"SUBJECT TO THE JURISDICTION THEREOF": BIRTHRIGHT CITIZENSHIP AND THE FOURTEENTH AMENDMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINETEENTH CONGRESS

FIRST SESSION

TUESDAY, FEBRUARY 25, 2025

Serial No. 119–6

Printed for the use of the Committee on the Judiciary

Available via: *http://judiciary.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE

59–353 WASHINGTON : 2025

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C O N T E N T S

TUESDAY, FEBRUARY 25, 2025

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WITNESSES

LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING

"SUBJECT TO THE JURISDICTION THEREOF": BIRTHRIGHT CITIZENSHIP AND THE FOURTEENTH AMENDMENT

Tuesday, February 25, 2025

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to notice, at 2:23 p.m., in Room 2141, Rayburn House Office Building, the Hon. Chip Roy [Chair of the Subcommittee] presiding.

Present: Representatives Roy, Jordan, McClintock, Hageman, Hunt, Grothman, Harris, Onder, Gill, Scanlon, Raskin, Jayapal, Balint, Kamlager-Dove, and Goldman.

Also present: Representative Biggs.

Mr. ROY. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare a recess at any time.

We welcome everyone to today's hearing on birthright citizenship.

I will now recognize myself for an opening statement.

As Supreme Court Justice Louis Brandeis once wrote,

> The most important office, and the one which all of us can and should fill, is that of private citizen.

This hearing is on the issue foundational to our Republic: Who is an American citizen by birthright?

Section 1 of the 14th Amendment grants citizenship to all persons who are, quote, "born or naturalized in the United States and subject to the jurisdiction thereof." It is the latter clause, "subject to the jurisdiction thereof," that we will examine today in significant part. Our inquiry is simple. What was the original public meaning of the jurisdiction clause?

The 14th Amendment was drafted to rectify the terrible decision in the 1857 *Dred Scott* v. *Sandford* case by recognizing former slaves as rightful Americans.

As we'll learn from our witnesses today, the answer is clear: The jurisdiction clause, as originally understood, grants birthright citizenship only to children whose parents have full, exclusive allegiance to the United States. The Constitutional text in history shows that children of illegal aliens and illegal aliens who are in

the United States temporarily are not citizens by birthright under the 14th Amendment.

For decades, proponents of automatic birthright citizenship have claimed the 14th Amendment and the *Wong Kim Ark* case bestows automatic citizenship to all children born to foreign nationals, including illegal aliens. This is a blatant misunderstanding of both items, resulting in birthright citizenship serving as a driving force of illegal immigration to the United States, as many illegal aliens and temporary visa holders know they can reap the benefits of their child's citizenship.

President Trump's first-day Executive Order on birthright citizenship restored the 14th Amendment to this original meaning. Despite what you may hear on the news, some of the most respected legal scholars agree with the Constitutional interpretation outlined in President Trump's Executive Order. Some of these legal scholars include those here on this panel today.

Our witnesses will dive into the history of the 14th Amendment and Congress and the Supreme Court, but I'll give you a brief version.

The drafters of the 14th Amendment understood not to grant citizenship to persons, quote, "owing allegiance to any foreign sovereignty." In the first cases decided after ratification, the Supreme Court held that "jurisdiction" in the 14th Amendment means not nearly subject in some respect or degree to the jurisdiction of the United States but completely—but completely—subject to their political jurisdiction and owing them direct and immediate allegiance.

Of course, illegal aliens and legal temporary United States residents do not owe complete, direct, and immediate allegiance to the United States. Therefore, their children are not citizens by birthright under the 14th Amendment.

Now, I'm sure we'll hear a lot from our colleagues on the other side of the aisle about Supreme Court precedent as well, so let us make one thing clear at the outset: The Supreme Court has never held that children of illegal aliens or aliens who are in the United States temporarily are entitled to birthright citizenship. President Trump's Executive Order is consistent with Supreme Court precedent.

I'd also like to emphasize the purpose of today's hearing. We're here to discuss an important Constitutional question—this is, after all, the Constitution Subcommittee—and I hope that we can keep our focus on the text and history of the 14th Amendment. No doubt, some of the policy implications will come up, and it would be a disservice not to at least mention those important issues implicated by the Constitutional question.

In addition to twisting the Constitution, a court precedent conferring automatic citizenship is a bad policy. It devalues the meaning of American citizenship by bestowing it to the children of lawbreakers who entered the United States without the consent of its people, almost rewarding them for trespassing into our country's soil.

To add context, an estimated 124,000–300,000 so-called "anchor babies," which are children born to illegal aliens, are born each year, according to the Center for Immigration Studies. In 2023, up

to 250,000 children were born to illegal aliens in 2023, which accounted for seven percent of total births in the Nation that year.

Moreover, it further strains government programs that are already strained. For example, in terms of Supplemental Nutrition Assistance, SNAP, which provides school meals, Americans shell out $5 billion each year in SNAP and food stamps for the U.S.-born children of illegal aliens, according to a 2023 report by the Federation for American Immigration Reform.

If one looks at the amount illegal aliens and their U.S.-born children are projected to consume in Federal welfare program benefits, the American taxpayer foots an even larger bill. Take, for example, in a July 2024 report, the Congressional Budget Office, which answers to us, concluded that the Federal Government is projected to spend $177 billion in welfare benefits to illegal aliens and their U.S.-born children over the next 10 years. Now, mindful, that is a larger population, but it is clear that the birthright citizenship issue implicates those issues. This $177 billion includes Medicaid, SSI, Obamacare premium tax credits, food stamps, and more.

Ending universal birthright citizenship and thereby ending "birth tourism," a practice in which pregnant women travel to the United States to give birth and secure citizenship for their children, is good policy. Birth tourism diverts U.S. medical resources away from our own mothers and babies and allows shady and unscrupulous birth tourism quote, "agencies to prey on expectant mothers."

According to a 2020 study, there are between 20,000–26,000 foreign tourists in the U.S. giving birth on our soil annually. As far back as 2008, the CEO of the McAllen, Texas, Medical Center, where about 40 percent of births were to illegal-alien mothers, stated that, quote, "Mothers about to give birth walk up to the hospital clearly having just swam across the river in actual labor."

Just as concerningly, adversaries like China are abusing universal birthright citizenship and practicing birth tourism to nestle deeper into U.S. society, which carries security concerns. In 2018, Georgetown Law's O'Neill Institute wrote the following:

> Women from foreign countries, mainly China and Russia, are paying tens of thousands of dollars to temporarily relocate to the United States during their pregnancy in order to give birth in the United States and thereby guarantee U.S. citizenship for their child.

To shed light on the magnitude of this abuse, China hosts over 500 companies offering birth tourism services, resulting in more than 50,000 Chinese nationals delivering babies in the United States every year, according to a 2019 estimate. The Constitution does not require us to allow this practice, and we should not.

Even late Senate Democrat Majority Leader Harry Reid recognized the disastrous policy implications of birthright citizenship, as he opposed automatic citizenship for children born to foreigners. He said the following in a 1993 speech on the Senate floor:

> If making it easy to be an illegal alien isn't enough, how about offering a reward for being an illegal immigrant? No sane country would do that, right?

He continued:

> Guess again. If you break our laws by entering this country without permission and give birth to a child, we reward that child with U.S. citizenship

> and guarantee a full access to all public and social services this society provides. And that's a lot of services.

That is Harry Reid, the former Democrat leader in the U.S. Senate.

Senator Reid was right in his observation. No sane country would enable a foolish policy like automatic citizenship to children born to foreigners, especially illegal aliens. Congress should heed his warning.

Put simply, the Framers of the 14th Amendment did not intend for universal citizenship to children born to all classes of foreigners. Nor did the judges in the *Wong Kim Ark* case rule on the question of citizenship beyond the children of lawful permanent residents, including those born to illegal aliens and temporary visitors.

There's one more point I'd like to make in closing. Congress is where the debate over birthright citizenship should be happening. In fact, my friend from Texas, Representative Brian Babin, his legislation, the Birthright Citizenship Act, would fix this policy gap and restore the practice of granting U.S. citizenship as intended in the 14th Amendment.

Section 8, Article I, Section 5 of the 14th Amendment, grant us power over questions of citizenship. President Trump's Executive Order rightly returns that power to us, and, in doing so, it returns us to the reasonable, commonsense interpretation of the 14th Amendment when it was ratified in 1868.

I now recognize the Ranking Member, Ms. Scanlon, for her opening statement.

Ms. SCANLON. Mr. Chair, since this is our first hearing of the new Congress, I'd like to say that I am anticipating we will continue to have a vigorous exchange of ideas in this Committee room, and I imagine we'll tackle some interesting and thorny legal disputes throughout this term.

However, I have to admit that today's topic probably won't meet that expectation, because, for more than a century, there have been few legal questions as open-and-shut as whether being born in the United States makes someone a United States citizen.

This is a little bit of a spoiler alert here. I'll skip ahead and tell you right now: It does. Frankly, to suggest otherwise is nothing but a blatant and disingenuous attempt to rewrite our Nation's history and the very words of the Constitution.

Contrary to the Chair's assertions, the history of the amendment does not support the interpretation that he and his colleagues are pressing. I beg to differ with his assertion that it's only been a few decades of people making the interpretation which has been in effect for over a century.

Now, rewriting history and ignoring the rule of law has become a feature, not a bug, under the Trump Administration, but it's one that Congress has a Constitutional obligation to prevent rather than enable.

So, why are our Republican colleagues questioning the plain and long-settled meaning of the birthright citizenship clause? Simply put, it's because President Trump and his allies in Congress think there's something to gain politically by stripping an entire group of American citizens of their rights, their votes, their very identities, and turning them and their descendants into a permanent underclass.

They want to decide who they deem worthy of being a citizen of our country and who isn't based on who their parents are and where their parents are from. In an act of really cynical irony, they want to, in essence, resurrect the rationale behind the *Dred Scott* decision that the 14th Amendment was written to reject once and for all.

Our history, our quest for a more perfect Union, has always been about expanding opportunity and civic participation, not ripping it away. Broadening our electorate has been an important part of that progress, including through Constitutional amendments that guarantee citizenship and franchisement regardless of race, women's suffrage, and more. In doing so, we've sought to make our country and its government more representative, more fair, and more perfect.

That's a goal, a vision, that all patriotic Americans should share. Any attempt to radically reinterpret the Citizenship Clause serves only to further the goal of Right-wing extremists to unconstitutionally limit who can have a political voice in this country.

Donald Trump's unconstitutional Executive Order to end birthright citizenship, along with legislative efforts by Republicans in Congress to do the same, would drag us backward, ensuring a government that's not for "the" people but for "some" people. It's the absolute antithesis of the promise of America.

It's been 150 years since the 14th Amendment enshrined birthright citizenship into the Constitution. In that time, the U.S. has been made better by the contributions of Americans born here to immigrant parents, regardless of where their parents came from or their parents' citizenship status.

Overturning birthright citizenship would hurt our Nation and deeply imperil our ability to continue striving for a better future. It would impact all Americans by creating a logistical nightmare. Bureaucracy would invade our maternity wards, with States and hospitals being forced to investigate which babies do or don't qualify for citizenship.

More troublingly, though, ending birthright citizenship would create a legal caste system based on the status of one's parents. Instead of citizens, the U.S. would develop a permanent underclass of stateless, not-legally recognized subjects who could be exploited or deported at the mercy of a political majority.

That would be a twisted reflection of the intended purpose of the 14th Amendment, because the language chosen by the amendment's Framers in the aftermath of the Civil War was to prevent this kind of caste system from ever returning.

So, if our Republican colleagues want to have a legal argument today, here it is:

> The American children of undocumented immigrants and the American children of those here on visas, such as for work or study, are indeed persons born here in America. At the moment of their birth, they're subject to the laws of the United States, with an undeniable Constitutional claim to the rights, duties, and protections of that reciprocal relationship.

In other words, citizenship.

The 14th Amendment's guarantee that all persons born in the United States and subject to the jurisdiction thereof are citizens of

the United States—and that's the quote—clearly applies to those individuals.

The plain text of that clause is about as straightforward a statement of American law as you can get, but there's additional support throughout the legislative history of this clause. In the debates on the passage of this amendment over a century ago, Congress clearly defined the intent and purpose of the birthright citizenship clause and rejected the types of arguments being advanced against it today.

Similarly, the Supreme Court considered and rejected arguments against the plain meaning of the amendment in the case of the *United States* v. *Wong Kim Ark* way back in 1898. Subsequent cases have rejected the proposition being advanced by our colleagues today that the children of certain immigrants born in the United States should be denied citizenship, because it's unconstitutional.

Clearly, the law and history support that straightforward conclusion. That's why four Federal judges have already blocked the President's Executive Order attempting to end birthright citizenship. One of those judges, Judge Coughenour, a Reagan appointee, told Trump's DOJ lawyers the Executive Order was, quote, "blatantly unconstitutional." In fact, he said in the courtroom—and I would hate to have been the lawyer on the receiving end of this—he had, quote, "difficulty understanding how a member of the bar would state unequivocally that this is a Constitutional order." Noting that it boggled his mind.

Flimsy arguments aside, ultimately, a President cannot unilaterally repeal a Constitutional amendment. Any elementary student of civics knows the only way to repeal an amendment is with another amendment. Remember prohibition? The 18th Amendment to the Constitution outlawed the sale and manufacture of alcohol in 1919, and it was repealed by the 21st Amendment in 1933.

There's the rub: Americans overwhelmingly support birthright citizenship. Presidents and extremists like Stephen Miller who have championed the idea know that they don't have the votes to pass a Constitutional amendment to repeal birthright citizenship, much less get the approval of three-quarters of the States to make it law. So, instead, they're trying to do an end-run on the Constitution, with a tortured and unconstitutional reading of the English language and more than a century of legal analysis.

Our Republican colleagues are here today trying to enable the President as he pushes his wager that his Supreme Court, the one he stacked, will ratify his illegal attempt to amend the Constitution without the consent of the American people.

As a Congress, as a government, as a Nation, we should not be in the business of turning back the clock and allowing or pushing our country to backslide into the most shameful parts of its past. Instead, we should be passing laws that guide it toward the light of a brighter future, one in which our most fundamental American principles and the promise to form a more perfect Union ring true for all rather than just for a privileged few.

That more just, that more fair America—and the policies that actually get us there is what I and my Democratic colleagues would rather use this Committee to fight for.

I yield back.

Mr. ROY. Not seeing either the Chair or Ranking Member, we'll move forward. Without objection, all other opening statements will be included in the record.

We will now introduce today's witnesses.

Mr. Charles Cooper. Mr. Cooper is the Chair and founding partner of Cooper & Kirk, PLLC, a boutique law firm in Washington, DC. He has spent more than 30 years in private practice and has argued nine cases before the U.S. Supreme Court. He previously served in the Department of Justice and was a law clerk to Justice William Rehnquist.

Mr. R. Trent McCotter. Mr. McCotter is a partner at Boyden Gray, PLLC, where he litigates in Federal Court and before Federal agencies. He previously served as a Deputy Associate Attorney General, where he oversaw the Department's Civil, Appellate, and Federal Programs Branches. He also previously served as a Federal prosecutor with the U.S. attorney for the Eastern District of Texas—of Virginia. A slip. It comes right out.

Mr. Matt O'Brien. Mr. O'Brien is the Director of Investigations at the Immigration Reform Law Institute, where he oversees IRLI's investigations into fraud, waste, and abuse in the application and enforcement of the Nation's immigration laws. He previously served as an immigration judge and in various positions with the Department of Homeland Security.

Professor Amanda Frost. Ms. Frost is the David Lurton Massee, Jr., Professor of Law at the University of Virginia. That's my undergraduate alma mater. Professor Frost's research focuses on immigration and citizenship law, Federal courts and jurisdiction, and judicial ethics.

We thank our witnesses for appearing today.

We'll begin by swearing you in. Would you please rise and raise your right hand?

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record reflect that the witnesses have answered in the affirmative.

Thank you. Please be seated.

Please know that your written testimony will be entered into the record in its entirety. Accordingly, we ask that you summarize your testimony in five minutes.

Mr. Cooper, you may begin.

STATEMENT OF CHARLES J. COOPER

Mr. COOPER. Thank you very much, Chair Roy—

Mr. ROY. Mr. Cooper, I think—is your microphone—thank you, sir.

Mr. COOPER. Good afternoon to Members of the Committee.

I am especially pleased to be here to explore with you the meaning of six words of the Citizenship Clause of the 14th Amendment: "and subject to the jurisdiction thereof."

The recurring debate over the meaning of these words boils down to a choice between two alternatives. Does it mean subject merely to the regulatory jurisdiction of the United States? That is, subject

to the laws of the United States, as is virtually everyone on United States soil, including aliens who are here illegally or are here for the purpose of bearing a child to make it an American citizen? Or does the jurisdiction of the United States mean something more than that? The full and complete jurisdiction, requiring an allegiance that comes from a permanent, lawful commitment to make the United States one's home, the place where one permanently and lawfully resides?

I believe that this latter interpretation is compelled by the Citizenship Clause's text, structure in history, as well as by common sense.

I have time for just a couple of brief opening points.

First, the text of the clause. If "subject to the jurisdiction of the United States" means nothing more than the duty of obedience to the laws of the United States, why did its Framers choose such a strange way to say that? Why didn't they just say "subject to the laws of the United States?" Doing so would've been quite natural, given that this straightforward, unambiguous phrase is used in both Article III and Article VI.

The clause also ensures that birthright citizenship makes newborns citizens of both the United States and of the States wherein they reside—that is, where they live, their home. This word, standing alone, implies a lawful permanent residence. It plainly excludes tourists and other lawful visitors, as well as illegal aliens, who are prohibited by law from residing in a State, although they all must obey our laws.

Second, the history of the clause. The clause was framed by the 39th Congress to Constitutionalize the Civil Rights Act of 1866, which had been passed by that same Congress just two months earlier. The 1866 act explicitly denied birthright citizenship to persons, quote, "subject to any foreign power," and to, quote, "Indians not taxed."

It is clear from the debate in the 39th Congress that Congress decided to replace this language with "subject to the jurisdiction thereof" not because Congress suddenly and without any comment decided to broaden the scope of birthright citizenship from the act; rather, Congress was concerned that the phrase "Indians not taxed" language generated uncertainty about the citizenship status of the children of Indians, primarily rich and poor Indians.

The dispute is best captured by this comment from Senator Trumbull, who wanted to replace the words "Indians not taxed" even though he was the principal author of the 1866 act. He said this:

> I am not willing to make citizenship in this country depend on taxation. I am not willing, if the Senator from Wisconsin is, that the rich Indian residing in New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen.

This comment reflects two important points about the intended meaning of the clause by its authors, I think.

First, they intended that the children of Tribal Indians who resided on reservations and owed their direct allegiance to their Tribes would not be entitled to birthright citizenship, but the children of assimilated Indians who had left their reservations and had

established permanent residence among the body politic of the States would be entitled to birthright citizenship.

Second, it is not at all plausible that the Framers of the Citizenship Clause intended that Tribal Indians be able to evade this limitation on birthright citizenship for their children by the simple expedient of leaving the reservation long enough to give birth to a child.

The key distinction between Tribal Indians and assimilated Indians was allegiance. Tribal Indians owed their direct allegiance to the Tribe, while an Indian who established a permanent domicile within the State and assimilated into the body politic committed his primary allegiance to the United States and, thus, entitled his children to citizenship at birth.

The Supreme Court's 1884 decision in *Elk* v. *Wilkins* confirmed this understanding essentially, ruling that the clause requires persons to be completely subject to the political jurisdiction—political jurisdiction—of and owing direct and immediate allegiance to the United States.

I'll make one final point. The Supreme Court's 1898 decision in *Wong Kim Ark* had nothing to do with the children of illegal aliens or aliens lawfully but temporarily admitted to the country. The court carefully framed the issue before it twice in verbatim terms as involving, quote,

> A child born in United States of parents of Chinese descent who have a permanent domicil and residence in the United States.

Thank you, Mr. Chair.

[The prepared statement of Mr. Cooper follows:]

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Testimony of Charles J. Cooper

on

" 'Subject to the Jurisdiction Thereof': Birthright Citizenship and the Fourteenth Amendment"

Before the

Subcommittee on the Constitution and Limited Government

of

The House Committee on the Judiciary

February 25, 2025

Washington, DC

Good morning Chairman Roy and Members of the Subcommittee. Thank you for inviting me to participate in today's hearing entitled, " 'Subject to the Jurisdiction Thereof': Birthright Citizenship and the Fourteenth Amendment."[1] I am honored to share with you my thoughts on the subject of today's hearing, the Citizenship Clause of Section 1 of the Fourteenth Amendment. That Clause provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

More specifically, the purpose of today's hearing is to explore the meaning of six words of the Citizenship Clause—"and subject to the jurisdiction thereof"—which make clear that not all persons born in the United States are constitutionally entitled to the precious privilege of American citizenship. Only those persons who are born on American soil and are at the time of their birth "subject to the jurisdiction" of the United States become citizens under the Fourteenth Amendment. These words are thus among the most important in the Constitution, for their meaning determines whom among those born in the

[1] Founding partner, Cooper & Kirk, PLLC. During the Reagan Administration, I served as the Assistant Attorney General for the Office of Legal Counsel from 1985–1988, and I was a member of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States for seven years (1998-2005). Much of my litigation practice over almost four decades has focused on cases involving constitutional issues, and I have testified before congressional committees on more than two-dozen occasions.

United States are entitled to birthright citizenship and thus to the freedoms, opportunities, protection, and duties that come with it.

The debate over the scope of the Citizenship Clause turns largely on the meaning of "jurisdiction"—"a word of many, too many, meanings." *Wilkins v. United States*, 598 U.S. 152, 156–57 (2023) (internal quotation marks omitted). Those who read the Citizenship Clause to guarantee essentially universal birthright citizenship argue that anyone who is "required to obey U.S. laws" is "subject to the jurisdiction" of the United States. James C. Ho, *Defining "American,"* 9 GREEN BAG 367, 368–69 (2006); *see, e.g.*, Elizabeth Wydra, *Birthright Citizenship: A Constitutional Guarantee*, AM. CONST. SOC'Y L. & POL'Y, 1, 3 (2009) https://perma.cc/67YD-EYNX. That view grants citizenship essentially to anyone born within our borders, whether here legally or illegally, fleetingly or permanently. Those who understand the Clause to require a stronger connection between the person born on United States soil and the American body politic (including, as discussed below, the Framers and supporters of the Citizenship Clause in the 39th Congress) interpret "jurisdiction" in its "full and complete" sense, requiring a reciprocal political bond between the newborn and the sovereign defined by the "allegiance" owed by the new citizen in return for the "protection" of the sovereign.

The recurring debate over the scope of the Clause has divided government

officials, scholars, and judges since the Fourteenth Amendment became part of the Constitution in 1868. That debate came roaring back to life on Inauguration Day, January 20, 2025, when President Trump signed Executive Order 14160, entitled "Protecting the Meaning and Value of American Citizenship." 90 Fed Reg. 8449 (January 29, 2025).

President Trump's Executive Order rejects the Executive Branch's longstanding view that the Citizenship Clause guarantees birthright citizenship to all "children born in the United States of aliens" except for "children born in the United States of foreign diplomats" and "members of Indian tribes." Legislation Denying Citizenship at Birth to Certain Children Born in the United States, 19 OP. O.L.C. 340, 342 (1995). Instead, the order interprets the Citizenship Clause to grant birthright citizenship only to the children of citizens and of aliens who are lawful permanent residents.[2] The order thus excludes from natural-born citizenship the children of aliens whose presence in the country is illegal and the children of aliens who have been permitted by law to enter the country on a temporary basis. *See* 90 Fed. Reg. at 8449. I believe that President Trump's interpretation of the Clause is correct, and clearly so, despite the

[2] Specifically, the executive order denies birthright citizenship to persons born in the United States whose mothers are in the country either unlawfully or lawfully but only temporarily and whose fathers are not citizens or lawful permanent residents at the time of the child's birth. 90 Fed. Reg. at 8449.

government's decades-long (but erroneous) practice of recognizing essentially universal birthright citizenship.

The Executive Order's interpretation of the Citizenship Clause is supported by the provision's text, structure, and history, as well as by common sense. But before turning to these traditional indicia of the Clause's original public meaning, we must first address the notion that, as a District Court judge recently ruled in preliminarily enjoining implementation of the order, the Supreme Court's 1898 decision in *Wong Kim Ark v. United States*, 169 U.S. 649 (1898), "resolved any debate about ... the meaning of 'subject to the jurisdiction thereof'... [and] forecloses the President's interpretation of the Citizenship Clause." *Casa, Inc. v. Trump*, __ F. Supp. 3d __, 2025 WL 408636, at * 6 (D. Md. Feb. 5, 2025) (quoting *Wong Kim Ark*, 169 U.S. at 654). The *Wong Kim Ark* case had nothing to do with the children of illegal aliens or aliens lawfully but temporarily admitted to the country.

The plaintiff in *Wong Kim Ark* was born in California to Chinese parents who were lawful permanent residents domiciled in that state. Upon returning from a temporary visit to China, he was denied reentry under the Chinese Exclusion Act, which barred aliens "of the Chinese race, and especially Chinese laborers, from coming into the United States." *Wong Kim Ark*, 169 U.S. at 653. The plaintiff argued that he was a natural-born United States citizen and

therefore not subject to exclusion under the Act. The Supreme Court was especially careful to frame the "single question" presented, which it repeated verbatim *twice* in the opinion, as follows:

> [W]hether a child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the emperor of China, but have a *permanent domicil and residence in the United States*, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States.

Id. at 653, 705 (emphasis added). The Court held that this "question must be answered in the affirmative." *Id.* at 705. The holding of the case was thus confined, by its own terms, to the birthright citizenship of children born in the United States to *lawful permanent residents*. And it was the plaintiff's own lawful permanent domicile in the United States, inherited from his parents, that gave rise to the duty of allegiance that he owed to the country where he was born and where he would be raised by his parents. This much seems clear from the *Wong Kim Ark* Court's "irresistibl[e] conclusions" that

> [t]he fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, *in the allegiance and under the protection of the country*, including all children here born of *resident* aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns and their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes *owing direct allegiance to their several tribes*.

Id. at 693 (emphases added). For a person born within the territory of the United States to be "subject to the jurisdiction thereof," it appears from this passage that the person must at birth owe a sufficiently direct duty of allegiance to the sovereign in return for the sovereign's reciprocal obligation of protection. The child of members of an Indian tribe who owe direct allegiance to their tribe does not qualify, although clearly born in the United States.

Nor do the children of aliens who are here illegally, at least not under any common sense understanding of the Citizenship Clause. A hypothetical scenario that alters the facts of *Wong Kim Ark* will help bring the point into sharper focus. Suppose that the plaintiff in *Wong Kim Ark* had been born in California to parents who had entered the United States in violation of the Chinese Exclusion Act and were thus subject to criminal prosecution and deportation upon discovery. The "single issue" presented under these facts would be framed something like this:

> Whether a child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the emperor of China and who entered and have remained in the United States in violation of our laws prohibiting the same, and who thus owe no allegiance to our country, becomes at the time of his birth a citizen of the United States.

I submit that it is implausible in the extreme that the *Wong Kim Ark* Court would have answered this question "in the affirmative."

To be sure, there is dicta in the Court's opinion to the effect that any person who is born in the United States and who is not within any of the four

"exceptions" identified by the Court is entitled to birthright citizenship. *See Wong Kim Ark*, 169 U.S. at 682, 693. But that dicta is not binding and, more fundamentally, is wrong. The holding of the Court—that a child born here to lawful permanent residents domiciled in this country is a citizen at birth—is correct, as the text, structure, and history of the Citizenship Clause demonstrate.

I. The Text of the Citizenship Clause

If "subject to the jurisdiction" of the United States means nothing more than the duty of obedience to "the laws of the United States," then why didn't the Framers of the Clause just say "subject to the laws of the United States"? Doing so would have been quite natural given that this straightforward, unambiguous phrase is used in both Article III and Article VI. And if this is all that "subject to the jurisdiction thereof" was understood to mean, why did the Framers of the Clause add the phrase to "born in the United States," which standing alone necessarily implies amenability to the government's sovereign regulatory authority? *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible."). It is no answer to say that the inclusion of "subject to the jurisdiction thereof" was necessary to ensure that the Clause did not eliminate the four exceptions to universal birthright citizenship identified by the *Wong Kim Ark* Court. Those exceptions (save for the exception

for children of Tribal Indians) were not found by the Court to be implicit in the Clause as a result of a careful exegesis of the original public meaning of "subject to the jurisdiction thereof," but rather were forced on the Clause on the theory that they were incorporated from our country's common-law traditions.

Apart from these threshold textual problems with universal birthright citizenship, advocates of that interpretation necessarily must read into the Clause qualifications that simply have no basis in its text, structure, and history. Start with the word whose meaning is the center of debate: "jurisdiction." The most natural reading of the Citizenship Clause is that it requires a person to be subject to the "full and complete" jurisdiction of the United States. This is in keeping with the standard canon that "[g]eneral words (like all words, general or not) are to be accorded their full and fair scope." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF JUDICIAL TEXTS 101 (2012). This means that they are "not to be arbitrarily limited" to only a subset of their natural meaning. *Id.* An example of this canon at work in a closely analogous context is the Supreme Court's construction of the Executive Vesting Clause, which provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Interpreting the phrase "[t]he executive Power" in accordance with the general-terms canon, the Supreme Court has explained that "all of it" is vested in the President. *Seila Law LLC v.*

CFPB, 591 U.S. 197, 203 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1). In other words, the full and complete executive power is what the Constitution means by vesting in the President "[t]he executive Power." This is in contrast to the Legislative Vesting Clause, which vests only "the legislative Powers herein granted" in Congress. U.S. Const. art. I, § 1.

Thus, when the Framers of the Citizenship Clause used the term "jurisdiction," standard tools of interpretation presume that they meant the *full and complete* jurisdiction of the United States, which requires more than just one's physical presence in the Country that creates a temporary duty of "submission and obedience" to our laws. *Fleming v. Page*, 50 U.S. 603, 615–16 (1850) (describing the "temporary allegiance" owed by "foreigners and enemies" while on land controlled by the United States). No, it requires a person to owe a "direct and immediate allegiance" to the sovereign. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *see also* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (1880). In other words, "jurisdiction" encompassed not only the power to enforce laws, but also the concept of "political jurisdiction" as described in *Elk*, 112 U.S at 102 (citizenship attaches at birth only to those "*completely* subject to" our country's "*political* jurisdiction.") (emphases added). A plain-meaning reading of "jurisdiction," in accordance with the general-terms canon, thus is not satisfied

by a fleeting exercise of the purely regulatory jurisdiction that attaches even to the "temporary and local allegiance" owed by an alien here only temporarily. *The Schooner Exch. v. McFaddon,* 11 U. S. 116, 144 (1812); *see* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 48 (1834). Again, had the Framers of the Citizenship Clause intended to extend birthright citizenship to any person amenable to Congress' regulatory "jurisdiction," surely it would not have chosen words so ill-suited to its purpose. At a minimum, it could have used a qualifier like "subject to the jurisdiction thereof *to any extent*." Yet it chose not to do so.

Those who owe a "direct and immediate allegiance" sufficient to establish the "political jurisdiction" of the United States obviously include citizens and their children. But this category also includes children born here to persons who have lawfully established permanent residence. Such lawful permanent residents, although not full members of the political community, have sufficient ties to establish a permanent domicile, which is deeply tied to the concept of allegiance. *Wong Kim Ark*., 169 U.S. at 692 ([W]hen the parents are domiciled here birth establishes the right to citizenship."). That person's child would inherit his father's permanent domicile and thus become American by birth. The children of persons who were merely in the country temporarily are not subject to the full and complete jurisdiction of the United States because, although their parents

owe "submission and obedience" to the laws, *Flemming*, 50 U.S. at 615-16, and were thus "subject in some respect or degree to the jurisdiction of the United States," *Elk*, 112 U.S. at 102, their presence only created an inherently "temporary and local allegiance." *The Schooner Exch.*, 11 U.S. at 144. In any event, no reasonable understanding of the concept of the allegiance/protection bond between citizen and sovereign can be stretched to include a person born in the United States to illegal aliens, who are at pains to evade discovery by our government because, although bound like anyone else on American soil to comply with our laws, their very presence here is in intentional defiance of them. They owe no genuine allegiance to the United States.

Although the general-terms canon of construction, like all such canons, is defeasible by the context in which a term is used, *see* Scalia & Garner, *supra*, at 59, the rest of the Citizenship Clause's text also points in the same direction: A person born in the United States must be "completely subject to [its] political jurisdiction, and owing [it] direct and immediate allegiance" to be constitutionally entitled to citizenship at birth. *Elk*, 112 U.S. at 102.

The text surrounding the phrase "subject to the jurisdiction thereof" supports the Executive Order's "complete-jurisdiction" interpretation and defeats the "regulatory-jurisdiction" one. Given that legal enactments are read as a "harmonious whole," *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012)

(internal quotation marks omitted), the surrounding text provides strong evidence that the Citizenship Clause requires full and complete jurisdiction, *see* Scalia & Garner, *supra*, at 180.

Begin with the Citizenship Clause's statement providing that persons born in the United States and meeting the jurisdictional requirements for citizenship shall be a "citizen[] of the United States and of the State wherein they *reside*." U.S. CONST. amend. XIV, § 1, cl. 1 (emphasis added). The Clause clearly presumes that persons granted birthright citizenship "reside" in a state.

To "reside" meant the same thing in 1868 as it means today: the place where one lives, where he is "domiciled." JOHN TRAYNOR, LATIN PHRASES AND MAXIMS 295–96 (1861) (equating domicile and residence); VINE W. KINGSLEY, RECONSTRUCTION IN AMERICA 24 (1865) (same). And it is clear that the "residence" contemplated by the Framers of the Clause is the place where one lives both permanently and legally. Nineteenth-century law recognized that a nation could "prescribe[] a certain form, whereby a stranger shall be admitted to establish his domicile therein." ROBERT PHILLIMORE, 4 COMMENTARIES UPON INTERNATIONAL LAW 218-222 (1889) (discussing the difference between *de facto* and *de jure* domicile); *The Georgia*, 74 U.S. 32, 41 (1868) (describing Phillimore's commentaries "on international law" as "learned and most valuable"). Thus, when a country refused domicile to a person, it followed

obviously, that he could not legally establish his domicile in the country. After all, the very idea of a domicile requires the consent of both parties—allegiance from the person seeking domicile in return for the sovereign's protection—and a person whose very presence flouts the law has not demonstrated allegiance to the sovereign in any capacity. *See* Robert G. Natelson & Andrew T. Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 BR. J. AM. LEG. STUDIES 1, 29 & n.182 (2024). It was understood even in England, with its expansive doctrine of *jus soli*, that an alien cannot "pay any Allegiance to any other Society, unless he be afterwards received into it." *See* MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 80 (5th ed. 1786). Lord Coke, ruling under the doctrine of *jus soli*, recognized a similar point by stating that a requirement of birthright citizenship was "the parents be under the actual obedience of the King." *Calvin's Case* (1608), 77 Eng. Rep. 377, 399; 7 Co. Rep. 1, 18b (K.B.). Illegal aliens have not been "received" into the United States, Bacon, *supra*, at 80, and they are certainly not under "actual obedience" to it, *Calvin's Case*, 77 Eng. Rep at 399.

The Framers of the Fourteenth Amendment were well aware, of course, that our nation was founded on the self-evident truth that governments "deriv[e] their just powers from the consent of the governed," THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), and that mutual consent was required to

establish the allegiance/protection bond necessary to make a citizen. It would thus make no sense that children born here to temporary visitors and illegal aliens, neither of whom have been permanently "received" into the country, are citizens under the Citizenship Clause. *See generally* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). By permitting a foreigner to visit our country, the sovereign has not consented to let that person establish a permanent relationship with the body politic, much less that person's child. It has only consented to that person obtaining a "local" allegiance in return for temporary protection. *The Schooner Exch.*, 11 U.S. at 144. The case against the birthright citizenship of the children of illegal immigrants is ever clearer. The United States, far from consenting to their presence, has prohibited it, and thus has clearly not consented to the reciprocal duties of allegiance and protection that make for a citizen. *See* Bacon, *supra*, at 80.

The Citizenship Clause's presumption that persons entitled to citizenship by birth "reside" in a "state" is thus important evidence that "jurisdiction" means full and complete jurisdiction requiring an allegiance/protection bond between citizen and sovereign. Persons who have legally and permanently domiciled themselves in a state, and necessarily the country in which that state exists, have established a "direct and immediate" allegiance to their new home. *Elk*, 112 U.S. at 102. This allegiance is passed on to their child through the inherited domicile

and trumps any residual allegiance that the parents or child may owe extraterritorially to their native country. Thus, their children become citizens by birth. Under this interpretation, all the pieces of the Citizenship Clause fit together.

Other provisions of the Fourteenth Amendment confirm that "subject to the jurisdiction thereof" in the Citizenship Clause means "full and complete" jurisdiction. U.S. CONST. amend. XIV, § 1, cl. 1. The Equal Protection Clause, for instance, invokes the regulatory jurisdiction of each state by using the territorial phrase "within its jurisdiction." *Id.* ("nor deny to any person within its jurisdiction the equal protection of the laws"). Although both clauses use the word "jurisdiction," their textual difference explains the difference in meaning. When Congress simply meant its power to enforce the laws, it used the term "within," which carries a spatial or territorial connotation, *see Within*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("In the limits or compass of; not beyond."), not the phrase "subject to." Thus, members of Indian tribes are entitled to the equal protection of the laws, *United States v. Antelope*, 430 U.S. 641, 647-650 (1977), even though they are not constitutionally entitled to citizenship at birth, *Elk*, 112 U.S. at 102. Indeed, even illegal aliens "within [the] jurisdiction" of a state are entitled to the "equal protection of the laws." *Plyer v. Doe*, 457 U.S. 202, 210 (1982) (cleaned up). The

presumption that "a material variation in terms suggests a variation in meaning" demonstrates that the Equal Protection Clause's coverage of persons "within [the] jurisdiction" of a state sweeps broader than the Citizenship Clause's use of the different phrase "subject to the jurisdiction" of the United States. Scalia & Garner, *supra*, at 170; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–16 (2001).

Finally, the constitutional structure as a whole casts grave doubt that children born in America to mere temporary visitors or illegal aliens are constitutionally entitled to natural-born citizenship. *See* Scalia & Garner, *supra*, at 167 (Whole Text Canon). Although the Constitution treats natural-born and naturalized citizens the same in almost every respect, it makes an exception for eligibility to serve as President of the United States. Only a natural-born citizen can serve as the President. U.S. CONST. art. II, § 1, cl. 5. This exception to the general rule of equal citizenship was viewed as necessary to ensure that the President would have the utmost allegiance to the United States. As explained by Justice Story in his Commentaries on the Constitution, the requirement of natural citizenship "cuts off all chances for ambitious foreigners" and "interposes a barrier against those corrupt interferences of foreign governments in executive elections." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473 (1833). It would be odd in the extreme for the

Constitution to allow a person born to foreign visitors who owe no permanent allegiance to the United States (and who may even be avowed enemies of the country) and who promptly return to and raise their child in their native country, to become President while denying the same opportunity to a person who is brought to America as an infant, is naturalized the moment he turns 18, and serves in our military. The framers of the Fourteenth Amendment did not create a Constitution that disqualifies, for example, Senator Bernie Moreno from serving as President, but permits an American-born terrorist like Yaser Hamdi to seek and serve (even theoretically) in that office. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *cf. also id.* at 554 (Scalia, J., dissenting) (referring to Hamdi as "a *presumed* American citizen" (emphasis added)).

I. The History of the Citizenship Clause

The history of the Citizenship Clause confirms what the text states: birthright citizenship is guaranteed only to persons whose parents are subject to the full and complete jurisdiction of the United States and thus owe to our country the allegiance that comes with it. The relevant legislative history begins with the passage of the Civil Rights Act of 1866 over the veto of President Johnson. The 1866 Act was a charter of freedom for the newly freed slaves. It guaranteed property rights, contract rights, and equal treatment under the laws and, most importantly for this case, contained a citizenship provision establishing "[t]hat all

persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

The problem with the 1866 Act was twofold. First, it was unclear in the Constitution (as even its proponents acknowledged) where Congress received the power to enact it. *See McDonald v. City of Chicago*, 561 U.S. 742, 775 & n.24 (2010) (plurality op.); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982). Second, because it was ordinary legislation, it could be repealed by a future Congress. And given President Johnson's earlier veto, there was a risk of future resistance.

To solve these issues, Congress proposed and the states ratified the Fourteenth Amendment to the Constitution, which gave the Civil Rights Act of 1866 firm constitutional footing and ensured that the Act's principles would not be subject to legislative repeal or revision. Given this history, "it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866." *McDonald*, 561 U.S. at 775 (plurality op.).

The Civil Rights Act of 1866 thus gives critical insight into the meaning of the Citizenship Clause, which imported it into the Constitution. The Act, importantly and explicitly, excluded from birthright citizenship American-born

persons "subject to any foreign power." Civil Rights Act of 1866 § 1. The phrase "not subject to any foreign power," would have precluded, at a minimum, the birthright citizenship of children of temporary visitors or illegal aliens because the child's parents would continue to owe their permanent and dominant allegiance to the foreign country where they (and therefore their child) were permanently and legitimately domiciled. *Cf.* Michael D. Ramsey, *The Original Meaning of "Natural Born,"* 20 U. Pa. J. Const. L. 199, 213–26 (2017) (explaining that children of noncitizens would ordinarily be claimed as citizens by the parents' country of citizenship). Thus, interpreting the Act and Fourteenth Amendment in harmony, children who are subject to a foreign power are not entitled to birthright citizenship as a matter of both statutory and constitutional law.

But under the regulatory-jurisdiction view, the Fourteenth Amendment made the Civil Rights Act of 1866 *unconstitutional*. If the 1866 Act contains an allegiance requirement that the Citizenship Clause does not, then the former is unconstitutional with respect to persons who are consequently denied birthright citizenship on the basis of allegiance. The same Congress that passed the Civil Rights Act did not make that piece of landmark legislation unconstitutional two months later in the amendment designed to "incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd v. Hodge*, 334 U.S. 24, 32 (1948).

There is no evidence in the debates over the Citizenship Clause that the 39th Congress had a sudden change of heart about the scope of the 1866 Act's citizenship provision that explained the change in language and evinces a change in meaning. The evidence shows instead that Congress replaced the language of the 1866 Act because it had generated uncertainty about the status of Indians, not because it was intended to broaden the scope of birthright citizenship from that established by the Act. Senator Trumbull, who introduced the language in the 1866 Act, "admitted difficulty in finding the right language to express his intent and proposed or considered various formulations before settling on the one ultimately adopted." Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L. REV. 405, 452–53 n.229 (2020) (citing CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Senator Trumbull)). Indeed, he initially considered the phrase "that persons born in the United States, and owing allegiance thereto" shall be citizens. CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Senator Trumbull). But he later realized that even persons "temporarily resident" owe a temporary, local allegiance to the country in the form of a duty to follow the laws, and this language would thus make them citizens, a result that no Senator participating in the recorded debate supported. *Id.* Thus Trumbull settled upon the language of the 1866 Act: "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens

of the United States."

Senator Howard, who drafted the Citizenship Clause of the Fourteenth Amendment and was "not fully satisfied with Trumbull's" language in the 1866 Act, Ramsey, *Originalism and Birthright Citizenship*, *supra*, at 452–53 n.229, used the phrase "subject to the jurisdiction thereof" in lieu of the phrase "not subject to any foreign power, excluding Indians not taxed." This change in language was not meant to change the meaning of Act's requirements for birthright citizenship, but rather to deal with concerns about the phrase, "Indians not taxed." Senator Trumbull himself and other supporters of the Clause objected to including the phrase "Indians not taxed" because it might be construed to apply differently to the children of rich and poor assimilated Indians living off reservations, creating a type of caste system where the children of rich Indians (who paid taxes) would obtain citizenship at birth but the children of poor Indians (who paid no taxes) would be excluded. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Senator Trumbull) ("I am not willing to make citizenship in this country depend on taxation. I am not willing, if the Senator from Wisconsin is, that the rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen."); *id.* at 2895 (Statement of Senator Hendricks) (arguing for a literal interpretation of the phrase "not taxed"); *id.* at 574 (statement of Senator Henderson) (raising concerns that the

phrase "not taxed" will be interpreted too broadly).

The rest of the legislative history of the Fourteenth Amendment further proves that the 39th Congress harbored no intention of straying from what it had enacted two months prior. That is, it intended to retain the allegiance requirement that was clear from the face of the Civil Rights Act of 1866. For instance, Senator John Conness from California, a major proponent of the Amendment, explained that the purpose of the Fourteenth Amendment was to "incorporate" the 1866 Act into the "fundamental instrument of the nation." CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). Other prominent Senators made similar remarks, confirming that the purpose of the Citizenship Clause was to constitutionalize the 1866 Act and not to expand citizenship by birth to persons subject to a foreign power. *See Hurd*, 334 U.S. at 32 n.12 (citing statements). As Senator Howard explained, "[t]he word 'jurisdiction,' as here employed, ought to be construed so as to imply a *full and complete jurisdiction* on the part of the United States." CONG. GLOBE, 39th Cong. 1st Sess. 2891 (1866). (emphasis added). Senator Trumbull, the author of the 1866 Act, agreed that the goal was to constitutionalize the Act, not expand it. As he explained, "[i]t is only those persons who come *completely* within our jurisdiction, who are subject to our laws, that we think of making citizens." *Id.* (emphasis added).

We thus have the author of the 1866 Act (Trumbull), the author of the

Citizenship Clause (Howard), and one of the foremost defenders in the Senate of that Clause (Conness), all agreeing that the differing language of Citizenship Clause of the Fourteenth Amendment and the Citizenship Clause of the Civil Rights Act of 1866 means the same thing.

That these statements were primarily made in the context of debating the citizenship status of Indians makes them especially probative because of the close regulatory analogy between Indians and temporary foreign visitors. Tribal Indians born within the territory of the United States owed primary allegiance to their tribes. *See* Ramsey, *Originalism and Birthright Citizenship*, *supra*, at 451. Despite their primary allegiance to their tribes, there was no doubt that they could be charged with crimes, *United States v. Kagama*, 118 U.S. 375, 379–85 (1886), and even though the federal government elected not to interfere with tribal affairs, it had "plenary" jurisdiction to do so, *see Winton v. Amos*, 255 U.S. 373, 391 (1921); *United States v. Holliday*, 70 U.S. 407, 416–18 (1866). Congress's decision to allow tribal government to exist at all was simply a matter of legislative grace. Despite the plenary authority over tribes, Senator Trumbull commented that "they are not subject to our jurisdiction." CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). Such a statement would make no sense if the Citizenship Clause referenced only regulatory jurisdiction.

The congressional debates thus make clear that having Indian blood was not

the reason that the children of Tribal Indians were not granted citizenship by birth. It was their allegiance to their tribe that was incompatible with granting birthright citizenship to their children. But if an Indian left his reservation, established a permanent domicile within a state, and assimilated into the body politic, his children would then be entitled to citizenship at birth. As the renowned constitutional scholar and Chief Justice of the Michigan Supreme Court Thomas Cooley explained, if "tribal relations are dissolved" between the Indian and the tribe, and "the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community" his children become citizens at birth. Cooley, *supra*, at 243.

The debate in the 39th Congress over the citizenship status of the children of Chinese immigrants permanently domiciled in California and "Gypsies" in Pennsylvania is similarly revealing. Senator Edgar Cowan of Pennsylvania opposed the Citizenship Clause because he worried that it would prohibit Pennsylvania from removing Gypsies from its territory and enable California to be overrun by Chinese-immigrant laborers. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866) (statement of Senator Cowan). California Senator Conness responded with partial agreement, stating that the Citizenship Clause would make no distinctions based on race, and thus the children of persons of Chinese descent

in California and of Gypsies in Pennsylvania would not be excluded from birthright citizenship based on their race. *Id.* at 2891-92. And he made his view clear that the children of Chinese immigrants who had established their permanent domicile in California would be subject to the full and complete jurisdiction of the United States and their children would be entitled to citizenship at birth. *Id.*

In sum, the statutory and legislative history of the Citizenship Clause teach at least three things about the Clause. First, the Clause was designed to constitutionalize the citizenship provision of the Civil Rights Act of 1866, not to broaden the scope of birthright citizenship. Second, the phrasing used in the 1866 Act was changed to better reflect the status of members of Indian tribes within our country, which was a primary concern of the Framers. Third, the purpose of the Clause was to eradicate racial discrimination in birthright citizenship. What the statutory and legislative history do *not* show—what that history refutes—is that the simple obligation of virtually all persons on United States soil to follow United States laws was sufficient to grant one's American-born child citizenship. To the contrary, a person must, at a minimum, owe the primary allegiance to the United States that comes with establishing one's lawful permanent domicile in this country to entitle the person's children to birthright citizenship. And aliens who are present in the United States temporarily or illegally do not qualify.

II. *Elk:* The Supreme Court's Early Interpretation of the Citizenship

Clause

The Supreme Court's interpretation of the Citizenship Clause in *Elk v. Wilkins*, 112 U.S. 94 (1884), also supports what the Clause's text and history make clear. As the Supreme Court has consistently explained, early interpretations of constitutional text are usually strong evidence of that text's public meaning. *United States v. Alabama Great Southern R. Co.*, 142 U.S. 615, 621 (1892); *see Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 390 n.3 (2024).

The Supreme Court in *Elk* explained that the Clause requires a person to be at birth "not merely subject in some respect or degree" to the jurisdiction of the United States but to be "completely subject to the[] political jurisdiction, and owing the[United States] direct and immediate allegiance." *Id.* at 102. Thus, in *Elk*, an Indian born on a reservation to Tribal parents did not have a valid claim to citizenship by birth. Despite being born within the territory of the United States, he was born "owing immediate allegiance," like his parents, to his tribe. *Id.*; *Cf. Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J.) (explaining the status of Indian Tribes). *Elk* is thus essential in understanding the original public meaning of the Citizenship Clause and is, unlike the dicta in *Wonk Kim Ark*, a binding precedent of the Court.

III. The Purpose of the Citizenship Clause

As explained above, the primary purpose of the Citizenship Clause was to

constitutionalize the citizenship provision of the Civil Rights Act of 1866 and, in turn, entitle freed slaves who were born in the United States and their children to constitutionally protected citizenship. Requiring full and complete jurisdiction over persons born in the United States achieves this purpose.

If a former slave was born within the United States to enslaved parents, he was subject to the jurisdiction of the United States at the time and was therefore entitled under the Clause to citizenship once he became free. Although born into bondage, the children of slaves, like the slaves themselves, owed allegiance to the government in which they were domiciled and not to the country from which they were torn. *See Dred Scott v. Sandford*, 60 U.S. 393, 531 (1857) (McLean, J., dissenting); *see also id.* at 573 (Curtis, J., dissenting) (same); *id.* at 420 (majority opinion) (same). If a slave was freed, the question whether he was thereafter a citizen turned on whether he would have been a citizen had he been born free. *See id.* at 573 (Curtis, J., dissenting). Thus, a slave born in the United States owed an allegiance to the United States, and upon receiving his freedom, became a citizen.

Perhaps just as important is the fact that slaves born in the United States never owed any allegiance to a foreign power while enslaved or thereafter. Their only plausible allegiances were to their master and this country. Thus, they would clearly fall within the text of the Civil Rights Act of 1866. And because the 1866 Act and the Citizenship Clause of the Fourteenth Amendment mean the same

thing, they would also fall within the Fourteenth Amendment. The Citizenship Clause thus accomplished its mission of granting natural-born citizenship status to freed slaves born in the United States.

Some scholars who favor the regulatory-jurisdiction interpretation of the Citizenship Clause point to the existence of illegally imported slaves after the slave trade was banned in 1808, *see* An Act to prohibit the importation of slaves, 2 Stat. 426 (1807) (effective on Jan. 1, 1808), as a basis for rejecting the complete-jurisdiction interpretation, *see generally* Gabriel Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021). Their logic is that because some slaves were illegally trafficked into the country after 1808, and because there was no indication that the children of these persons were denied citizenship, the complete jurisdiction interpretation must be wrong. *Id.* But surely there is a fundamental difference between slaves illegally brought against their will into this country by the criminal acts of their captors and aliens voluntarily and knowingly violating our laws by illegally entering the country or illegally overstaying their permission to be present in our country. Although a slave's captor broke the law smuggling him into the country, the slave himself did not violate the law. Thus, they had not rejected obedience to our laws by the act of entering the country illegally. Additionally, just like the children of slaves who entered the

country before the prohibition on the slave trade, slaves in the country illegally were not "subject to any foreign power" within the meaning of the Civil Rights Act of 1866. And because that Act, again, carries the same meaning as the Citizenship Clause, the children of illegally imported slaves would be entitled to citizenship under any reading of the Citizenship Clause.

The complete-jurisdiction reading of the Citizenship Clause would not, of course, make natural-born citizens of slaves born outside of the United States and then smuggled into the country. But that fact is irrelevant because *no* interpretation of the Citizenship Clause would make persons born outside of the United States citizens.

IV. Conclusion

As outlined above, I believe that the complete-jurisdiction interpretation of the Citizenship Clause is compelled by its text, structure, and history and by common sense. The notion that those who Framed and ratified the Citizenship Clause would have been indifferent to the modern practices of "birth tourism" and illegal immigration if these practices had been in existence in their day is simply preposterous. They would have framed the Clause, I believe, to unambiguously ensure that birthright citizenship was not granted to the children of aliens whose presence in the United Sates was illegal or lawful but temporary. As it happens, the meaning of words they used, while not explicitly anticipating these problems, achieved the same result. Accordingly, President Trump's Executive Order, in my opinion, is constitutional.

Mr. ROY. Thank you, Mr. Cooper.

We will now move to Mr. McCotter, and I welcome you for your opening statement.

I will note, Ms. Frost, we've gone over a little bit of time. I'll give you ample time as well.

Mr. McCotter, please proceed.

STATEMENT OF R. TRENT McCOTTER

Mr. MCCOTTER. Chair Roy, Ranking Member Scanlon, and distinguished Members of the Committee.

The 14th Amendment confers citizenship on any person who was both born or naturalized in the United States and subject to the jurisdiction thereof. Each of those clauses invokes a specialized term of art. In other words, it doesn't mean what it might mean at first glance.

For example, courts have held as recently as four years ago that those born in U.S. territories are not covered by the Citizenship Clause despite being literally born in the United States. Similarly, for the jurisdiction clause, it invokes the historic doctrine of allegiance, meaning the person must owe direct and exclusive allegiance to the sovereign, as the D.C. Circuit held as recently as 2015.

Now, the historical record for the jurisdiction clause is lengthy and complex. I would respectfully direct you all to the amicus brief that I submitted on behalf of many Members of this Committee. I'll highlight three issues in particular.

First, like Mr. Cooper, I'll emphasize the importance of the Civil Rights Act of 1866. There is widespread agreement that the jurisdiction clause of the 14th Amendment was meant to Constitutionalize that act and that they mean the same thing, but, of course, the 1866 act excluded those who are subject to any foreign power. That means citizenship, for both clauses, turns on not being subject to any foreign power.

Senator John Bingham, who was later the principal author of the 14th Amendment, said, what does this mean? It means, quote, "every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty," would be a citizen. American birthright citizenship was reserved for those who were not already deemed allegiant to another sovereign at their birth.

That takes me to my second point. You may have noticed in the quote from Senator Bingham that he refers to the parents' allegiance. Obviously, the 14th Amendment itself refers to the allegiance of the child. So, what's the connection there?

The connection is that, at that time, and in many countries even now, the children born to citizens of that country were deemed, themselves, to be citizens of that country. For example, in English law at the time, a child born to English citizens in America would be deemed an English citizen at birth and, therefore, could not owe complete and exclusive allegiance to the United States. That would deprive that child of being entitled to birthright citizenship. That's the connection between the parents' allegiance and the child's allegiance that you see so often.

This leads to the third and final point to emphasize today. As Mr. Cooper said, as a matter of logic and history, the phrase "subject to the jurisdiction thereof" cannot mean "subject to the laws thereof."

The exceptions prove the point. There is widespread agreement that children born in the United States to Ambassadors or to invading soldiers would not receive birthright citizenship. So, it's not correct to say that all those born in the United States are citizens, even under those who challenge President Trump's Executive Order. As far as I'm aware, almost no one holds that view.

The explanation given for why Ambassadors' children and children of foreign soldiers are not entitled to birthright citizenship is often that those individuals are not subject to U.S. law. In other words, they have various forms of immunity.

That's wrong. Not even Ambassadors have full immunity. At best, it's contingent. Their home country can revoke it. Nor are foreign soldiers immune from U.S. law when they are within the United States. So, the inquiry cannot turn on parents' supposed immunity.

As Mr. Cooper also pointed out, there's the fact that there was complete agreement at the time of the 14th Amendment that American Indian children—that Indian children would not be covered, even though they are undoubtedly subject to U.S. law and long have been.

The theory that "subject to the jurisdiction thereof" means "subject to the laws thereof" proves far too little. It cannot explain any of the categories widely accepted.

It also proves too much. If it's correct that having a parent with contingent or a partial immunity, as an ambassador would have, could deprive the child of birthright citizenship, then domestic individuals who have partial or contingent immunity—judges, prosecutors, even Members of Congress who possess immunity for certain acts under speech or debate—would likewise fall within the same category.

Of course, we know that's not right. We know that the children of those officials are U.S. citizens while those of Ambassadors are not.

What test explains the exceptions? It's allegiance, the first point I mentioned. Judges, prosecutors, Members of Congress, they're all fully allegiant to the United States. Ambassadors, foreign soldiers are not.

The takeaway for this Committee? Congress can confer citizenship by statute and has done so for many groups not covered by the jurisdiction clause, including Indians and those born in many of the territories. That power is and always has been exclusively Congress's alone to exercise.

Thank you.

[The prepared statement of Mr. McCotter follows:]

Hearing Before the House Judiciary Committee

Subcommittee on the Constitution and Limited Government

"'Subject to the Jurisdiction Thereof': Birthright Citizenship and the Fourteenth Amendment"

Tuesday, February 25, 2025

Testimony of R. Trent McCotter

Partner, Boyden Gray PLLC

Chairman Roy, Ranking Member Scanlon, and distinguished members of the Committee:

The Fourteenth Amendment confers citizenship on any person who is both (1) "born or naturalized in the United States" and (2) "subject to the jurisdiction thereof."[1] Each requirement invokes specialized terms of art. Courts have construed the first clause to exclude those born in U.S. territories, despite being literally "in" the United States.[2] And "jurisdiction" in the second clause (the "Jurisdiction Clause") invokes the historic doctrine of "*ligeantia*," meaning the person must owe direct and exclusive allegiance to the sovereign.

The D.C. Circuit held only a few years ago that "birthright citizenship does not simply follow the flag," meaning it does not monolithically apply to everyone born on U.S. soil.[3] The court held: "the evident meaning of the words 'subject to the jurisdiction thereof' is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[4]

The historical record regarding the Jurisdiction Clause is lengthy and complex. The *amicus curiae* brief I drafted and submitted on behalf of many members of this Committee in the ongoing litigation over President Trump's Executive Order lays out

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[1] U.S. Const. amend. XIV.

[2] *See Fitisemanu v. United States*, 1 F.4th 862, 877 (10th Cir. 2021); *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

[3] *Tuaua*, 788 F.3d at 305.

[4] *Id.* (cleaned up).

a much more detailed review than I can present in brief remarks here. I have attached a copy of that brief to my formal statement.

But today I will highlight three issues in particular.

First, the importance of the Civil Rights Act of 1866. There is widespread agreement that the Jurisdiction Clause of the Fourteenth Amendment was meant to constitutionalize that Act and that they mean the same thing. The Civil Rights Act gave citizenship to those "born in the United States and *not subject to any foreign power*."[5] The Act stated the operative language in the negative form ("not subject to any foreign power"), whereas the Jurisdiction Clause of the Fourteenth Amendment stated it in the affirmative ("subject to the jurisdiction" of the United States).

Citizenship for both thus turns on not being subject to any foreign power. Senator John Bingham, a principal author of the future Fourteenth Amendment, confirmed this understanding when he said that "every human being born within the jurisdiction of the United States of parents *not owing allegiance to any foreign sovereignty*" would be a citizen.[6] American birthright citizenship was reserved for those who were not already allegiant to another sovereign at their birth.

That takes us to my second point: the role of the parents. To be sure, the text of the Jurisdiction Clause refers to the allegiance of the person born in the United States, i.e., the child. But note that John Bingham referred to the *parents*' allegiance. Why is that? Because historically and even today, the general rule is that a child's

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[5] Ch. 31, 14 Stat. 27, 27 (1866) (emphasis added).

[6] Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (emphasis added).

home country will claim him as a citizen at birth, regardless of where he is born. For example, children born in America to English citizens were deemed by English law to be English citizens themselves at birth[7]—and thus allegiant to Britain, and thus ineligible for birthright American citizenship.

Thus, scholars have argued that the crucial inquiry was "the parents' allegiance to a foreign country."[8] And that, in turn, tells us the child's allegiance. This is why in 1872, just four years after ratification of the Fourteenth Amendment, the Supreme Court noted that birthright citizenship excluded "citizens or subjects of foreign States born within the United States."[9] Even today, many nations deem children born to their citizens or nationals to be, in turn, citizens or nationals themselves at birth. The children thus do not owe total allegiance to the United States.

This leads me to the third and final point to emphasize today: as a matter of logic and history, the phrase "subject to the jurisdiction thereof" cannot mean "subject to the *laws* thereof." There is widespread agreement that children born in the United States to ambassadors or to invading soldiers would not receive birthright citizenship. An explanation commonly given is because their parents are not subject to U.S. law.

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[7] Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 St. Louis U. Pub. L. Rev. 329, 358 (2013). So did American law at the time. *See* Ch. 71, 10 Stat. 604 (1855).

[8] Mensel, *supra*, at 334.

[9] *Slaughter-House Cases*, 83 U.S. 36, 73 (1872).

Note that even this explanation turns on the status of the *parents*, as I noted above (after all, no child is *born* an ambassador himself, for example). But that proffered explanation is otherwise wrong. Not even ambassadors have full immunity from U.S. law; at most, they have contingent immunity, which their home countries can waive not just on a person-by-person basis, but even on a charge-by-charge basis.[10] Nor are foreign soldiers immune from U.S. law when within the United States.[11] So the inquiry cannot turn on the parents' supposed immunity.

There is also the notable example of American Indians, who have likewise long been recognized as excluded from birthright citizenship under the Fourteenth Amendment, even though they are undoubtedly subject to U.S. law.[12]

The theory that "subject to the jurisdiction thereof" means "subject to the laws thereof" thus proves far too little. It cannot explain *any* of the categories widely accepted as excluded from birthright citizenship.

The theory also proves too much. If parents' contingent or partial immunity (as ambassadors have) were sufficient to render their children "not subject to the jurisdiction" of the United States, then any number of domestic individuals with partial or contingent immunity—e.g., judges, prosecutors, and even Members of Congress, who possess immunity for certain acts under the Speech or Debate Clause—would likewise fall within the same category. Of course, we know the

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[10] *See Diplomatic and Consular Immunity*, U.S. Dep't of State, July 2019, https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf.

[11] *See Ex Parte Quirin*, 317 U.S. 1, 20 (1942) (upholding convictions of German soldiers captured in the United States).

[12] *See, e.g.*, 1 Stat. 137 (1790).

children of those officials are indeed U.S. citizens, while those of ambassadors are not.

What test best explains the agreed-upon exceptions? It is allegiance, the first point I started with today. Judges, prosecutors, and Members of Congress—unlike ambassadors, foreign soldiers, and Indians, at least as understood in the 1860s—owe total allegiance to the United States. It has nothing to do with immunity.

It would have been quite easy to say in the Fourteenth Amendment that the person must be subject to the *laws* of the United States, but the drafters chose instead to use the term of art *jurisdiction*. The Supreme Court has said that "[j]urisdiction … is a word of many, too many, meanings,"[13] so it should come as no surprise that the meaning of that term in an amendment written nearly 160 years ago would be nuanced—a point explained in far more detail in our *amicus* brief.

A discussion of the best interpretation of the Supreme Court's decision in *Wong Kim Ark* is likewise too long to provide in these brief remarks, but I'll note one thing: Justice John Marshall Harlan—the patron of interpreting the Constitution as color-blind and the sole dissenter in *Plessy v. Ferguson*—joined Chief Justice Fuller's dissent in *Wong Kim Ark,* arguing that Wong "never became and is not a citizen of the United States."[14] Clearly, Justice Harlan viewed a narrow reading of birthright citizenship as fully consistent with our Nation's commitment to equal protection.

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[13] *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004).

[14] *United States v. Wong Kim Ark*, 169 U.S. 649, 732 (1898) (Fuller, C.J., dissenting).

Congress can confer citizenship by statute and has done so for many groups not covered by the Jurisdiction Clause, including Indians.[15] But that power is Congress's alone to exercise. Thank you.

[15] *See, e.g.*, Ch. 233, 43 Stat. 253 (1924).

ATTACHMENT: *AMICUS CURIAE* BRIEF SUBMITTED ON BEHALF OF MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

No. 25-1153

In the United States Court of Appeals for the Fourth Circuit

CASA, INC., *et al.*,
PLAINTIFFS-APPELLEES,
v.
DONALD J. TRUMP, *et al.*,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND, No. 8:25-cv-201-DLB

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO STAY

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* state they are natural persons and therefore have neither any parent corporations nor any shares that could be owned by any publicly held corporation.

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*[1]

Amici are 18 members of Congress who serve on the Committee on the Judiciary of the U.S. House of Representatives. Chairman Jim Jordan leads this coalition and is joined by Reps. Andy Biggs, Chip Roy, Brandon Gill, Troy Nehls, Lance Gooden, Victoria Spartz, Mark Harris, Scott Fitzgerald, Robert Onder, Harriet M. Hageman, Tom McClintock, Wesley Hunt, Glenn Grothman, Ben Cline, Russell Fry, Michael Baumgartner, and Brad Knott.

Amici have a strong interest in the outcome of this case because Congress, as a co-equal branch of government, has an interest in the courts upholding the Constitution. Specifically, the historical record confirms that the Fourteenth Amendment does not confer citizenship on the children of aliens unlawfully present in the United States.

Because of this, "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress," *United States v. Ginsberg*, 243 U.S. 472, 474

[1] *Amici* have filed a motion for leave to file this brief. No party opposes leave to file. No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

(1917), but Congress has never granted citizenship to the children of aliens unlawfully present, *see also* 8 U.S.C. § 1408. Thus, the other branches are forbidden from conferring such citizenship on their own, a limitation that the Executive Order ensures is followed within the executive branch. *See also INS v. Pangilinan*, 486 U.S. 875, 885 (1988) ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations.").

The Court should grant Defendants-Appellants' motion to stay in part the District Court's preliminary injunction.

SUMMARY OF THE ARGUMENT

The Fourteenth Amendment confers citizenship on any person who is both (1) "born or naturalized in the United States" and (2) "subject to the jurisdiction thereof." U.S. Const. amend. XIV. Each requirement invokes specialized terms of art. The first clause has been construed to exclude those born in U.S. territories, despite being literally "in" the United States.[2] And "jurisdiction" in the second clause (the "Jurisdiction

[2] *See Fitisemanu v. United States*, 1 F.4th 862, 877 (10th Cir. 2021); *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

Clause") invokes the historic doctrine of "*ligeantia*," meaning the person must owe direct and exclusive allegiance to the sovereign, which in turn must consent to the person's presence.

Notably, the Jurisdiction Clause does not say that the person must be subject to the *laws* of the United States, but rather subject to its *jurisdiction*. The distinction matters. Even in modern caselaw and statutes, "[j]urisdiction ... is a word of many, too many, meanings," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), so it should come as no surprise that the meaning of that term in an amendment written nearly 160 years ago would be nuanced and invoke pre-existing doctrines.

As the D.C. Circuit has held, "birthright citizenship does not simply follow the flag." *Tuaua*, 788 F.3d at 305. Rather, "the evident meaning of the words 'subject to the jurisdiction thereof' is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id.* (quoting *Elk v. Wilkins*, 112 U.S. 94, 102 (1884)) (cleaned up).

There is widespread agreement that the Jurisdiction Clause means that children born in the United States to ambassadors or invading

soldiers would not receive citizenship under the Fourteenth Amendment. The best reason is because they do not owe total allegiance to the United States, rather than (as Plaintiffs contend) because those groups allegedly have immunity from federal law (in fact, they do *not* have unconditional immunity, as explained below). As explained in more detail below, there is a wealth of support for the proposition that the Clause applies the same to children of those illegally present in the country because they (like ambassadors and foreign soldiers) do not owe total allegiance to the United States; they remain citizens of their home countries, to whom they owe at least divided allegiance and which often imposes birthright citizenship of its own on the children born to its nationals in the United States. Allegiance is also a reciprocal relationship. The person must be present with the consent of the sovereign, a factor on which the Supreme Court extensively relied in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). But illegal aliens and their children are present in the United States without consent, *i.e.*, only by defying its laws.

Early English caselaw supports this concept of total allegiance and its role in citizenship, and even the Senators who drafted and debated the Jurisdiction Clause stated that children of "aliens" or others "owing

allegiance to anybody else" would not receive citizenship. That understanding extended for decades after the ratification of the Fourteenth Amendment. And some modern scholars argue that the "core purpose of the citizenship clause [was] to include in the grant of birthright citizenship all who are *lawfully in the United States*," and scholars have also distinguished the caselaw on which Plaintiffs rely.[3]

Because the Fourteenth Amendment does not confer citizenship on the children of illegally present aliens, and because Congress has not done so by statute, the other branches cannot confer such citizenship on their own. *See Pangilinan*, 486 U.S. at 885; *Ginsberg*, 243 U.S. at 474. The Executive Order at issue here properly ensures that rule is followed within the executive branch, and thus the Court should grant Defendants-Appellants' emergency motion for a partial stay of the District Court's preliminary injunction, which also suffers from numerous jurisdictional and scope-of-relief issues, as Defendants-Appellants explain in their emergency motion.

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[3] Samuel Estreicher & David Moosmann, *Birthright Citizenship for Children of Unlawful U.S. Immigrants Remains an Open Question*, Just Sec. (Nov. 20, 2018), https://www.justsecurity.org/61550/birthright-citizenship-children-unlawful-u-s-immigrants-remains-open-question/.

ARGUMENT

I. English Law.

In *Calvin's Case*—which the Supreme Court later cited in *Wong Kim Ark*, discussed below—Lord Coke explained what made someone subject to the jurisdiction of English courts. *Calvin's Case* (1608) 77 Eng. Rep. 377, 385. He noted that "it is *nec cœlum*, *nec solum*, neither the climate nor the soil, but *ligeantia* [allegiance] and *obedientia* [obedience] that make" one "subject" to the laws of the country. *Id.* Jurisdiction in that sense does not turn simply on whether the person was present within the territory or subject to its *laws*, but whether he owed allegiance to the sovereign. As the D.C. Circuit has explained, *Calvin's Case* means "[t]hose born 'within the King's domain' and 'within the obedience or ligeance of the King' were subjects of the King, or 'citizens' in modern parlance." *Tuaua*, 788 F.3d at 304 (quoting 77 Eng. Rep. at 399).

Lord Coke cited several prior cases to make the point. Most notable was *Perkin Warbeck's Case*, where a Dutchman declared himself the rightful heir to the English throne, then traveled to England in an attempt to take the throne. He was captured, but the English court concluded he "could not be punished by the common law" because he was

not subject to the civil courts' jurisdiction. *Calvin's Case*, 77 Eng. Rep. at 384. There was no state of war between the countries, but his mere presence was unlawful, and thus he had never been under the "protection of the King, nor ever owed any manner of ligeance unto him." *Id.*

As Professor Estreicher explains, "Warbeck's very setting foot on English soil as a pretender to the throne made him a criminal in the eyes of English law, one who had never claimed the protection of the king by virtue of his lawful presence in the realm. Thus, it was the illegality of Warbeck's presence that placed him outside of the ordinary jurisdiction of English law." Estreicher, *supra* note 3.

II. The Understanding of Citizenship During the Drafting of the Fourteenth Amendment.

The concept that "jurisdiction" included two concepts—i.e., being subject to a nation's laws but also holding allegiance to the sovereign—continued into international relations and American practice in the leadup to the Fourteenth Amendment.

"The status of dual allegiance, ordinary as it seems today, seemed anomalous and inappropriate" in the 1860s, as "the general view was that 'no one can have two countries.'" Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship*

Clause of the Fourteenth Amendment, 32 St. Louis U. Pub. L. Rev. 329, 334 (2013). Thus, at the time of the Fourteenth Amendment's drafting and ratification, the term "'immigration status' ... would have been meaningless" because the United States had only minimal immigration laws in the modern sense, and instead the crucial inquiry was "the parents' allegiance to a foreign country." *Id.*

That is because the general, albeit not completely uniform, rule at the time was that citizenship of a child followed the parents' citizenship, and their original sovereign would often "claim[] the allegiance of the child" regardless of where he was born, as "British law at the time plainly did." *Id.* at 358. United States law was the same: in 1855, Congress enacted a law dictating that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States," except for "persons whose fathers never resided in the United States." Ch. 71, 10 Stat. 604 (1855); *see Weedin v. Chin Bow*, 274 U.S. 657, 659 (1927). Accordingly, "in 1866 ... a foreigner could be

domiciled in the United States but remain subject to a foreign power." Mensel, *supra*, at 356.

With this background, the terminology used by the drafters of the Jurisdiction Clause makes more sense to modern readers.

The history of the Jurisdiction Clause begins with the Civil Rights Act of 1866, which stated: "[A]ll persons born in the United States and *not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." Ch. 31, 14 Stat. 27, 27 (1866) (emphasis added). Senator John Bingham, a principal author of the future Fourteenth Amendment, said this provision meant that "every human being born within the jurisdiction of the United States of parents *not owing allegiance to any foreign sovereignty*" would be a citizen. Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (emphasis added). This invoked the concept of total allegiance to the United States—a concept defeated if the parents (and thus their child) owed any allegiance to their home country.

There were, however, serious doubts whether Congress had constitutional authority to enact the 1866 Act—President Johnson vetoed it in part on that basis, but the veto was overridden—and so "it was clear

to many in the Republican majority that a constitutional amendment would be needed to give the Civil Rights Act a solid foundation on which to survive future legal challenges." Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 Tex. Rev. L. & Pol. 135, 147–48 (2019). Accordingly, it "cannot be seriously doubted" that what would become the Jurisdiction Clause was intended to have the exact same meaning as the Act, which referenced foreign allegiance. *Id.* at 147.

The earliest draft of the Fourteenth Amendment originally included no citizenship clause, but in May 1866, Senator Benjamin Wade sought to replace the word "citizen" in the privileges-or-immunities clause with the phrase "persons born in the United States or naturalized by the laws thereof." Cong. Globe, 39th Cong., 1st Sess. 2768 (1866). This prompted a discussion of whether that was actually the proper definition of "citizen." *See* Mensel, *supra*, at 362–63.

Senator Jacob Howard, a sponsor of the Fourteenth Amendment, soon proposed a new clause that invoked the historic term of art "jurisdiction": "[A]ll persons born in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the States wherein they reside." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).

Importantly, Howard explained that "[t]his will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of embassadors [sic] or foreign ministers accredited to the Government of the United States, but will include every other class of persons." *Id.* This express reference to "aliens" suggests that even the drafter did not believe it would apply only narrowly to children of ambassadors, who are listed separately.

The primary focus of debate during this time was whether the Jurisdiction Clause would extend to Indians, who were not expressly mentioned in the Clause. Senator Edgar Cowan noted that "[i]t is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power." *Id.* at 2890. "[S]ojourners" or "travelers," for example, have a "right to the protection of the laws; but he is not a citizen in the ordinary acceptance of the word." *Id.* The right to protection of the laws invoked the narrower sense of jurisdiction, but to become a citizen, something more was required.

Senator Lyman Trumbull, who was Chair of the Senate Judiciary Committee and seen as the Senate expert on the closely aligned Civil Rights Act of 1866, was asked what the Jurisdiction Clause meant in this context. He replied: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means." *Id.* at 2893. He further stated: "'subject to the jurisdiction thereof' … means 'subject to the complete jurisdiction thereof.'" *Id.* Any divided loyalty meant no citizenship, just as it did in the Civil Rights Act of 1866.

Applying that test to Indians was seen as so straightforward that the drafters decided against including an express exception for "Indians not taxed," as they had done in the 1866 Act and would also do in Section Two of the Fourteenth Amendment. Federal law had long applied to Indians, *see, e.g.*, 1 Stat. 137 (1790), but they owed at least partial loyalty to their tribes—and thus the Jurisdiction Clause *unambiguously* meant the Fourteenth Amendment would not confer citizenship on their children. Congress later granted Indians citizenship via statute,[4] but until that time, "the Indians were regarded as alien people residing in

[4] *See, e.g.*, Ch. 233, 43 Stat. 253 (1924).

the United States" and thus "were not 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the fourteenth amendment of the Constitution." *Nunn v. Hazelrigg*, 216 F. 330, 332–33 (8th Cir. 1914).

As modern scholars have recognized, "Senator Trumbull and those who agreed with him spoke of the jurisdiction arising from allegiance." Mensel, *supra*, at 369. Thus, everyone recognized the narrow form of jurisdiction, meaning entitlement to protection of the laws. But it "is clear that the men who drafted and passed the Citizenship Clause … recognized a second degree of subjection to a country's jurisdiction—a subjection to its 'complete' jurisdiction in ways more closely associated with the rights, duties, and deeply rooted natural allegiance inherent to long-term residence in, and meaningful interaction with, a particular society." Swearer, *supra*, at 150. And that more complete form of jurisdiction was needed for citizenship. Merely being born in the United States and being subject to its laws was insufficient. If the parents or child had divided allegiances, the child would not be a U.S. citizen under the Jurisdiction Clause.

That approach directly tracked the Civil Rights Act of 1866, which the Jurisdiction Clause constitutionalized, as noted above. Recall that Act excluded those who "ow[e] allegiance to any foreign sovereignty." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866). That same limitation was carried into the Jurisdiction Clause, except the latter was stated affirmatively vis-à-vis the United States (i.e., must owe allegiance to the United States), whereas the Act had been stated negatively vis-à-vis foreign sovereigns (i.e., cannot owe allegiance to another sovereign). But they meant the same thing.

As noted, the most common example at the time of someone who lacked complete allegiance to the United States would be the children of Indians, but the same "rationale that excluded the children of Indians would exclude the children of Europeans, born in the United States, if the European power involved claimed the allegiance of the child," which—most notably—"British law at the time plainly did." Mensel, *supra*, at 358. Because no one could owe allegiance to two sovereigns at that time (*see supra*), such children could not claim total allegiance to the United States and thus would not be citizens under the Fourteenth

Amendment, just as they would not be citizens under the Civil Rights Act of 1866.[5]

This focus on allegiance continued in the years immediately after the Fourteenth Amendment was ratified, as explained next.[6]

III. Post-Ratification Understanding of Scholars and the Supreme Court.

In the years immediately after ratification of the Fourteenth Amendment, scholars and the Supreme Court viewed the Jurisdiction

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[5] Even now, many countries claim children born abroad to citizens. *See, e.g.*, Venezuela Constitution Ch. II, § 1, art. 32 ("Are Venezuelans by birth: … Any person who was born in a foreign territory, and is the child of a father and mother who are both Venezuelans by birth."); *Nationality*, Gov't of Colombia, https://www.cancilleria.gov.co/tramites_servicios/nacionalidad (Article 96 of the Colombian Political Constitution deems "Colombian nationals by birth" those "[c]hildren of a Colombian father or mother who were born in a foreign land and then resided in Colombian territory or registered in a consular office of the Republic"); Henio Hoyo, Eur. Univ. Inst., *Report on Citizenship Law: Honduras* 5 (Apr. 2016), https://cadmus.eui.eu/bitstream/handle/1814/40848/EUDO_CIT_CR_2016_06.pdf (Honduran Constitution awards "*ius sanguinis* for children born abroad to those born from Honduran citizens by birth"); Roberto Courtney, Eur. Univ. Inst., *Report on Citizenship Law: Nicaragua* 4–5 (May 2015), https://core.ac.uk/download/pdf/45685706.pdf (Nicaraguan law grants citizenship to "the children of Nicaraguans born overseas regardless of any other nationalities they may have.").

[6] For those who may wish to consider contemporaneous public discussion of the Jurisdiction Clause, unfortunately "there was little in the newspapers on the technical issue of jurisdiction within the meaning of the citizenship clause." Mensel, *supra*, at 372.

Clause as extending well beyond children of ambassadors and foreign soldiers, confirming the view that "jurisdiction" was a term of art referring to a specific type of relationship between the individual and the sovereign.

In 1872, just four years after ratification, the Supreme Court noted that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and *citizens or subjects of foreign States born within the United States*." *Slaughter-House Cases*, 83 U.S. 36, 73 (1872) (emphasis added). To be sure, this was likely *dicta*, but it reflected the contemporaneous understanding that the Jurisdiction Clause was not a narrow exception solely for "ministers," "consuls," and invading soldiers, but applied also to children whose parents remained citizens of another country. All of these groups had one thing in common: they lacked total allegiance to the United States.

One year later, the U.S. Attorney General (who had been a Senator during the debates over the Fourteenth Amendment) issued a formal opinion explaining that "[t]he word 'jurisdiction' must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment." 14 Op. Att'ys

Gen. 295, 300 (1873). "Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent. Political and military rights and duties do not pertain to them." *Id.* Again, note the two different forms of "jurisdiction."

The next year, the House of Representatives issued a report stating that "[t]he United States have not recognized a 'double allegiance.' By *our* law a citizen is bound to be 'true and faithful' alone to our Government." H.R. Rep. No. 43-784, at 23 (1874). This again equates citizenship with the concept of total allegiance, not mere partial allegiance by the individual, nor partial authority by the sovereign over that individual.

The 1881 *A Treatise on Citizenship* by Alexander Porter Morse adopted the Attorney General's 1873 view, reiterating that "[a]liens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent," and thus their children would not be citizens. Alexander Porter Morse, *A Treatise on Citizenship* § 198, at 237–38 (1881).

Contemporary scholars further confirmed that "jurisdiction" had two meanings, one limited and one more complete. Francis Wharton's 1881 edition of *A Treatise on the Conflict of Laws* recognized that "[i]n one sense" a child born in the United States is necessarily subject to its jurisdiction in the simple sense that "[a]ll foreigners are bound to a local allegiance to the state in which they sojourn." Francis Wharton, *A Treatise on the Conflict of Laws* § 10, at 34–35 (2d ed. 1881). "Yet the term 'subject to the jurisdiction,' as above used, must be construed in the sense in which the term is used in international law as accepted in the United States as well as in Europe." *Id.* § 10, at 35. And "by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final. The same conditions apply to children born of foreigners in the United States." *Id.*

George Collins, who was later appointed *amicus* in *Wong Kim Ark*, explained in 1884 that "[t]he phrase … 'subject to the jurisdiction thereof' does not mean territorial jurisdiction, as has been held in some cases, but means national jurisdiction; that is the jurisdiction which a nation possesses over those who are its citizens or subjects as such." George D.

Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 Am. L. Rev. 831, 837 (1884).[7]

In 1884, the Supreme Court decided *Elk v. Wilkins*, 112 U.S. 94, which held that Indians were not citizens under the Fourteenth Amendment, as they owed allegiance to their tribes. The Court held that the "evident meaning" of the Jurisdiction Clause was that a person was "not merely subject in some respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id.* at 102 (emphasis added).

Moving beyond the context of Indians, the Court explained that the Fourteenth Amendment would confer citizenship only on those children whose parents are "owing no allegiance to any alien power." *Id.* at 101.

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[7] Numerous other contemporaneous law articles reiterated that jurisdiction meant a reciprocal relationship, with the individual owing total allegiance to the sovereign, which consented to that person's presence. "'[B]orn in the United States' means born, not alone on the soil of the United States, but within its allegiance .... To be a citizen of the United States is a political privilege, which no one not born in it can assume, without its consent in some form." G.M. Lambertson, *Indian Citizenship*, 20 Am. L. Rev. 183, 185 (1866); *see* Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. Pub. L. 35, 72 (2011) (collecting authorities).

But "an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law." *Id.* Again, note the concepts of total allegiance by the individual and an "acceptance by the United States." *Id.* "Jurisdiction" in the Jurisdiction Clause invoked that reciprocal relationship.

In lectures posthumously published in 1891, Supreme Court Justice Samuel Miller likewise explained the Jurisdiction Clause extended beyond mere ambassadors: "If a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction." Samuel F. Miller, *Lectures on the Constitution* 279 (1891).

Given this body of evidence, modern scholars have recognized there was "significant agreement among contemporary legal scholars" and "Executive Branch officials during this same time, including Secretaries of State," that the Jurisdiction Clause invoked the concept of total

allegiance to the United States. Swearer, *supra*, at 169–72 (collecting additional examples).

IV. Plaintiffs Overread *Wong Kim Ark*.

Plaintiffs chiefly rely on the Supreme Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), but their reliance is misplaced because—as explained below—the Court tied allegiance to whether the United States had "permitted" or "consent[ed]" to the parents being permanently present in the United States at the time of the child's birth, *id.* at 684, 686, 694. Illegal aliens, by definition, are not present with the consent of the United States, and accordingly it makes little sense to argue that *Wong Kim Ark* dictates citizenship for their children.

Wong Kim Ark involved a person who was born in the United States to alien parents who, at the time of the child's birth, "enjoy[ed] a permanent domicile and residence" in the United States, with the sovereign's permission. *Id.* at 652. The Court held that such a child "becomes at the time of his birth a citizen of the United States." *Id.* at 705. Invoking the old concept of allegiance, the Court held that foreigners present in the United States "are entitled to the protection of and owe

allegiance to the United States, *so long as they are permitted* by the United States to reside here." *Id.* at 694 (emphasis added).

Continuing with the theme of sovereign consent as an aspect of allegiance, the Court held it was "incontrovertible" that "the jurisdiction of every nation within its own territory is exclusive and absolute" and may only be qualified by the "consent, express or implied," of the sovereign. *Id.* at 686. That traced Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812), which addressed the rights of Americans whose ship had been seized at sea by Napoleon's agents and then sailed into Philadelphia under a French flag. *Id.* at 117–18. Echoing language later found in the Fourteenth Amendment, the Court held that the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute," and thus "[a]ll exceptions" to it "must be traced up to the consent of the nation itself." *Id.* at 136. Rights could not be gained against the sovereign by those acting in defiance of its laws.

Wong Kim Ark concluded that foreigners owe the requisite allegiance when the United States permits them to be here permanently. One need not decide whether *Wong Kim Ark* was fully correct on that

score because the test it imposes still resolves the question here: by definition, illegal aliens do not have "consent" to be here, are not "permitted" to "reside here," nor have they been given "permanent domicile and residence in the United States." *Wong Kim Ark*, 169 U.S. at 653, 686, 694.

The Executive Order at issue here notably excludes "children of lawful permanent residents," *Protecting the Meaning and Value of American Citizenship*, Exec. Order § 2(c) (Jan. 20, 2025), which is the modern equivalent to the parents in *Wong Kim Ark*. The Court's opinion extended no further.

Plaintiffs rely on a few broad statements in *Wong Kim Ark*, but ironically the opinion itself cautioned against relying on such statements. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Wong Kim Ark*, 169 U.S. at 679. Accordingly, circuit courts across the country have long read *Wong Kim Ark* narrowly, in light of its specific facts. *See Tuaua*, 788 F.3d at 305

(citing *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994)).

One final note: Justice John Marshall Harlan—the patron of interpreting the Constitution as color-blind and the sole dissenter in *Plessy v. Ferguson*—joined Chief Justice Fuller's dissent in *Wong Kim Ark,* arguing that Wong "never became and is not a citizen of the United States." *Wong Kim Ark*, 169 U.S. at 732 (Fuller, C.J., dissenting). Clearly, Justice Harlan viewed the government's position as fully consistent with our Nation's commitment to equal protection.[8]

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[8] Plaintiffs' reliance on a footnote in *Plyler v. Doe*, 457 U.S. 202 (1982), is also misplaced. *First*, the footnote "is *dicta* referring to *dicta*," because it was unnecessary to the analysis in *Plyler* itself and also relied on *dicta* from *Wong Kim Ark*. Swearer, *supra*, at 198. *Second*, the *Plyler* footnote mentioned the same limitations that were present in *Wong Kim Ark*, i.e., the concept that "jurisdiction" is "bounded only, if at all, by principles of *sovereignty and allegiance*."457 U.S. at 212 n.10 (emphasis added). *Third*, there are several textual differences between the equal protection clause (at issue in *Plyler*) and the citizenship clause (at issue here). The former refers to persons "*within* the jurisdiction" of a *state*, whereas the latter clause refers to persons "*subject to* the jurisdiction" of the *United States*. If the Framers had intended the two to mean the same thing, they would have used the same phrase, especially because they used very Specific terminology throughout Section One of the Fourteenth Amendment. Scholars have argued that "subject to the jurisdiction" referred to the concept of "total allegiance" to the national sovereign as

V. Contemporary Scholars Support the Federal Government's View.

Modern scholars and jurists have signaled agreement with the government's interpretations of the Jurisdiction Clause, *Wong Kim Ark*, or both. As noted above, Professor Estreicher, a nationally renowned scholar, has written that reliance on *Wong Kim Ark* for applying birthright citizenship to children of illegal aliens is "misplaced." Estreicher, *supra* note 3. "*Wong* by its facts (and some of its language) is limited to children born of parents who at the time of birth were in the United States lawfully and indeed were permanent residents." *Id.*

As Professor Estreicher explains, "the circumstances of *Wong Kim Ark* differ from the unlawful immigration context. Wong's parents were clearly permitted to be within the United States at the time of his birth. A second respect in which the facts of the case differ is that, unlike for

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discussed above, whereas "within the jurisdiction" referred to the separate, "local allegiance to the state in which they sojourn," i.e., the state they are "within." Wharton, *supra,* § 10, at 34–35; *see* Swearer, *supra*, at 199–200. That tracks the historic discussion recounted above, where the Framers and contemporary scholars acknowledged that those illegally present might receive protection of the laws and thus were subject to a lesser form of jurisdiction, but their children would not receive the permanent status and benefits of citizenship because they lacked total allegiance.

children of unlawful immigrants, there was no U.S. prohibition of Wong's presence at time of his birth. His birth and presence within the United States was entirely lawful." *Id.* And that distinction matters given that *Wong Kim Ark* itself repeatedly referred to the importance of the sovereign's consent.

Modern jurisprudence has likewise rejected the notion that the Jurisdiction Clause looks only to whether the child would be subject to the laws of the United States. The D.C. Circuit held just a few years ago that "the concept of allegiance is manifested by the Citizenship Clause's mandate that birthright citizens not merely be born within the territorial boundaries of the United States but also 'subject to the jurisdiction thereof.'" *Tuaua*, 788 F.3d at 305. And "the evident meaning of the words 'subject to the jurisdiction thereof' is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id.* (quoting *Elk*, 112 U.S. at 102) (cleaned up) (emphasis in original).

Again, this makes clear that the question is not simply whether "ultimate governance remains" with "the United States Government,"

e.g., whether the United States has jurisdiction to prosecute the person, *id.* at 306, but rather whether there is a reciprocal relationship where the person owes total allegiance to the sovereign, which allows the person to be present.

Judge Richard Posner, before he retired, also wrote about the Jurisdiction Clause, arguing in a concurrence that the interpretation espoused by Plaintiffs here "makes no sense," and he "doubt[ed]" it was correct even under existing caselaw because many aliens present in the United States owe no allegiance to it. *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring). He noted that hundreds of thousands of foreign nationals have come to the United States solely to give birth, without the slightest hint of owing allegiance to the United States. "[T]here is a huge and growing industry in Asia that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American. Obviously, this was not the intent of the 14th Amendment; it makes a mockery of citizenship." *Id.*[9]

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[9] Further, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the detention of a man who claimed to be a U.S. citizen, Justices Scalia and Stevens wrote separately in part to note that they were merely "presum[ing]" the plaintiff to be an "American citizen" for purposes of the

VI. "Subject to the Jurisdiction Thereof" Cannot Mean "Subject to the Laws Thereof."

As recounted above, the historical record and both contemporary and modern scholarship demonstrate that the Jurisdiction Clause looks beyond the simple question of whether the person is subject to the laws of the United States. There are additional reasons to reject Plaintiffs' simplistic view.

First, it would have been easy enough to say "subject to the laws" of the United States, but instead the drafters used a different term: "jurisdiction." That was intentional. And it invoked a term of art with a nuanced history and understanding, as explained above. But Plaintiffs never provide an answer for why the drafters did not use far simpler language if they meant only to invoke the simple concept of being subject to U.S. law.

Second, the laws surrounding immunity further demonstrate why Plaintiffs' interpretation is incorrect. Plaintiffs acknowledge that

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lawsuit, even though he had been born in Louisiana, *id.* at 554 (Scalia, J., dissenting). Hamdi's parents were not U.S. citizens nor lawful permanent residents but rather were present in the United States only on temporary work visas when Hamdi was born. James C. Ho, *Defining 'American,'* 9 Green Bag 2d 367, 376 & n.42 (2006).

children of ambassadors and invading soldiers are not entitled to birthright citizenship under the Fourteenth Amendment. But Plaintiffs are wrong to contend that this is because those groups are supposedly immune from U.S. law. Federal law *does* apply at least in part to invading soldiers and even more obviously to their newborn children, who would not be enemy combatants. *See Ex Parte Quirin*, 317 U.S. 1, 20 (1942) (upholding convictions of German soldiers captured in the United States). And U.S. law also applies to most diplomatic officials, as only a narrow set has anything approaching full immunity, which itself can always be waived case-by-case by the home country. *See Diplomatic and Consular Immunity*, U.S. Dep't of State, July 2019, https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf. Further, there is no diplomatic official who is fully immune from all forms of *civil* liability, i.e., being haled into the jurisdiction of a court. *See id.*, App. C (for example, all types of diplomatic officials can be issued traffic citations).

This means none of Plaintiffs' examples holds up. Every type of person they list as falling within the Jurisdiction Clause is *already* subject to at least some of the laws of the United States, and they could

be subjected to even more laws on a case-by-case basis. At best, they have qualified, partial, or contingent immunity. Plaintiffs have no way to explain how individuals who are clearly subject to at least some of the laws of the United States are nonetheless *not* subject to the laws of the United States. The answer is that Plaintiffs' test is just the wrong one.

Third, Plaintiffs' interpretation proves too much. If qualified, partial, or contingent immunity were sufficient to render diplomatic officials' children not subject to the jurisdiction of the United States, then the children of domestic officials who receive such immunity—e.g., judges and prosecutors—would likewise not be subject to the jurisdiction of the United States and thus not citizens under the Fourteenth Amendment. That is wrong, of course. And the reason is because domestic judges and prosecutors—unlike ambassadors and invading soldiers—have total allegiance to the United States and are present with its consent. They are therefore subject to its jurisdiction, and their children born or naturalized in the United States are citizens.

* * *

For all these reasons, the touchstone for birthright citizenship under the Fourteenth Amendment is allegiance to the United States, rather than merely being subject to its laws or some subset thereof.[10]

CONCLUSION

The Court should grant Defendants-Appellants' emergency motion to stay in part the District Court's preliminary injunction.

February 19, 2025

Respectfully submitted,

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[10] Plaintiffs' reliance on statutory citizenship fails because it uses the same language as the Jurisdiction Clause. 8 U.S.C. § 1401(a) (requiring the person be "subject to the jurisdiction thereof").

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. Fed. R. App. P. 29(a), 32(g)(1). There is no type-volume limitation for an *amicus* brief in support of an emergency motion. This brief contains 6,386 words. *Amici* have sought leave of Court to file this brief.

/s/ R. Trent McCotter

CERTIFICATE OF SERVICE

I hereby certify that on this date, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF filing system and that service will be accomplished using the CM/ECF system.

/s/ R. Trent McCotter

Mr. ROY. Thank you, Mr. McCotter.
Mr. O'Brien, you may proceed.

STATEMENT OF MATT O'BRIEN

Mr. O'BRIEN. Chair Roy, Ranking Member Scanlon, the Members of the Committee, it's a privilege to appear before you today, and I thank you for the invitation.

The two witnesses before me, have very ably summarized what's at issue here. What I would like to point out is two things based on my many years of experience working in immigration law directly. I actually began my career as an immigration examiner in the Naturalization Division of the INS, so I'm very familiar with these issues.

Now, it's very easy to say the meaning of this case is obvious. Of course, if it were obvious, it probably wouldn't have had to become a case in the first place.

The common narrative goes something like this: *Wong Kim Ark* means that everyone born in the U.S. gets citizenship. Later, in *Plyler* v. *Doe*, Justice Brennan confirmed this in that holding, stating that no plausible distinction with respect to the 14th Amendment jurisdiction can be drawn between resident aliens whose entry into the United States was lawful and resident aliens whose entry was unlawful.

There are two major problems with that approach, though.

The first is that the court in *Wong Kim Ark* couldn't address the question of citizenship being conferred on illegal aliens because there were no illegal aliens to speak of at the time. U.S. immigration law barred a very small slice of individuals, among them: Chinese nationals who were subject to the provisions of a treaty between the United States and China, criminals and people who were likely to become public charges, as well as those who appeared to be clinically insane.

The concept of illegal aliens was one that wouldn't come along until much later. At that point in time, anybody who could pay the 50-cent admission tax, entrance tax, could be admitted to the United States and was permitted to remain there indefinitely.

Now, the second problem with the standard narrative about *Wong Kim Ark* is that Justice Brennan's assertion in *Plyler* v. *Doe* is obiter dicta, a judge's incidental expression of opinion that is not essential to a decision and does not constitute part of the precedent established by a case. In that case, in a footnote, Justice Brennan expressed his personal opinion that a 1912 immigration law treatise, not case law or statute, held that everyone born in the U.S. was a citizen.

In short, neither *Wong Kim Ark* nor *Plyler* had anything to do with whether the children of illegal aliens become U.S. citizens at birth. In fact, that question has not yet been addressed by the Supreme Court. There is little basis on which it may be argued that the holding in *Wong Kim Ark* would require a conclusion that the children of illegal aliens are automatically entitled to citizenship on being born within the confines of the United States.

If the United States is to formulate a reasonable policy for the transmission of citizenship, then it must abandon the dangerous folk tale that is currently associated with *Wong Kim Ark*. I hope

that my testimony here today will assist this Committee in getting to the heart of what *Wong Kim Ark* and the 14th Amendment really require.

If one stops and thinks about this, it would be utterly irrational to lay out a list of people who are inadmissible to the United States and whose presence here is unlawful, which can result in their criminal prosecution as well as their removal from the United States, but then allow those people to transmit citizenship to their children unquestionably and without any qualifications.

I thank you for inviting me here today.

[The prepared statement of Mr. O'Brien follows:]

TESTIMONY OF

Matthew J. O'Brien
Former Immigration Judge

BEFORE

U.S. HOUSE
Committee on the Judiciary,
Subcommittee on the Constitution and Limited Government

ON

Subject to the Jurisdiction Thereof: Birthright Citizenship and the Fourteenth Amendment

February 25, 2025
Washington, DC

INTRODUCTION

Chairman Roy, Ranking Member Scanlon and Members of the Committee, it is a privilege to appear before you today and I thank you for the invitation.

My name is Matthew J. O'Brien. I am a former Immigration Judge, a former head of the National Security Division at U.S. Citizenship and Immigration Services (USCIS) and a former Assistant Chief Counsel with U.S. Immigration and Customs Enforcement (ICE). I have also worked as a private bar immigration attorney, including several years at Boston's Hale & Dorr (which is now Wilmer Hale). Altogether, I have approximately three decades of experience working in immigration law and policy. And my perspective is somewhat unique, in that I have acted as counsel to aliens seeking immigration benefits, in addition to serving as counsel to the United States.

In fact, I began my career in immigration with the old Immigration and Naturalization Service, as an Immigration Examiner working in the Naturalization Division. And birthright citizenship is an issue in which I have had a longstanding academic and professional interest.

Whether the child of a foreign national acquires citizenship merely through birth on American territory, or whether there are additional requirements, is a question of great significance for the United States. As you are well aware, as a matter of Constitutional law, the people of the United States *are* the government of the United States. Accordingly, rules concerning who becomes a U.S. citizen at birth quite literally determine who will govern the United States.

At present, those rules are not being applied according to the provisions of the Fourteenth Amendment and relevant legal precedent. Rather, they are being applied on the basis of folk myth, a misreading of the relevant Supreme Court opinions, and a profound misunderstanding of U.S. immigration history.

THE DEBATE OVER BIRTHRIGHT CITIZENSHIP

The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend. XIV, § 1.

The 1898 case *United States v. Wong Kim Ark* is often read as standing for, and indeed establishing, the widespread view that anyone born on American soil, at least to parents who are not members of a foreign country's diplomatic delegation, part of an invading force, or Indians born in the allegiance of a tribe, enjoys birthright citizenship by virtue of this clause. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

At issue in Wong Kim Ark was whether a son born to Chinese subjects while they were lawfully residing in the United States was a citizen at birth by virtue of the Citizenship Clause. The Court held that he was. However, the import of that holding has been consistently and grossly overread in the roughly 127 years that have elapsed since the Court's ruling.

The common narrative describing what *Wong Kim Ark* means runs something like this: In that case, the Supreme Court decided that the Fourteenth Amendment confers citizenship on everyone born on American soil. Later, in *Plyler v. Doe*, 457 U.S. 202 (1982), Justice Brennan confirmed this holding stating that, "…no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."

There are, however, two fundamental problems with this narrative. First, in *Wong Kim Ark*, the Supreme court did not address whether children born of parents illegally present in the United States become "natural born" citizens of the United States. Indeed, the Supreme Could not have addressed the question of whether the children of illegal aliens become citizens by birth because in 1898, when the case was decided, there were few restrictions on immigration to the United States.

Pursuant to the *Immigration Act of 1882* (22 Stat. 214), only convicts, the insane and persons likely to become public charges were inadmissible. And pursuant to the *Chinese Exclusion Act* (22 Stat. 58) – which implemented a treaty with the Emperor of China – suspended the admission of Chinese nationals for ten years, while permitting those present in the U.S. as of November 17, 1880 to remain. Other than those falling within these limited grounds of inadmissibility, anyone who could pay the $0.50 admission tax could lawfully enter the United States and remain here. As such, there were few, if any, illegal aliens at the time and the concept of unlawful presence as we understand it today did not exist.

According to Yale Law School Professors Peter Schuck and Rogers Smith, "The question of the citizenship status of the native-born children of illegal aliens never arose [in *Wong Kim Ark*] for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter." Peter Schuck & Rogers Smith, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

The second problem with the standard narrative is that Justice Brennan's assertion in *Plyler v. Doe* is *obiter dicta* – a judge's incidental expression of opinion that is not essential to a decision and does not constitute part of the precedent established by a case. In Footnote 10, located at *Plyler*, 457 U.S. at 211, Justice Brennan expressed his personal opinion – based on a 1912 immigration law treatise, not case law or a statute – that illegal aliens must be treated the same as aliens lawfully present. He was not expressing the opinion of the Court on any issue essential to the resolution of the claims before it in *Plyler.*

In short, neither *Wong Kim Ark*, nor *Plyler*, had anything to do with whether the children of illegal aliens become U.S. citizens at birth. That question has not yet been addressed by the Supreme Court and there is little basis on which it may be argued that the holding in *Wong Kim Ark* would require a conclusion that the children of illegal aliens are entitled to citizenship upon being born within the confines of the United States.

WHAT DID THE COURT REALLY SAY IN *WONG KIM ARK?*

A careful reading of *Wong Kim Ark* reveals that the Supreme Court's holding was actually quite narrow. The case held only that:

> A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil [*sic*] and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution. *Wong Kim Ark*, 169 U.S. at 649.

The Court's decision turned on the interpretation of two legal terms: "subject to the jurisdiction thereof" and "permission to reside."

The phrase "subject to the jurisdiction thereof," then, as used in the Citizenship Clause, refers not merely to being subject to the laws of the United States. Rather, it connotes being subject to the nation's political jurisdiction, and "owing it direct and immediate allegiance." *Wong Kim Ark*, 169 U.S. at 680 (citing *Elk v. Wilkins*, 112 U.S. 94, 101-102 (1884)). As the Court earlier had held, in a passage cited in the above holding of Wong Kim Ark:

> Chinese laborers, [] like all other aliens residing in the United States for a shorter or longer time, are entitled, *so long as they are permitted by the government of the United States to remain in the country*, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person of property, and to their civil and criminal responsibility. *Fong Yue Ting*, 149 U.S. at 724 (emphasis added).

"Reside" is defined in the 1890 edition of Webster's Dictionary as "to dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicile or home." *Webster's International Dictionary of the English Language* (Noah Porter ed., G. & C. Merriam Co. (1890)). *Black's Law Dictionary* (1891) defines "permission" as "[a] license to do a thing; leave to do something which otherwise a person would not have the right to do." Thus, as used in *Wong Kim Ark*, the phrase "permitted to reside" applied to Chinese nationals, and also aliens of nationalities other than Chinese, who resided here without being prohibited from doing so.

In essence, the Justices who authored the majority opinion interpreted "domiciled residents" as meaning something akin to "lawful permanent resident" and "subject to the jurisdiction thereof" as meaning "not subject to any foreign power." *Wong Kim Ark,* 169 U.S. at 651, 721. In turn, the Court found that, due to their intention to reside permanently in the United States, *Ark*'s parents were free enough of foreign allegiance to distinguish them from diplomats and other agents of foreign government whose children do not become citizens at birth.

Not to regard the Court as holding permission to reside in the country to be a prerequisite

for being subject to the jurisdiction of the United States for Citizenship Clause purposes would be to truncate the reasoning the Court gave for its judgment, ignore the precedents it cited, and make nonsense of its opinion. For example, the Court would then have left open the possibility (which it explicitly foreclosed, and had earlier foreclosed, *Fong Yue Ting*, 149 U.S. at 724) that those residing in the country while being prohibited from doing so were within the allegiance and protection of the United States, and thus subject to its jurisdiction. Indeed, an illegal alien, subject to apprehension, detention, and removal at all times, is hardly within the "protection" of the United States, as the phrase "allegiance and protection" has always been understood. *See*, *e.g.*, *Minor v. Happersett*, 88 U.S. 162, 165-66 (1874) ("The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.") (emphasis added).

The Court's proviso requiring lawfully permitted residence is clearly part of its holding, not *dicta*, under the principle that the Supreme Court may set forth a standard as part of its holding in a case even when the Court finds that the standard has been met in that case. *See*, *e.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979) (holding that a federal court hearing habeas corpus must consider whether there was legally sufficient evidence to support a conviction, not just whether there was some evidence, and finding that the prosecution had met the former, higher standard).

Likewise, Wong Kim Ark did not leave open the question of whether persons born in this country to persons who did not lawfully reside in the country were birthright citizens, merely because Wong Kim Ark's parents lawfully resided here. Rather, the standard it announced and applied, which implies that those born in this country to illegal aliens, tourists, and others who do not lawfully reside here ***are not*** birthright citizens, was and is part of the Court's holding, even though the Court found that Wong Kim Ark met that standard. (Wong Kim Ark's parents lawfully resided in the United States from 1873 until their return to China in 1890. 169 U.S. at 652-53.)

IN LIGHT OF THE REST OF THE IMMIGRATION AND NATIONALITY ACT, BIRTHRIGHT CITIZENSHIP IS A WHOLLY IRRATIONAL POLICY

The baseless interpretation of the Citizenship Clause of the Fourth Amendment being advanced by those who favor unrestricted birthright citizenship makes no sense within the broader context of our immigration laws.

The provisions of the Immigration and Nationality Act (INA) set forth at 8 U.S.C. §§ 1182 and 1227 define an expansive class of aliens who are inadmissible to and removable from the United States. Anyone falling within that class of aliens is subject to exclusion or deportation. Nevertheless, the United States has long been a magnet for illegal immigration.

One of the reasons for that is that American laws actually reward those who enter and remain in the country illegally. An entire array of local, state and federal benefits are available to foreign nationals, regardless of their immigration status. Many states provide illegal aliens with drivers licenses. The I-9 employment verification process is stacked against employers who wish to comply with laws against employing illegal aliens – but they wind up being sued for

discrimination by the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices. And, despite the fact that 8 U.S.C. §§ 1182 and 1227 define an expansive class of aliens who are inadmissible to and removable from the United States, until very recently the overall risk of deportation for immigration violators has been low.

When aliens do actually find themselves in removal proceedings, the deck tends to be stacked against the government because aliens can access forms of relief such as "Cancellation of Removal for Certain Non-Lawful Permanent Residents," found at 8 U.S.C. § 1229b, which allows illegal aliens – who can convince an immigration court that they have successfully evaded deportation for ten years before removal proceedings and have a parent or child who would suffer undue hardship upon their deportation – to go from illegal to green card holder. Moreover, 8 U.S.C. § 1229b even allows an illegal alien to leave the country (*i.e.,* self-deport) and return (*i.e.* illegally re-enter the U.S. again), as long as the absence is short and the alien does not get caught.

The current misreading of *Wong Kim Ark* being advanced by those who favor unrestricted birthright citizenship is yet another example of how absurdity reigns supreme in America's immigration legislation and precedent.

8 U.S.C. Part II, §§ 1421 through 1459 set forth multiple hundreds of pages of rules and requirements for the conferral of citizenship on aliens. The most significant pre-requisite for naturalization is lawful presence in the United States. Moreover, anyone who is naturalized is required to take the following oath of allegiance to the United States:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God. 8 U.S.C. § 1448, 8 C.F.R. § 337.1.

It beggars belief that any internally coherent system of law could make it both a crime and a civil offense for an alien to enter or remain in the U.S. without authorization; but at the same time confer upon the children of that alien full membership in the American polity. Ultimately, such an approach sets the scene for the invasion of the United States and its occupation and seizure by adverse possession. And it is difficult to believe that either the Framers of the Constitution or the Congress that passed the Fourteenth Amendment could have countenanced such an undesirable result.

CONCLUSION

Simply put, the current interpretations of the Citizenship Clause of the Fourteenth Amendment are based on alleged conclusions that were never actually made by the Supreme Court in *Wong Kim Ark*. Nevertheless, the defenders of unrestricted birthright citizenship insist that the Fourteenth Amendment can only be read in the way they interpret it. These contentions are absurd.

As former Assistant U.S. Attorney Andrew McCarthy wrote in an August 18, 2015 piece published in *National Review*:

> If denying birthright citizenship seems like an offensive proposition to some, it can only be because we've lost our sense of what citizenship should be – the concept of national allegiance inherent in it. If a couple who are nationals of Egypt enter our country and have a baby while they are here, why is it sensible to presume that child's allegiance is to the United States rather than Egypt? If the baby of an American couple happened to be born while they were touring Egypt, would we not presume that the child's allegiance was to the United States.

There are colorable arguments that even the limited Supreme Court holding in *Wong Kim Ark* went too far, that the import of the Fourteenth Amendment was limited to recently emancipated slaves. There are colorable arguments that *Wong Kim Ark* may have been rendered entirely irrelevant because the Immigration and Nationality Act of 1965 significantly altered the criteria for deciding who is lawfully resident and within the allegiance of the United States. However, there are no reasonable arguments that when deciding *Wong Kim Ark* the Supreme Court intended to extend birthright citizenship to a class of aliens that did not then exist: persons inadmissible to or deportable from the United States pursuant to the INA.

Mr. ROY. Thank you, Mr. O'Brien. I appreciate your testimony. Ms. Frost, you may begin.

STATEMENT OF AMANDA FROST

Ms. FROST. Chair Roy, Ranking Member Scanlon, and distinguished Members of the Committee, thank you for the opportunity to discuss the significance and meaning of the 14th Amendment Citizenship Clause.

Some provisions of the U.S. Constitution are broad and confusing, but the Citizenship Clause is not one of them. The text, the drafting history, the original understanding, and over a century of unanimous judicial precedent and historical practice all confirm that the Citizenship Clause means what it says.

As the text States, the Citizenship Clause grants citizenship to all born in the United States, and the only meaningful exception today is for the children of consular officials.

The Citizenship Clause was intended to remove the stain of *Dred Scott* from our Constitution, the Supreme Court decision that held citizenship turned solely on race and ancestry and not birthplace. In 1867—sorry—1868, the Nation rejected *Dred Scott*.

When discussing this addition to the Constitution, the Reconstruction Congress explicitly stated that it wanted to provide citizenship to the four million formerly enslaved Americans and the children of immigrants arriving from around the globe.

This Congress also acknowledged and well-knew that some of those enslaved Americans had been brought into this country in violation of the law, because laws after 1808 prohibited the international slave trade. These were the illegal aliens of the day.

Thus, it is wrong, as Mr. O'Brien just stated, to say that there wasn't such a thing as an undocumented or illegal alien at the time. The Reconstruction Congress well-knew there was and of course intended to grant those people citizenship.

That is why President Trump's Executive Order has been rejected by every Federal court that has addressed it over the last month—five and counting. These judges have been scathing. Federal Judge John Coughenour, appointed to the bench by Ronald Reagan, described the Executive Order as "blatantly unconstitutional." Federal Judge Joseph Laplante, a George W. Bush appointee, enjoined the Executive Order on the grounds that, quote, "it contradicts the text of the 14th Amendment and the century-old, untouched precedent that interprets it."

These judges have concluded that the Trump Administration's arguments in favor of the Executive Order are ahistorical, atextual, and illogical, also inconsistent with the order itself.

For that reason, I'm not going to spend any more of my time here discussing the meaning of the Citizenship Clause, which is detailed in my text of my written statement—and I'm happy to answer questions—but, instead, I'm going to move on and talk about the devastating consequences of this Executive Order for the 3.5 million American families who every year welcome a new child into their family.

The Executive Order claims the power unilaterally to rewrite the Constitution. That alone is disturbing enough. In doing so, it excludes hundreds of thousands of newborn children from citizenship,

including the children of immigrants who came legally to the United States.

All these newborn children would be declared undocumented immigrants from the moment they are born. Some would be born stateless. All would be at risk of being deported away from their parents, denied all the rights and privileges of citizenship, at the most vulnerable moment of their new lives.

Worse, if this were to go into effect, it would not be limited to the people carved out by the Executive Order—that is, the children of undocumented immigrants and the children of temporary immigrants. It would affect all Americans, every single person giving birth to a child going forward. All would now have to produce paperwork proving their status, their citizenship, their green-card status, at the time of the child's birth. As an immigration lawyer, I will tell you, for many people, that is not easy.

I thought this was a Committee that favored limited government. This is expanding the Federal bureaucracy and the paperwork burdens on these families, hospitals, State agencies, and overburdened immigration officials, as I said, at the most sensitive moments of these people's lives.

As explained, the Executive Order is not only unconstitutional, it is not only a terrible policy, it also conflicts with fundamental American values. We are a Nation that rejects the test of ancestry and lineage, and we prefer instead to grant citizenship based on birthplace. It's a choice we've made well over a century ago.

To be born in America is to be born an equal citizen. America is excellent at integrating the children of immigrants into our society. It is one of our great strengths.

All Americans should be proud that in 1868 the Nation rejected *Dred Scott* and reclaimed citizenship based on location of birth, not lineage and ancestry, welcoming the children of immigrants. We must never go back.

[The prepared statement of Ms. Frost follows:]

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The Subcommittee on the Constitution and Limited Government

U.S. House of Representatives
Committee on the Judiciary

"'Subject to the Jurisdiction Thereof':
Birthright Citizenship and the Fourteenth Amendment"

Feb. 25, 2025

Testimony of Amanda Frost
David Lurton Massee, Jr., Professor of Law
University of Virginia School of Law

Thank you for inviting me to testify regarding the meaning of the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution.

I am a professor of law at the University of Virginia School of Law. My areas of expertise include immigration and citizenship law, and I have authored a book and numerous academic articles on these topics.

Part I of my testimony explains that the Citizenship Clause grants birthright citizenship to all children born on U.S. soil, with narrow exceptions, as confirmed by the text, original understanding, and over a century of judicial precedent and historical practice. Part II describes President Donald J. Trump's Executive Order 14160, which purports unilaterally to amend the Constitution and rewrite federal law by denying citizenship to those guaranteed that status at birth under both the Constitution's Citizenship Clause and a federal statute, 8 U.S.C. 1401(a). Part III describes the flaws in the legal arguments asserted in defense of the Executive Order. Part IV concludes by describing the devastating consequences of the Executive Order for *all* American families should it ever go into effect.

I. The Meaning of the Fourteenth Amendment's Citizenship Clause

Birthright citizenship is a foundational legal principle that defines "American" based on birth on U.S. soil, not ancestry. On July 4, 1776, the thirteen original colonies declared their independence from England and rejected a hereditary monarchy, transforming themselves from British subjects into sovereign U.S. citizens. According to the U.S. Constitution, "citizen" is the only title that matters—a title bestowed on all born in the United States who do not fall into a handful of common-law exceptions.

In 1857, the Supreme Court's infamous decision in *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), rejected this founding value. Chief Justice Roger B. Taney declared that no Black person could ever be a citizen of the United States, defining "American" by race and ancestry. *Id.* at 404. The Chief Justice further explained that Congress had no "power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage . . . belongs to an inferior or subordinate class." *Id.* at 417. In Taney's view, many people—including the

children of many immigrants—were "inferior" and "subordinate," and therefore excluded from U.S. citizenship.[1]

In 1868, the nation rectified *Dred Scott*'s grave error by ratifying the Fourteenth Amendment to the U.S. Constitution. The first sentence of that amendment, known as the Citizenship Clause, overturned *Dred Scott* by establishing universal birthright citizenship for all but those falling within the narrow common-law exceptions, as well as children born into sovereign Indian tribes. As its drafters explained, the Citizenship Clause guaranteed citizenship not only to the former slaves, but also to the children of immigrants arriving from around the globe.

For nearly 127 years, the U.S. Supreme Court has repeatedly stated that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth within the territory." *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). For nearly that same length of time, the federal government agreed. That is, until now.

The Text of the Citizenship Clause

Many constitutional provisions are broad and vaguely worded. The Fourteenth Amendment's Citizenship Clause is not one of them. In full, the Citizenship Clause reads:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*[2]

As the Supreme Court recognized in *Wong Kim Ark*, that language is "universal, restricted only by place and jurisdiction." 169 U.S. at 676. The clause "'subject to the jurisdiction thereof'" was meant "to exclude, by the fewest and fittest words," only the following groups: the "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state," as well as "children of members of the Indian tribes." *Id.* at 682. Everyone else falls within "the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding the alienage of the parents." *Id.* at 689. *See also Doe v. Trump*, 25 WL 487372, Civil Action No. 25-10135-LTS (D. Mass. Feb. 13,

[1] *See* Gabriel J. Chin, "*Dred Scott* and Asian Americans," 24 U. Pa. J. Const. L. 633, 642 (2022) (quoting Taney's 1840 opinion in *United States v. Dow* describing Asians as "inferior" to the "white race").
[2] U.S. Const. amend XIV, § 1.

2025). (In 1924, Congress granted children of tribal members citizenship by statute. *See* 8 U.S.C. 1401(b).)

***United States v. Wong Kim Ark* (1898)**

Wong Kim Ark was born in San Francisco in the early 1870s to Chinese immigrant parents. Like all immigrants from Asia, Wong's parents were barred under federal law from naturalizing. They left the United States when Wong was a child.

In 1895, the U.S. government denied Wong entry to the United States upon his return from a visit to China. The government argued that because Wong's parents were citizens of China at the time of his birth, they were "subject to the jurisdiction of the Emperor of China" and not the United States. As their child, Wong was therefore also "the subject[] of a foreign power" because, the government claimed, the "domicile of the parent is the domicile of the child. Their people are his people."[3]

In a 6-2 decision, the Supreme Court rejected this argument. The Citizenship Clause began with the phrase "[a]ll persons born," granting "universal" citizenship based on birthplace. *Id.* at 676. The Court agreed with Wong's lawyers that the qualifying language "and subject to the jurisdiction thereof" excluded children born to enemy aliens during a hostile occupation of the United States, and children of diplomatic representatives—both longstanding common law exceptions to birthright citizenship—as well as children born into sovereign Indian tribes. *Id.* at

[3] Brief for the Petitioner (Conrad), at 49-51, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). On behalf of the United States, Solicitor General Holmes Conrad also argued that the Fourteenth Amendment was itself unconstitutional, calling it of "doubtful validity," and describing its addition to the Constitution as a "blot on our constitutional history." *Id.* at 46-48 & n.1. Joining the United States government was private lawyer George Collins, who authored a second brief signed onto by Solicitor General Conrad. Collins had openly vilified Chinese immigrants and their children in his law review articles and statements to the press, describing them as the "obnoxious" Chinese, and arguing that Americans should not be forced to "accept [the children of Chinese immigrants] as fellow citizens . . . because of mere accident of birth." *No Ballots for Mongols*, S.F. Examiner, May 2, 1896, 16. In their joint Supreme Court brief, Collins and Conrad wrote: Are "Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth? . . . If so, then . . . American citizenship is not worth having." Brief for Petitioner (Collins), at 34, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

694.[4] In all these exceptions, the children were not subject to the full force and effect of U.S. law due to their special status, in marked contrast to the children of all other immigrants, including Wong.

In the 127 years since its decision in *Wong Kim Ark*, the Supreme Court has repeated that conclusion many times. *See, e.g., United States ex rel. Hintopoulous v. Shaughnessy*, 353 U.S. 72, 73 (1957) (A child born to undocumented immigrants is "of course[] an American citizen by birth" despite the parents' "illegal presence."); *INS v. Rios-Pineda,* 471 U.S. 444, 446 (1985) (stating that an undocumented immigrant "had given birth to a child, who, born in the United States, was a citizen of this country"); *Hirabayashi v. United States*, 320 U.S. 81, 96-97 (1943) (noting that thousands of "persons of Japanese descent" living in the United States "are citizens because born in the United States," even though "under many circumstances" they are also citizens of Japan "by Japanese law"); *INS v. Errico,* 385 U.S. 214, 215-16 (1966) (same). *See also Plyler v. Doe*, 457 U.S. at 211 & n.10 ("[N]o plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.").

Unsurprisingly, over the past month, four district courts and a federal court of appeals have all concluded that the President's effort unilaterally to amend the U.S. Constitution is unlikely to succeed. *See, e.g.,* "Per Curiam Order," *Washington v. Trump*, No. 2:17-cv-00141 (9th Cir. 2025); "Preliminary Injunction Order," *N.H. Indonesian Cmty. Support v. Trump*, 1:25-cv-38 (D.N.H. Feb. 10, 2025); "Preliminary Injunction Order," *New Jersey v. Trump*, 1:25-cv-10139 (D. Mass. Feb. 13, 2025). Federal Judge John Coughenour, appointed by President Ronald Reagan in 1981, declared the President's Executive order to be "blatantly unconstitutional," adding he could not "remember another case where the question presented is as clear as this one is." Likewise, Judge Joseph N. Laplante, a George W. Bush appointee, enjoined the Executive Order on the ground that it "contradicts the text of the Fourteenth Amendment and the century-old untouched precedent that interprets it." "Preliminary Injunction Order," at 6, *N.H. Indonesian Cmty Support v. Trump*, No. 25-cv-38-JL-TSM (Feb. 11, 2025).

[4] Children "born on foreign public ships," *id.* at 694, fall outside the Citizenship Clause because they are not born "in" the United States. *See* State Department Foreign Affairs Manual, 8 Fam 301.1-3(d).

Original Understanding

These judicial decisions follow inexorably not only from the Citizenship Clause's plain text, but also from the original understanding of the Fourteenth Amendment. *See generally* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L. J. 405 (2020).

On May 30, 1866, Senator Jacob Howard of Michigan proposed adding the Citizenship Clause to the Fourteenth Amendment. He explained that this addition is "simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Howard noted that the Clause did not apply to the children born to ambassadors—a longstanding common law exception to birthright citizenship—but added that "it will include every other class of persons."[5] In subsequent discussion, Senator Howard and others agreed that children born to members of Indian tribes would also fall within the exception for those not "subject to the jurisdiction" of the United States.

The breadth of the Citizenship Clause was immediately apparent to all. Senator Edgar Cowan of Pennsylvania, who opposed this amendment, correctly described it as "assert[ing] broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States." He objected to giving citizenship to "a traveler" who "comes here from Ethiopia, from Australia, or from Great Britain," arguing "we ought to exclude others besides Indians not taxed." In particular, Cowan was appalled by what he described as "a flood of immigration of the Mongol race," asking "[i]s the child of the Chinese immigrant in California a citizen?"[6]

The answer was yes. Senator John Conness of California immediately responded that the "children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States."[7]

The only substantive debate that followed concerned children born to Indian tribes, further confirming the breadth of the Citizenship Clause and the narrow scope of the exception for those not "subject to the jurisdiction" of the United States. Senator Howard explained that Indian tribes had unique constitutional status as "sovereign Powers" living within the United States. Accordingly, the United States has "always recognized in an Indian tribe the same sovereignty over

[5] Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).
[6] *Id.* at 2890-91.
[7] *Id.* at 2891.

the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains."[8] Illinois Senator Lyman Trumbull agreed, adding that the "very fact that we have treaty relations with them shows that they are not subject to our jurisdiction."[9] None of those arguments apply generally to children born to immigrants of any status in the United States, then or now.

Historical Practice

For more than a century, the executive branch has obeyed the command of the Citizenship Clause's text, as confirmed by the original understanding and the unbroken line of judicial precedent.

The federal government routinely grants passports, social security numbers, and all the rights of citizenship to the children of noncitizens, including the children of undocumented immigrants and temporary lawful immigrants. *See, e.g.*, 20 C.F.R. 422.107(d) ("[A]n applicant for an original or replacement social security number card may prove that he or she is a U.S. citizen by birth by submitting a birth certificate . . . that shows a U.S. place of birth."); State Department Foreign Affairs Manual, 8 Fam 301.1-1(d) ("All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth."). In testimony before the House Judiciary Committee in 1995, then-Assistant Attorney General Walter Dellinger recounted this long history, declaring: "The constitutional guarantee of citizenship to children born in the United States to alien parents has consistently been recognized by courts and Attorneys General for over a century."[10]

Congress, too, has long agreed that the Citizenship Clause means what it says. *See, e.g.*, 8 U.S.C. 1401(a). Moreover, Congress has an independent constitutional obligation to determine the citizenship of its own members.[11] Save one shameful exception in 1870—when several senators challenged the citizenship of the first Black member of Congress, Mississippi Senator Hiram Rhodes

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[8] *Id.* at 2895.
[9] *Id.* at 2893.
[10] *See Legislation Denying Citizenship at Birth to Certain Children Born in the United States: Statement Before the Subcomm. of Immigration and Claims on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of Walter Dellinger, Former Assistant Att'y Gen., Office of Legal Counsel, U.S. Department of Justice).
[11] U.S. Const. art. I, § 5, cl.1.

Revels—Congress has never questioned the citizenship of its members born in the United States based on their ancestry.[12]

II. Executive Order 14160

On January 20, 2025, President Donald J. Trump issued Executive Order 14160, which purports to deny citizenship to millions of Americans automatically granted that status at birth under the Constitution's Citizenship Clause, as well as under 8 U.S.C. 1401(a). Without legal basis, Section 1 of the Executive Orders asserts:

> *United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.*

Through this unilateral rewriting of the Constitution, the Executive Order claims to strip citizenship from everyone born in the United States to undocumented immigrants or lawful temporary immigrants (known as "nonimmigrants" under the Immigration and Nationality Act). Expressly included are the many nonimmigrant visa-holders who are permitted to live and work in the United States on such visas for a decade or more, many of whom eventually obtain green cards and citizenship in the United States. *See* 8 U.S.C. 1255 (permitting adjustment of status from nonimmigrant to lawful permanent resident (green card) status).

Section 2 of the Executive Order states that it is "the policy of the United States that no department or agency of the United States government shall issue [or accept] documents recognizing United States citizenship" of those identified in Section 1. Section 2 further states that this policy will "apply only to persons who are born within the United States after 30 days from the date of this order."[13] Accordingly, had the Executive Order not immediately been enjoined by several

[12] Richard A. Primus, "The Riddle of Hiram Revels," 119 Harv. L. Rev. 1680 (2006).

[13] Significantly, the 30-day temporal limitation in Section 2 does *not* apply to the effort to rewrite the Citizenship Clause in Section 1.

federal courts, it would bar federal agencies from providing passports, social security numbers, or federal benefits to babies born to undocumented immigrants or nonimmigrants after February 19, 2025.[14]

III. The Flawed Legal Arguments in Defense of the Executive Order

In its court filings attempting to defend the Executive Order, the Trump administration makes legal arguments that are at odds with the Citizenship Clause's text, the drafting history, Supreme Court opinions, and over a century of historical practice. Furthermore, these arguments are inconsistent with the scope of the Executive Order itself.

Allegiance

In its legal filings, the Trump administration argues that Citizenship Clause applies only to those who have an "allegiance" to the United States that is "'complete'" and "unqualified by 'allegiance to any alien power.'" *See* "Defs' Opp. to Pl's Mot. for a Prelim. Inj. and Mem. of Points and Authorities," at 10, *County of Santa Clara v. Trump,* No. 5:25-cv-00981 (N.D. Ca. 2025). *See also* "Brief of Amici Curiae Members of Congress in Support of Defs," at 12, *Washington v. Trump*, No. 2:25-cv-00127-JCC (making similar arguments). In doing so, the administration attempts to rewrite the text of the Citizenship Clause, which does not include the word "allegiance."

The Trump administration's allegiance argument is identical to the argument expressly rejected by the U.S. Supreme Court nearly 127 years ago in *Wong Kim Ark*. In 1898, the Solicitor General of the United States argued that Wong's parents were "subject to the jurisdiction of the Emperor of China" and not the United States, and so Wong was therefore also "the subject[] of a foreign power." The government lost.

Even if "complete" and "unqualified" allegiance was a prerequisite to U.S. citizenship, however, birth in the United States establishes such allegiance. The purpose of the Citizenship Clause is to ensure that all born in the United States are automatically citizens with all the rights and responsibilities that accompany that

[14] *See, e.g.,* "Preliminary Injunction Order," *N.H. Indonesian Cmty. Support v. Trump*, 1:25-cv-38 (D.N.H. Feb. 10, 2025); "Preliminary Injunction Order," *New Jersey v. Trump*, 1:25-cv-10139 (D. Mass. Feb. 13, 2025).

status, save the limited common-law exceptions. The allegiance of the parents is irrelevant to the allegiance of the child, who is an American by virtue of birth on U.S. soil. *See Wong Kim Ark,* 169 U.S. at 659 (noting that "allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign"); "Preliminary Injunction Order," *Doe v. Trump*, No. 25-10135-LTS, 25 WL 487372, (D. Mass. Feb. 13, 2025).

Finally, the allegiance rationale is at odds with the Executive Order itself. That argument would exclude from birthright citizenship not only the children of undocumented immigrants and temporary immigrants—the groups expressly targeted by the Executive Order—but also the children of dual citizens and green card holders. *See* "Preliminary Injunction Order," *Doe v. Trump*, No. 25-10135-LTS, 25 WL 487372 (D. Mass. Feb. 13, 2025). If "complete" and "unqualified" allegiance was the test, then the Citizenship Clause would apply *only* to children born to parents who both had U.S. citizenship (and no other) at the time of the child's birth in the United States—a result in conflict not only with *United States v. Wong Kim Ark* but also with the lines the Executive Order purports to draw.

Domicile

The Trump administration claims that a child of noncitizens does not receive citizenship based on birth in the United States unless at least one noncitizen parent is "domiciled" in the United States at the time of the child's birth. *See* "Defs' Opp. to Pl's Mot. for a Prelim. Inj. and Mem. of Points and Authorities," at 13, *County of Santa Clara v. Trump,* No. 5:25-cv-00981 (N.D. Ca. 2025).

Once again, the Trump administration seeks to rewrite the Citizenship Clause to add a word absent from its text. The Citizenship Clause was never intended to apply only to those making their permanent home in the United States, which is why the framers of that amendment did not use the term "domicile" to limit its application. During the 1866 debates on the Senate floor, Senator Cowan observed that the children of "traveler[s]" born in the United States would be citizens, and Senator Conness agreed that the Citizenship Clause applies to "children of all parentage whatever" born in the United States.[15]

And once again, the government's position is foreclosed by *Wong Kim Ark,* which did not turn on domicile. To the contrary, the Court's opinion concluded that the Citizenship Clause adopted the common-law rule under which "every person" born within the country was a citizen, "whether the parents were settled, or merely temporarily sojourning, in the country . . . . save only the children of foreign

[15] Cong. Globe, 39th Cong., 1st Sess. 2890-2891 (1866)

ambassadors . . . or a child born to a foreigner during the hostile occupation." *Id.* at 460. *See also id.* at 664 (favorably citing *Lynch v. Clarke,* 1 Sandf. Ch. 583 (1884), which recognized citizenship at birth for a child born to Irish parents temporarily visiting New York).[16]

Like the allegiance argument, the domicile rationale is inconsistent with the Executive Order it purports to justify. Domicile can be defined as the place "'in which [a person's] habitation is fixed without any present intention of removing therefore.'"[17] Both undocumented immigrants as well as many lawful temporary visitors (nonimmigrants) may intend to remain in the United States indefinitely.

In its legal filings, the Trump administration erroneously asserts that "[t]emporary visitors to the United States, by definition, retain permanent homes in foreign countries." *See* "Defs' Opp. to Pl's Mot. for a Prelim. Inj. and Mem. of Points and Authorities," at 12, *County of Santa Clara v. Trump,* No. 5:25-cv-00981 (N.D. Ca. 2025). That is incorrect. Several categories of nonimmigrants to the United States are permitted to enter with "dual intent"—meaning they can enter on a temporary visa but intend to stay if they can find a legal pathway to do so—and so need not demonstrate that they retain a foreign residence. *See* 8 U.S.C. 1184(b). These nonimmigrants may eventually adjust to lawful permanent resident (green card) status without leaving the United States, as permitted under 8 U.S.C. 1255, and may later become naturalized citizens. Conversely, even lawful permanent residents (green card holders) do not have an unconditional right to remain in the United States. *See* 8 U.S.C. 1227 (listing removal grounds).

Consent

Finally, the Trump administration argues that "if the United States has not consented to someone's enduring presence, it likewise has not consented to making citizens of that person's children." Defs' Mem. of Law in Objection to Pls' Mot. for

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[16] Although the Court noted that Wong's parents were "domiciled residents" of the United States at the time of his birth, it also observed that Wong was "of Chinese descent" and that he had only "one residence . . . in California" throughout his life. 169 U.S. at 458. None of these facts are relevant to Court's holding. As the Court well knew, Wong's parents did not have a legal right to remain permanently in the United States. Wong's parents were barred by federal law from naturalizing, and the U.S. government could (and did) exclude and deport Chinese immigrants like the Wong family at its discretion. *See Chae Chan Ping v. United States,* 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

[17] Justin Lollman, "The Significance of Parental Domicile Under the Citizenship Clause," 101 U. Va. L. Rev. 455, 459 (2015) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Little, Brown & Co., 6th ed. 1865).

Prelim. Inj., at 2, *N.H. Indonesian Cmty Support v. Trump*, No. 1:25-cv-38-JL-TSM. *See also* "Brief of Amici Curiae Members of Congress in Support of Defs," at 12, 16, *Washington v. Trump*, No. 2:25-cv-00127-JCC (arguing that the Citizenship Clause requires that "sovereign consent" to the parents' presence). Again, that is a requirement made up out of whole cloth that appears nowhere in the text of the Citizenship Clause.

The Citizenship Clause is focused on the *child* born on U.S. soil, not the parents. And for good reason. The Citizenship Clause's primary goal was to grant citizenship to the newly-free slaves. As Congress well knew, thousands of enslaved persons had been brought to the United States in violation federal laws banning their importation after 1808. Unquestionable, the nation intended the Citizenship Clause applied to these "illegal aliens" and their progeny, just as it applies to everyone else in America.[18]

IV. The Consequences of the Executive Order for All Americans

If the Trump administration were to succeed in rewriting the Constitution, the consequences would be dire for *all* families in the United States.

At a minimum, children born after February 19, 2025, to legal temporary immigrants as well as undocumented immigrants—approximately 300,000 children every year—would be rendered "illegal aliens" from the moment of their birth.[19] The Executive Order instructs federal agencies to deny these children social security numbers, access to federal benefits reserved for citizens, and passports. Some would be born stateless. If these children left the country with their parents,

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[18] *See* Gabriel J. Chin and Paul Finkelman, "Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation," 54 U.C. Davis L. Rev. 2215 (2021).

[19] Jeffrey S. Passel, D'Vera Cohn, and John Gramlich, *Number of U.S.-born babies with unauthorized immigrant parents has fallen since 2007*, Pew Research Center, Nov. 1, 2018 (estimating number of children born to undocumented immigrants at about 250,000 in 2016); Jason Richwine and Steven A. Camarota, *Births to Illegal Immigrants and Long-Term Temporary Visitors (Preliminary estimates)*, Center for Immigration Studies, Feb. 14, 2025 (estimating between 225,000 and 250,0000 births to undocumented immigrants in 2023, and another 70,000 births to temporary visitors (nonimmigrants) in 2023, excluding tourists).

No government agency has provided an estimate of the number of children born to women visiting the United States under a tourist visa. Federal law prohibits granting a tourist visa for "the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States." 22 C.F.R. 41.31(b)(2)(i). That regulation further provides that "[a]ny B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is presumed to be traveling for the primary purpose of obtaining U.S. citizenship for the child." *Id.* at 41.31(b)(2)(iii).

they would be barred from returning even if their parents have a legal right to re-enter the United States. By law, these newborns would be subject to removal from the country and their family from the moment of their birth.

Nor would the harm be limited to the families targeted in the Executive Order. Even families in which one or both parents are green card holders or even U.S. citizens would now have to prove their own status to the satisfaction of federal officials before their child would be recognized as a U.S. citizen. And that would not be easy.

Today, hospitals typically report live births to the relevant state agency, which then submits that information to the Social Security Administration. But hospitals do not routinely request information about the immigration or citizenship status of parents. Nor are hospital staff or state agencies equipped to determine whether documentation satisfies federal officials' requirements for such status, which would require knowledge of complex federal immigration laws and regulations. If these parents cannot quickly produce proof of their child's citizenship, the Executive Order will deprive these newborns of federal and state medical and other benefits at the most vulnerable time of their lives.[20]

The test of lineage imposed by President Trump's Executive Order would become even more difficult to satisfy in the years to come. Future generations of parents could not rely on their own birth certificates to establish their child's citizenship because place of birth would no longer suffice. For every child born in the next generation, the parents would need to provide not only their birth certificate demonstrating birth in the United States, but also proof of *their* parents' citizenship and immigration status, and on down through the generations to follow. The United States would have replaced the egalitarian rule that we are all equally American at birth with a test of lineage and ancestry—a legal rule at odds with our Constitution and antithetical to the nation's founding values.

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[20] *See* Jacob Hamburger, "The Consequences of Ending Birthright Citizenship," Wash U. L. Rev. (forthcoming 2025). Immigration and citizenship documentation is complicated, confusing even legal experts on those issues. To give just a few examples: 1) even if a green card states on its face that it has expired or is conditional, the holder retains lawful permanent resident status; 2) many parents will not have easy access to birth certificates; and 3) under the Child Citizenship Act, children with lawful permanent resident status automatically become citizens if they reside with a U.S. citizen parent, but will not have any documentation of that status. Parents of newborns, busy hospital staff, and state officials should not be required to obtain and parse such documentation to obtain the rights of citizenship for their child.

Conclusion

The Citizenship Clause's text, original understanding, and longstanding historical practice all establish that, save for a handful of narrow common law exceptions, all born in the United States are U.S. citizens. The conclusion has been confirmed by judicial decisions stretching back over a century. Birthright citizenship is a fundamental expression of America's founding values, which rejected lineage as the sole basis for membership. The Supreme Court's odious decision in *Dred Scott v. Sandford* marked the only significant deviation from this founding principle. All Americans should be proud that in 1868 the nation rejected *Dred Scott* and reclaimed citizenship based on location of birth, not lineage. We must never go back.

Mr. ROY. Thank you, Ms. Frost.

We will now proceed under the five-minute rule with questions.

The Chair recognizes the gentlelady from Wyoming for five minutes.

Ms. HAGEMAN. Thank you, Mr. Chair.

Birthright citizenship allows for predatory birth tourism practices in which foreign-born women come to the United States on tourist visas to give birth so that their children become U.S. citizens. Once the children turn 21, they can sponsor their parents to become legal U.S. residents so the family can immigrate to America.

Concerningly, the majority of these birth tourists come from one of America's greatest adversaries, including China.

Because of advances in technology, lax surrogacy laws, and the incorrect understanding of the 14th Amendment, countries are now using international surrogacy programs to rent wombs in America.

Mr. O'Brien, there is a back-and-forth in U.S. policy regarding scrutiny and restrictions for birth tourism, including two different policies issued in 2015 and 2020.

Where does our Federal policy currently stand on this issue? Is it strong enough to prevent this practice of essentially renting wombs for surrogacy to have anchor babies?

Mr. O'BRIEN. Well, the fact is that we don't have any policies specifically on this. We have the immigration laws, but, as we've seen with the last administration, if the government refuses to enforce those, they have no effect whatsoever.

There's anywhere from 125,000–300,000, depending on whose estimates you're looking at, incidents of birth tourism each year. The implications of this are absolutely frightening if you look at it long-term.

During the cold war, the Russians had a program called the Illegals Program, where they inserted agents of influence and spies into the United States with documents that made it appear that they were lawfully here. If those people had children, they became U.S. citizens, and regularly those children were trained—despite the fact that they allegedly had a claim to United States citizenship, they were trained to be against the interests of the United States.

So, this is something that is dangerous. We need a firm policy against it. It is something that places the United States at a great deficit in terms of national security.

Ms. HAGEMAN. Well, then I want to focus specifically on this issue. According to *The Heritage Foundation*, they have reported on the new birth tourism tactic which uses international commercial surrogacy to exploit America's misinterpretation of the 14th Amendment and our lax surrogacy laws.

Intended parents who are foreign nationals use a surrogate in or transported to the United States and the surrogate may be an American woman who then gestates a child for a fee, allowing foreign nationals to essentially rent a room or buy a baby.

Mr. O'Brien, under the current wrongful interpretation of the 14th Amendment, this child would gain U.S. citizenship, wouldn't they?

Mr. O'BRIEN. Yes, they would. Because the Immigration and Nationality Act has become a muddle under the weight of misinterpretations about various effects of provisions of the act, that places the United States in a position where people with no connection to the United States, who simply want to be here because they either don't like the political or economic conditions in their home country, can then use the citizenship of an adopted child or a surrogate child to try and access the United States and then eventually get lawful permanent residence and become citizens themselves.

Ms. HAGEMAN. This form of birth tourism actually exacerbates the crisis we have with birth citizenship, requiring direct and exclusive allegiance—which should require direct and exclusive allegiance to the United States. Don't you agree?

Mr. O'BRIEN. Yes, it does. It exacerbates it significantly.

Ms. HAGEMAN. Well, what's very interesting is, China banned international surrogacy, yet the international industry is disproportionately fueled by Chinese nationals, who make up 41.7 percent of the surrogacy industry.

Should this raise national security concerns, that China is aggressively participating in a practice that it has banned in its own country?

Mr. O'BRIEN. Yes. China has an established pattern through an organization called the People's Work Bureau (ph) of approaching people who have a familial connection to China, regardless of their citizenship, and then pressuring them based on connections to Chinese family members who are still within the PRC to provide intelligence information, whether that be national security information or economic espionage information.

Ms. HAGEMAN. Well, and what's interesting is that the children—these children who are receiving American citizenship, they receive that even if the parents intend to raise them abroad.

What are the benefits of having a child with American citizenship?

Mr. O'BRIEN. The benefits of having a child with U.S. citizenship is, that child can later sponsor you for lawful permanent residence. It also makes the child eligible for all sorts of things that come along with U.S. citizenship, which is entering and leaving the United States. The implications of that from a national security or criminal perspective are enormous.

This is truly frightening, and it's shocking to me that there is so much debate about this. I think if we're arguing about this, we've sort of lost the concept of what citizenship is and what it means.

Ms. HAGEMAN. Amen. I think you make a very good point.

I ask unanimous consent to put into the record an article from July 15, 2024, entitled, "The New Face of Birth Tourism: Chinese Nationals, American Surrogates, and Birthright Citizenship."

And, with that, I yield.

Mr. ROY. Without objection. Also, without objection, Mr. Biggs will be permitted to participate in today's hearing for the purpose of questioning the witnesses if a member yields him time for that purpose.

I will now recognize the gentlelady from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chair.

Let me be very clear: Donald Trump's Executive Order to eliminate birthright citizenship is, quote, "blatantly unconstitutional." Those are not my words. Those are the words of Judge John Coughenour, a Reagan-appointed Federal judge from my home State of Washington.

The judge went on to say that, while, quote,

> The rule of law is, according to [Trump], something to navigate around or something to be ignored, whether that be for political or personal gain in the courtroom, the rule of law is a bright beacon.

Which that judge intends to follow.

For over 100 years, birthright citizenship has been enshrined as a fundamental right under the 14th Amendment. The language in the amendment is very clear—"all persons born or naturalized in the United States"—in fact, so clear that at least four Federal judges have concluded that the Executive Order is unconstitutional.

Like many of the attacks on immigrants by the Trump Administration, this attack centers on old tropes that question the, quote, "allegiance" of immigrants—tropes that were applied to enslaved Black people brought to this country in shackles as well as Japanese-Americans imprisoned and interned during World War II.

These attacks are couched in a completely baseless argument that, somehow, immigrants born in the United States to a parent who is undocumented don't have sole, quote, "allegiance" to the United States.

Professor Frost, this argument is actually very similar to the very arguments made in 1897 by Solicitor General Holmes Conrad in the Supreme Court case *United States* v. *Wong Kim Ark*, when he argued that the children of Chinese immigrants were not, quote, "subject to the jurisdiction of the United States" because they owed their allegiance to the Emperor of China. The Supreme Court considered these racist arguments and they categorically rejected them, correct? Can you explain why, if that's the case?

Ms. FROST. Yes, that's correct.

I think it's worth noting that Holmes Conrad came from a slave-owning family, he was an officer in the Confederate Army, and he himself lost his citizenship for a period of time because he was a traitor to the United States of America.

In addition to the argument you just noted that he made that stated that the children of immigrants, and in particular Chinese immigrants, did not have allegiance to the United States—he made that argument explicitly, and it was rejected by the Supreme Court in 1898. In addition to that, I think it's worth noting, he also told the Supreme Court of the United States that the entire 14th Amendment was unyal. That's an argument he made. I'm not aware of, ever, a solicitor general making that argument to any other Supreme Court in the history of the United States. Of course, the Supreme Court rejected that as well.

That argument's been made, and it's lost 127 years ago and it will fail again today, as it already has in front of five Federal courts.

Ms. JAYAPAL. At that time, the Supreme Court held that the phrase "subject to the jurisdiction thereof" was an extremely nar-

row qualification that only excepted three specific classes of persons from citizenship.

Can you tell us what those three classes were and why they do not apply and implicate children of undocumented immigrants?

Ms. FROST. Yes. The Reconstruction Congress was very clear—the Supreme Court agreed in *Wong Kim Ark* and subsequent cases—that the "subject to the jurisdiction thereof" language applied to three groups.

One was the children of diplomats and consular officers, for the obvious reason that the French Ambassador to the United States doesn't want their child born in the U.S. to be a citizen. Their situation, the United States, is they're representing a foreign power. In fact, the embassy itself is considered foreign territory.

Native Americans, that was the only really substantive discussion the Reconstruction Congress had at the time they suggested this addition of the Citizenship Clause to the 14th Amendment. They pointed out in many discussions that the Indians, Native American Tribes, were sovereign powers with whom we had treaty relations, who were not subject to U.S. law; they had their own Tribal courts and laws. At that time, they wanted to be excluded, and the Reconstruction Congress didn't want them to be automatically included.

I should note that there is now a Federal law that gives Native Americans automatic birthright citizenship.

The final group I'm happy to say we've never encountered, which is enemy aliens in occupied territory—

Ms. JAYAPAL. Great. I'm going to stop you just because I have another question here.

One of the lawsuits blocking the order was brought by an individual in my State, Alicia Lopez. She was born and raised in El Salvador, but she fled the country after experiencing a violent and abusive situation. She has applied for asylum, has received a work permit while her application is pending. She's lived in Washington State since 2016. She has a five-year-old son with her partner. She's pregnant with a second child, who is due in July.

I want to bring this back to the real impact of what willactually happen. Birthright citizenship has generated this deep sense of membership in our society, a collective commitment to a shared value, an opportunity, equality, and contribution that's allowed America to thrive.

What's the impact on real-life Americans across this country?

Ms. FROST. Yes. To eliminate birthright citizenship would be to create a permanent underclass, a caste system, which was the very result the Reconstruction Congress intended to end.

Ms. JAYAPAL. Thank you so much.

I yield back, Mr. Chair.

Mr. ROY. I thank the gentlelady from Washington.

I now recognize the Committee Chair, Mr. Jordan.

Chair JORDAN. I thank the Chair and thank you for holding this hearing.

I would yield my time to the gentleman from Arizona.

Mr. BIGGS. I thank the gentleman for yielding.

I'm going to ask each one of you a question related to this scenario, because this is a real scenario.

In Yuma, Arizona, they have one hospital for about 150,000 people. They have a small maternity unit, about 8–10 beds. Many times, the beds, every one of them is occupied by a mom-to-be who has illegally crossed our border, usually through the Cocopah Reservation. I know right where they come. They go in and they have a baby, and then they both depart to go back South across the border.

I guess my question for each one of you is this. Under the original meaning—because I'm trying to establish—you've all made it clear; I want to make it clearer.

Under the original meaning of the 14th Amendment, Ms. Frost, is that child a citizen of the United States of America?

Ms. FROST. Yes, of course, because the Reconstruction Congress wanted—

Mr. BIGGS. OK. Thank you. We'll go to—thank you. I appreciate that.

Now, Mr. Cooper?

Mr. COOPER. No, Congressman, not under the Citizenship Clause of the 14th Amendment.

Mr. BIGGS. Mr. McCotter?

Mr. MCCOTTER. I agree with Mr. Cooper; that's correct.

Mr. BIGGS. Mr. O'Brien?

Mr. O'BRIEN. No, because she's not lawfully present in the United States, the mother.

Mr. BIGGS. Let's consider—we have a very, very disparate interpretation of *Wong Kim Ark*. We've got Ms. Frost's position—and I don't want to misstate it, but—that the original allegiance—or "the jurisdiction thereof" displaced the allegiance requirement, right? So, there's no more allegiance requirement.

Is that fair? Is that a fair description of what you're saying, at least in that portion?

Ms. FROST. I'm not sure what you're referring to by the original "allegiance requirement." There was never an allegiance requirement. There was the *Dred Scott* decision, which said—

Mr. BIGGS. OK. That's what I'm getting at. You believe there was never a—jurisdiction there have never required allegiance to the sovereign.

So, now, I want to clarify that.

When you get to that, Mr. McCotter, why is it that in *Wong Kim Ark* the court said that the plaintiff or the Appellant in that case was actually a citizen of the United States?

Mr. MCCOTTER. The Supreme Court's rationale is a little hard to follow in *Wong Kim Ark*, to be honest, but it does say that the parents there were lawfully present with the consent of the sovereign, which is the United States—the equivalent of our modern-day LPR, lawful permanent resident.

Mr. BIGGS. So, if because that's the way I read *Wong Kim Ark*. They're talking about there's lawful presence and there's an intention to domicile, which is a legal term of art meaning you're intending to live there, stay there, and be part of that community. That's really what that gets at.

I am baffled by the notion, then, that if you cross through the Cocopah Reservation and you go into the regional hospital in Yuma and you have a baby, and your intention is to immediately leave

and go back home—you're not legally present in the United States, nor do you have an intention to be here. Why, then, is that baby entitled to birthright citizenship?

Mr. Cooper?

Mr. COOPER. Congressman, that baby is not entitled to birthright citizenship. I think *Wong Kim Ark* does not in any way support the claim that it's entitled to that, to birthright citizenship. As I mentioned previously, the issue in that case was very clearly limited to aliens who had established a permanent and lawful domicile in this country. So, whether you think that's sufficient or not, it clearly doesn't sweep within it people who have come into this country illegally.

I would also point out, *Wong Kim Ark* itself said there are some certain irresistible conclusions to be drawn from the Citizenship Clause, including that the 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory in the allegiance and under the protection of the country. The reason they concluded there is—

Mr. BIGGS. I have to go there because I want to go really quick because it actually segues from that nicely, and that is, one of the things—and, actually, Ms. Frost indicated this.

In the Indian Tribe case, when we look at that, it is because there was respect for a Tribal Indian having an allegiance to that Tribe. That's very different than someone who crosses over, has a baby, and returns to their native country. Isn't that true?

Mr. O'Brien? I'll go to Mr. O'Brien.

Mr. O'BRIEN. Yes, that's true.

In *Wong Kim Ark*, what the court did was, they inferred that long-term residence was an intention by someone who was working toward citizenship and wanted to be a long-term member of the community of the United States.

The court was at pains to point out that there were two qualifications: (1) That the individual attempting to transmit citizenship had to be lawfully present in the United States with the permission of the government; and (2) that person was within the allegiance of the United States, meaning that this individual had more than a simple obligation to obey the laws while present.

Mr. ROY. I thank the gentleman from Arizona, and I thank the witness.

I will now recognize the gentleman from New York, Mr. Goldman.

Mr. GOLDMAN. Thank you, Mr. Chair.

Mr. O'Brien, I want to go back to where you were right there. Mr. McCotter said this, as well—your interpretation is, to be lawfully present in the United States with consent of the sovereign, Mr. McCotter said, "that's the equivalent of a lawful permanent resident."

Is that correct, Mr. McCotter?

Mr. MCCOTTER. That's correct, yes.

Mr. GOLDMAN. You agree, Mr. O'Brien?

Mr. O'BRIEN. Yes, I do.

Mr. GOLDMAN. Why is a visa holder not lawfully present in the United States with consent of the sovereign?

Mr. O'BRIEN. Well, first, a visa holder is a person who has a permit to board a common carrier and come to the United States and request admission. A person who has been admitted to the United States by the appropriate authorities following inspection by an immigration officer is lawfully present.

Mr. GOLDMAN. So, someone with a visa, a work visa, that could go on for years and years, you're saying, is not lawfully present?

Mr. O'BRIEN. No, that's not what I said at all. I said a person who has been admitted in a visa classification, like H–1B, F–1, so on, and so forth, is lawfully present while they're in compliance with the terms of the immigration laws.

Mr. GOLDMAN. OK. So, I agree. You're trying to restrict this to green cards. The problem that I'm addressing here is, this Executive Order is not restricted to green cards. It prohibits birthright citizenship if neither parent is either a lawful permanent resident or a United States citizen.

Do you agree with that, Mr. O'Brien?

Mr. O'BRIEN. Yes, I do. The court in *Wong Kim Ark*—

Mr. GOLDMAN. OK. Thank you.

So, in *Wong Kim Ark*—exactly. In *Wong Kim Ark*, they used the definition you just said, which would include visa holders, and yet the Executive Order expressly excludes visa holders.

Let's move to the second point, allegiance. This is what—the "subject to the jurisdiction thereof" that all three of you have talked about relates to allegiance. I'd love to see a clear and definitive definition of "allegiance," but let's just talk about what you all were saying.

"Allegiance" means assimilated. Is that correct, Mr. Cooper? That's one of the things that you said?

Mr. COOPER. I think that only a person, or at least an Indian, under the view of the Framers of the Citizenship Clause, who had been assimilated and had left the reservation and therefore had essentially abandoned that person's allegiance to the Tribe and had shifted their allegiance to the United States, just like others could have a child—

Mr. GOLDMAN. I see. So, if you move off of a Tribal reservation and you move across the street at the time—where you're talking about originalism here—and you move across the street, then all of a sudden your allegiance has changed from the Indian Tribe, the Native American Tribe, to the United States. That's what you're saying.

Do you disagree with that?

Mr. COOPER. I do disagree with that. I think—

Mr. GOLDMAN. OK.

Mr. COOPER. I think the notion—

Mr. GOLDMAN. Is there a time requirement? You must live off of the reservation for one year, two years, and five years?

Mr. COOPER. No. No.

Mr. GOLDMAN. No, there's not. This is the problem, is, you start talking about allegiance and you're excluding green card holders.

Now, green card holders are also citizens of other countries. Yet, somehow, in this definition of "allegiance," that a green card holder has more allegiance to the United States than that person would, by necessity, by definition, than that person would to a foreign

country. That seems like a pretty bold statement to be asking the Supreme Court to say.

What scares me about it, as an American Jew, when Jews are often accused of dual loyalty with Israel, is, you're now getting into a situation where the government has to determine which country any individual has more allegiance to—the country that they have immigrated to, and even if they're a lawful permanent resident, or the country of their citizenship.

It baffles me that the Republican Party, the party of small government, the party of federalism and States' rights, would sit here and say, yes, it is the government's job to create a definition of "allegiance," which somehow is required for birthright citizenship.

Now, look, Mr. Biggs—and you may not like the example—birthright tourism, you call it—of someone coming into the United States, having a baby, and then leaving. If you don't agree with that, that's fine. Pass a Constitutional amendment. Because this is clear. This definition that you're providing is unbelievably vague and very, very careless, and I look forward to the courts rejecting it.

Thank you. I yield back.

Mr. ROY. I thank the gentleman from New York.

As individuals who recite the Pledge of Allegiance down on the floor of the House of Representatives every time we open the House, I think for those of us who understand what allegiance is—particularly, the gentleman from Texas, who wore the uniform of our Armed Forces, I think he's fully aware of what allegiance is.

I would also note that one of the very few responsibilities our Federal Government has is actually making those determinations as to who should be citizens and who should be in our country.

Mr. HUNT. Right. Correct.

Mr. ROY. I would now recognize the gentleman from Texas.

Mr. HUNT. Thank you, Mr. Chair.

I understand more than anyone that we are a Nation of immigrants. There's a difference, stark difference, between giving citizenship to the children of slaves, the children of those subject to the Middle Passage, the children of sharecroppers, and the children of those who were once considered property and giving citizenship to the children of people who crossed a border illegally, stay in taxpayer-funded luxury hotels, who receive free Xboxes, free cell phones, free flights around the country, and three square meals a day. There's a big difference.

My great-great-grandfather was born on a plantation, Rosedown Plantation in Louisiana. He had to join the Union Color Guard to gain his freedom.

By morphing the Citizenship Clause into something that wasn't meant to be, it's demeaning to descendants of slaves like me. Not just me who served this country, but my father is a retired colonel; my sister went to West Point and is a retired colonel; my brother went to West Point. We are talking about a direct descendant of a slave that earned—earned—the right to be in this country and passed that ilk down to his ancestry. People bled for it. People died for it. It means something.

The purpose of the 14th Amendment that President Trump—President Trump's birthright citizenship Executive Order is that

the Citizenship Clause of the 14th Amendment was never meant to apply to children of illegal or legal aliens.

Allowing birthright citizenship to stay in place dilutes the citizenship of not just Black Americans like me but every single American citizen that had to earn it the right way. Let's say this in black and white: Either you're a U.S. citizen or you are not.

Now, the Left has spent decades cheapening what it means to be an American citizen. They have quite literally been chipping away at the basic value of American citizenship. They pretend to be altruistic, but we know the truth. Ozzy Osbourne's daughter said on "The View" that we have to let illegal immigrants in this country because "who else will clean our toilets?" We hear it all the time. "Who will pick our crops?" Even though that we know that American citizens are the majority of those people picking our crops, we know what you're insinuating. All this must end now.

Mr. O'Brien, earlier, you brought up birth tourism and how it's an issue of national security. Could you expound on that and talk about why that's an issue? As somebody that's served this country, this is near and dear to my heart.

Mr. O'BRIEN. Sure.

If we give U.S. citizenship to absolutely anyone who is born on our soil, that takes the United States out of control of who becomes a U.S. citizen. Since, as everyone here knows, the people are the Government of the United States, that puts us in a position where we could be allowing people who are citizens of adversary Nations to be coming here, having children who gain U.S. citizenship, and then are trained to be adversaries of the United States.

It puts them in a position where they can get jobs with security clearances, they can join the military, they can work in the defense industry, which they would not otherwise be able to do.

Mr. HUNT. So, over the course of the last four years, have there been citizens—people that have entered into our country that are our adversaries, that have come to this country, that we know of, and had children?

Mr. O'BRIEN. Yes, there have been a massive number of people who have come here, and not just over the last four years; it was happening before. I worked—

Mr. HUNT. Yes.

Mr. O'BRIEN. —in the national security apparatus of the Department of Homeland Security, and I worked on many cases where that had happened.

Mr. HUNT. Is there any other country in the world that you know operates like this?

I'm saying this from the standpoint of somebody that's deployed to Saudi Arabia and other countries around the world. This would never happen anywhere else, by the way.

Can you name a country in modern or recent history that has behaved like this? What has been the outcome of this type of behavior? Meaning that, is this even a sustainable model, given the number of people that have entered this country over the course—especially the last four years?

Mr. O'BRIEN. No, it's not a sustainable model.

The only other place where it existed was in a number of the Latin American countries. Most of them did away with it after they

were attempting to attract migrants to build their industries and build the number of people living in those countries. So, this is something that's nearly nonexistent.

Mr. HUNT. Thank you, Mr. O'Brien.

The Left throws "love thy neighbor" in our face, and they say that we have to have open borders to be nice to people.

Well, I just want to tell the Left: We have a bunch of neighbors right here in our country that are Americans. You see, your neighbors are the homeless veterans that you drive by on the way to work. Our neighbors are the wayward teens running away from a bad home environment. Your neighbors are the families who just got evicted from their apartment.

What do all those neighbors have in common? They're all Americans. Let's use our American taxpaying dollars to put Americans first. News flash: This is why President Trump is our President. Because it's past due that we put the American citizen first.

Once we solve our issues here—I'm a Christian—by God, let's help everybody else. At this point, we have enough problems to fix in our own country. This must stop.

Thank you for your time.

Mr. ROY. I thank the gentleman from Texas.

I will now recognize the gentlelady from Vermont.

Ms. BALINT. Thank you, Mr. Chair.

Today we've heard a lot of different legal theories about interpreting the Constitution, and at times I know it feels a little bit like a law school lecture. So, I'd like to cut through the legalese and clearly focus on something that I find deeply troubling.

What Republicans are offering is a plan to redefine who gets to be American. It's a big step toward a country where Americanness itself applies to only a privileged few and a country where future and past generations are relegated to an underclass status. They're trying to stake out who is a real American, and it will leave a whole lot of people out. This is a frightening road to go down.

The arguments we've heard have been with us since our founding, as you pointed out, Professor Frost. The *Dred Scott* decision changed the common-law understanding of birthright citizenship for all. It enabled slave owners to use the law to take away citizenship, to take away identity, to take away the freedom of Black people. The 14th Amendment and the Civil Rights Act of 1866 were a direct response to *Dred Scott*. The law grants citizenship to people born in this country, plain and simple.

Yet, here we are, over 150 years later, talking about how maybe the straightforward language of the law could possibly or should actually be used to deny citizenship for, often, people of color.

Ms. Frost, did the Framers of the 14th Amendment intend to extend birthright citizenship to the children of slaves and other noncitizens?

Ms. FROST. Yes. The Reconstruction Congress could not have been clearer. They used clear language, and their discussions that followed made this clear. They said, of course they wanted to overrule *Dred Scott*, which included giving citizenship to all enslaved Americans, including those who had arrived illegally because they'd been illegally imported after the laws prohibited it. They

were the illegal aliens of the day. The Reconstruction Congress said, "we want them to have citizenship."

The second group explicitly discussed was the children of immigrants—in particular, the children of Chinese immigrants. That was the intention of the Reconstruction Congress, and they achieved that through clear language.

Ms. BALINT. Thank you. Through clear language.

Citizenship was based on where you were born, correct, and not, actually, the identity of your parents?

Ms. FROST. Of course. We are a country that doesn't visit the sins of the father on the child. We believe in the idea that all people born are equally American because they are born in the United States. Our Constitution rejected titles of nobility explicitly. We, of course, rejected a hereditary monarchy.

America is about birthplace. It's not ancestry or lineage.

Ms. BALINT. Is it safe to say that the 14th Amendment enshrined citizenship for an entire class of people and their ancestors?

Ms. FROST. Yes, of course. Any other rule would require a test of lineage and ancestry for every new child born in the United States.

I'd like to quickly add, 33 countries have birthright citizenship, in response to Congressman Hunt's question, including Mexico and Canada. We are not outliers.

Ms. BALINT. Exactly. I'm so glad you brought that up, because I had it in my notes to bring that up as well.

What if the Supreme Court decides that the 14th Amendment actually does not give citizenship to children born in this country to noncitizens? What if the Supreme Court made that ruling? Where does that leave the descendants of those who've been granted birthright citizenship?

Ms. FROST. Yes, it would unwind the citizenship of the entire country. We are a Nation of immigrants. A very significant majority of us trace back—really, other than Native Americans—trace back our lineage to an immigrant parent and grandparent. Five percent of our military are the children of immigrants.

Now, all of us, when we have a baby, the first thing we'd have to do is produce proof of our citizenship. Imagine a generation from now on. It wouldn't be good enough to show your own birth certificate; you'd have to show the lineage.

This is exactly what *Dred*—what the Reconstruction Congress wanted to prevent, and it's exactly the result that *Dred Scott* wanted.

Ms. BALINT. I appreciate that so much.

So, let's follow this logic. Say a person's grandparents came to this country from Central Europe in the 19th century. An investigation reveals that those grandparents used false pretenses or false names at Ellis Island.

Does that mean, based on what my colleagues would be saying today, that the present-day descendants of those grandparents are not citizens?

Ms. FROST. Yes. The logic of the position is that every single person who considers themselves an American—perhaps people in Congress, certainly people voting—would suddenly be under scrutiny, and any flaw in their family's immigration history, going back

to the Contract Labor Act of 1885, where if you came to the U.S. with a contract to work, that was illegal—many people violated that law in 1885. All those people and their descendants today could have their citizenship questioned and could be stripped of their citizenship under the Executive Order.

Ms. BALINT. Thank you.

If I could, in conclusion—because I see that I'm out of time—doing away with birthright citizenship is an intentional choice to give this President, I believe, massive power to dictate who is and who is not an American.

I yield back.

Mr. ROY. I thank the gentlelady from Vermont.

I now recognize the gentleman from North Carolina.

Mr. HARRIS. Thank you, Mr. Chair. Thank you for this hearing, and to all you that are serving on this panel today.

The issue of birth tourism is a big concern for me and stands out as a glaring example of a loophole being taken advantage of.

Mr. O'Brien, in your testimony, you shared a little bit ago with Mr. Hunt about the national security risk associated with widespread birth tourism. What are among the top countries that are taking part in this practice? Where do they come from?

Mr. O'BRIEN. Well, the largest is China. The second-largest is India. Then it drops off from there, but there are still large numbers of people from a large number of countries that we should have concerns about.

Mr. HARRIS. Very good.

Aside from the national security risk that you've already addressed, this practice puts many of those involved in coming here in harm's way.

Can you talk about how the birth tourism can harm the expectant mothers involved in this?

Mr. O'BRIEN. Certainly.

It's not advisable, at least according to all the medical personnel that I've talked to, for women who are in an advanced stage of pregnancy to do something like a 14–24-hour flight from China.

We have seen repeatedly along the Southern border people who are traveling in extremely harsh environments, attempting to cross the Rio Grande, while expecting a child imminently.

So, this is a danger to both the mother and the child.

Mr. HARRIS. Thank you.

I'm also curious, while we're here, Mr. O'Brien, about the comparison between how the United States treats this concept of birthright citizenship when compared to the rest of the developed world.

Is it common for other countries to automatically grant citizenship to those born on their soil?

Mr. O'BRIEN. No, it's not common. It's something that's most typically associated with the United States, Latin America, Canada, and a few other countries that have extremely truncated variations of it.

Mr. HARRIS. How would you say America compares to most EU countries in regard to this issue?

Mr. O'BRIEN. It's profoundly broader. Most countries that have birthright citizenship have significant restrictions on it compared to the United States.

Mr. HARRIS. Very good.

Mr. McCotter, I would like to hear from you about how Congress can play its part in this conversation. It's one thing for Executive Orders; it's another thing for court decisions and interpretation.

What steps can Congress take to support President Trump's Executive Order?

Mr. MCCOTTER. I authored an amicus brief on behalf of many Members of this Committee, and we submitted that in almost all the District court proceedings and in several of the circuit court proceedings. So, the court is at least aware of these Members' views on the historical understanding of the jurisdiction clause. That's one thing, of course, Congress could do.

Congress obviously could hold a hearing, which we're having now, and I'm glad to participate.

Mr. HARRIS. Well, I'm proud to be a cosponsor of Representative Brian Babin's Birthright Citizenship Act of 2025, which does clarify which individuals automatically receive American citizenship at birth. In fact, I've told folks, if ever there's a time for us to clarify and codify, that time is now.

Would you deem it necessary that Congress clarify this question surrounding the Citizenship Clause, or should it be left to other institutions?

Mr. MCCOTTER. The Supreme Court has long held that the decision of citizenship is left to Congress, except, of course, as dictated by the 14th Amendment. The courts can interpret the 14th Amendment as they're doing now, but otherwise it is exclusively a congressional prerogative.

Mr. HARRIS. We do have an opportunity now and with the Act introduced to take some action on this.

With that, Mr. Chair, I'll yield back my time.

Mr. ROY. I thank the gentleman from North Carolina.

I will now recognize the gentleman from Maryland and the Ranking Member of the Committee.

Mr. RASKIN. Mr. Chair, thank you very much.

Thanks to all the witnesses for being here.

Special greetings to my former colleague, Professor Frost.

I wanted to start with you, because there's been a major flurry of litigation about the onslaught of unlawful and unconstitutional Executive Orders that have come down from the administration. This Executive Order has appeared in four different courts, and, as I understand it, all four of them have worked to stop it, either through a temporary restraining order or a preliminary injunction.

They were appointed, by my count, by Presidents Reagan, George W. Bush, Barack Obama, and Joe Biden—two Republicans and two Democrats. Let's take a look at what they said.

Here's Judge Coughenour, who was nominated by President Reagan.

> Citizenship by birth is an unequivocal Constitutional right. It's one of the precious principles that makes the United States the great Nation that it is. The President cannot change, limit, or qualify this Constitutional right by Executive Order.
>
> I can't remember a case that presented a question as clear as this.

Says Judge Coughenour.

> And the fact that the government cloaked what is in fact a Constitutional amendment under the guise of an Executive Order is equally unconstitutional. The Constitution is not something the government can play policy games with.

Here's U.S. District Judge Laplante from New Hampshire, who'd been nominated by President Bush.

> The [plaintiffs] are likely to suffer irreparable harm if the order is not granted.

Here's U.S. District Judge Deborah Boardman, nominated by President Biden to the court in my home State, in Maryland.

> The Executive Order interprets the Citizenship Clause of the 14th Amendment in a manner that the Supreme Court has resoundingly rejected and no court in the country has ever endorsed.

Finally, check out Judge Sorokin, nominated to the District court in Massachusetts by President Obama, who says,

> The 14th Amendment says nothing of the birthright citizen's parents, and efforts to import such considerations at the time of enactment and when the Supreme Court construed the text were rejected.

No Federal judge, to my knowledge, has upheld this Executive Order against legal attack. Tell me why you think there is such unanimity across the spectrum among the judges.

Ms. FROST. Well, first, the language is crystal-clear of the 14th Amendment. There are thorny and complicated and broad and vague provisions of the Constitution, but the Citizenship Clause could not speak more clearly. That's what the court said in *Wong Kim Ark*. Its language is universal.

Mr. RASKIN. I did a little research on this last night, and I found that the leaders of the writing of the first section of the 14th Amendment were Republicans from Ohio, right?

John Bingham was described as the primary author of the Citizenship Clause by Supreme Court Justice Hugo Black, who said he was the 14th Amendment's James Madison, the second Founder who most worked to realize the universal promise of Madison's Bill of Rights and Jefferson's Declaration of Independence.

Another great Ohio Republican, U.S. Senator Benjamin Wade, insisted on making the Citizenship Clause perfectly clear to avoid any backsliding in times of high partisan feeling. He said,

> I have always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States; but by the decisions of the courts there has been a doubt thrown over that subject; and if the Government should fall into the hands of those who are opposed to the views that some of us maintain, those who have been accustomed to take a different view of it, they may construe the provision in such a way as we do not think it liable to construction at the time, unless we fortify and make it very strong and clear. If we do not do so, there may be danger that when party spirit runs high it may receive a very different construction from that which we [the Founders] put upon it.

I wonder what you think Senator Wade might be saying about the debate today about whether it's OK just to throw away the first sentence of the 14th Amendment.

Ms. FROST. Yes, he was remarkably prescient. He foresaw a future in which a future political party would want to take away citizenship and voting and political power from groups of Americans it didn't like and didn't view as fully American.

Mr. RASKIN. All right.

I'm sorry to rush you along here, but the original purposes of the 14th Amendment remain perfectly clear for anyone who's an originalist, right? They wanted to stop the government from reconstituting a racial or ethnic caste system based on the inheritance of a subordinate or a superior legal status from one's parents.

In post-Reconstruction America, nobody would ever become a slave or a serf or a legal outcast or a prince or a princess or a king or a count at birth, because everybody here would attain equal citizenship at birth.

Am I capturing it correctly?

Ms. FROST. You are.

Mr. RASKIN. All right.

I yield back to you, Mr. Chair.

Mr. ROY. I thank the Ranking Member of the Committee.

I will now recognize Mr. Grothman for five minutes.

Mr. GROTHMAN. I'd like to ask one of the three gentlemen on the right here—and I've had other Committee hearings, so I'm sorry if I'm going over things we've already dealt with.

It says in the 14th Amendment that citizens are people who are—all persons born in the U.S. and not subject to any foreign power. They must've had something on their mind when they said "not subject to any foreign power."

Does anyone want to comment on that, how that little phrase there, how that affects what the original drafters intended?

Mr. MCCOTTER. I addressed some of that in my opening remarks, sir. So, the best understanding is that it referred to children who would be deemed citizens of their parents' home country as of the moment of birth.

Mr. GROTHMAN. OK. Right now, in this country, if your wife goes to Italy and has a baby, does she become an Italian citizen? Would anybody say that?

Mr. MCCOTTER. I'm not sure of what Italy's laws are. I would defer to Mr. O'Brien on that.

I can say that, at the time of the 14th Amendment, for example, English citizens born in the U.S. would still be deemed English citizens. That's why they would not be entitled to birthright citizenship.

Mr. GROTHMAN. OK. There are a variety of other countries that have some form of birthright citizenship, none of them in Europe. Canada, but you mentioned, Mr. O'Brien, that that's a limited type of birthright citizenship. Could you elaborate on that?

Mr. O'BRIEN. Yes. In most of those countries, there are restrictions that require at least one of your parents to be there lawfully. In some cases, its birthright citizenship combined with a familial lineage.

There are all different ways of doing this. What I can say unequivocally is that the United States is the only place that does it the way it's done here.

Mr. GROTHMAN. OK. If you would interpret it the way some people want it interpreted, you would say the United States would be a clear outlier in the globe?

Mr. O'BRIEN. Yes.

Mr. GROTHMAN. Would they have been a clear outlier in 1866?

Mr. O'BRIEN. Well, yes, because at that point most other countries in the world were monarchies, and the monarch considered you to be something akin to property owing to permanent allegiance. So, regardless of where you were born, you could still be considered a citizen, depending on how you had left the country.

Mr. GROTHMAN. Of course, we have records of the debate at the time, in 1866. There's a quote here from a Senator Howard from Michigan, making it clear that he felt we were excluding people or foreigners or aliens normally.

Do you want to elaborate on that, what the drafters at the time thought?

Mr. O'BRIEN. Sure. The drafters at the time were concerned about the treatment of emancipated slaves during the Reconstruction time. Frankly, at that point in time, there was a relatively small number of people in the United States, and, as I had stated in my opening remarks, the concept of "illegal alien" was not the same as it is now—

Mr. GROTHMAN. Was there any indication at that time that—in the hypothetical that the opponents of President Trump cite today, was there any indication that the drafters of the amendment believed that if somebody just came here as a visitor or whatever—we talk about people coming from China and landing in San Diego or whatever—that the equivalent would've resulted in people being a citizen? Is there any evidence of that in 1865–1866?

Mr. O'BRIEN. No. The court in *Wong Kim Ark* was very explicit when it said that it was referring to people who were residing in the United States with the permission of the government.

Mr. GROTHMAN. There's no evidence of any of the debaters at that time saying, whoosh, we're opening the door to become American citizens to anybody who just gets off a boat and—

Mr. O'BRIEN. No. If you stop and think about the way the amendment was drafted, if that's what they wanted, they could've just left the qualifying statement out and said "anyone born in the United States is a citizen." They added "subject to the jurisdiction thereof" for a reason.

Mr. GROTHMAN. Exactly. It's in there for a purpose.

It's an amendment to the Constitution of the United States. You wouldn't put that in there if you wanted anybody who just shows up to be—as a baby to be a citizen, correct?

Mr. O'BRIEN. That's correct.

Mr. GROTHMAN. OK. Do any of the others of you know any examples of other countries—any other countries that have something this broad, just so we understand the way an average person thinks about these things?

Ms. FROST. Yes. I'll say that 32 countries have birthright citizenship just like the United States, including Canada and Mexico.

Mr. GROTHMAN. OK. Mr. O'Brien, she's saying something that is a little misleading there. When she says "just like the United States"—even there are no European countries—are they, when they have birthright citizenship, just like the United States? From what you told me, that's not true.

Mr. O'BRIEN. No. To the best of my knowledge, at present, there is some kind of limitation on birthright citizenship in all the places that have it.

Mr. GROTHMAN. Well, thank you all for tolerating me, and we'll send it back to the Chair.

Mr. ROY. I thank the gentleman from Wisconsin.

I now recognize the gentlelady from California.

Ms. KAMLAGER-DOVE. Thank you, Mr. Chair and Ranking Member.

I think there's a quick video that I have.

[Video shown.]

Ms. KAMLAGER-DOVE. All right. I just thought since the South Africans are in the news I would play that.

I had a question for you, Mr. O'Brien. Is the Equal Protection Clause part of the 14th Amendment, yes or no?

Mr. O'BRIEN. Yes, it is.

Ms. KAMLAGER-DOVE. OK. Thank you.

Mr. McCotter, is the Due Process Clause part of the 14th Amendment, yes or no?

Mr. MCCOTTER. Yes, although each clause has different language—

Ms. KAMLAGER-DOVE. OK. Thank you. Yes, I do know, but thank you for that.

I ask those questions because I have heard no objection from this body, no quarrel, and no disagreement, with the fact that the Equal Protection Clause and the Due Process Clause are embedded in the U.S. Constitution through the 14th Amendment.

In fact, this country's President that so many revere has invoked the Due Process Clause on the regular—as he should, because it is his right. He has, in fact, showed the country how due process works when applied without prejudice. If only it would work for the rest of us like that, but I digress. The point is; those tenets are here to stay—with birthright citizenship.

I want to talk about the times that gave rise to the 14th Amendment. It was 1868. There was the aftermath of the four-year, divisive, destructive Civil War that killed roughly three-quarters of a million soldiers, or two percent of the population; resistance in the form of Reconstruction; a massive tsunami in a soon-to-be U.S. territory that killed 70 people. In the aftermath of the 1868 Louisiana Constitution which gave Black men the right to vote and a public education, you had the Louisiana Massacre, where Black people were murdered trying to vote. As people would say from my hood in L.A., the White folks went cray-cray.

In spite of all that, White Congressmen showed up in 1868 to debate the 14th Amendment, because in the midst of the madness and violence of the time it was that important. It passed, with birthright citizenship—those three clauses. These tenets forever changed this country.

The 14th Amendment is a pillar of American law in a good way, and it has been for 160 years. Everyone recognizes that it should not be touched, that it is sacrosanct, even Justice Scalia. Scalia, whose ideology I do not support—his reasoning is that the full 14th Amendment, which includes the Due Process Clause and the Equal Protection Clause as well as birthright citizenship, was based on originalism, textualism, and traditionalism, and that one should consider the political and intellectual climate, beliefs, and preju-

dices of the time it was ratified, and the amendment should be protected.

Which is why it is worth revisiting 1868. Because the origin story of the amendment is as applicable now as it was then. You had a Democratic President impeached in 1868 and a Republican President impeached in 2019–2021. You had political violence in 1968 [sic] with the Louisiana Massacre and an insurrection that happened here in 2021, where Capitol Police were speared with American flags. You had a tsunami in Hawaii in 1868 and a fire again in 2023. You had an economic turndown in 1868, and you have $15 eggs under Trump right now in 2025. Same environment—toxic, hostile, destructive, and deadly.

Let's be clear, they had immigrants back then, too—Irish, Jews, Germans, Italians, and people who couldn't speak English. They saw through the moment and passed the 14th Amendment.

It's not like this country has not had moments where people have felt under attack. We've had Jim Crow, World War II with the Germans, McCarthyism, the Japanese in internment camps, the Vietnam War. Birthright citizenship has survived all that.

Now, not because of war but because somebody can't get a job at Walmart, because of xenophobia, fragile ego, and mediocrity, we are going to look for culprits instead of protecting the Constitution. It is the epitome of laziness.

If they could put the 14th Amendment in the Constitution during those hostile times, we can keep it in law during ours. The climate is not different. It is the patriotism of the Republican Party that is different.

With that, Mr. Chair, I yield back.

Mr. ROY. Well, I would just observe for the record that the phrase "White people be cray-cray" is itself cray-cray.

I will now recognize the gentleman from California.

Mr. MCCLINTOCK. Also racist, of course. I was wondering how long it would take the Democrats to play the race card, and I want to thank my colleague from California for satisfying that curiosity.

We can thank the Democrats, under Joe Biden, for bringing this issue to the forefront. The mass illegal migration over the last four years has made answering this question a necessity: Have those who have illegally entered our country in defiance of our laws and who are subject to deportation under those laws—can they be considered as having accepted the jurisdiction of the laws that their very presence defies? I don't think it does.

We know that this phrase, "subject to the jurisdiction thereof"—we know that means former slaves are citizens. That was the stated purpose of the amendment, that's the plain language of the amendment—passed, by the way, over the objections of the Democratic Party at the time.

We know from the congressional debate that its authors understood its meaning to exclude foreign nationals who were merely passing through the country. Somewhere along the way, it simply seems to have become assumed.

My first question—I guess I'll begin with you, Mr. O'Brien. Have any laws been passed that specifically provide birthright citizenship for illegal migrants?

Mr. O'BRIEN. No. There were none. One of the reasons that this interpretation persists is because this wasn't an issue at the time that the case was decided, so it was left alone—

Mr. MCCLINTOCK. Well, how did it come to be that it was simply assumed?

Mr. O'BRIEN. Nobody knows that. When I was at FAIR, we did an extensive research project where we spent hours trying to find this, and we couldn't find any commentary on the *Wong Kim Ark* decision discussing the import, we couldn't find any government directives indicating that this was the rule. It just appears to have started happening in the mid-1920s.

Mr. MCCLINTOCK. Mr. McCotter, can you offer any light on this subject?

Mr. MCCOTTER. I think that's probably right. I think that's probably practicality. People weren't really paying attention perhaps, and that's how we ended up with this kind of—

Mr. MCCLINTOCK. No act of Congress, no Supreme Court decision, obviously no Executive Order until a few weeks ago touching on this subject?

Mr. COOPER. Mr. McClintock, if I may—

Mr. MCCLINTOCK. Mr. Cooper?

Mr. COOPER. —just jump in here, I think the unfortunate reality is that the *Wong Kim Ark* case was misinterpreted, in much the way I think that my friend Professor Frost here misinterprets it, to have been a holding some of the very broad language that is clearly dicta, instead of the narrow and specifically identified holding, which was quite limited to people who are in this country and who bear children in this country who have a permanent lawful residence in this country, at least to act to establish allegiance to the country.

Mr. MCCLINTOCK. Right. It just kind of simmered in the background until we had this mass, historic, illegal migration, and now we have to confront it.

The Chair says the issue belongs to Congress, and I'd say, well, sort of. Obviously, Congress can't deny automatic birthright citizenship by statute if that's what the 14th Amendment guarantees. Of course, neither could an Executive Order. Congress would have to propose a Constitutional amendment to the States, if that's what the 14th Amendment actually means.

If the 14th Amendment does not provide automatic birthright citizenship and no statutes have been passed and no other Supreme Court orders issued, it seems to me that no law would be needed to deny it; it was never extended in the first place.

Is that—Mr. O'Brien, is that essentially correct?

Mr. O'BRIEN. Yes, that is correct.

The question that *Wong Kim Ark* has been interpreted as addressing was never the question that was before the court. The case came before the court to determine whether *Wong Kim Ark* was an individual who fell into one of either the privileged or prohibited classes under the Chinese Exclusion Act, which itself was a modification of a treaty of trade and friendship between China and the United States—

Mr. MCCLINTOCK. Well, they—were here permanently, within the laws, within the jurisdiction of the United States, by act of a ratified treaty.

Mr. O'BRIEN. Yes. That's exactly it.

Mr. MCCLINTOCK. So, if that's the case, then wouldn't the President's Executive Order simply be restating existing law?

Mr. O'BRIEN. I believe that's exactly what it does.

Mr. MCCLINTOCK. Mr. McCotter?

Mr. MCCOTTER. That's what my amicus brief on behalf of Members of this Committee says, sir.

Mr. MCCLINTOCK. Mr. Cooper?

Mr. COOPER. I agree with that, Congressman McClintock.

Mr. MCCLINTOCK. I will just assume Professor Frost disagrees.

That's it for me, Mr. Chair. I yield back.

Mr. ROY. I thank the gentleman from California.

I will now recognize the Ranking Member and gentlelady from Pennsylvania, Ms. Scanlon.

Ms. SCANLON. Thank you.

The effort to end birthright citizenship is hardly something new. It's been the long-term goal of antisemitic and White nationalist groups for decades. The claim is largely based on the bigoted Great Replacement conspiracy theory, the same conspiracy theory that has inspired a lot of deadly terrorist attacks in recent years. We're hearing really uncomfortable echoes of some of that here in Congress in this day and age.

As we're listening to some of these statements, I was reminded of one of our predecessors' statements here, the great Barbara Jordan, who at a critical moment in our country's history talked about "we, the people." When that document was completed in September 1787, neither she nor I, nor Professor Frost were included in that document, but, as she said, "through the process of amendment, interpretation, and court decision, we were finally included."

As Members of Congress now, we should not sit here and be idle spectators, much less participants, in the diminution, the subversion, or the destruction of the Constitution. I would submit that the effort we're seeing here today to try to reinterpret and twist the clear language and legislative history of the birthright citizenship clause would be such a diminution, subversion, or destruction of the Constitution.

Now, Professor Frost, you've studied this for quite a long time. You, unlike several of the people here, are not a contributor to "Project 2025."

We've heard a lot about the specific language "subject to the jurisdiction of." Why did they choose that phrase?

Ms. FROST. The Reconstruction Congress told us clearly what they wanted to do there. They wanted to exclude the children of diplomats and Ambassadors.

Ms. SCANLON. Uh-huh.

Ms. FROST. They also discussed at length the need to exclude children born into Native American Tribes, which were separate foreign sovereigns with whom we had treaty relations, with their own courts and laws.

Ms. SCANLON. OK.

It did strike me, the inconsistency in claiming that an undocumented immigrant is not subject to the jurisdiction of the United States, when they are, in fact, subject to our criminal code, paying taxes, et cetera.

Can you talk about that and talk about how that relates to the issue of the exception for diplomats and their children?

Ms. FROST. Yes, sure. Of course, all children of immigrants, including—and all immigrants, including undocumented immigrants, are subject to the laws of the United States. President Trump knows that better than most, in that he is seeking to deport and enforce the immigration laws and other laws fully against this group.

I'll also add something I mentioned before, which is, the Reconstruction Congress was well aware there were people in the United States in violation of the law. Those were the enslaved African-Americans brought to the United States in violation of Federal law. Of course, the Citizenship Clause was intended to provide them with citizenship despite the fact they were there in violation of U.S. law.

Ms. SCANLON. I noticed you reacting to some of the testimony about the U.S. being some outlier with respect to birthright citizenship or having—it looked like you might have a different interpretation. Can you expand on that?

Ms. FROST. Yes. With all due respect to Mr. O'Brien, who is a deep expert in U.S. immigration law, I don't think he is familiar with the laws of the 32 other countries that have birthright citizenship—automatic birthright citizenship, just like the United States.

In Canada, if you're born in Canada, regardless of who your parents are, you're a citizen. That's why Senator Ted Cruz had to renounce his Canadian citizenship in 2014, because he was born in Canada to a U.S.-citizen mother.

Ms. SCANLON. Thank you.

I also was struck by the idea that we would be putting a rather strange burden on our maternity wards and our States if every time someone is born they have to determine the citizenship or the immigration status of their parents.

How would that play out? Does the delivery nurse have to ask which border the person came across, whether or not they checked in, whether they filed an asylum claim, or whether maybe they just overstayed their visas to study here if they were, for example, from South Africa?

Do you have any thoughts on that?

Ms. FROST. It would impose enormous bureaucratic burden on hospitals, on State agencies, on our already-overburdened immigration officials, and on the parents of newborn children.

As an immigration lawyer, I will say, many people lack documentation of their citizenship or of their immigration status if they're lawful permanent residents. They may not be able to show that. We are asking these people at the time of their child's birth to prove this or risk having their child be deemed an undocumented immigrant from the moment it's born.

Ms. SCANLON. OK. I do think it's interesting that this is hardly the open-and-shut case that our colleagues would suggest. Senator Cruz was recently quoted as saying, "That's actually a disputed

legal question. There are serious scholarly arguments on both sides," *et cetera*.

With that, I see my time has expired, so I would just have a unanimous-consent request to enter into the record a statement of the Leadership Conference on Civil and Human Rights.

Mr. ROY. Without objection.

Ms. SCANLON. Thank you. I yield back.

Mr. ROY. I thank the gentlelady from Pennsylvania.

I will also, without objection, ask to insert in the record a collection of quotes from the gentlelady from Texas, Ms. Jordan. The airport bears her name I fly in and out of Austin, Texas, every week.

It's a collection of quotes from her service as Chair of a Commission regarding immigration in the 1990s, in which she makes very clear her position that the enforcement of border security is important, the importance of having immigration policy that works is important, that we should not have amnesty, that we should—immigration should not be a path to public benefits—she was very clear in her language about that—and numerous other quotes from the gentlelady from Texas, Ms. Jordan.

Without objection, I'll insert that in the record.

Mr. ROY. I will now recognize the gentleman from Missouri, Mr. Onder.

Mr. ONDER. Thank you, Mr. Chair.

Thank you to the witnesses for being here today.

My colleague from Pennsylvania mentioned the term "White nationalism," and I would remind everyone of the context of the 14th Amendment, that the original White nationalists, Southern Democrats, fought a civil war to deny Blacks their Constitutional rights, to deny their very humanity, and then, in the wake of that civil war, sought to deny them of the rights of citizenship as well. In that context the 14th Amendment was enacted to make sure that White nationalists, Southern Democrats, not deny Black slaves—former slaves of their rights, and therefore made it clear they were citizens.

Mr. McCotter, one of the authors of the 14th Amendment, Senator John Bingham, said that,

> The Citizenship Clause conferred citizenship to every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty.

Another author of the 14th Amendment, Senator Lyman Trumbull, stated that "subject to the jurisdiction of the United States" in the Citizenship Clause meant not owing allegiance to anybody else.

Do aliens, and particularly illegal aliens, owe allegiance exclusively to the United States, or do they still bear allegiance to their home country?

Mr. MCCOTTER. They would still bear at least partial allegiance to their home country.

Mr. ONDER. Therefore, in part, foreign Ambassadors, diplomats do not have—children of foreign Ambassadors and diplomats do not have birthright citizenship?

Mr. MCCOTTER. That's correct. This came up earlier in some prior questioning, about how LPRs, lawful permanent residents, could somehow be included within the birthright citizenship clause. I think the response to that is that *Wong Kim Ark* itself recognized

that those individuals do have sufficient allegiance, but that's because they're here permanently with the consent of the United States.

Mr. ONDER. OK. An example of the absurdity of all-out birthright citizenship: El Chapo's wife, Emma Coronel, traveled to California to give birth and then immediately returned to Mexico. Under Biden's policy, the children of a drug lord were then American citizens, who had every right to American bank accounts. Indeed, they obtained American bank accounts.

Did El Chapo's children—did they owe full allegiance to the United States?

Mr. MCCOTTER. They would not, no. Their children would've been at least partially allegiant to their parents' home country.

Mr. ONDER. So, it is that—and in your testimony it's very clear—that this idea of full allegiance is pivotal here?

Mr. MCCOTTER. It was the widely understood understanding of the jurisdiction clause at the time it was ratified, yes.

Mr. ONDER. OK.

Mr. MCCOTTER. If I may just briefly—

Mr. ONDER. Yes.

Mr. MCCOTTER. —respond to the claim that some of the arguments in this area are inherently racist in some way, I'd point out, in *Wong Kim Ark*, Justice John Harlan, the sole dissenter from *Plessy* v. *Ferguson*, the patron of interpreting the Constitution as colorblind, he dissented in *Wong Kim Ark* and said that Wong had never become a U.S. citizen.

Mr. ONDER. Yes. Likewise, if I recall, it was, what, *Plyler* v. *Doe*, in which Justice Brennan, in dictum, in a footnote, opined that anyone born physically in the United States be a birthright citizen.

Does dictum have the same force of law as a holding in a case?

Mr. MCCOTTER. It doesn't. Also, in that footnote, Justice Brennan said that jurisdiction, the phrase "jurisdiction," is bounded only, if at all, by principles of sovereignty and allegiance—the exact same things we've already talked about.

Mr. ONDER. Which is what you're arguing today? OK. Thank you.

Mr. ROY. The gentleman yields?

Mr. ONDER. I yield.

Mr. ROY. All right. I appreciate that.

I will now recognize myself for five minutes.

I would just ask: Professor Frost, we talked a little bit earlier about the extent to which we've got—the record is replete with examples of tourism, birth tourism, in which there are mal-actors who are profiting by moving people into—or transporting people into the United States to then deliver babies.

So, we have a Georgetown Law report talking about women from foreign countries—China and Russia—paying tens of thousands of dollars to temporarily relocate to the United States, give birth, and then often return. We have that happening at the Southern border with some regularity, in McAllen; we have it in Laredo; we have it in El Paso and throughout Texas, I certainly can attest personally.

You believe that all those children, regardless of why they end up on American soil, that those children are, in fact, U.S. citizens under the law?

Ms. FROST. I'm so glad you asked that, because there's actually a Federal regulation, 22 CFR 41.31, which bars people from coming to the United States to give birth and gives consular officials the authority to bar anyone—

Mr. ROY. The individual—

Ms. FROST. —visibly pregnant from—

Mr. ROY. That's not the question. The question is; these babies are born on American soil. These babies are born on American soil. They are brought here. They are brought here for profit. Are they citizens, yes or no?

Ms. FROST. Yes, they are citizens. If you have a problem enforce the regulations.

Mr. ROY. OK. So, the question is, they are, in fact, citizens under your interpretation of the law?

Mr. McCotter, you noted just a minute ago that, in fact, Justice Harlan was the lone dissent in *Plessy*—correct?

Mr. MCCOTTER. That's correct, yes.

Mr. ROY. Was also a dissenter in *Wong*.

Mr. MCCOTTER. Right. He joined Chief Justice—

Mr. ROY. So a threshold question, a threshold question, here is: With respect to *Wong*, which is often cited as the basis, now 130 years hence, for these individuals being viewed as citizens by, now, in this instance, the most pernicious models, where people are profiting for bringing people into the United States to have babies, exploit our laws, go back to their countries, or exploit our laws for citizenship, that they are deemed citizens based on an interpretation of an opinion 130 years ago, yes or no, Mr. McCotter, do you believe that *Wong* stands for that premise?

Mr. MCCOTTER. I do not. I cite support for that in the brief.

Mr. ROY. You believe that it is limited to, at most, an LPR-type status under today's law?

Mr. MCCOTTER. Right.

Here's a quote:

> *Wong*, by its facts and some of its language, is limited to children born of parents who at the time of birth were in the United States lawfully and indeed were permanent residents.

That's from a professor at NYU.

Mr. ROY. Mr. Cooper, do you share that view?

Mr. COOPER. I do share that view.

I would point out again that *Wong* itself conditioned its irresistible conclusion from the 14th Amendment. It affirms the ancient and fundamental rule of citizenship by birth within the territory in the allegiance and under the protection of the country, which was premised, in that case, on the parents of *Wong* being lawful permanent residents, allegiant to this country.

Mr. ROY. So, to be clear, Mr. Cooper, you do not believe that *Wong*'s opinion extends, certainly, at a minimum, beyond, again, what we would characterize under today's law as an LPR-status individual?

Mr. COOPER. No. It clearly didn't have anything to do, as Mr. O'Brien has said, with illegal aliens or aliens here who may be here lawfully but only temporarily.

Mr. ROY. Are you aware of any opinion by the U.S. Supreme Court that has extended beyond that interpretation since *Wong*?

Mr. COOPER. No.
Mr. ROY. Mr. McCotter, do you agree with that?
Mr. MCCOTTER. I agree, yes.
Mr. ROY. Mr. O'Brien, do you agree with that?
Mr. O'BRIEN. I do.
Mr. ROY. So, now, having established that this is, in fact, the State of the law with respect to *Wong* and everything since *Wong*, now my question is, is *Wong* itself correct?
We have an opinion by Justice Harlan—Justice Harlan, who was the dissent in *Plessy*. Was *Plessy* later overturned?
Mr. Cooper?
Mr. COOPER. Yes. Yes.
Mr. ROY. Mr. McCotter?
Mr. MCCOTTER. Yes.
Mr. ROY. Overturned. Mr. O'Brien?
Mr. O'BRIEN. Yes.
Mr. ROY. Professor Frost, *Plessy* was overturned?
Ms. FROST. Yes.
Mr. ROY. Now we've got *Wong*. Is *Wong* itself correct on the law with respect to even LPRs, under the interpretation of the 14th Amendment?
I would ask, Mr. Cooper, your opinion on that.
Mr. COOPER. Well, I will tell you, Mr. Chair, that I think there is significant support for the conclusion, the holding, in *Wong* in the debates under the Citizenship Clause. One doesn't have to conclude that it is correct to uphold this Executive Order, because the Executive Order is entirely consistent with *Wong*.
Mr. ROY. Mr. McCotter, do you have anything to add to that? Mr. O'Brien? Then I will be done with my time.
Mr. MCCOTTER. No, sir.
Mr. ROY. Mr. O'Brien, anything to add?
Mr. O'BRIEN. I do not believe it was correct. I would go so far as to say that the holding itself should be considered limited to the terms that were before the court, which had to do with a treaty with China which is no longer in existence.
Mr. ROY. I appreciate the gentlemen.
We now have another Member of the Committee, and I will recognize my colleague and my friend from Texas, Mr. Gill.
Mr. GILL. Thank you, Mr. Chair.
A hundred and sixty years ago, Democrats were asking us, if it weren't for slavery, who would pick our cotton? Today they're asking a similar question, which is, if it weren't for mass migration, who would pick our avocados? It's a similar pattern that they've established. You can say that the United States is not, in fact, better off by importing a massive class of what is virtually serf labor, which undermines our cultural fabric and our government as well.
I'd also like to point out that the admission that we need more and more unvetted illegal aliens pouring into our country is also an admission that the goal—or one of the goals of our colleagues on the other side of the aisle is explicitly to reduce American wages. Because that's exactly what they're doing and what they're saying they're doing whenever they talk about bringing in cheap labor.

We're talking here about birthright citizenship, which has provided an enormous loophole in our immigration system and has facilitated the mass importation of illegal aliens. Through this current loophole, upwards of 300,000 people a year are granted automatic citizenship in the United States despite having been born to parents who have no ties to our country and who are here illegally.

Also, due to failures in our legal immigration system, these individuals then use their citizenship to sponsor their illegal-alien parents and other family members for a green card, which creates a never-ending cycle of people coming into the country who have no business being here at all.

We've now gotten to the point where the percentage of America's foreign-born population is quickly approaching 15 percent, which is the highest it's been since at least 1910.

Mr. O'Brien, I'd like to start with you, with a couple questions, if you don't mind.

Under the 14th Amendment, Native Americans, due to Tribal allegiances, were not granted citizenship. Is that correct?

Mr. O'BRIEN. That's correct.

Mr. GILL. Got it. The children of foreign diplomats were also expressly excluded from birthright citizenship?

Mr. O'BRIEN. That's correct.

Mr. GILL. Got it. From the available evidence, is it safe to say that the authors of the 14th Amendment understood a difference between total allegiance to the United States compared to simply being subject to the legal jurisdiction by nature of presence in our country?

Mr. O'BRIEN. Yes. I think they made that very clear in the debates.

Mr. GILL. Got it. In your opinion, based off this difference, would the authors of the 14th Amendment conclude that an individual whose parents did not owe total allegiance to the United States be granted birthright citizenship?

Mr. O'BRIEN. No. I think the import of the holding in *Wong Kim Ark* was that only individuals who were lawfully present in the United States could transmit citizenship to their children born—or, I should say, only the children born of people who were lawfully present in the United States could acquire citizenship at birth.

Mr. GILL. Uh-huh. Despite all this, some of my colleagues here still contend that, essentially, any person born here, regardless of their legal status or the legal status of their parents, have a Constitutional right to become a United States citizen.

Have you seen any evidence to suggest that the authors of the 14th Amendment would support that view?

Mr. O'BRIEN. No. I don't think the authors of the opinion in *Wong Kim Ark* would've supported it either.

Mr. GILL. Got it. Thank you very much.

Mr. Chair, I yield my time back to you.

Mr. ROY. Well, I thank my colleague from Texas.

I would now recognize the gentlelady from Pennsylvania for a unanimous-consent request.

Ms. SCANLON. Yes. I seek unanimous consent to introduce Barbara Jordan's obituary in *The New York Times* from January 18, 1996, in which it notes that she spoke out against a proposal to

deny automatic citizenship to the children of illegal immigrants, saying, I quote, "to deny birthright citizenship would derail this engine of American liberty."

Mr. ROY. Without objection.

I would ask consent to insert into the record the amicus brief that was submitted by a number of House colleagues that was drafted by Mr. McCotter.

I would also like to introduce into the record a note that was written by Amy Swearer from *The Heritage Foundation*, who has written extensively on this issue; and also an op-ed that was written by Mr. Cooper, along with Pete Patterson, on this subject as well.

Without objection, I'll insert that in the record.

Mr. ROY. That concludes today's hearing. We thank the witnesses for appearing before the Subcommittee today.

Without objection, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record.

Mr. ROY. Without objection, the hearing is adjourned.

[Whereupon, at 4:24 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on the Constitution and Limited Government can be found at: *https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=117923*.

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