8 But that's not textual. So how do
9 you -- how do you get there? You say it in
10 just a few sentences, so can you elaborate?

11 GENERAL SAUER: Sure. If you look at
12 the nine -- I think, if you look at the 19th
13 century sources, what you see is that even
14 though their entry may have been unlawful, 19th
15 century antebellum law never treated their
16 presence as unlawful. In fact, quite the
17 opposite. One of the amici, in fact, points
18 to, like, a Mississippi statute, which probably
19 is replicated throughout the South before the
20 Civil War, that says slaves in Mississippi have
21 an indefeasible domicile in Mississippi. In
22 other words, even if they run away, if they get
23 away, Mississippi says, nope, you still live
24 here. Right?

25 And so it would be astonishing, in

1 other words, for the opponents of the
2 Fourteenth Amendment to say, oh, you know,
3 these people were not domiciled and, therefore,
4 it goes the other way because, actually, U.S.
5 law, even if they were -- even if they were
6 brought in illegally and unlaw -- you know,
7 through an illegal slave trade, once they were
8 there, by U.S. law, they --

9 JUSTICE BARRETT: Well, their intent
10 is to return as soon as they can, let's say.
11 So they're -- they're here, they're resident,
12 and maybe under your theory, I mean, which
13 says, well, lawfulness for a different purpose,
14 but they're here, they're resident. Let's --
15 let's take your assumption that they're not
16 here unlawfully.

17 Let's say they don't have an intent to
18 stay. They want to escape and go back the
19 second they can. Are they domiciled?

20 GENERAL SAUER: Under the 19th century
21 law. I mean, I think this is the flip side of
22 the hypothetical that we talked about earlier.
23 Under 19th century law, they are treated as
24 domiciled in the United States, so it would be
25 astonishing. And -- and the debates on the

1 congressional floor talk about not this
2 specific case, but they say, look, slaves who
3 have been forced to come here and have been
4 here are lawfully domiciled here. And they
5 don't use the way as "domiciled" like they
6 have; they use "allegiance." They say they
7 don't have allegiance to -- once they've been
8 forced to come here, they don't have allegiance
9 to any foreign or African potentate and,
10 therefore, they're --

11 JUSTICE JACKSON: But, General, that
12 goes to --

13 JUSTICE BARRETT: How would that apply
14 to human -- the children of illegally
15 trafficked people today? Would the same
16 reasoning apply?

17 GENERAL SAUER: It would turn on
18 whether the parents -- the parents are lawfully
19 domiciled in the United States.

20 JUSTICE BARRETT: So, if they're
21 brought in illegally, but then they choose to
22 remain and they want to remain and they're
23 domiciled, you would say that their lawful
24 presence is not dictated by whether they were
25 brought here lawfully or not, and that's

1 different from someone who, say, crosses the
2 border unlawfully?

3 GENERAL SAUER: Yeah, I think it would
4 turn on whether their presence is lawful. And
5 I would --

6 JUSTICE JACKSON: General, can I --

7 GENERAL SAUER: In other words,
8 obviously, there are many -- many other
9 important things that could be done to assist
10 people like that. The question is, if they
11 give birth to someone in the United States, is
12 that person naturally a citizen? That would
13 turn based on the original public meaning of
14 the clause on the lawfulness of their presence,
15 are they domiciled.

16 JUSTICE JACKSON: General, can I ask
17 you a question? To follow up on what Justice
18 Gorsuch was exploring with you with respect to
19 domicile, did I understand you to say that
20 domicile is going to be eventually or is
21 controlled by Congress, who is domiciled?
22 I'm -- I'm struggling to figure out who is
23 domiciled in your argument.

24 GENERAL SAUER: The domiciliaries are
25 people who are lawfully present and have an

1 intent to remain permanently. So that's the
2 kind of black-letter, you know, understanding
3 of domicile.

4 Now Congress can dictate that certain
5 classes of people, illegal entrants and so
6 forth, cannot lawfully -- lack the legal
7 capacity to form a legally binding domicile.

8 JUSTICE JACKSON: But, if that's so,
9 then doesn't it make the domicile for the
10 purpose of the Fourteenth Amendment turn then
11 ultimately on Congress's will in a way that the
12 Framers did not intend? I mean, my
13 understanding was the Framers put this
14 Citizenship Clause into the Constitution to
15 prevent future Congresses from being able to
16 affect citizenship in this way.

17 GENERAL SAUER: May I respond?

18 CHIEF JUSTICE ROBERTS: Sure.

19 GENERAL SAUER: Very briefly, no, I
20 don't think so because it is up to the alien
21 whether or not they want to be domiciled here.
22 Now there may be clearer --

23 JUSTICE JACKSON: But I thought you
24 just said Congress can -- can -- can make
25 determinations as to who counts as being

1 domiciled here.

2 GENERAL SAUER: Yeah, in this --

3 JUSTICE JACKSON: So, if that's true,
4 then it ultimately would impact, in your
5 theory, whether or not this person can claim
6 that they have citizenship for Fourteenth
7 Amendment purposes based on Congress's
8 determination. And I just thought that's what
9 the Fourteenth Amendment was trying to get away
10 from.

11 GENERAL SAUER: If I may?

12 CHIEF JUSTICE ROBERTS: Yes, please.

13 GENERAL SAUER: Very briefly, I'd just
14 point -- point you to the discussion in
15 Professor Wurman's amicus brief where he talks
16 about that this is not a new problem. Going
17 back even to the British common law, there's
18 the situation of people who lack a safe conduct
19 and are passing through the king's domains
20 without permission, and he says the best
21 reading of the common law is they are not under
22 the protection of the king and they're not
23 covered by the rule of birthright citizenship.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 You mentioned in your -- your briefing
2 and also this morning the problem of birth
3 tourism. Do you have any information about how
4 common that is or how significant a problem it
5 is?

6 GENERAL SAUER: It's a great question.
7 No one knows for sure. There's a March 9th
8 letter from a number of members of Congress to
9 DHS saying do we have any information about
10 this. The -- the -- the -- the media reports
11 indicate estimates could be over one -- a
12 million or 1.5 million from the People's
13 Republic of China alone.

14 The -- the Congressional Report that
15 we cite in our brief talks about certain hot
16 spots like Russian elites coming to Miami
17 through these birth tourism companies.

18 And, I mean, here's -- here's --
19 here's a fact about it that I think is
20 striking. Media reported as early as 2015 that
21 based on Chinese media reports, there are
22 500 -- 500 birth tourism companies in the
23 People's Republic of China whose business is to
24 bring people here to give birth and return
25 to -- to that nation.

1 CHIEF JUSTICE ROBERTS: Having said
2 all that, you do agree that that has no impact
3 on the legal analysis before us?

4 GENERAL SAUER: I think it's -- I
5 quote what Justice Scalia said in his Hamdan
6 dissent, where they had -- where, like, their
7 interpretation has these implications that
8 could not possibly have been approved by the
9 19th century Framers of this amendment. I
10 think that shows that they've made a mess --
11 their interpretation has made a mess of the
12 provision.

13 CHIEF JUSTICE ROBERTS: Well, it
14 certainly wasn't a problem in the 19th century.

15 GENERAL SAUER: No, but, of course,
16 we're -- we're in a new world now, as Justice
17 Alito pointed out to, where 8 billion people
18 are one plane ride away from having a -- a
19 child who's a U.S. citizen.

20 CHIEF JUSTICE ROBERTS: Well, it's a
21 new world. It's the same Constitution.

22 (Laughter.)

23 GENERAL SAUER: It is. And, as
24 Justice Scalia said, I think, in the case that
25 Justice Alito was referring to, you've got a

1 constitutional provision that addresses certain
2 evils and it should be extended to reasonably
3 comparable evils. He said that about statutory
4 interpretation. I think the same principle
5 applies here, and I think we quote that in our
6 brief.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas, anything further?

9 JUSTICE THOMAS: General, you're
10 getting a lot of questions about immigration,
11 and they harken back, of course, to
12 citizenship, which is defined in or set out in
13 the Fourteenth Amendment.

14 How much of the debates around the
15 Fourteenth Amendment had anything to do with
16 immigration?

17 GENERAL SAUER: I think that the
18 principal focus of those debates has to do
19 really not with immigrants but with the Indian
20 tribes. I mean, obviously, the main goal, the
21 one pervading purpose, as this Court said in
22 the Slaughter-House cases, was to establish the
23 citizenship of the freed slaves and their
24 children.

25 But they were very concerned about

1 the -- the -- the -- the problem of something
2 that they all accepted as a given, which is
3 that the children of tribal Indians are not
4 within the rule of birthright citizenship.

5 So I think that's what they focus on.
6 We draw an analogy to that too, the issue of
7 temporary sojourners. And then -- but there
8 are mentions of temporary sojourning multiple
9 places in the congressional debates, and all of
10 those quotes go in our direction.

11 JUSTICE THOMAS: And there was --
12 Justice Sotomayor brought up Wong Kim Ark.
13 There was no question in that case that --
14 about domicile, was there?

15 GENERAL SAUER: I disagree. The Court
16 says at the very beginning of its opinion here
17 are the accepted facts. These are lawfully
18 domiciled here. When it states the question
19 presented, it talks about domicile.

20 When it recites the legal principle at
21 page 693, it says "domicile" three times. And
22 at page 705 at the end of the opinion, it says
23 here's the single question we've decided.
24 We've decided that Chinese immigrants with a
25 permanent domicile and residence here fall

1 within the rule of birthright citizenship.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Under the minimum
4 definition of "domicile," which I think existed
5 in 1868 and continues to exist today, a
6 person's domicile is the place where he or she
7 intends to make a permanent home.

8 Now, normally, you would think that a
9 person who is subject to arrest at any time and
10 removal could not establish a domicile, but we
11 have an unusual situation here because our
12 immigration laws have been ineffectively and,
13 in some instances, unenthusiastically enforced
14 by federal officials.

15 So there are people who are subject to
16 removal at any time if they are apprehended and
17 they go through the proper procedures, but they
18 have in their minds made a permanent home here
19 and have established roots, and that raises a
20 humanitarian problem, and I wonder if you
21 could -- you could address that.

22 GENERAL SAUER: If I may, one legal
23 and one humanitarian. The legal point is, if
24 you look at those cases, for example, Carson
25 against Reid, Park against Barr, this Court's

1 decisions in Elkins and Toll against Moreno,
2 they talk about the legal capacity to -- you
3 know, to -- to create a domicile excluding
4 someone who may have the subjective intent,
5 which otherwise would be determinative, as
6 being excluded.

7 On the humanitarian point, I would
8 point out, as I said at the beginning, Justice
9 Alito, that the United States' rule of nearly
10 unrestricted birthright citizenship is an
11 outlier among modern nations. It's a very
12 small minority of nations that have that rule.

13 For example, every -- every nation in
14 Europe has a different rule. And the notion
15 that they have a huge humanitarian crisis as a
16 result of not having unrestricted birthright
17 citizenship, I don't think, is a strong
18 argument.

19 And I'd point out, obviously, for --
20 you know, for -- for -- for reliance-related
21 reasons, this Executive Order applies only
22 prospectively. And we ask the Court to rule
23 only prospectively.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: I agree with you
2 what the European nations' rule is, but England
3 was always different, wasn't it?

4 GENERAL SAUER: Not until 1983 it
5 changed to the -- to the --

6 JUSTICE SOTOMAYOR: That's not quite
7 true. The Wong Kim Ark does a wonderful job of
8 laying out the English rule. And you claim it
9 was different, but there isn't any treatises or
10 scholars who say it's different. English rule
11 was always by birth. Other people were not
12 by -- other countries were not by birth.

13 Let me just go to the implications of
14 what you're asking us to do. You are asking us
15 to overrule Wong Kim Ark. Well, there, Wong
16 Kim Ark's parents were domiciled in the U.S.,
17 but they owed loyalty to China. They
18 eventually returned to China.

19 So they didn't have a primary
20 allegiance to the United States. So you're not
21 asking that. Are you asking us to overrule
22 then our cases, one of which said that a child
23 of illegal aliens could be -- was a citizen?
24 You're asking us to overrule that?

25 GENERAL SAUER: No. First of all,

1 we're not asking you to overrule Wong Kim Ark.

2 We agree with the holding of Wong Kim Ark --

3 JUSTICE SOTOMAYOR: But you are asking
4 us to --

5 GENERAL SAUER: -- and much of the
6 reasoning, and -- and then, as to those later
7 cases starting in 1966 where the Court makes
8 sort of, you know, unreasoned references to
9 this issue, we think --

10 JUSTICE SOTOMAYOR: Wait a minute.
11 Hintopoulos, the reference -- the respondent
12 unlawfully overstayed her visa and gave birth
13 to a child here. The Court, Harlan II, wrote:
14 The child is, of course, an American citizen.
15 That person wasn't domiciled here lawfully.

16 GENERAL SAUER: Yeah. We --

17 JUSTICE SOTOMAYOR: So you're asking
18 us to overrule that case?

19 GENERAL SAUER: I wouldn't call --
20 I -- I wouldn't say we're asking you to
21 overrule. We think that's similar to a
22 drive-by jurisdictional ruling where there's a
23 simple statement that's not debated, there's no
24 further analysis of it, there's really an
25 assumption there, and we think that's similar

1 to cases where the Court just assumes
2 jurisdiction without discussing it.

3 JUSTICE SOTOMAYOR: When we ruled in
4 Thind that Indians could not become citizens,
5 the government then after began to unnaturalize
6 many Indians who had been sworn in as citizens.

7 You asked us to concentrate only on
8 the prospective nature of the citizens order,
9 but the logic of your position, if accepted, is
10 that the next president -- this president or
11 the next president or a Congress or someone
12 else could decide that it shouldn't be
13 prospective. There would be nothing limiting
14 that according to your theory.

15 GENERAL SAUER: If, as we ask, the
16 Court confines its ruling to prospective relief
17 only, which I take exception to that --

18 JUSTICE SOTOMAYOR: No, I'm saying to
19 you don't -- yeah, that's what you're asking us
20 for relief right now. I'm asking whether the
21 logic of your theory would permit what happened
22 after the Court's decision in Thind, that the
23 government could move to unnaturalize people
24 who were born here of illegal residents.

25 GENERAL SAUER: No. We believe the

1 Court should do what it did in Sessions against
2 Morales-Santana, where there was a -- a ruling
3 that would have deprived people who were
4 already citizens of citizenship, and the Court
5 said this applies prospectively only, and we
6 think that's the appropriate course here.

7 JUSTICE SOTOMAYOR: Well, but that's
8 not what we did in Thind.

9 GENERAL SAUER: We think that Sessions
10 provides the -- the proper course here. And
11 that's what we're asking. We are not asking
12 for any retroactive relief.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: General, I think even
15 your brief concedes that the position you're
16 taking now is a revisionist one with respect to
17 a substantial part of our history.

18 And I think that that's in large part
19 because of Wong Kim Ark and the way people have
20 read that case, which, of course, was in the
21 late 19th century, and have read it ever since
22 then. And what that case suggests is -- I
23 mean, there's a very clear rationale. You say,
24 oh, it says the word "domicile" a bunch of
25 times, which it does. It's a long opinion. It

1 says a lot of things.

2 But the rationale of the case is
3 really quite clear. It says there was this
4 common law tradition. It came from England.
5 We know what it was. Everybody got citizenship
6 by birth except for a few discrete categories,
7 which were the ones that the Chief Justice
8 mentioned at the beginning.

9 And that tradition carried over to the
10 United States. And then what the Fourteenth
11 Amendment did was accept that tradition and not
12 attempt to place any limitations on it.

13 And so that was the clear rationale, a
14 clear rationale that is diametrically different
15 from your rationale. And everybody took Wong
16 Kim Ark to say that and to say that, as a
17 result of that, of course, birthright
18 citizenship was the rule. And I think
19 everybody has believed that for a long, long
20 time.

21 And I guess my question is this. You
22 have a story about what -- about the reasons
23 why we should go back to what you view as the
24 original meaning, and given the long history of
25 this country's understanding about birthright

1 citizenship, what would it take -- what do you
2 think it should take to accept that story in
3 terms of the -- the magnitude of the evidence
4 that we would need to see in order to accept
5 this revisionist theory and in order to change
6 what I think people have thought the rule was
7 for more than a century?

8 GENERAL SAUER: Let me make two points
9 in response to that, one historical and one
10 legal. Historical point: I disagree with the
11 way you've characterized the understanding of
12 Wong Kim Ark. And I would point to something
13 that's emphasized in their amici's briefs,
14 which is, in 1921, Richard Flournoy, who
15 becomes a senior State Department official in
16 the Roosevelt administration and pushes their
17 theory as to temporary sojourners, writes a Law
18 Review article in 1921 where he says: I think
19 that children of temporary visitors should be
20 citizens. But he admits that is not the
21 understanding of Wong Kim Ark. He admits Wong
22 Kim Ark did not hold that.

23 And he admits that there's an array of
24 authorities that go against him. He talks
25 about careful and reliable, high authorities.

1 And that's referring to the consensus that we
2 point out in pages 26 to 28 of our brief, where
3 you've got 12 treatises from 1881 to 1922 that
4 all say -- including for decades after Wong Kim
5 Ark, that say children of temporary sojourners
6 are not included.

7 What happens between 1921 and the
8 1930s? Well, Mr. Flournoy became a senior
9 State Department official, and he adopted that
10 as the policy of the Roosevelt administration.

11 So their argument is basically saying
12 there wasn't this consensus going back to 1898.
13 The consensus, as their own author admits, goes
14 entirely in the opposite direction for 50
15 years, right? For 50 years, from the framing
16 of the clause, through the 1920s, maybe 60
17 years, the general understanding when it comes
18 to what's at issue here and was not at issue in
19 Wong Kim Ark is that children of temporary
20 visitors do not become citizens under the
21 clause.

22 And then the legal point, you -- you
23 referred to the sort of concept of temporary
24 and local allegiance, and they rely on The
25 Schooner Exchange, this theory that you've got

1 temporary and local allegiance. But, if you
2 actually look -- look at page 572 of the
3 Congressional Record, right at the beginning
4 introducing the Civil Rights Act, Senator
5 Trumbull says: I said not subject to any
6 foreign power. I wanted to say born in the
7 United States and, you know, owing allegiance
8 to the United States, but I was aware that
9 there's "a sort of allegiance for persons
10 temporary resident in the United States whom we
11 have no right to make citizens."

12 So Senator Trumbull says: The reason
13 I haven't adopted the language and meaning that
14 they say should be packed into these provisions
15 is that everybody knows that the children of
16 temporary visitors should not be citizens.

17 JUSTICE KAGAN: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: Just to follow up
21 on -- on that point, General, one interesting
22 counterpoint about the understanding of Wong
23 Kim Ark that followed with respect to temporary
24 sojourners -- and I -- I take you've got
25 your -- your well-taken points -- but there

1 was, of course, John Marshall Harlan, the great
2 dissenter, who dissented in Wong Kim Ark and
3 later gave a bunch of lectures.

4 And he -- he posed the question about
5 the sojourners: Suppose an English father and
6 mother went down to the hot springs to get rid
7 of the gout, and while there, they have a
8 child, now back in England. Is that child a
9 citizen of the United States born of the
10 jurisdiction thereof by mere accident of birth?
11 And he says: Under Wong Kim Ark, he is. And
12 he continues: I was one of the minority, and,
13 of course, I was wrong.

14 Now I -- I'm sure that was
15 tongue-in-cheek, but what do you do with that?

16 GENERAL SAUER: I draw the -- I mean,
17 I'd say two things in response to that. First
18 of all, he gave a speech, but we have 12
19 uncontradicted treatises that say the opposite,
20 that that is not what Wong Kim Ark means and
21 that's not the meaning of the clause.

22 But also, I'd make a more fundamental
23 point. When you're looking at Wong Kim Ark,
24 one of the -- the dissent has this dominant
25 theme that -- really predominant theme, like,

1 you can't be doing this because you can't make
2 the -- the -- we all agree or it's obvious that
3 the children of temporary resident -- temporary
4 visitors do not become citizens.

5 And how does the majority opinion
6 address that? It says "domicile" three times
7 when it recites the legal rule. It says
8 permanent residents and domicile when it
9 decides the holding. So the Court should be
10 bound by what it says. This is what we're
11 deciding.

12 And, again, at page 75, it says this
13 is the single question -- now there's been a
14 lot of discussion up to that point, but at the
15 very end, they say the single question we've
16 decided is the citizenship status of the
17 children of Chinese immigrants with a -- a
18 permanent residence and domicile in the United
19 States.

20 JUSTICE GORSUCH: Do you think Native
21 Americans today are birthright citizens under
22 your test and under your friend's test?

23 GENERAL SAUER: I think so. I mean,
24 obviously, they've been granted citizenship by
25 statute.

1 JUSTICE GORSUCH: Put -- put aside the
2 statute.

3 GENERAL SAUER: Yeah.

4 JUSTICE GORSUCH: Do you think they're
5 birthright citizens?

6 GENERAL SAUER: No, I think the -- the
7 clear understanding that everybody agrees in
8 the congressional debates is that the children
9 of tribal Indians are not birthright citizens.

10 JUSTICE GORSUCH: I understand that's
11 what they said, but your test is the domicile
12 of the parents, and that would be the test
13 you'd have us apply today, right?

14 GENERAL SAUER: Yes. Yes. So, if a
15 tribal Indian, for example --

16 JUSTICE GORSUCH: Are tribal members
17 born --

18 GENERAL SAUER: -- you know, gives up
19 allegiance to --

20 JUSTICE GORSUCH: -- born today
21 birthright citizens?

22 GENERAL SAUER: I think so on our
23 test, yeah, if they're lawfully domiciled here.

24 JUSTICE GORSUCH: Okay. And then --

25 GENERAL SAUER: I'm not sure -- I have

1 to think that through, but -- but --

2 JUSTICE GORSUCH: I'll take the --

3 GENERAL SAUER: -- that's my reaction.

4 JUSTICE GORSUCH: -- I'll take the
5 yes. That's all right.

6 (Laughter.)

7 JUSTICE GORSUCH: And then I just want
8 to ask you quickly about the INA adopted in
9 1940 and 1952. It uses the same term as the
10 Citizenship Clause. And one might have a
11 pretty good argument -- I'm sure you've got
12 some arguments along just these lines -- that
13 it should be understood to mean whatever it
14 meant in 1868.

15 Well, there was a lot of water over
16 the dam between those two things. And as your
17 brief points out, by the Roosevelt
18 administration, there's a pretty strong jus
19 soli move, that is to say that the thin concept
20 of jurisdiction, power over, is enough, a
21 broader understanding of birthright.

22 Would there be an argument for reading
23 that statute under its original plain meaning
24 at the time, 1940, 1952, to perhaps have a
25 different meaning than the Constitution?

1 GENERAL SAUER: We don't think that's
2 the best interpretation referred to. I give
3 two reasons. One is it would be very
4 surprising if a statute that says exactly the
5 constitutional phrase, "subject to the
6 jurisdiction thereof," were interpreted to mean
7 something totally different or to ossify a
8 then-current misunderstanding of the clause.

9 We think that the -- that the best
10 analogy here is probably state long-arm
11 statutes. Take a sort of non-controversial
12 example, state long-arm statutes routinely say
13 we're going to exercise personal jurisdiction
14 to the extent of due process. It takes the
15 constitutional standard and it puts it in -- in
16 the statute. And nobody thinks that those
17 ossify -- you know, are limited to the
18 precedents, this Court's precedents at the time
19 they were enacted. Everyone thinks that that
20 phrase "due process" incorporates, you know,
21 the developing law of due process and minimum
22 contacts and so forth, including from this
23 Court.

24 So we think that's the best analogy
25 when it's -- when you're looking at the

1 constitutional phrase itself and you take it
2 out of a -- a freighted context, the natural
3 interpretation is to say this means what --
4 this reflects the objective meaning of the
5 Constitution, and the objective meaning of the
6 Constitution is its original public meaning in
7 1866 and 1868.

8 JUSTICE GORSUCH: Do you see any
9 notable counterpoints to that argument?

10 GENERAL SAUER: I'm sure there are
11 arguments on the other side. We've addressed
12 them in the brief.

13 JUSTICE GORSUCH: So -- so, really, at
14 the end of the day then, this is a straight-up
15 constitutional ruling you want from this Court,
16 win or -- win, lose, or draw?

17 GENERAL SAUER: Yeah. We -- we -- we
18 think that the statute and the Constitution
19 means the same thing. If the Court disagrees,
20 obviously, we'd prefer an adverse ruling if the
21 Court's going to do that on a statutory basis
22 than a constitutional basis --

23 JUSTICE GORSUCH: Well, but you've
24 just disavowed that in -- in your responses to
25 me by saying that that's not an available

1 option, is the way I understood it.

2 GENERAL SAUER: Right. Yes. The
3 Court would have to disagree with our statutory
4 position, which is that it means the same thing
5 as the Constitution. But, if the Court were to
6 do that, then the natural course would probably
7 be to rule on statutory grounds alone. Now we
8 think they mean the same thing, and we've got
9 arguments for that, including, I think, the
10 analogy I just referenced.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

14 JUSTICE KAVANAUGH: General, how
15 should we think about the text of the
16 Fourteenth Amendment, "subject to the
17 jurisdiction thereof," as distinct from the
18 different language of the Civil Rights Act of
19 1866, which refers, as you know, to "persons
20 not subject to any foreign power?"

21 Those texts are on their face
22 different, and the history that Justice Kagan
23 referred to might have developed quite a bit
24 differently if the Fourteenth Amendment's text
25 had used the phrase that was in the Civil

1 Rights Act.

2 GENERAL SAUER: That's an excellent
3 point. And this Court has held in multiple
4 cases -- Hurd against Hodge and General
5 Building Contractors -- has recognized that
6 they're intended and they did mean the same
7 thing. And that's powerfully reinforced by the
8 congressional debates, where you -- really,
9 what they're discussing is they said they were
10 dissatisfied with the language in the Civil
11 Rights Act because the phrase "Indians not
12 taxed" they thought was ambiguous. And so they
13 switched to the affirmative statement as
14 opposed to the negative statement, the
15 affirmative statement, "subject to the
16 jurisdiction thereof," but there's express
17 statements in the Congressional Record
18 essentially that were doing the same thing.
19 And that is what this Court's case law has
20 reflected.

21 JUSTICE KAVANAUGH: Why didn't they
22 say the same thing?

23 GENERAL SAUER: Again, it appears they
24 preferred the sort of positive formulation,
25 "subject to the jurisdiction thereof," as

1 opposed to "not subject to any foreign power."
2 And, again, there's a deep concern and lengthy
3 discussion of the potential ambiguity in the
4 Civil Rights Act. They wanted to eliminate an
5 ambiguity but do the same thing. And I think
6 that that's -- that's very strongly reflected
7 in those debates.

8 JUSTICE KAVANAUGH: By the time of the
9 1940 and 1952 congressional actions where
10 Congress repeats "subject to the jurisdiction
11 thereof," given Wong Kim Ark, one might have
12 expected Congress to use a different phrase if
13 it wanted to try to disagree with Wong Kim Ark
14 on what the scope of birthright citizenship or
15 the scope of citizenship should be.

16 And yet Congress repeats that same
17 language, knowing what the interpretation had
18 been. So how are we to think about that?

19 GENERAL SAUER: I think baked into
20 that question is an understanding, I think,
21 that was reflected in Justice Kagan's earlier
22 question that everybody understood that Wong
23 Kim Ark meant that, and the history I talked
24 about, I think, refutes that, that, really,
25 there's a consensus that goes our way for

1 decades and decades after the adoption of the
2 amendment and after Wong Kim Ark on the
3 specific question of the children of temporary
4 visitors, and -- and it's really not until --
5 and, again, their author in 1921 is saying,
6 hey, the other side is the consensus.

7 JUSTICE KAVANAUGH: Do you -- I'm
8 sorry to interrupt.

9 GENERAL SAUER: Yeah, sorry, go ahead.

10 JUSTICE KAVANAUGH: But there's
11 Executive Branch interpretations and others.
12 And if -- if you're in Congress in 1940 and
13 1952 and you want to limit the scope of Wong
14 Kim Ark or to eliminate ambiguity, why do you
15 repeat the same language rather than choosing
16 something different?

17 For example, you could use the
18 language from the Civil Rights Act of 1866 or
19 some similar formulation if your idea in 1940
20 and 1952 was to not have ambiguity or not have
21 an overly broad scope.

22 GENERAL SAUER: I think -- I think, if
23 you look at the structure of that statute where
24 it's 1401(a) and then (b) through (h), (a), it
25 says these are the people who are entitled to

1 birthright citizenship. (A) is the
2 constitutional standard, and then (b) through
3 (h) are all the categories that Congress has
4 super-added to that.

5 I think the natural inference is that
6 Congress is codifying, which it was consciously
7 doing in 1941, pulling all the naturalization
8 rules and immigration rules together into one
9 statute and said, you go to one place, here's
10 who's -- who -- who is a birthright citizen;
11 (a) those who are guaranteed that right by the
12 Citizenship Clause, and (b) through (h) are the
13 ones that Congress has added through its
14 naturalization power.

15 So that inference to me says (a) is
16 merely -- it's not trying to change or alter
17 the constitutional standard. It's just saying,
18 hey, the baseline is what the Constitution
19 says, and we -- we codify that and then we move
20 on to the new categories.

21 JUSTICE KAVANAUGH: Of what relevance,
22 if any, do you think Section 5 of the
23 Fourteenth Amendment has here that gives
24 Congress the power to enforce the article, the
25 Fourteenth Amendment, by appropriate

1 legislation? Does that give Congress room
2 here, or do you not think so?

3 GENERAL SAUER: I -- I do think that a
4 ruling in our favor would leave room for
5 Congress. I -- I don't think you have to rely
6 on Section 5. I think that Congress has its
7 own inherent power to grant citizenship by
8 statute.

9 So, if the Court were to rule in our
10 favor for the classes of individuals that they
11 say should be covered, Congress has the
12 latitude to do that.

13 JUSTICE KAVANAUGH: How much room do
14 you think Section 5 gives, if any -- and it may
15 not be any -- Congress to interpret the phrase
16 "subject to the jurisdiction thereof" or to
17 define that? Does it -- is that -- is that
18 relevant at all?

19 GENERAL SAUER: It's a great question,
20 and I'm thinking about it for the first time.
21 I assume it would be governed by the congruence
22 and proportionality test from this Court's case
23 law. How that would apply here, I don't know.
24 And I don't think it's presented because our
25 contention is that the statute means exactly

1 the same thing. If anything is congruent and
2 proportional, it's that. And I think the Court
3 held that in United States against Georgia.

4 JUSTICE KAVANAUGH: You've mentioned
5 several times the practices of other countries,
6 and that, obviously, as a policy matter
7 supports what you're arguing here. But,
8 obviously, we try to interpret American law
9 with American precedent based on American
10 history. That's certainly what I try to do and
11 I think you try to do.

12 And so why should we be thinking
13 about, even though as a policy matter I get the
14 point, thinking about, gee, European countries
15 don't have this or most other countries, many
16 other countries in the world don't have this?

17 Doesn't that -- I guess I'm not seeing
18 the relevance as a legal constitutional
19 interpretive matter necessarily, although I
20 understand it's a very good point as a policy
21 matter.

22 GENERAL SAUER: Yeah. I -- I largely
23 agree with that. And you can view it as being
24 raised preemptively defensively. I'm going
25 first, but, obviously, the other side and their

1 amici say -- you know, make prediction --
2 end-of-the world-type predictions, and our
3 point is, you know, it's a very small minority
4 because almost every country and, certainly,
5 all -- all European countries have a different
6 rule, and the world hasn't ended there.

7 JUSTICE KAVANAUGH: The other side --
8 last one. The other side relies heavily, of
9 course, on Wong Kim Ark, and you disagree with
10 their interpretation.

11 Oftentimes, when you are dealing with
12 a constitutional precedent like this, you might
13 argue we disagree with that interpretation, but
14 if you adopt their interpretation or agree with
15 their interpretation of that precedent, you
16 should overrule it.

17 And you're -- you haven't made that
18 argument here, and I'm just giving you an
19 opportunity to explain why you haven't.

20 GENERAL SAUER: Because we think it's
21 totally unambiguous in Wong Kim Ark that the
22 holding is -- relates to domiciled aliens. And
23 so we strongly agree with the holding. We
24 think domicile was the touchstone, and we think
25 it's not a coincidence for the reasons I -- I

1 maybe speculated a little bit when I was
2 talking with Justice Gorsuch about, you know,
3 how the dissent raises this and then the
4 majority's like, well, we're putting domicile
5 in there so we know that the absurd conclusion
6 that they say would come from this isn't there.

7 But also, domicile has kind of the
8 sort of relationship that creates this
9 relationship of allegiance that makes you part
10 of a political community if you're an alien
11 from another country.

12 That's deeply rooted in their
13 understanding where they're doing it -- they
14 talk about domicile in Yick Wo against Hopkins,
15 in 1892 and 1893 cases, and there's this deeply
16 rooted understanding again that goes all the
17 way back to the early 19th century.

18 So we think that's a really important
19 conception. So I -- I -- I mean, we disagree
20 with some of the dicta in Wong Kim Ark that we
21 discuss and we think there's dicta that goes
22 our way that the other side overlooks, and
23 we're not asking the Court to overrule dicta.
24 We just say don't follow erroneous dicta and
25 don't apply it to this brand-new situation that

1 was not decided in Wong Kim Ark.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: So, General Sauer, I
6 want to zoom out a little bit and think about
7 jus soli and jus sanguinis. So, as I
8 understand it, at the time of the Fourteenth
9 Amendment, those were the two dominant
10 approaches. You know, jus soli, the English
11 common law, roughly following the soil, jus
12 sanguinis, roughly citizenship following the
13 parents.

14 Now jus soli was very generous on the
15 soil, the English common law, and so it
16 extended citizenship to those born there who
17 may not have been born of parent citizens, but
18 jus sanguinis, you know, if parents who are
19 citizens and had a child abroad, then that
20 child's citizenship followed the parents.

21 So one thing that's puzzling me about
22 your argument when I think about the
23 ratification of the Fourteenth Amendment, in
24 many ways, it would have made sense for them --
25 and you -- you acknowledge the jus sanguinis in

1 citing Vitel. It would have made sense in some
2 ways for them to say, okay, we're going to
3 follow -- if they wanted to accomplish what
4 you're saying they wanted to accomplish, you
5 could say, well, we're going to follow jus
6 sanguinis because we're going to make it all
7 ride on parentage. But, instead, I mean, the
8 Fourteenth Amendment we're talking about
9 "subject to the jurisdiction thereof," but it
10 also says "born in the United States."

11 So you have the jus soli kind of point
12 there, but you're saying it narrowed that point
13 by tying it to the citizenship of the parents
14 at least as to soil, but I take it you're not
15 arguing that United States citizens who have
16 children born abroad would qualify for
17 birthright citizenship.

18 So it's -- it's kind of a narrower
19 view of both the traditional jus soli rule and
20 a narrow -- narrower view of the jus sanguinis
21 rule. So why would they have done that, and if
22 they were going to invent an entirely new kind
23 of citizenship, like an American brand, why
24 wouldn't we have seen more discussion of that
25 in the debates?

1 GENERAL SAUER: I think you do.
2 And -- and, honestly, I think the right way to
3 conceptualize it, it is much more -- it is a
4 modified jus soli because even the British
5 sources don't just say you're born here, you're
6 a citizen. They say you're born here and you
7 have to be under the protection of the
8 sovereign, you have to have a relationship of
9 allegiance. "Allegiance" is the word in
10 Calvin's case that provided the backstop.

11 JUSTICE BARRETT: But they don't focus
12 on the parents. It's the child. And your
13 approach focuses on the parents' allegiance.

14 GENERAL SAUER: Yeah, I'm not sure
15 that that's true of the two sources, but --

16 JUSTICE BARRETT: Well, it seems a
17 little ambiguous, and I'm going to ask your
18 friend on the other side that question.

19 GENERAL SAUER: Let me -- let me point
20 out then that there are two criteria. One is
21 birth on the soil and the other is legiance or
22 allegiance. What we have is birth on the soil
23 remains the same, right, and -- and so they
24 are, and that's why so much of Wong Kim Ark is
25 actually, we agree with because they are

1 adopting a modified British rule. They are not
2 going the French rule, you know, that Vitel
3 talks about, where it's like who's -- who's the
4 citizen. That had to be done by statute, as
5 you pointed out, which it was in 1401.

6 But what they've got is they say
7 "birth in the United States" and "subject to
8 the jurisdiction thereof." That is talked
9 about as allegiance, allegiance, allegiance, in
10 the congressional debates. But they were
11 clearly not incorporating the British feudal
12 monarchial conception of allegiance, where it's
13 infeasible.

14 I mean, going back to the early 1700s,
15 our -- our nation had repudiated the notion
16 that citizenship is infeasible. The
17 expatriation statutes for the late 1700s
18 reflect that. And -- and -- and, again, you
19 look at the 1868 Congressional Report that we
20 cite, there, this is the same group of -- group
21 of congressmen, Republican congressmen, and
22 they say things like the U.S. Constitution
23 itself is proof that Blackstone's theory of
24 allegiance was not accepted.

25 So they accept birth on U.S. soil, but

1 then they take the concept of allegiance and
2 give it its Republican/Democratic/American
3 understanding, and that's very, very -- I think
4 that makes a ton of sense.

5 JUSTICE BARRETT: Okay. And let's
6 talk about its application. So, you know,
7 there are some -- I can imagine it being messy
8 in some applications. So how -- what would you
9 do with what the common law called
10 "foundlings"? You know, the -- the thing about
11 this is then you have to adjudicate if you're
12 looking at parents and if you're looking at
13 parents' domicile, then you have to adjudicate
14 both residence and intent to stay. What if you
15 don't know who the parents are?

16 GENERAL SAUER: I think -- I think
17 there are marginal cases. That one, I think,
18 has the benefit of being addressed in 1401(f),
19 where it talks about --

20 JUSTICE BARRETT: Yeah, yeah, yeah,
21 yeah, but what about the Constitution?

22 GENERAL SAUER: Under the
23 Constitution, it's -- it's -- I mean, look,
24 the -- "domicile" is a constitutional standard
25 in all kinds of other situations --

1 JUSTICE BARRETT: Well, and it's hard.

2 I mean --

3 GENERAL SAUER: -- diversity
4 jurisdiction, personal jurisdiction -- sorry.

5 JUSTICE BARRETT: Well, yeah, in
6 personal jurisdiction, I mean, 1332, diversity
7 jurisdiction. And the thing is it has to be
8 litigated because it turns on intent, and
9 both -- the virtue of both jus soli and jus
10 sanguinis, whichever one you pick, it's a
11 bright-line rule.

12 How would it work? How would you
13 adjudicate these cases? You're not going to
14 know at the time of birth for some people
15 whether they have the intent to stay or not,
16 including -- including U.S. citizens, by the
17 way.

18 I mean, what if you have someone who
19 is living in Norway with, you know, their --
20 their husband and family but is still a U.S.
21 citizen, comes home and has her child here and
22 goes back? How do we know whether the child is
23 a U.S. citizen because the parent didn't have
24 an intent to stay?

25 GENERAL SAUER: I'd say -- make two

1 points, one practical, one legal. The
2 practical point is, under the terms of this
3 Executive Order, you don't have to because the
4 Executive Order turns on an objectively
5 verifiable thing, which is immigration status.
6 Are you lawfully present but temporarily
7 present, or are -- do you have an illegal
8 status? So those kind of, like, you know,
9 taking evidence, so to speak, under subjective
10 intent wouldn't be done.

11 And as to the constitutional point,
12 obviously, domicile is baked into a lot of
13 constitutional and legal concepts, and there --
14 there may be situations where facts are
15 determined. But, if you look at the guidance,
16 the guidance that all the agencies did after
17 this Court in CASA said the agency could go
18 forward and issue guidance, the guidance
19 provides, I think, very, very clear, objective,
20 verifiable approaches to -- to doing this.

21 And -- and so the -- as a practical
22 matter, I don't think it's presented by this
23 Executive Order.

24 JUSTICE BARRETT: Thank you, General.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Good morning,
3 General. So I guess I am looking at your
4 position in this case, and it boils down to
5 requiring us to do at least these two things:
6 One is believe that the Framers were not
7 importing the common law rule and understanding
8 of birthright citizenship, and the second is to
9 believe that what they were doing was departing
10 from that common law rule in the way that you
11 suggest, that is, in the -- they were seeking
12 to have this turn on domicile.

13 I think you have a number of hurdles
14 to accomplish those two things, one of which, I
15 think, is that when we look at this Court's
16 case law -- no one, I think, has mentioned
17 Schooner's Exchange, but it appears -- that was
18 a 19- -- an 1812 case in which it seems as
19 though the Court had already accepted at the
20 time of the ratification of the Fourteenth
21 Amendment that the allegiance that you're
22 talking about was the English common law rule,
23 that, in other words, allegiance meant that you
24 are covered by the laws of the jurisdiction,
25 that you can rely on that jurisdiction's

1 protection. That's what allegiance meant.

2 Now you're saying today, no, no,
3 allegiance meant something about loyalty or
4 that kind of idea. But, if the Supreme Court
5 had, prior to the Fourteenth Amendment,
6 established that allegiance meant the common
7 law definition, I think your first hurdle is to
8 help us understand why we would believe that
9 when the common -- when the Fourteenth
10 Amendment was ratified, the Framers weren't
11 just incorporating what we had previously said
12 it meant.

13 GENERAL SAUER: Page 572 of the
14 Congressional Record directly addresses this.
15 They say the concept of temporary and local
16 allegiance from The Schooner Exchange is what
17 is meant by -- or temporary and local
18 jurisdiction from The Schooner Exchange is what
19 is meant by the word "jurisdiction" in the
20 Fourteenth Amendment.

21 Senator Trumbull says: I thought
22 about saying owing allegiance, but, again,
23 "there's a sort of allegiance from persons
24 temporarily resident in the United States whom
25 we have no right to make citizens." So he

1 expressly and consciously --

2 JUSTICE JACKSON: Okay. But what --

3 GENERAL SAUER: -- rejected reliance
4 on Schooner Exchange.

5 JUSTICE JACKSON: -- what do we do
6 with -- I mean, that's a debate and it's a
7 discussion, very valid, but then we have a
8 subsequent debate between Fessenden and Wade
9 where the same concept comes up and it becomes
10 clear at least from Senator Wade's perspective
11 that that's wrong.

12 So Senate -- Fessenden -- and I'm not
13 sure whether these are senators, I apologize --
14 Fessenden says: Suppose a person is born here
15 of parents from abroad temporarily in this
16 country. Wade responds: The Senator says a
17 person may be born here and not be a citizen.
18 I know that is so in one instance, in the case
19 of the children of foreign ministers who reside
20 near the United States, et cetera, et cetera.

21 So it appears as though, in that
22 exchange, at least Senator Wade believed that
23 the English common law understanding of what it
24 means to have allegiance, to be a temporary
25 person on the soil, was what was being adopted.

1 GENERAL SAUER: Yeah. That concept or
2 that exchange strongly supports us. If you
3 look at it in context, Senator Wade has
4 introduced a version that says only birth on
5 U.S. soil and doesn't have any allegiance or
6 jurisdictional element to it.

7 And so Senator Fessenden stands up and
8 says, well, that can't be right because, you
9 know, obviously, what about the children of
10 temporary visitors? It has this -- you know,
11 it's another one of these statements that has
12 this appeal to a background understanding that
13 we all agree that the temporary visitors, their
14 children do not become citizens.

15 And then Senator Wade has to kind of
16 backtrack and say, well, what about the
17 children of ambassadors? And, in the end,
18 Congress does not adopt Senator Wade's
19 proposal. So we think that, to the extent you
20 can draw an inference from that, the inference
21 strongly supports us.

22 JUSTICE JACKSON: All right. Well,
23 let me just ask you about why we wouldn't see
24 in the Fourteenth Amendment anything about
25 parental allegiance. Several of my colleagues

1 have talked about the fact that your view of
2 this turns on what the status of the parents
3 are and not the child, as would the "born in
4 the United States" view of it.

5 What -- can you help us understand why
6 we wouldn't expect to see a mention of parents
7 in the text of this amendment?

8 GENERAL SAUER: I think it was well
9 understood that, for example, children
10 cannot -- you know, newborns cannot form
11 domicile. So it followed every 19th century --

12 JUSTICE JACKSON: That assumes
13 domicile is in the test. And I'm asking you,
14 how do we know that Congress did adopt the test
15 that you say it adopted?

16 GENERAL SAUER: Yeah, when you're
17 looking at 19th century conceptions of
18 allegiance, the notion that the allegiance --
19 again, you say "domicile" is instantiating the
20 concept of allegiance for aliens as opposed to
21 citizen. All of that, the 19th century
22 understands the newborn's domicile, its
23 allegiance, follows the allegiance of the
24 parents.

25 And I'd point out that their theory

1 relies on parental allegiance as well because
2 they recognize the exceptions for, you know,
3 hostile invading armies, for tribal Indians,
4 for ambassadors. Again, the child's allegiance
5 status, even on their view --

6 JUSTICE JACKSON: All right. But what
7 do -- what do we do --

8 GENERAL SAUER: -- turns on the status
9 of the parent.

10 JUSTICE JACKSON: -- what do we do
11 with -- with Professor Muller's amicus brief
12 and the historical record and the fact that
13 even at times in this country where we
14 understood that the parents were declared
15 enemies of the United States -- I'm talking
16 about World War II and Japanese internment --
17 babies born in that circumstance were given
18 birthright citizenship? So it seems as though
19 this concept of allegiance of the parents
20 really wasn't driving birthright citizenship at
21 least at this period of -- of our history.

22 GENERAL SAUER: We --

23 JUSTICE JACKSON: So are you saying
24 this is wrong or they shouldn't have gotten
25 birthright citizenship?

1 GENERAL SAUER: Well, if they were
2 domiciled here, yes, they should have. If they
3 were temporarily present, then no.

4 But -- but the executive practice we
5 can see --

6 JUSTICE JACKSON: Can I -- I'm sorry.
7 How does --

8 GENERAL SAUER: -- from the 1930s.

9 JUSTICE JACKSON: -- how does the
10 temporary presence run with your concept of
11 allegiance? I'm not sure I understand. So can
12 you be clear? Are you saying that only people
13 who are domiciled here as you define it can
14 form the necessary loyalty to the United
15 States?

16 GENERAL SAUER: It's not a --
17 allegiance is not a question of subjective
18 loyalty.

19 JUSTICE JACKSON: Okay.

20 GENERAL SAUER: You owe. It is
21 something you owe. It's a reciprocal
22 relationship between the citizen. Whether they
23 want it or not, they have that allegiance. And
24 I think it's powerfully --

25 JUSTICE JACKSON: On the basis of

1 what?

2 GENERAL SAUER: Domicile. I mean,
3 that's what it says in so many words in The
4 Venus and The Pizarro. It says, look, if
5 you're talking about an alien, if they're just
6 temporarily passing through, no, they don't
7 have allegiance. But, if they've made it their
8 permanent home, they become part of our
9 political community, and they are analogous or
10 akin to --

11 JUSTICE JACKSON: Yeah.

12 GENERAL SAUER: -- citizens.

13 JUSTICE JACKSON: All right. Just
14 quickly because I'm -- I'm mindful of the time,
15 what do you do with Wong -- Wong Kim Ark's
16 statement that birthright citizenship is -- is
17 applying "independently of a residence with
18 intention to continue such residence
19 independently of any domiciliation"? I know
20 that they used "domicile." It's a fact in the
21 case. But that's not a part of their holding.
22 It's not what the reasoning turns on. Correct?

23 GENERAL SAUER: I believe you're --
24 yeah, I believe you're quoting from page 693 of
25 that opinion, and it goes on to say not citizen

1 turns on that but the duty of obedience to our
2 laws. It doesn't take the further step at that
3 point and say, therefore, if you have temporary
4 and local allegiance, you're a citizen. And
5 immediately before that, you have that, page
6 693, summary of the Court's holding where it
7 says --

8 JUSTICE JACKSON: So you say Wong
9 Kim --

10 GENERAL SAUER: -- domicile, domicile,
11 domicile.

12 JUSTICE JACKSON: -- Wong Kim Ark
13 incorporates a domicile requirement?

14 GENERAL SAUER: That is the holding.
15 It's definitely clearly expressed in the
16 holding in multiple places.

17 JUSTICE JACKSON: All right. One
18 final thing. Prospective. You say prospective
19 we're supposed to do this, don't worry about
20 the people who are already here and who would
21 not qualify under your rule.

22 How does this work? Are you
23 suggesting that when a baby is born, people
24 have to have documents, present documents? Is
25 this happening in the delivery room? How are

1 we determining when or whether a newborn child
2 is a citizen of the United States under your
3 rule?

4 GENERAL SAUER: And I think that's
5 directly addressed in the SSA guidance that's
6 cited in our brief. What SSA says is there's
7 currently a system where, for example,
8 secure -- Social Security numbers are generated
9 based on the birth certificate. They say this
10 can still be for the vast majority of instances
11 completely transparent. You will still get
12 a -- because the --

13 JUSTICE JACKSON: Not on transparent.
14 I'm just talking about the particulars because
15 now you say your rule turns on whether the
16 person intended to stay in the United States.
17 And I think Justice Barrett brought this up.

18 So are we bringing pregnant women in
19 for depositions? What -- what are we doing to
20 figure this out?

21 GENERAL SAUER: No. As I pointed out
22 earlier, the Executive Order turns on
23 lawfulness of status. So, if you -- if you --
24 if you give birth to a baby in the hospital
25 right now, it gets the birth certificate in the

1 system. There's a computer system that we
2 talked about that assigns --

3 JUSTICE JACKSON: So there's no
4 opportunity -- there's apparently no
5 opportunity then for the person to prove or to
6 say that they actually intended to stay in the
7 United States?

8 GENERAL SAUER: Absolutely not. The
9 opposite is true. Their opportunity to dispute
10 if they think they were wrongly denied, which
11 would only happen in a tiny minority of
12 cases --

13 JUSTICE JACKSON: After the fact.

14 GENERAL SAUER: -- is directly
15 addressed in that guidance.

16 JUSTICE JACKSON: After the fact --

17 GENERAL SAUER: Yes, yes.

18 JUSTICE JACKSON: -- after their baby
19 has been denied citizenship, then we can go
20 through the process?

21 GENERAL SAUER: Yes. And -- and the
22 way that -- I mean, I'm summarizing because I'm
23 not a expert on computers --

24 JUSTICE JACKSON: Yes.

25 GENERAL SAUER: -- but there's a

1 computer program that currently automatically
2 generates a Social Security number.

3 SSA says, look, a Social Security
4 number, non-citizens can have them if they have
5 work authorization, so it doesn't prove
6 citizenship. We'll give you a Social Security
7 number provided that there's -- the system
8 automatically checks the immigration status of
9 the parents, which there are robust databases
10 for, and then you -- you -- you -- it appears
11 no different to the vast majority of birthing
12 parents.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Wang.

17 ORAL ARGUMENT OF CECILLIA D. WANG

18 ON BEHALF OF THE RESPONDENTS

19 MS. WANG: Mr. Chief Justice, and may
20 it please the Court:

21 Ask any American what our citizenship
22 rule is and they'll tell you, everyone born
23 here is a citizen alike. That rule was
24 enshrined in the Fourteenth Amendment to put it
25 out of the reach of any government official to

1 destroy.

2 When the government tried to strip
3 Mr. Wong Kim Ark's citizenship on largely the
4 same grounds they raise today, this Court said
5 no. Thirty years after ratification, this
6 Court held that the Fourteenth Amendment
7 embodies the English common law rule.
8 Virtually everyone born on U.S. soil is subject
9 to its jurisdiction and is a citizen.

10 It excludes only those cloaked with a
11 fiction of extraterritoriality because they are
12 subject to another sovereign's jurisdiction
13 even when they're in the United States, a
14 closed set of exceptions to an otherwise
15 universal rule.

16 My friend has now clearly said that
17 the government is not asking you to overrule
18 Wong Kim Ark. That is a fatal concession
19 because Wong Kim Ark's controlling rule of
20 decision precludes their parental domicile
21 requirement.

22 The dissent understood that, and the
23 majority tells us six times in the opinion that
24 domicile is irrelevant under common law. Lynch
25 versus Clarke was already the dominant American

1 case on citizenship, and it held that the
2 U.S.-born daughter of temporary visitors from
3 Ireland who took the baby back to Ireland with
4 them, that that daughter was a U.S. citizen.

5 Authorities including Lincoln's
6 attorney general and Kent's commentaries
7 embraced Lynch, and Kent specifically talked
8 about temporary sojourners' children being U.S.
9 citizens. Justice Fields said in 1884 that
10 that reflected the general understanding.

11 That understanding was confirmed by
12 Congress with its 1940 act. The Fourteenth
13 Amendment's fixed bright-line rule has
14 contributed to the growth and thriving of our
15 nation. It comes from text and history. It is
16 workable, and it prevents manipulation.

17 The Executive Order fails on all those
18 counts. Swaths of American laws would be
19 rendered senseless, thousands of American
20 babies will immediately lose their citizenship,
21 and if you credit the government's theory, the
22 citizenship of millions of Americans, past,
23 present, and future, could be called into
24 question.

25 All of this tells us the government's

1 theory is wrong.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: There are five
4 exceptions to citizenship that you do accept.

5 MS. WANG: Yes, depending on how many
6 you count, Justice Thomas, how you count them.

7 JUSTICE THOMAS: What is the
8 underlying rule of law that you use to connect
9 these five exceptions?

10 MS. WANG: Sure. So, as I just said,
11 all of the exceptions involve situations where
12 that U.S.-born child is not subject to the
13 jurisdiction of the United States because that
14 extraterritoriality, the fiction of
15 extraterritoriality, the interaction of another
16 sovereign between the United States'
17 jurisdiction and that person, applies to the
18 child as well as to the parent.

19 Everyone else born in the United
20 States is subject to the United States'
21 jurisdiction. To answer Justice Barrett's
22 question to my friend, that's what sets those
23 exceptions apart from other U.S.-born persons.

24 CHIEF JUSTICE ROBERTS: We -- we've
25 heard a lot of talk about Wong Kim Ark, and you

1 dismiss the use of the word "domicile" in it.
2 It appears in the opinion 20 -- 20 different
3 times and including in the question presented
4 and in the actual legal holding. And the
5 government doesn't want it to be overruled
6 because it relies on -- it's willing to rely on
7 that particular fact in that case.

8 Isn't it at least something to be
9 concerned about to say that since it's
10 discussed 20 different times and has that
11 significant role in the opinion that you can
12 just dismiss it as irrelevant?

13 MS. WANG: Well, Chief Justice,
14 Mr. Chief Justice, I think we have to look at
15 what the controlling rule of decision is in
16 Wong Kim Ark. Justice Gray takes pains in the
17 majority opinion to set out his analysis.

18 He first starts with a premise that in
19 construing the Fourteenth Amendment Citizenship
20 Clause, we look to the English common law.
21 That was the rule that applied from the
22 colonial era on at least for the colonists and
23 for European immigrants.

24 He then says: Look, Chief Justice
25 Marshall tells us in The Schooner Exchange what

1 "subject to the jurisdiction" means, again
2 looking to English common law.

3 Under English common law, if you are
4 born in the dominions of the sovereign, you owe
5 natural allegiance, and those who are present
6 in the dominions of the sovereign owe temporary
7 allegiance for as long as they're present.

8 The only exceptions again at common
9 law were ambassadors, people born on foreign
10 ships, and people who are born during periods
11 of foreign occupation. He then gets to the
12 government's favorite page, 693, where he says,
13 look, we have had this rule in the United
14 States as to citizenship at least for white
15 Americans from before independence.

16 The purpose of the Fourteenth
17 Amendment was to embrace that universal rule of
18 birthright citizenship, to embrace and
19 incorporate the common law exceptions, with the
20 single additional exception of the preexisting
21 exception for tribal Indians that we had in the
22 United States, which is an analogous exception,
23 and that's the closed set of exceptions.

24 You can't make sense of the holding in
25 the case without looking to the controlling

1 rule of decision, which is the common law. And
2 I think my friend agrees that under English
3 common law, domicile was not relevant, and the
4 children born to temporary visitors in the
5 territory of the sovereign were always
6 considered birthright citizens.

7 JUSTICE KAGAN: Well, Ms. Wang, I
8 mean, everything you say strikes me as, yeah,
9 that's -- that's the way I read it too, but
10 then what are those 20 domicile words doing
11 there? Like, you can, you know, take some of
12 them and say I don't know, they were just
13 summarizing the facts of the case, but not all
14 of them. And why did they keep on, like -- why
15 did they sprinkle that in the opinion?

16 MS. WANG: Well, I think, again, that
17 was -- those were the stipulated facts in the
18 case. And it's clear we have textual evidence
19 in the majority opinion that they were simply
20 saying this is an a fortiori application of
21 that controlling rule that comes from the
22 English common law. Justice Gray writes again,
23 after setting out the English common law rule
24 and the exceptions with the single additional
25 exception for children of members of Indian

1 tribes, that the amendment in clear words and
2 manifest intent includes that children born
3 within the territory of the United States of
4 all other persons of whatever race or color
5 domiciled within the United States.

6 And, as was pointed out earlier, the
7 very next part of that same paragraph, he cites
8 to Webster talking about Thrasher's case and he
9 says people who are born in this country owe
10 allegiance independently of residents within --
11 I'm sorry, foreign nationals owe allegiance
12 independently of a residence with the intention
13 to continue such residence independently of any
14 domiciliation and independently of taking any
15 oath of allegiance, which is totally contrary
16 to both the government's theory of dual
17 allegiance or partial allegiance and to the
18 theory of domiciliation.

19 JUSTICE ALITO: I mean, I would -- I
20 might agree with you if "domicile" had simply
21 been sprinkled in the opinion, but in Wong Kim
22 Ark, it's a long opinion, but it begins by
23 saying here's the question, and it ends by
24 coming back to the question, and it says here's
25 the question, stated at the beginning of the

1 opinion: Namely, whether a child born in the
2 United States of parents of Chinese descent who
3 at the time of his birth are subjects of the
4 Emperor of China but have a permanent domicile
5 and residence in the United States and are
6 there carrying on business. And he states the
7 diplomatic exception. And he says, for the
8 reasons above stated, this Court is of the
9 opinion that the question must be answered in
10 the affirmative.

11 So why put "domicile" in? Sometimes
12 it's hard to figure out what is the holding of
13 a case. Here, he tells us, this is the holding
14 of the case. Why put "domicile" in there?

15 MS. WANG: Well --

16 JUSTICE ALITO: It's just something --
17 it's -- it's something irrelevant that he
18 wanted to throw in? It's like, you know,
19 whether a child born in the United States of --
20 of parents of Chinese descent who once resided
21 at a particular address in San Francisco, who
22 attempted to enter the country at the Port of
23 San Francisco, why put it in if it's
24 irrelevant?

25 MS. WANG: Well, Justice Alito, all I

1 can -- I'll give you two responses. The first
2 is that, again, it was a stipulated fact. The
3 second is that, regardless of what the judgment
4 in the case was, which, again, was an a
5 fortiori application of the rule of decision,
6 the rule of decision in Wong Kim Ark has
7 binding precedential effect.

8 Even if you think that Wong Kim Ark
9 decided the case based on the stipulated facts,
10 you have to follow that controlling rule of
11 decision, and if you follow that rule, you get
12 to the same result for people without domicile.

13 Wong Kim Ark says six times in the
14 first parts of the opinion, as well as on the
15 page the government focuses on, that domicile
16 is not relevant, that --

17 JUSTICE GORSUCH: Well --

18 JUSTICE JACKSON: Ms. --

19 JUSTICE GORSUCH: -- Ms. Wang, on --

20 MS. WANG: Sure.

21 JUSTICE GORSUCH: -- on that, what do
22 we do with the fact that, after Wong Kim Ark,
23 at least some authorities took the view that
24 the non-domiciliary question wasn't decided,
25 remained open, and even continued to press the

1 view that domicile is required?

2 Now I know you've got a lot of good
3 stuff on your side too, but what do we do with
4 the fact that it -- many -- many sound legal
5 authorities thought it remained an open
6 question, even if one of them wasn't John
7 Marshall Harlan?

8 MS. WANG: I liked your example from
9 Justice Harlan's lecture here in D.C. So
10 here's what I would say. All of the
11 government's citations in their brief generally
12 either were rejected by Wong Kim Ark expressly
13 if they predated Wong Kim Ark --

14 JUSTICE GORSUCH: I'm talking post.

15 MS. WANG: Post.

16 JUSTICE GORSUCH: If we're trying to
17 understand how the legal community understood
18 what happened in Wong Kim Ark --

19 MS. WANG: Sure.

20 JUSTICE GORSUCH: -- it seems to me
21 it's a mess.

22 MS. WANG: So --

23 JUSTICE GORSUCH: But maybe you can
24 persuade me otherwise.

25 MS. WANG: I -- I think I can, Justice

1 Gorsuch.

2 First, as to the post-Wong Kim Ark
3 authorities that the government cites, each one
4 of them is inconsistent with Wong Kim Ark's
5 reasoning or doesn't mention it at all. Most
6 of them are -- have very little reasoning at
7 all.

8 And, in contrast, what we have on our
9 side post-Wong Kim Ark is numerous federal
10 court decisions around the time of Wong Kim
11 Ark, between ratification and Wong Kim Ark,
12 that said that domicile is not relevant. They
13 cited Lynch versus Clarke, which, again, was
14 about the daughter of temporary sojourners. We
15 have the sixth edition of Kent, which was cited
16 in Wong Kim Ark and, of course, was then cited
17 after Wong Kim Ark was decided by many
18 authorities, again, discussing temporary
19 sojourners.

20 Anyone who wanted to know what the law
21 of citizenship was under the Fourteenth
22 Amendment after Wong Kim Ark would go to the
23 sixth edition of Kent, where he says in that
24 footnote on page 38 that the rule was Lynch
25 versus Clarke and temporary sojourners'

1 children are U.S. citizens.

2 We have members of Congress speaking
3 on the record on debates on immigration laws
4 where they were finally passing these
5 immigration restrictions that Senator Cowan
6 wanted, and they all stated either that Lynch
7 was the rule, that Attorney General Bates had
8 stated the rule, again citing Lynch, or Kent,
9 in stating the rule that everyone born in the
10 U.S. is a citizen and saying, look, children of
11 Chinese immigrants, these immigrants who are
12 unwelcome, these immigrants that Congress is
13 now trying to bar from entering the United
14 States, if -- their children born in the United
15 States are citizens.

16 We have an 1896 -- so a couple years
17 before Wong Kim Ark -- but an 1896 State
18 Department regulation which said the U.S.-born
19 children of foreign nationals are U.S. citizens
20 excepting only the children of ambassadors.

21 And then you have Marshall Woodworth,
22 who was a U.S. attorney who writes in a Law
23 Review article that he -- talking specifically
24 about temporary sojourners' children, and he
25 says: I don't think that's a good rule from a

1 policy perspective, but that's the general
2 rule.

3 JUSTICE GORSUCH: And -- and --

4 JUSTICE ALITO: Ms. Wang, can I --

5 MS. WANG: Yes.

6 JUSTICE GORSUCH: Please.

7 JUSTICE ALITO: Can I offer a possible
8 explanation for why Justice Gray made a point
9 of putting "domicile" in what he said was the
10 holding of the case, and it is this: Wong Kim
11 Ark and his parents, had they come to the
12 United States from Europe, could have been
13 naturalized, but, because they were Chinese,
14 they could not be naturalized. And they had
15 done everything that they could to make
16 themselves Americans by -- by establishing a
17 domicile in the United States.

18 And so that's what this was about.
19 He -- he -- he couldn't get naturalized because
20 of a racist law, but they had done everything
21 they could to become part of the American
22 society. At the time -- at the same time,
23 there were many, many men who were horribly
24 exploited, brought to the United States to work
25 on the transcontinental railroad, to work in

1 mines. They were worked to death. They were
2 treated horrifically. But they were not --
3 they were overwhelmingly men. There wasn't an
4 indication that they were -- they would stay
5 here, they could stay here. They didn't have
6 permanent homes.

7 And the opinion -- and the opinion is
8 drawing a distinction between those two
9 categories of people who would have been well
10 understood at the time when Wong Kim Ark was
11 decided.

12 MS. WANG: No, Justice Alito, I don't
13 think that's a plausible explanation for why
14 domicile is mentioned in Wong Kim Ark because,
15 again, the controlling rule of decision based
16 on the English common law and cases from
17 Schooner Exchange to Lynch versus Clarke to
18 State versus Manuel, which was the North
19 Carolina decision that said, look, the rule in
20 the United States from independence on has been
21 the English common law rule, it's -- that
22 explanation would be inconsistent if --

23 JUSTICE JACKSON: But, Ms. Wang --

24 MS. WANG: Yes?

25 JUSTICE JACKSON: -- isn't -- isn't

1 that explanation -- I -- I take Justice Alito's
2 point, and I think he actually makes a good one
3 in the sense that it could be that Justice Gray
4 emphasized domicile to help the public accept
5 the outcome of this case.

6 You're suggesting that the emphasis on
7 domicile was not a part of the rule, meaning he
8 wasn't saying you had to be like a foreigner
9 who is doing everything they can and who can't
10 be naturalized. But he might have emphasized
11 those facts in this case precisely because
12 Chinese immigrants were unwanted, precisely
13 because he had to get this out into the public
14 and people were going to say: Whoa, you're
15 saying these people have -- this -- this baby
16 has to be a citizen?

17 And so one could imagine that it was
18 important from a standpoint of helping people
19 accept this citizen rule under these
20 circumstances to emphasize that these
21 particular people in this case were in Justice
22 Alito's first category.

23 MS. WANG: I think that is very
24 possible, Justice Jackson. And, as evidence of
25 that, I would point to the fact that if you

1 look at the briefing in Wong Kim Ark, you'll
2 see that even though the parties had stipulated
3 in the -- in the district court that Wong Kim
4 Ark's parents were domiciled in the United
5 States, when the case came to the Supreme
6 Court, the government's brief argued that it
7 was impossible for Chinese immigrants to have
8 domicile because they expressed the view that
9 was common among people who opposed immigration
10 by Chinese nationals to the United States,
11 there was a common view that Chinese people
12 were inherently temporary sojourners in the
13 country.

14 And so I do think it's possible,
15 Justice Alito and Justice Jackson, that he was
16 trying to dispel that notion and tell the
17 government --

18 JUSTICE JACKSON: Absolutely, that at
19 least it reads as though he's trying to make --
20 to -- to -- to calm everyone down. These
21 particular people were domiciled, but we're
22 following the English common law rule. And
23 when you look at the English common law rule,
24 domicile is not a factor.

25 MS. WANG: That's right. I think --

1 you know, who knows why the majority opinion
2 mentioned domicile. We know it's a stipulated
3 fact. We know the government tried to renege
4 on that stipulation and rely on this assumption
5 on the part of anti-Chinese advocates at that
6 time that Chinese people couldn't form a
7 domicile in the United States. And he followed
8 the English common law rule.

9 JUSTICE BARRETT: Ms. Wang, can I --

10 JUSTICE SOTOMAYOR: Counsel --

11 JUSTICE BARRETT: Oh.

12 JUSTICE SOTOMAYOR: Go ahead.

13 JUSTICE BARRETT: I just wanted to ask
14 you a question about how the exceptions fit
15 within the general rule. You've called them
16 exceptions, and some of the common law sources
17 call them exceptions, so I take that point.

18 But, if we think of jus soli as tied
19 to the territory and we look at the exceptions
20 as territorial in a sense, then they seem kind
21 of like natural outgrowths of that rule, and
22 this is what I mean, and -- and -- and this is
23 where I -- I want your help with how the
24 exceptions played out in practice.

25 If you look at Indian reservations as

1 unique places because Indians were
2 quasi-sovereigns, separate nations in the
3 American system, if you look at occupied alien
4 territory as territory that's outside of the
5 jurisdiction of the United States, and then, if
6 you look at the diplomatic exception almost
7 like diplomats and their children have little
8 bubbles around them, like the embassy is really
9 the territory of that country, and even when
10 they're traveling around, they're all not
11 subject to the jurisdiction by virtue of this
12 territorial fiction, are those just
13 applications of the rule?

14 And, if they are, then what happens to
15 alien enemies, like the German spies in Ex
16 parte Quirin, or what happens to Indians who
17 are actually not on the reservation but may be
18 born, say, in Baton Rouge? How does the rule
19 apply in those situations? Does it travel with
20 the person, or is it tied in some sense to the
21 land?

22 MS. WANG: Sure. So let me answer
23 each part in turn.

24 So the thing that all of the
25 exceptions have in common, again, is this sense

1 that the -- the person is -- has this fiction
2 of extraterritorial -- extraterritoriality
3 around them. Let's set aside the Indian tribal
4 exception for a moment and come back to it.

5 So the -- the example of enemy aliens,
6 for example, *Ex parte Quirin*, is one that is
7 answered by Justice Story in both *Inglis* and in
8 *Rice*. And the touchstone under the American
9 application of English common law was that in
10 wartime, the touchstone is whether there's a
11 foreign occupation of U.S. territory. So --

12 JUSTICE BARRETT: And that's -- just
13 to interrupt for one second to clarify.

14 MS. WANG: Sure.

15 JUSTICE BARRETT: And that is
16 territorial. Sometimes -- it just seemed to me
17 that the rule varied. Sometimes it was stated
18 as enemy alien and sometimes it was focused on
19 occupied territory.

20 MS. WANG: Sure. So -- so the rule --
21 I -- I don't think there's a separate rule for
22 enemy aliens. And the government's briefs
23 describe the exception as an enemy alien
24 exception. I -- I don't think that is the best
25 way to think about it.

1 Rice and Inglis tell you that when the
2 British forces are occupying Castine, Maine, no
3 one is subject to U.S. jurisdiction there
4 because Britain is ruling -- is governing
5 Castine, Maine. And Justice Story explains,
6 look, if the U.S. then retakes that territory,
7 people -- babies who are born to U.S. citizens
8 by what he called post-limine become U.S.
9 citizens.

10 So that's -- that's the -- that's the
11 way to think about any wartime situation, enemy
12 aliens or otherwise.

13 As we heard earlier, Professor
14 Muller's amicus brief tells us how we've
15 thought about enemy aliens in wartime. Even in
16 World War II, when the United States was
17 detaining Japanese nationals who were deemed
18 enemy aliens of the United States, when those
19 enemy aliens had babies in these detention
20 camps, everyone agreed that those babies were
21 U.S. citizens.

22 And Professor Muller goes on to
23 explain that, you know, there are many cases of
24 those U.S. citizens going on to a lifetime of
25 government service to the United States.

1 Everyone agrees those babies are U.S. citizens
2 like everyone else. So, again, the touchstone
3 for enemy aliens is --

4 JUSTICE BARRETT: So what about --

5 MS. WANG: -- is there an occupation.

6 JUSTICE BARRETT: -- Indians? What
7 about the Indian who's off the reservation or
8 born off of a reservation?

9 MS. WANG: Sure. So, to start with
10 the basics, the -- I'll refer to the Indian
11 tribal exception just to use the term of art.

12 The Indian tribal exception, Elk
13 versus Wilkins tells us, comes from the
14 constitutionally unique status of Indian
15 tribes. In the Indian Commerce Clause, we know
16 that tribes are treated as basically
17 quasi-sovereign nations. We know that from the
18 Marshall trilogy of cases. We know from
19 Worcester versus Georgia, where Chief Justice
20 Marshall said that the tribes are essentially
21 distinct political communities --

22 JUSTICE BARRETT: Well, I understand
23 all that.

24 MS. WANG: Sure.

25 JUSTICE BARRETT: So just in the

1 interest of time just to --

2 MS. WANG: Sorry.

3 JUSTICE BARRETT: -- to focus you,
4 how -- I understand why the Indians are treated
5 differently for purposes of the law, but I want
6 to know, is it tied to territory or is it tied
7 to the status of someone as a member of a
8 tribe?

9 Because, if -- if you're looking at it
10 because of the special relationship of Indians
11 to the United States as a matter of the
12 Constitution, et cetera, well, I mean, citizens
13 of France are citizens of a different sovereign
14 as well.

15 MS. WANG: Sure. So Elk versus
16 Wilkins doesn't really answer that question.
17 The Court says there are two ways to look at
18 this: Either you look at it as a tribal member
19 is like an ambassador, or you can look at it
20 like there's a territoriality issue where
21 people are born on tribal lands and, therefore,
22 they're essentially, I think he says, Justice
23 Gray says at one point we might as well be
24 talking about someone who's born in Mexico.

25 JUSTICE GORSUCH: Well, there's a lot

1 in Elk --

2 MS. WANG: Sure.

3 JUSTICE GORSUCH: -- and some of it's
4 not terribly helpful for you, it seems to me,
5 because Justice Gray, again, strikes again,
6 says that -- that they may be subject in some
7 degree or respect to the United States.

8 So there's some jurisdiction. He says
9 they're born with -- in the -- in the
10 geographic limits, they are in a geographical
11 sense born in the United States, but, because
12 they are not completely subject to the
13 jurisdiction of the United States and owe
14 allegiance distinct from the United States,
15 that's what takes them outside. And -- and
16 that language sure sounds a lot like the
17 Solicitor General's presentation today.

18 MS. WANG: To the contrary, Justice
19 Gorsuch. I embrace that part of Elk versus
20 Wilkins' holding. Justice Gray, of course,
21 wrote both Wong Kim Ark and --

22 JUSTICE GORSUCH: I know. And it's
23 a -- it's a struggle.

24 (Laughter.)

25 MS. WANG: Sure. Let -- let me try to

1 help you out with that.

2 (Laughter.)

3 MS. WANG: So, you know, the -- the --
4 the -- the government tries to make it seem as
5 though what sets the exceptions apart, what
6 defines the exceptions, is that the government
7 has some maximum theoretical power, the
8 government could have exercised plenary
9 regulatory power over the tribes, and,
10 therefore, that's the same situation as a
11 foreign national in the United States.

12 But that's actually not true, because,
13 remember, if the -- the -- there's always this
14 background notion. Whatever the parameters of
15 the relationship between the United States
16 Government and tribal nations at that time of
17 ratification, there was this constitutionally
18 distinct status of the tribes and tribal
19 members, setting them -- excluding from
20 apportionment, which came -- was, you know,
21 renewed in the Fourteenth Amendment, and that's
22 not true of foreign nationals.

23 If the government were right that the
24 question is what's the maximum theoretical
25 power the government has, there would be no

1 ambassador exception because, of course, the
2 United States could decide in some instance to
3 go ahead and prosecute an ambassador. There
4 would be inter-sovereign comity considerations
5 there. That's how you define the exceptions.

6 And, as Wong Kim Ark says, Elk versus
7 Wilkins has no bearing on the question of
8 foreign nationals.

9 JUSTICE SOTOMAYOR: Ms. Wang, on the
10 earlier answer you gave to Justice Gorsuch on
11 the temporary sojourners' cases, those were
12 distinct cases, correct, where the parents had
13 come to the U.S. and didn't want to give
14 citizenship to their kids, took them out
15 immediately, correct?

16 MS. WANG: I'm sorry, Justice
17 Sotomayor, I'm not sure which cases you're
18 referring to.

19 JUSTICE SOTOMAYOR: All right.
20 I'll -- I'll -- that, we can look it up.

21 MS. WANG: Okay.

22 JUSTICE ALITO: Ms. Wang, would you
23 agree that the citizenship test in the
24 Fourteenth Amendment is the same as the test in
25 the 1866 Civil Rights Act?

1 MS. WANG: So the words are obviously
2 different. What Wong Kim Ark tells us and what
3 the debates tell us is that the Framers, there
4 was -- it was the same Congress, obviously,
5 framing both. Congress was trying to do the
6 same thing with both the 1866 Act and with the
7 Fourteenth Amendment.

8 They wanted to capture the common law
9 exceptions and the Indian tribal exception.
10 They started out with the two separate phrases,
11 "not subject to any foreign power" plus
12 excluding "Indians not taxed."

13 And as Justice Gray described it in
14 his majority opinion in Wong Kim Ark, they
15 decided to switch to the affirmative phrase,
16 "subject to the jurisdiction" and --

17 JUSTICE ALITO: Yeah. Well, do they
18 mean the same thing? And wouldn't it be very
19 odd if the citizenship test in the Fourteenth
20 Amendment were broader than the citizenship
21 test in the 1866 Civil Rights Act, particularly
22 in the light of the fact that the -- the -- the
23 1866 Civil Rights Act was reenacted after the
24 adoption of the Fourteenth Amendment and
25 remained in place until 1940?

1 MS. WANG: Sure. I -- the Framers
2 were trying to do the same thing with the
3 language in both.

4 JUSTICE ALITO: Okay. So then I think
5 we can turn to the language of the 1866 Civil
6 Rights Act because it's more straightforward.
7 You know, "subject to the jurisdiction thereof"
8 is like the -- you know, the puzzle wrapped in
9 an enigma wrapped in a mystery.

10 (Laughter.)

11 JUSTICE ALITO: But "not subject to
12 any foreign power" is pretty straightforward.
13 So let me give you these examples.

14 A boy is born here to an Iranian
15 father who has entered the country illegally.
16 That boy is automatically an Iranian national
17 at birth, and he has a duty to provide military
18 service to the Iranian government. Is he not
19 subject to any foreign power?

20 MS. WANG: Not within the meaning of
21 the 1866 Act, Justice Alito. And that's clear
22 from Wong Kim Ark, and it's clear from the
23 debates. What the Framers meant by the phrase
24 "not subject to any foreign power" was
25 referring to the ambassador exception.

1 If it meant what the government
2 contends, basically, not a subject of any
3 foreign power, that you were -- that another
4 country considers you a jus sanguinis citizen,
5 then lawful permanent residents, all foreign
6 nationals, should be excluded.

7 JUSTICE ALITO: Well, ordinary
8 public -- ordinary public meaning of that would
9 certainly encompass that boy, would it not?

10 MS. WANG: Justice Alito, if you think
11 that the language of the 1866 Act was
12 ambiguous, as Wong Kim Ark says, the shift to
13 the language of the Fourteenth Amendment, which
14 is the operative text, certainly clears up any
15 ambiguity.

16 JUSTICE ALITO: Well, what I said
17 about a boy born to an Iranian father is true
18 of children born here to parents who are
19 nationals of other countries. If I'm correct,
20 it's true to a child who's born here to Russian
21 parents. It's true to a child who's born here
22 to Mexican parents. They're automatically
23 citizens or nationals of those countries and
24 have a duty of -- of military service. It sure
25 seems like that's a -- that makes them subject

1 to a foreign power.

2 MS. WANG: But, again, Justice Alito,
3 that would have meant that the children of
4 Irish, Italian, and other immigrants, which
5 Wong Kim Ark refers to and the debate -- the
6 Framers referred to, would not have been
7 citizens either because, if the only test is
8 whether that U.S.-born child is considered a
9 citizen by another country under their jus
10 sanguinis laws, then no -- no foreign
11 nationals' children would be included in
12 citizenship.

13 JUSTICE ALITO: Well, all of -- in all
14 of those cases, the parents could be
15 naturalized, and then the children would be
16 derivatively nationalized -- naturalized when
17 the -- when the parents were naturalized.

18 Wong Kim Ark -- I'm sorry. The red
19 light is on.

20 CHIEF JUSTICE ROBERTS: Why don't you
21 finish.

22 JUSTICE ALITO: Wong Kim Ark has a
23 passage explaining how this Court should treat
24 dicta, and it quotes something that John
25 Marshall said. "It is well" -- this is quoting

1 from Wong Kim Ark: "It is well to bear in mind
2 the oft-quoted words of Chief Justice Marshall:
3 'It is a maxim not' -- 'maxim not to be
4 disregarded that general expressions in every
5 opinion are to be taken in connection with the
6 case in which those expressions are used. If
7 they go beyond the case, they may be respected
8 but ought not to control the judgment in a
9 subsequent suit when the very point is
10 presented for decision.'"

11 So does that fall within the, you
12 know, "what's good for the goose is good for
13 the gander" rule? That's how Wong Kim Ark
14 treats what was said in the Slaughter-House
15 case -- cases. Should we apply that same rule
16 to Wong Kim Ark itself?

17 MS. WANG: Wong Kim Ark tells you what
18 to make of the Slaughter-House dicta. It was
19 dicta. The issue of citizenship was not at
20 play in Slaughter-House.

21 And in contrast, the parts of the
22 holding -- the parts of the decision that I
23 alluded to are the controlling rule of
24 decision. Again, we look to the English common
25 law in construing the Fourteenth Amendment.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 Anything further, Justice Alito?

5 JUSTICE ALITO: Well, just a couple
6 more questions.

7 So, if those who framed and adopted
8 the Fourteenth Amendment had wanted to limit
9 the citizenship test to just those specific
10 groups that you concede fall outside the
11 birthright citizenship rule, why didn't they
12 refer specifically to those groups? Why did
13 they adopt a general rule? They could have
14 said all persons born or naturalized in the
15 United States, excluding Indians not taxed and
16 those ineligible under common law, are citizens
17 of the United States and of the state wherein
18 they reside. Or they could have said all
19 persons born or naturalized in the United
20 States, excluding Indians not taxed and the
21 children of foreign ambassadors or foreign
22 invaders, are citizens of the United States and
23 of the state wherein they reside. But they
24 didn't do that. They adopted a general rule.
25 So what's the explanation?

1 MS. WANG: I would say the -- Wong Kim
2 Ark tells us what the explanation is, that the
3 Framers of the Fourteenth Amendment, after
4 overriding President Johnson's veto, wanted to
5 adopt a universal rule with a closed set of
6 exceptions, and they believed that "subject to
7 the jurisdiction of the United States" did
8 that. And that term does describe both the
9 universal general rule and the common law
10 exceptions with the sole additional American
11 exception for tribal Indians.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Ms. Wang, I -- I
16 don't -- I've not quite understood the
17 Solicitor General's argument that lawful
18 domicile somehow changes the U.S.'s dominion
19 over a person or allegiance. Even in Justice
20 Alito's examples, if your parents are Iranian,
21 if you get permanent -- lawful permanent
22 residency here, that child still, by their
23 laws, when it leaves the United States, must
24 serve in the Iranian Army, correct?

25 MS. WANG: Well, I -- I don't know the

1 answer to that. What I can tell you is that
2 under Wong Kim Ark, the Court says we don't
3 care about problems of dual nationality. We
4 don't look to other countries' laws in
5 construing our Fourteenth Amendment.

6 JUSTICE SOTOMAYOR: Well, it was
7 undisputed there that Wong Kim Ark's parents
8 owed loyalties to China, correct?

9 MS. WANG: Sure. Yes. I --

10 JUSTICE SOTOMAYOR: What I'm saying
11 is, even if you become a permanent resident,
12 you're not a U.S. citizen.

13 MS. WANG: Correct. I --

14 JUSTICE SOTOMAYOR: So your primary
15 loyalty still remains with your citizenship
16 country, wherever you came from.

17 MS. WANG: That's right, Justice
18 Sotomayor. I take your point now.

19 JUSTICE SOTOMAYOR: And you understand
20 what I'm saying. And during temporary --
21 whether it's lawful or unlawful, temporary
22 presence in the United States, you are subject
23 to the U.S. laws, correct?

24 MS. WANG: That's right. The -- the
25 question that the Fourteenth Amendment asks is

1 whether the U.S.-born child is subject to U.S.
2 jurisdiction when they're born.

3 JUSTICE SOTOMAYOR: Meaning are they
4 within the U.S. territory?

5 MS. WANG: Exactly. Other than people
6 covered by that closed set of exceptions.

7 JUSTICE SOTOMAYOR: Okay. Thank you.

8 MS. WANG: That's right. The -- in
9 other words, the -- the government's rule,
10 which really is looking at whether someone has
11 a divided allegiance because they're a citizen
12 of another country, would exclude the children
13 of all foreign nationals, and that isn't what
14 they're saying.

15 JUSTICE SOTOMAYOR: Exactly. So the
16 only way that allegiance, lawful or unlawful,
17 can -- has no play in this question?

18 MS. WANG: I would say that the
19 relevance of allegiance is the relevance under
20 the English common law rule that's embodied in
21 the Fourteenth Amendment. All persons born in
22 the territory of the sovereign owe natural
23 allegiance. Those temp- --

24 JUSTICE SOTOMAYOR: Except for the
25 limited -- three limited exceptions?

1 MS. WANG: Precisely.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: I think I'd like to
4 take you back to the first question that
5 Justice Alito asked General Sauer, and it was
6 this question of what do we do if we think we
7 have a new problem that didn't exist at the
8 time of the Fourteenth Amendment.

9 I don't think, actually, that the U.S.
10 Government argues the case this way, but -- but
11 let's put the U.S. Government's arguments aside
12 and just ask something like: Well, everything
13 that you're saying would suggest an answer to
14 the question of people who -- the children of
15 people who are temporarily in the U.S. but here
16 lawfully.

17 Is there any way that there might be a
18 different answer with respect to the children
19 of people who are here unlawfully because of
20 this new problem issue that Justice Alito has
21 raised?

22 MS. WANG: No, there is no difference.
23 And, of course, the government's arguments as
24 to people who are unauthorized immigrants in
25 this country all runs through and hinges on

1 their domicile requirement.

2 The first thing I would say in
3 response is that, once again, it's
4 crystal-clear from Wong Kim Ark and from the
5 debates that the Framers of the Fourteenth
6 Amendment meant to have a universal common law
7 rule of citizenship subject to the closed set
8 of exceptions. And we can't take the current
9 administration's policy considerations into
10 account to try to reengineer and radically
11 reinterpret the original meaning of the
12 Fourteenth Amendment.

13 The second point I would make is that,
14 in fact, the Framers did consider the concept
15 and the actual problems of immigration that
16 were coming up at that time.

17 In addition to this, you know, notable
18 exchange between Senator and Cowan -- Senator
19 Cowan and Senator Conness, where Cowan says, if
20 we have the Citizenship Clause as part of the
21 Constitution, we are going to encourage these
22 gypsies, what he called gypsies, Roma, in
23 Pennsylvania, whom he characterized as
24 invaders, trespassers, and-law breakers, we'll
25 encourage them to come into our country because

1 their children will be citizens.

2 He says, Senator Conness, in your
3 state of California, you'll be facing a mass
4 flood of Chinese immigration if we adopt the
5 citizenship rule. And Senator Conness, himself
6 an Irish immigrant, says: Yes, and I am voting
7 for that because I believe in citizenship by
8 virtue of birth without regard to parentage.

9 And the third point I would make is
10 a -- an historical one, which is that recall
11 that at the time the Framers are -- are
12 thinking about birthright citizenship, we're --
13 there have just been 15 or 20 years of
14 unprecedented immigration from Ireland. There
15 were -- the Know Nothing party was dominant in
16 the 1850s, just a decade earlier, and they were
17 vehemently opposed to Irish immigration.

18 They believed Irish Catholic
19 immigrants were unassimilable and could never
20 become Americans. But even the Know Nothing
21 party members of Congress believed that the
22 children born in the United States to those
23 Irish immigrants were citizens like anyone
24 else. That's the intuition that the Framers of
25 the Fourteenth Amendment had.

1 Contrary to the -- to the
2 government -- the government's arguments now,
3 they wanted to grow this country, they wanted
4 to make sure we had a citizenry to populate the
5 military, to settle the country, and they --
6 they -- they also had an intuition that was
7 consistent with the founding aversion to
8 inherited rights and disabilities.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: On Lynch v.
14 Clarke, which you cite several times in the
15 brief and today, which I appreciate, the
16 government's response is that that decision was
17 questioned at the time and went unmentioned in
18 congressional debates about the Fourteenth
19 Amendment. I just want to get your response to
20 that point on Lynch.

21 MS. WANG: Sure. Not true. Though
22 the Lynch was not specifically mentioned by
23 name in the Fourteenth Amendment debates, it
24 was a couple months earlier in the debates on
25 the 1866 Act, where Senator Trumbull -- I'm

1 sorry -- Senator Lawrence talks about the great
2 case of Lynch versus Clarke, where it was
3 conclusively shown that all children born here
4 are citizens without any regard to the
5 political condition or allegiance of their
6 parents.

7 And then, of course, they discuss the
8 children of temporary sojourners elsewhere
9 without mentioning Lynch.

10 JUSTICE KAVANAUGH: I just want to
11 isolate a point that you've mentioned, which
12 is, if the Fourteenth Amendment used the phrase
13 "not subject to any foreign power," I think you
14 have a much tougher argument, and then earlier,
15 I think you indicated that they -- that's what
16 they meant even though they didn't say it. I
17 just want to give you a chance to unpack that
18 because I think that's a --

19 MS. WANG: Sure.

20 JUSTICE KAVANAUGH: If it said that, I
21 think our history would be a little different
22 and I think the text, even put aside the
23 history because that's speculation, the text
24 would be quite a bit different.

25 MS. WANG: Sure. So let me answer in

1 three parts. The first is that Wong Kim Ark
2 tells us that -- you know, the Court already
3 dealt with this and said, look, the Framers
4 were trying to do the same thing with the
5 language of the 1866 Act. To the extent you
6 think that the language is ambiguous or not as
7 good, let's look at the operative text,
8 "subject to the jurisdiction thereof."

9 The second point I would make is that
10 it's clear from the debates that the Framers,
11 in using the phrase "not subject to any foreign
12 power," were thinking about ambassadors. And
13 I -- I believe that Senator Wade at one point
14 says: Well, I wanted to start with the phrase
15 "all persons born in the United States are U.S.
16 citizens," but then I thought: Oh, wait, we
17 have these temporary visitors. In fact, the
18 government points to this quote. He says: So
19 there are these temporary visitors we can't
20 make citizen -- their children -- and we can't
21 make their children citizens. That's
22 ambassadors. And that's very clear from that.

23 JUSTICE KAVANAUGH: So, if that had
24 been the text, your argument would be that was
25 understood to be narrower than its text would

1 read?

2 MS. WANG: Yes.

3 JUSTICE KAVANAUGH: But that's not the
4 text, so I guess we don't need to deal with
5 that.

6 MS. WANG: Sure. And that brings me
7 to my third point, which is you can't read "not
8 subject to any foreign power" the way the
9 government urges you to without making the
10 children of all foreign nationals non-citizens.
11 And that's clearly not what the Framers were
12 doing.

13 JUSTICE KAVANAUGH: Justice Alito and
14 Justice Kagan raised an interpretive question
15 that I think is important, which is are the
16 exceptions -- you've used the word "closed"
17 many times -- frozen, or do we reason by
18 analogy to the exceptions that existed based on
19 things that were unforeseen at the time?

20 This comes up in the Second Amendment
21 now. It comes up in free speech law.

22 MS. WANG: Sure.

23 JUSTICE KAVANAUGH: And how do we
24 think about whether it's possible that there
25 could be an additional exception based on

1 modern circumstances, reasoning by analogy to
2 the exceptions that exist?

3 And I'm thinking in particular about
4 the non-citizens unlawfully in the country, not
5 the temporary part but the non-citizens
6 unlawfully in the country.

7 MS. WANG: Sure.

8 JUSTICE KAVANAUGH: Could you reason
9 by analogy, you've used the phrase, the --
10 several times, I think, the fiction of
11 extraterritoriality, and could that apply and,
12 if not, why not?

13 MS. WANG: Sure. So, here, I agree
14 with Professor Whittington, who says that the
15 government's position here is not positing a
16 new application of the rule but a challenge to
17 the rule itself. And I think that's right.

18 We know that the Fourteenth
19 Amendment's rule does provide for a universal
20 rule with a set of closed exceptions. Wong Kim
21 Ark says so at least twice. It says in an
22 earlier passage that the Framers were not
23 trying to introduce any new exceptions. To the
24 contrary, they were trying to foreclose any
25 caste-creating exceptions like the Court had

1 created in Dred Scott.

2 The second reason we know this is that
3 the debates themselves had the Framers saying,
4 number one, we are doing -- we are declaring
5 what is already the law in this country at
6 least for white Americans, and we are putting
7 any further exceptions to birthright
8 citizenship outside the reach of any future
9 Congress. They were very concerned about that.
10 That's the whole impetus for the Citizenship
11 Clause.

12 And the third -- the third thing I
13 would say is that -- that -- that -- that it
14 would be contrary to the central purpose of the
15 Fourteenth Amendment Citizenship Clause to
16 admit new exceptions.

17 For all those reasons, the entire
18 history of the Citizenship Clause is -- is --
19 is -- is driven by the notion that we don't
20 want to have any other exceptions.

21 JUSTICE KAVANAUGH: And then,
22 relatedly, just a separation-of-powers point
23 but get your answer. I understand your point
24 about the Executive Order, but Congress's
25 authority under Section 5 of the Fourteenth

1 Amendment, I guess the answer you just gave
2 means they don't have any authority to look at
3 this. Even if they passed it 435 to zero in
4 the House and a hundred to zero in the Senate
5 and said we're carving out a new, by analogy to
6 the existing categories, a new exception, your
7 point is no, they're closed, they're frozen
8 forever?

9 MS. WANG: Correct. And the way I
10 would put it is that the Citizenship Clause of
11 the Fourteenth Amendment, again, has a
12 universal rule with a closed set of exceptions.
13 Congress -- it sets a floor. So the Congress
14 has under the Naturalization Clause the power
15 to expand citizenship to other people not
16 covered by the Fourteenth Amendment, and,
17 obviously, they have in many ways, but they
18 can't go below that floor that -- that the --
19 the Constitution sets.

20 JUSTICE KAVANAUGH: I think Mr. Sauer
21 acknowledged that, and you mentioned this in
22 your opening, that if we agree with you on how
23 to read Wong Kim Ark, then you win.

24 So that could be a -- if we did agree
25 with you on Wong Kim Ark, that could be just a

1 short opinion, right, that says the better
2 reading is Respondents' reading, government
3 doesn't ask us to overrule, affirmed? Is
4 that --

5 MS. WANG: Yes.

6 (Laughter.)

7 JUSTICE KAVANAUGH: That's that --
8 then last question, though, why would we
9 address the constitutional issue -- this is the
10 last one -- why would we address the
11 constitutional issue given your argument on the
12 statutory -- our usual practice, as you're well
13 aware, of course, is to resolve things on
14 statutory grounds and -- and not to do a
15 constitutional ground.

16 MS. WANG: Sure. You know, I think we
17 obviously have these two paths to a win here.
18 We're happy to win on either or both of them.

19 I do think it would be prudent for the
20 Court to reaffirm its decision in Wong Kim Ark
21 where it's a landmark decision about the
22 definition of national citizenship in this
23 country. I just think it would be prudent for
24 the Court to go ahead and reaffirm that. But,
25 of course, we're happy to take a win on any

1 ground.

2 JUSTICE KAVANAUGH: Thank you.

3 (Laughter.)

4 MS. WANG: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 I'm sorry, Justice Barrett?

8 (Laughter.)

9 JUSTICE BARRETT: So I have a question
10 about the exceptions again. So, in your
11 interchange with Justice Kavanaugh just now,
12 you were talking about it as a closed set of
13 exceptions. And said that way, it sounds like
14 exceptions that people had in mind at the time
15 of the ratification but that were not explicit
16 in the amendment.

17 But I took your brief to be arguing
18 that "subject to the jurisdiction thereof" is
19 the language in the Fourteenth Amendment that
20 refers to those exceptions. Am I right?

21 MS. WANG: That's right.

22 JUSTICE BARRETT: Okay.

23 MS. WANG: It describes them.

24 JUSTICE BARRETT: It describes them.

25 And would you say -- this goes back to

1 a question that Justice Gorsuch asked General
2 Sauer. Our relationship to the Indian tribes
3 is different today than it was at the time that
4 the Fourteenth Amendment was ratified. Let's
5 put aside Section 1401. Is an -- a tribal
6 Indian born on a reservation today, on tribal
7 land, a natural-born citizen under the
8 Fourteenth Amendment?

9 MS. WANG: Under the Fourteenth
10 Amendment, no. Of course, Congress has
11 provided for citizenship for all tribal members
12 in the 1924 Act.

13 JUSTICE BARRETT: The by statute -- by
14 statute. And so is that because what "subject
15 to the jurisdiction of" meant? When you say
16 "closed set of exceptions," it means that the
17 jurisdiction as it existed in -- at the time of
18 the Fourteenth Amendment is still the
19 jurisdiction today?

20 MS. WANG: So --

21 JUSTICE BARRETT: To be -- let me just
22 be a little bit clearer.

23 MS. WANG: Sure.

24 JUSTICE BARRETT: Justice Kavanaugh
25 asked you if we could create new categories by

1 analogy. So there may be other sorts of people
2 who are present here to whom this "subject to
3 the jurisdiction" in the same way that we were
4 talking about, you know, the bubbles around
5 ambassadors or the soil of occupied territory
6 or the soil of tribal land.

7 Perhaps there -- those new carveouts
8 could exist by analogy today, like, if the
9 United States carved out some portion of some
10 state and suspended it from its jurisdiction.
11 Wouldn't the principle still apply?

12 MS. WANG: No, Justice Barrett, for
13 two reasons. The first is, again, that there
14 is a closed set.

15 JUSTICE BARRETT: But why is it
16 closed?

17 MS. WANG: It's --

18 JUSTICE BARRETT: The language doesn't
19 say it's closed.

20 MS. WANG: Sure. It's closed -- we
21 know it's closed because Congress says the very
22 purpose of the Citizenship Clause was to
23 foreclose new exceptions. That's clear from
24 the debates.

25 And I would say that the language

1 describes a closed set as well because it's --
2 you can't imagine another situation -- the
3 government is trying to make us imagine another
4 situation, right? They say, look, what if
5 Congress, in order to do an end-run, in order
6 to change the meaning of the Fourteenth
7 Amendment as to unauthorized immigrants'
8 children, Congress can say we are not going to
9 exercise jurisdiction.

10 JUSTICE BARRETT: Well, not quite,
11 because it's redefining jurisdiction. It's not
12 quite analogous, right, because the
13 government's domicile theory is a little bit
14 different than the jus soli theory, right?

15 MS. WANG: Sure. That's right.

16 JUSTICE BARRETT: Yeah.

17 MS. WANG: I'm just saying that in the
18 second step of their argument as to
19 undocumented immigrants, where they have to get
20 around the fact that undocumented immigrants by
21 and large are domiciled --

22 JUSTICE BARRETT: Mm-hmm.

23 MS. WANG: -- in the United States,
24 they're trying to say, look, we're going to --
25 we're going to manipulate the law either to

1 define domicile or to carve out to say -- just
2 wave a magic wand and say these babies are not
3 subject to the jurisdiction of the United
4 States.

5 There's still a missing factor under
6 that original meaning of the -- of -- of the
7 Fourteenth Amendment, and that's that there is
8 another sovereign who can exercise jurisdiction
9 over this person even though they're in the
10 United States.

11 And this gets me back to a question
12 you asked, Justice Alito. The -- the
13 difference between an ordinary non-ambassador
14 foreign national and everyone who's subject to
15 one of those jurisdictions is that even if --
16 if you take the government's argument and say a
17 foreign national is subject to their country of
18 nationality's jurisdiction in the United States
19 is actually not true.

20 If I'm a French national in the United
21 States, France cannot come into the United
22 States, arrest me, and try me for a crime under
23 French law. And that's what sets ordinary
24 foreign nationals apart from ambassadors --

25 JUSTICE BARRETT: Well, no, I mean, I

1 understand -- that wasn't quite the
2 hypothetical. I understand that. Let me just
3 ask you --

4 MS. WANG: I'm sorry.

5 JUSTICE BARRETT: No, that's okay.
6 Let me just ask you one last question --

7 MS. WANG: Sure.

8 JUSTICE BARRETT: -- about Indians.

9 So I gather what you're saying is that
10 Congress cannot expand the set of, we'll call
11 them, exceptions, right? But you're saying it
12 can't contract them either, and that was the
13 Indian example. So what if, again, putting
14 aside Section 1401, what if our relationship
15 with tribal Indians has changed so much that we
16 would say, no, Indians really are fully subject
17 to the jurisdiction of the United States in the
18 way any other, you know, natural-born citizen
19 is?

20 You're saying that that doesn't change
21 the constitutional status of Indian
22 citizenship?

23 MS. WANG: Let me be clear. What I'm
24 saying is that the meaning of the Fourteenth
25 Amendment is the -- we have to go with the

1 original public meaning. And, obviously, at
2 the -- at the very time that the Framers were,
3 you know, thinking about the Fourteenth
4 Amendment, at the time of ratification, that
5 relationship between the United States and
6 tribal nations was in flux, right?

7 The government has made various
8 arguments about Congress's authority, but the
9 way the Framers thought about it and the way
10 that Wong Kim Ark describes it is that there
11 was a unique constitutional status unlike any
12 other relationship between sovereigns in all
13 the world between the United States and the
14 Indian tribes.

15 And that is what gave rise to the
16 preexisting exclusion of Indian tribe -- tribal
17 members from U.S. citizenship, and that's what
18 the Fourteenth Amendment captures.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So I want to
22 understand how you are responding to the
23 government's argument that because temporary
24 visitors and undocumented immigrants are still
25 governed by their home countries, and in the

1 government's take on this, you can't have
2 two -- you can't have allegiance to two
3 different sovereigns, those groups can't have
4 the requisite allegiance to be subject to the
5 United States for the purpose of the Fourteenth
6 Amendment. That's what I hear the government
7 saying.

8 But I do think that that seems to rest
9 on a different understanding of allegiance than
10 what was in the English common law and that
11 when we understand what the English common law
12 thought about allegiance, you can see that you
13 can have allegiance to two different sovereigns
14 at the same time. This kind of goes back to
15 Justice Alito's questions.

16 I mean, I was thinking about this, and
17 I think they -- there are various sources that
18 say this, that you can have -- you obviously
19 have permanent allegiance based on being born
20 in whatever country you're from. That's what
21 everybody recognizes. But you also have local
22 allegiance when you are on the soil of this
23 other -- other sovereign.

24 And I was thinking, you know, I'm --
25 I'm -- I, a U.S. citizen, am visiting Japan.

1 And what it means is that, you know, if I steal
2 someone's wallet in Japan, the -- the Japanese
3 authorities can arrest me and prosecute me.
4 It's allegiance meaning can they control you as
5 a matter of law. I can also rely on them if my
6 wallet is stolen to, you know, under Japanese
7 law, go and prosecute the person who has stolen
8 it.

9 So there's this relationship based
10 on -- even though I'm a temporary traveler, I'm
11 just on vacation in Japan, I'm still locally
12 owing allegiance in that sense. Is that the
13 right way to think about it? And, if -- if so,
14 doesn't that explain why both temporary
15 residents and undocumented people would have
16 that kind of "allegiance" just by virtue of
17 being in the United States?

18 MS. WANG: That's absolutely right,
19 Justice Jackson, and that comports with the
20 plain text of the Fourteenth Amendment as it
21 applies to everyone born in the United States.
22 Other than those subject to the -- to the
23 exceptions that were baked in, a closed set,
24 you owe natural allegiance as a U.S.-born
25 citizen.

1 If you want to look at the parents of
2 those people, and let's say the parents are
3 foreign nationals but not ambassadors, the
4 parents owe temporary allegiance --

5 JUSTICE JACKSON: Right.

6 MS. WANG: -- under the common law.

7 JUSTICE JACKSON: So the babies get
8 the permanent allegiance piece of this, and the
9 parents get the local allegiance piece of this.
10 So, to the extent we're looking for allegiance,
11 we have it?

12 MS. WANG: That's right.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Rebuttal, General Sauer?

17 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

18 ON BEHALF OF THE PETITIONERS

19 GENERAL SAUER: Thank you, Mr. Chief
20 Justice.

21 Justice Kavanaugh, turning to Lynch
22 against Clarke that you raised -- it didn't
23 come up when I was talking about it -- keep in
24 mind that we said that it was questioned at the
25 time. It's questioned by a higher court in the

1 same state, the State of New York, and the
2 Ludlam decision in 1860 specifically said that
3 someone who's traveling or sojourning abroad,
4 though born in a foreign country, is not born
5 in foreign allegiance. So, obviously, there is
6 tension within that very state, and that's what
7 contemporary commentators noted.

8 And I'd make a more fundamental point
9 about that. Lynch is not interpreting the
10 Fourteenth Amendment because it predates it.
11 So it's not looking at the language of the
12 Fourteenth Amendment. It's looking at, you
13 know, what does the word "citizen" mean, for
14 example, in the clause. So there's an
15 anachronism to their reliance on it.

16 And I think that turns to a point that
17 Justice Alito emphasized, that once you get to
18 that language of the 1866 Civil Rights Act,
19 where Congress said "not subject to any foreign
20 power," clearly, we are no longer dealing with
21 the British conception of allegiance because
22 Calvin's case and Blackstone say whether you're
23 subject to another foreign power is irrelevant
24 to whether or not you become a citizen.

25 So, again, the concession that I heard

1 to be made that those two mean the same thing,
2 which this Court held in General Building
3 Contractors that the Civil Rights Act has the
4 same scope as -- as the Citizenship Clause of
5 the Fourteenth Amendment, once -- once you're
6 saying not subject to any foreign power,
7 Congress has clearly departed from the common
8 law, the British conception of allegiance, that
9 monarchial conception of allegiance. They have
10 adopted the Republican conception of
11 allegiance. And there's all kinds of evidence
12 going back to the late 1700s that that's the
13 way they thought about it.

14 And there was a reference, I think, in
15 my friend's presentation about the Marshall
16 Woodworth treatise from the late 1890s. That
17 treatise also, just like Lynch against Clarke,
18 the -- the language they quote is actually
19 describing the case or -- or the law, the
20 status of the law before the adoption of --
21 of -- of the Fourteenth Amendment.

22 So -- but, if you actually look at the
23 treatises we cite, again, I mean, you know,
24 Wharton, Morris, Justice Samuel Miller of this
25 Court, Lesser, Black, Hall, Winchester, Taylor,

1 Westlake, Bellott, there's this consensus going
2 from the time of the Fourteenth Amendment
3 onward and they're looking at the specific
4 question of temporary -- temporarily present
5 individuals in the jurisdiction, all those
6 sources say their children are not citizens.
7 And that goes both before and after -- after
8 Wong Kim Ark.

9 You see a similar consensus actually
10 in the congressional debates where, whenever it
11 comes up, temporary sojourners, it's
12 understood, the context indicates it's clearly
13 understood that those children are not
14 citizens.

15 And I would be -- therefore, finish
16 where I began with drawing a stark contrast
17 and -- and turn back to the first question that
18 Justice Thomas acted, that Republican Congress
19 in 1866 had a very, very clear understanding
20 that the children of the newly freed slaves
21 have the requisite allegiance to the United
22 States. This was all about overruling the --
23 the grave injustice of Dred Scott and making
24 sure that that allegiance was granted to the
25 children of slaves.

1 However, you have this contrast of a
2 very, very strong impressive consensus both in
3 the original understanding in the -- in the
4 congressional debates and carrying over into
5 commentators for 50 years afterwards that the
6 children of temporary sojourners are not
7 covered.

8 And for those reasons, we ask the
9 Court to reverse.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel, General.

12 The case is submitted.

13 (Whereupon, at 12:33 p.m., the case
14 was submitted.)

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<p style="text-align: center;">1</p> <p>1.5 [1] 33:12 10 [1] 17:4 12 [3] 19:19 45:3 47:18 1291 [1] 19:10 13 [1] 19:18 1332 [1] 67:6 1401 [3] 65:5 127:5 131:14 1401(a [1] 56:24 1401(f [1] 66:18 1473 [1] 8:2 15 [1] 117:13 16 [1] 19:17 1679 [1] 25:23 1700s [3] 65:14,17 137:12 18 [1] 20:17 1812 [1] 69:18 1814 [1] 26:9 1817 [2] 12:16 26:10 1850s [1] 117:16 1853 [1] 17:19 1860 [1] 136:2 1866 [19] 9:10 11:21 12:18 13:9 19:6 52:7 53:19 56:18 105:25 106:6,21,23 107:5,21 108:11 118:25 120:5 136: 18 138:19 1868 [14] 11:21 20:6,9,19 21:16 22:3, 16 23:17,20 24:3 37:5 50:14 52:7 65: 19 1880 [1] 20:18 1880s [1] 16:9 1881 [2] 16:3 45:3 1884 [1] 82:9 1890s [1] 137:16 1892 [2] 26:11 61:15 1893 [2] 26:12 61:15 1896 [2] 92:16,17 1898 [3] 21:13,15 45:12 19 [1] 69:18 1920s [1] 45:16 1921 [4] 44:14,18 45:7 56:5 1922 [2] 16:4 45:3 1924 [1] 127:12 1930s [2] 45:8 75:8 1940 [7] 50:9,24 55:9 56:12,19 82:12 106:25 1941 [1] 57:7 1952 [5] 50:9,24 55:9 56:13,20 1966 [1] 40:7 1983 [1] 39:4 19th [15] 17:14 24:24 26:7,10 27:12,14 28:20,23 34:9,14 42:21 61:17 73:11, 17,21</p> <hr/> <p style="text-align: center;">2</p> <p>20 [5] 84:2,2,10 86:10 117:13 2015 [1] 33:20</p>	<p>26 [3] 16:2 19:20 45:2 28 [3] 16:2 19:20 45:2 2890 [1] 13:8</p> <hr/> <p style="text-align: center;">3</p> <p>38 [1] 91:24</p> <hr/> <p style="text-align: center;">4</p> <p>40 [1] 14:1 435 [1] 124:3</p> <hr/> <p style="text-align: center;">5</p> <p>5 [4] 57:22 58:6,14 123:25 50 [3] 14:1 45:14,15 500 [2] 33:22,22 572 [2] 46:2 70:13</p> <hr/> <p style="text-align: center;">6</p> <p>60 [1] 45:16 693 [4] 36:21 76:24 77:6 85:12</p> <hr/> <p style="text-align: center;">7</p> <p>705 [1] 36:22 75 [1] 48:12</p> <hr/> <p style="text-align: center;">8</p> <p>8 [1] 34:17</p> <hr/> <p style="text-align: center;">9</p> <p>9th [1] 33:7</p> <hr/> <p style="text-align: center;">A</p> <p>able [1] 31:15 above [1] 88:8 abroad [4] 62:19 63:16 71:15 136:3 absence [1] 24:23 absent [1] 12:6 absolutely [3] 79:8 96:18 134:18 absurd [1] 61:5 accept [8] 25:8 43:11 44:2,4 65:25 83: 4 95:4,19 accepted [5] 36:2,17 41:9 65:24 69:19 accident [1] 47:10 accomplish [3] 63:3,4 69:14 according [1] 41:14 account [1] 116:10 acknowledge [1] 62:25 acknowledged [1] 124:21 act [28] 9:10,20,20 12:6,19 19:6 25:15, 25 26:13 46:4 53:18 54:1,11 55:4 56: 18 82:12 105:25 106:6,21,23 107:6, 21 108:11 118:25 120:5 127:12 136: 18 137:3 acted [1] 138:18 actions [1] 55:9 acts [1] 13:4 actual [2] 84:4 116:15</p>	<p>actually [13] 12:3 28:4 46:2 64:25 79: 6 95:2 98:17 104:12 115:9 130:19 137:18,22 138:9 added [1] 57:13 addition [1] 116:17 additional [4] 85:20 86:24 112:10 121: 25 address [6] 19:22 37:21 48:6 88:21 125:9,10 addressed [6] 14:2 22:5 52:11 66:18 78:5 79:15 addresses [2] 35:1 70:14 adjudicate [3] 66:11,13 67:13 administration [3] 44:16 45:10 50:18 administration's [1] 116:9 admit [1] 123:16 admits [4] 44:20,21,23 45:13 adopt [6] 60:14 72:18 73:14 111:13 112:5 117:4 adopted [14] 9:24 10:6 14:17,18 15:9, 16 45:9 46:13 50:8 71:25 73:15 111: 7,24 137:10 adopting [1] 65:1 adoption [3] 56:1 106:24 137:20 adverse [1] 52:20 advocates [1] 97:5 affair [1] 17:18 affect [1] 31:16 affirmative [4] 54:13,15 88:10 106:15 affirmed [1] 125:3 african [1] 29:9 after [21] 14:5 19:23 20:1 41:5,22 45:4 56:1,2 68:16 79:13,16,18 81:5 86:23 89:22 91:17,22 106:23 112:3 138:7,7 afterwards [1] 14:25 again [33] 24:5 48:12 54:23 55:2 56:5 61:16 65:18 70:22 73:19 74:4 85:1,8 86:16,22 89:2,4 91:13,18 92:8 94:15 98:25 101:2 103:5,5 109:2 110:24 116:3 124:11 126:10 128:13 131:13 136:25 137:23 against [13] 10:15 20:15 27:2 37:25, 25 38:1 42:1 44:24 54:4 59:3 61:14 135:22 137:17 agencies [1] 68:16 agency [1] 68:17 agree [17] 14:9 15:13 17:10 34:2 39:1 40:2 48:2 59:23 60:14,23 64:25 72: 13 87:20 105:23 122:13 124:22,24 agreed [1] 100:20 agrees [3] 49:7 86:2 101:1 ahead [5] 21:24 56:9 97:12 105:3 125: 24 akin [2] 24:13 76:10 alien [9] 17:15 26:2 31:20 61:10 76:5 98:3,15 99:18,23 aliens [13] 8:23 16:20 26:3 39:23 60: 22 73:20 99:5,22 100:12,15,18,19</p>
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