No. 25-365

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

BARBARA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The "main object" of the Citizenship Clause was to grant citizenship to freed slaves and their children, whose allegiance to the United States had generally been established through generations of parental domicile. *Elk* v. *Wilkins*, 112 U.S. 94, 101-102 (1884). By contrast, aliens who are just passing through the United States, and those who cross our borders illegally, lack ties of allegiance and do not obtain the "priceless and profound gift" of citizenship for their children. *Protecting the Meaning and Value of American Citizenship*, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

To receive citizenship under the Clause, a person must be both born "in the United States" and "subject to the jurisdiction thereof." U.S. Const. Amend. XIV, § 1; see 8 U.S.C. 1401(a). That language grants citizenship to children "completely subject" to the United

States' "political jurisdiction." *Elk*, 112 U.S. at 101-102. Children of temporarily present or illegal aliens do not qualify because their parents are not domiciled in, and thus do not owe the requisite allegiance to, the United States. Temporarily present aliens are by definition not domiciled here, while illegal aliens lack the legal capacity to form such a domicile.

That understanding prevailed for most of American history. It was shared by respected antebellum jurists such as Justice Story; by framers of the Fourteenth Amendment, including Senator Lyman Trumbull and Representative John Bingham; and by the Executive Branch, States, and commentators immediately after ratification. And that understanding comports with *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), which recognized a general rule of citizenship by birth in the territory for children of persons "domiciled within the United States," but which carved out exceptions (such as for members of Indian tribes) that would make no sense on respondents' theory. Only in the early 20th century did Executive Branch practice begin to depart from that original meaning.

Respondents advance a different view that they trace (Br. 1-2) to the common law: "citizenship by virtue of birth," "subject only to common-law exceptions" for foreign sovereigns and ambassadors, warships, and occupying armies, plus a "uniquely American" exception for Indian tribes.

That theory faces insuperable obstacles. "Subject to the jurisdiction thereof" rephrases the phrase "not subject to any foreign power" in the Civil Rights Act of 1866, ch. 31, 14 Stat. 27—a phrase that expressly incorporates citizenship based on allegiance and forecloses respondent's theory of regulatory jurisdiction. More-

over, "subject to the jurisdiction thereof" excludes the children of tribal Indians, though they are unquestionably subject to the United States' regulatory jurisdiction. And an impressive consensus of authorities immediately following ratification excluded children of temporary sojourners from birthright citizenship.

Respondents invoke *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812), but far from resolving the citizenship question, that case concerned foreign sovereigns' immunity from U.S. law. Respondents' main early authority about birthright citizenship, *Lynch* v. *Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. Ct. 1844), was questioned at the time and went unmentioned in the congressional debates about the Fourteenth Amendment. Contra Resp. Br. 12. And even if the antebellum evidence were mixed, evidence from the ratification era and post-ratification era overwhelmingly supports the government's interpretation.

Respondents emphasize *Wong Kim Ark*, where the Court in 1898 recognized the citizenship of children of aliens "enjoying a permanent domicil and residence" here. 169 U.S. at 652. But *Wong Kim Ark* was not a sea change in citizenship law, nor was it so understood at the time. The opinion explicitly limits its holding to aliens *domiciled* in the United States, *id.* at 693, and it affirmatively suggests that the Citizenship Clause does not cover children of aliens who are not "permitted by the United States to reside here," *id.* at 694. Respondents cite other, more expansive statements, but admit (Br. 6) that those statements were "broader" than necessary to resolve the case.

Moreover, respondents' theory is illogical.

- They insist (Br. 2) that citizenship does not depend on parental status, yet recognize (Br. 1-2)

exceptions for children of foreign diplomats, enemy aliens, and tribal Indians—all based on parental status.

- They argue (Br. 8) that the Clause "enshrine[s] the English common-law rule," yet accept (Br. 1-2) the uniquely "American exception of children born into Native American tribes."
- They maintain (Br. 31-32) that subjection to U.S. jurisdiction depends on whether "the United States has stayed its own sovereign jurisdictional hand," even though that theory would allow Congress to turn the Citizenship Clause on and off at will by temporarily "staying" its "jurisdictional hand" as to other groups.
- They contend (Br. 16) that a person is subject to U.S. jurisdiction if he must follow U.S. law, yet agree (Br. 28) that children of tribal Indians are not constitutionally entitled to citizenship even though they must obey the law.

Finally, respondents invoke 8 U.S.C. 1401(a), the provision of the Immigration and Nationality Act (INA or Act), ch. 477, 66 Stat. 163, that guarantees citizenship to persons born in the United States and subject to its jurisdiction. But because that statute echoes the Citizenship Clause's language, it is best understood to codify the Clause's objective meaning, not a late-arising misunderstanding of the Clause. An early-20th-century statute guaranteeing "equal protection of the laws" would not be interpreted to incorporate *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), today. Neither the Clause nor the Act guarantees U.S. citizenship to children of temporarily present or illegal aliens.

I. THE CITIZENSHIP ORDER COMPLIES WITH THE CITIZENSHIP CLAUSE

A citizen by birth under the Citizenship Clause must be both "born" "in the United States" and "subject to the jurisdiction thereof." U.S. Const. Amend. XIV, § 1. Children of temporarily present aliens or illegal aliens are not "subject to" the United States' "jurisdiction," as the historical evidence—especially from the critical juncture immediately surrounding ratification—firmly shows. To the extent there is any doubt on that point, this Court should resolve it against constitutionalizing near-universal birthright citizenship and in favor of leaving Congress with the flexibility to decide, under its naturalization power, whether to grant citizenship to such children.

A. The Citizenship Clause Ties Citizenship To Domicile

A person is subject to the United States' "jurisdiction" only if he owes sufficient allegiance to, and may claim protection from, the United States. See *Elk*, 112 U.S. at 102. Under the model that the United States adopted, the allegiance of aliens depends on parental domicile. See Gov't Br. 14-21; Schmitt Amicus Br. 7-13. A domiciled alien "owes allegiance to the country" where he lives. *The Pizarro*, 2 Wheat. 227, 246 (1817). Domicile is therefore "closely related to matters of civil jurisdiction" and "one of the fundamental considerations in controversies over citizenship." Frederick A. Cleveland, *American Citizenship as Distinguished from Alien Status* 39 (1927).

American vs. English law. Respondents rely (Br. 8, 16) on "English common law" to interpret the Citizenship Clause. But "reflexively resorting" to English law is "problematic because America had fought a war * * * to free itself from British law and practices." *United*

States v. *Rahimi*, 602 U.S. 680, 722 n.3 (2024) (Kavanaugh, J., concurring). English law is an especially unhelpful guide here. At the time of the Fourteenth Amendment's adoption, a congressional report concerning citizenship stated that there was "no just foundation" for the view "that everything that was law in England before, was law in America after the Revolution." *Report of the Comm. on Foreign Affairs Concerning the Rights of American Citizens in Foreign States*, *in* Cong. Globe, 40th Cong., 2d Sess. App. 99 (1868). The report criticized England's "feudal theory of allegiance," in which allegiance is "controlled by the place of birth," as incompatible with the "American system." *Id.* at 95. Indeed, respondents admit (Br. 18) that English law cannot explain the "peculiarly American" exception to birthright citizenship for tribal Indians, which was universally acknowledged at the time of the Clause. English law, though the subject of some commentary, was not the prevailing rule.

The Citizenship Clause instead reflects the backdrop of American citizenship law, which was influenced by the law of nations. "International law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Early courts and commentators tied American citizenship law to the "general principles of the law of nations." *Shanks* v. *Dupont*, 3 Pet. 242, 248 (1830) (Story, J.); see Gov't Br. 21. Debates on the Citizenship Clause acknowledged that American law was rooted in "the general law relating to subjects and citizens recognized by all nations." Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); see Ilan Wurman, *Jurisdiction and Citizenship*, 49 Harv. J. L. & Pub. Pol'y 315, 322-323 (2026).

Someone acquires birthright citizenship under that American understanding only if he is "completely subject to [the United States'] political jurisdiction," "not merely subject [to it] in some respect or degree." *Elk*, 112 U.S. at 102. In other words, a person becomes a citizen by birth only if he is subject to "that full and complete jurisdiction to which citizens generally are subject." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 243 (1880); see Wurman 429.

Children of domiciled aliens satisfy that criterion. Secretary of State William L. Marcy explained in 1853:

> [A domiciliary] pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him[.] * * * In nearly all respects his and their condition as to the duties and burdens of Government are undistinguishable[.]

2 *A Digest of the International Law of the United States* § 198, at 485 (Francis Wharton ed., 1887).

By contrast, children of non-domiciled aliens do not satisfy that criterion. To be sure, such children owe the United States "temporary and local allegiance," meaning that they must obey U.S. law while here. *Schooner Exchange*, 7 Cranch at 144. But as respondents concede (Br. 9-10), "temporary allegiance" differs from the "permanent allegiance" owed by "natural-born subjects." In fact, even British sources recognize that a domiciled alien owes a degree of "allegiance to th[e] country, very different from a mere obedience to its laws during a temporary residence." *Hodgson* v. *DeBeauchesne*, 14

Eng. Rep. 920, 931 (Privy Council 1858). As a result, in contrast to children of citizens and domiciled aliens, children of non-domiciled aliens are not "completely subject to [the United States'] political jurisdiction," *Elk*, 112 U.S. at 102. See Wurman 438-444.

Respondents contend (Br. 9) that the Citizenship Clause focuses on the status of "the child, not the parent," and that a child of a non-domiciled alien is still subject to the United States' regulatory jurisdiction. But the Citizenship Clause focuses on "political jurisdiction," *Elk*, 112 U.S. at 102, which does depend on parental status. Even respondents concede, moreover, that a child's citizenship depends on parental status. For example, they accept (Br. 1-2) that the Citizenship Clause does not grant birthright citizenship to the children of ambassadors, invaders, or tribal Indians.

Respondents also lack an adequate answer to the part of the Citizenship Clause that provides that those born in the United States and subject to its jurisdiction "are citizens of the United States *and of the States wherein they reside*." U.S. Const. Amend. XIV, § 1 (emphasis added). Respondents contend (Br. 35) that the Clause refers to "reside[nce]," but "'residence' in the [C]onstitution" means "permanent domicil." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1473, at 333 (1833); see *Williams* v. *North Carolina*, 317 U.S. 287, 322 (1942) (R. Jackson, J., dissenting) (Citizenship Clause "probably use[s] 'residence' as synonymous with domicile"). Respondents also observe (Br. 35) that the Clause refers to residence in the context of state citizenship, but that misses the point. By providing that persons born in the United States and subject to its jurisdiction are both U.S. citizens *and* citizens of the States where they reside, the Clause pre-

supposes that natural-born citizens born in any State "reside," *i.e.*, are domiciled, in the United States.

Finally, contrary to respondents' suggestion (Br. 18), the link between citizenship and domicile does not render redundant the exception to birthright citizenship for children of foreign diplomats. That exception makes clear that, regardless of whether diplomats or their spouses intend to remain in the United States indefinitely, their children do not become U.S. citizens. That is why members of the Congress that proposed the Fourteenth Amendment recognized distinct exceptions to birthright citizenship for children of "temporary sojourners" and children of "representatives of foreign governments." Cong. Globe, 39th Cong., 1st Sess. 1117 (statement of Rep. Wilson).

Children of temporarily present aliens. Throughout the 19th and into the 20th century, courts and commentators identified children of temporary sojourners as an exception to birthright citizenship. See Gov't Br. 21-29; Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Birthright Citizenship* 20-29 (rev. Sept. 22, 2025).* That exception would have been inexplicable on respondents' theory.

To start, many antebellum sources treated children of temporary sojourners as an exception to birthright citizenship. See Gov't Br. 21-23. Respondents argue (Br. 21) that the treatise where Justice Story endorsed that exception concerned only foreign law, but that treatise actually concerned the conflict of laws—*i.e.*, the interaction of U.S. and foreign law—and accordingly addressed children born to foreigners temporarily in

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* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5223361

the United States. See Joseph Story, *Commentaries on the Conflict of Laws* § 48, at 48 (1834).

Respondents insist (Br. 21-22) that Justice Story expressed a different view in his dissenting opinion in *Inglis* v. *Trustees of the Sailor's Snug Harbour*, 3 Pet. 99 (1830), but that dissent recognized that the children of aliens become citizens by birth only if born "while the parents are resident [in the country] under the protection of the government." *Id.* at 164. Respondents invoke (Br. 9) Chancellor Kent's treatise, but the cited passage did not specifically address sojourners and recognized birth "within the jurisdiction *and allegiance*" of the United States as essential for citizenship. 2 James Kent, *Commentaries on American Law* 38 (6th ed. 1848). Respondents also cite Attorney General Bates's brief opinion on citizenship, but that opinion likewise did not specifically address temporary sojourners and, in any event, reaffirmed the link between citizenship and allegiance. See 10 Op. Att'y Gen. 382 (1862); see also Kurt T. Lash, *Prima Facie Citizenship*, 101 Notre Dame L. Rev. 101, 129-135 (2026); Wurman 361.

Respondents emphasize (Br. 12-14) *Lynch*, where the New York Chancery Court held that a child is a citizen of his place of birth even if his parents are temporary sojourners there. But *Lynch* reflexively assumed that American law mirrored English law. See 1 Sand. Ch. at 658. Other courts, including a New York appellate court, rejected its reasoning. See Gov't Br. 22, 41; Wurman Amicus Br. 18-25. Notably, *Lynch* "went unmentioned" during the debates about the Fourteenth Amendment. Lash 119. Respondents identify (Br. 12-13) some decisions that cited *Lynch*, but most post-date the Fourteenth Amendment, and none actually held

that children of temporary sojourners become citizens by birth.

The government and its amici have cited many ratification-era sources expressing the understanding that children of temporary sojourners do not become U.S. citizens by birth. See Gov't Br. 23-24; Schmitt Amicus Br. 14-25; Tennessee Amicus Br. 11-13. Respondents, by contrast, have not identified any source from that era specifically stating that the children of sojourners do become citizens. At most, they identify (Br. 17-18) an exchange where Senator Benjamin Wade explained that, under his proposed version of the Citizenship Clause, such children would be citizens. But his proposal would have extended citizenship to all persons "born in the United States" (regardless of whether they are subject to its jurisdiction). Cong. Globe, 39th Cong., 1st Sess. 2768. And Congress did not adopt it.

Immediately following the Fourteenth Amendment's ratification, the Executive Branch and a host of commentators recognized the exception from birthright citizenship for children of temporarily present aliens. See Gov't Br. 24-28, 31; Tennessee Amicus Br. 13-17; Cruz Amicus Br. 14-19. Respondents assert (Br. 39) that some of those sources were "driven by opposition to Reconstruction" and "were attempting to undermine the clear meaning of the Citizenship Clause." That is hardly true of such sources as Senator Lyman Trumbull and Representative John Bingham (leading proponents of the Fourteenth Amendment), Representative Philemon Bliss (a critic of *Dred Scott* v. *Sandford*, 19 How. 393 (1857)), Justice Samuel F. Miller (an appointee of President Lincoln), George Bancroft (who delivered President Lincoln's funeral oration), and Henry Campbell Black (a respected legal commentator). See Gov't

Br. 23-24, 26-27. Respondents attack (Br. 39-40) the motives of Francis Wharton and David Dudley Field, but this Court has repeatedly cited their work in other contexts. See, *e.g.*, *Rosewell* v. *LaSalle National Bank*, 540 U.S. 503, 519 n.23 (1981); *Iannelli* v. *United States*, 420 U.S. 770, 773 (1975).

Meanwhile, respondents have not identified *any* commentator from the second half of the 19th century who clearly stated that the Citizenship Clause extends citizenship to children of temporarily present or illegal aliens. At most, they cite (Br. 38) a commentator who noted in 1896 that, "[p]rior to the Fourteenth Amendment," *Lynch* had recognized the citizenship of children born to alien parents during "temporary sojourn[s]." Marshall B. Woodworth, *Citizenship of the United States under the Fourteenth Amendment*, 30 Am. L. Rev. 535, 539 (1896). But that commentator added that, "whatever may have been the trend of judicial declarations" before ratification, the question now "is confined to the meaning of the words" of the Citizenship Clause. *Id.* at 540. He then explained that, though the Clause could be read to cover anyone who is "subject to the *laws* of the United States," it could also be read to refer to "the political jurisdiction of the United States," requiring the type of "full and unqualified" allegiance that "citizens" "owe to their country." *Id.* at 542-544. In short, even if the antebellum evidence is mixed, the ratification-era and post-ratification evidence firmly supports the government's reading.

Children of illegal aliens. Like children of sojourners, children of illegal aliens are not domiciled in, and so are not subject to the complete political jurisdiction of, the United States. Illegal-alien parents, whose only ties

to this country arise from violating our laws, lack the requisite allegiance.

Respondents assert (Br. 43) that "[m]ost" illegal aliens are in fact domiciled in the United States. Not so. A person can acquire a domicile only if he is "legally capable" of doing so. Restatement (First) of Conflict of Laws § 15 (1934); see Gov't Br. 29-30. An illegal alien's very presence in the United States violates federal law. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (citing 8 U.S.C. 1302, 1306, 1325). A fortiori, an illegal alien lacks the legal capacity to establish domicile here. *Carlson* v. *Reed*, 249 F.3d 876, 880-881 (9th Cir. 2001).

More broadly, even if some illegal aliens were domiciled here, that would still doom respondents' facial challenge, which requires them to "establish that no set of circumstances exists under which the [Order] would be valid." *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (citation omitted). Respondents quibble (Br. 44) with the categories covered by the Order, but such objections should be addressed through as-applied challenges, not a facial attack on the Order.

Respondents' amici err in contending (*e.g.*, Amar Br. 8) that the government's theory would deny citizenship to children of slaves who were unlawfully brought to the United States after the abolition of the slave trade in 1808. In the eyes of the Fourteenth Amendment's framers, "the abolition of slavery made every slave in the United States a presumptive citizen," and freed slaves owed "allegiance to the United States" regardless of the circumstances of their enslavement. Lash 202. There is, moreover, a meaningful difference between people who voluntarily violate our immigration laws and people who were "forced against their will to enter the United States" as slaves. *Id.* at 201.

Respondents' contrary theory provides a powerful incentive for illegal immigration. See Gov't Br. 8. Respondents contend (Br. 42-43) that the Constitution "deliberately" imposes a citizenship rule that "draws immigrants to this country," but the Constitution plainly does not seek to encourage *illegal* immigration. To the contrary, "the power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). This Court should construe the Citizenship Clause in a manner that preserves rather than undermines that core sovereign power.

B. Respondents' Interpretation Is Unsound

Respondents contend that the Citizenship Clause uses "jurisdiction" to mean the "authority of government." Br. 16 (citation omitted). They then gerrymander that definition to explain the exceptions to birthright citizenship, equating jurisdiction with the absence of "immunity" when discussing diplomats, *id.* at 11; with the "practical" ability to apply the law when discussing invaders, *ibid.*; and with the lack of an "inter-sovereign relationship" when discussing Indian tribes, *id.* at 32. That reading suffers from insuperable problems. See Tennessee Amicus Br. 4-26.

Surplusage. Reading "jurisdiction" to mean "authority of government" would render the jurisdictional requirement superfluous, given that the United States *could* apply its laws to anyone in its territory. As respondents acknowledge (Br. 32), the United States' regulatory jurisdiction "within its own territory" is "absolute." *Schooner Exchange*, 7 Cranch at 136.

Respondents try (Br. 30-32) to avoid that problem by arguing that the relevant question is "whether the

United States has stayed its own sovereign jurisdictional hand" rather than "how far the United States *could* go." But that theory lacks historical support and contradicts the Citizenship Clause's basic objective. As respondents explain, the Congress that proposed the Clause did not trust future Congresses to leave the Civil Rights Act untouched, and thus the Clause aims "to put citizenship beyond the power of any governmental unit." Br. 17 (quoting *Afroyim* v. *Rusk*, 387 U.S. 253, 263 (1967)). On respondents' view, however, any future Congress could defeat that objective—and turn the Clause on and off at will—through the simple expedient of granting newborns temporary immunity from U.S. law at the time of their birth.

Other exceptions. Respondents' theory cannot explain the exception to birthright citizenship for children of tribal Indians. Everyone understood "subject to the jurisdiction thereof" to exclude the children of tribal Indians, yet those Indians were subject to the United States' regulatory jurisdiction. Respondents claim (Br. 32) that "[t]he scope of federal authority over Tribes was controversial and contested." By the Fourteenth Amendment's adoption, however, it was settled that the United States could (and did) apply its laws to Indians. Since 1817, the United States had punished Indians for crimes against non-Indians in Indian country. See General Crimes Act of 1817, ch. 92, § 1, 3 Stat. 383. In 1831, Chief Justice Marshall wrote that Indians are "subject to many of those restraints which are imposed upon our own citizens" and that many tribes had acknowledged the United States' regulatory authority "in their treaties." *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831). And by 1846, it was "firmly and clearly established" that "Indian tribes residing within the territorial limits of

the United States are subject to [its] authority." *United States* v. *Rogers*, 4 How. 567, 572 (1846).

Respondents cite (Br. 29-33) *Elk*, but that decision undermines their theory. The Court held that birthright citizenship extends only to people who are "completely subject" to the United States' "political jurisdiction," 112 U.S. at 102, and that tribal members do not satisfy that test because they owe "allegiance to their several tribes," *id.* at 99. So too, children of non-domiciled aliens are not completely subject to the United States' political jurisdiction because they owe allegiance to foreign countries—a conclusion that applies *a fortiori* to illegal aliens. Contrary to respondents' theory, moreover, *Elk* did not read the Citizenship Clause to refer to regulatory jurisdiction. The Court recognized the exception for tribal Indians even while acknowledging that the United States could regulate such Indians "through acts of Congress in the ordinary forms of legislation." *Ibid.*

Respondents' other attempts to explain the exception fare no better. They emphasize (Br. 29) the United States' "inter-sovereign relationship" with tribes, but the United States also has an "inter-sovereign relationship" with foreign nations. They analogize (Br. 30) the exception for tribes to the exception for diplomats, but the exception for tribes covers *all* tribal members, not just tribes' diplomatic representatives. They ultimately dismiss (Br. 33) the exception for tribes as "complex" and "unique," but that is an admission that their theory cannot explain it. The better explanation is the one in *Elk*: Though tribal Indians are subject to the United States' regulatory jurisdiction in countless ways that foreign diplomats are not, they are not "completely subject" to the United States' "political jurisdiction" be-

cause they owe "immediate allegiance" to their tribes. 112 U.S. at 102.

Nor can respondents' theory explain the exception for "children of alien enemies, born during and within [a] hostile occupation." *Wong Kim Ark*, 169 U.S. at 655. Respondents contend that an enemy occupation necessarily "supplants U.S. authority" over the occupied territory, Br. 32 n.8, but the exception applies only to "children of alien enemies" born in occupied territory, *Wong Kim Ark*, 169 U.S. at 655. It does not cover the children of U.S. citizens born in occupied territory, even though such children would likewise be beyond the reach of U.S. law. See *Inglis*, 3 Pet. at 156 (Story, J., dissenting). That example confirms that citizenship turns on allegiance, not subjection to U.S. law.

Civil Rights Act. Respondents' theory encounters an insurmountable problem in the Civil Rights Act, which granted citizenship only to persons who were "not subject to any foreign power," § 1, 14 Stat. 27. "[N]ot subject to any foreign power" expressly invokes ties of allegiance, not regulatory authority. Respondents offer (Br. 18-20) no textual basis for reading "not subject to any foreign power" to mean "bound by U.S. law." Respondents are therefore forced to argue (Br. 20) that the Citizenship Clause's meaning differs from the Civil Rights Act's. But that cannot be right. The Act and the Clause were enacted and proposed in the same year by the same Congress for the same purpose. See Cong. Globe, 39th Cong., 1st Sess. 2896 (statement of Sen. Doolittle) ("the celebrated civil rights bill" was "the forerunner of this constitutional amendment"). One of the Fourteenth Amendment's "primary purposes" "was to incorporate the guaranties of the Civil Rights Act" into the Constitution. *Hurd* v. *Hodge*, 334 U.S. 24, 32

(1948). Indeed, Congress re-enacted the Act soon after ratification and allowed it to remain in effect until 1940. See Gov't Br. 42.

C. *Wong Kim Ark* Does Not Dictate A Contrary Reading

Respondents contend (Br. 23) that *Wong Kim Ark* read the Citizenship Clause "to *specifically* foreclose the government's parental domicile argument." *Wong Kim Ark* did no such thing. See Gov't Br. 32-37; Tennessee Amicus Br. 18-20; Cruz Amicus Br. 19-22. The Court read the Clause to codify the "fundamental rule of citizenship by birth within the territory" for children of "resident aliens" who are "domiciled within the United States." *Wong Kim Ark*, 169 U.S. at 693. The Court mentioned domicile more than 20 times in its opinion, including in describing the question presented, the legal rule adopted by the Court, and the Court's holding. See Gov't Br. 32-34. In the central statement of its holding, the Court mentioned residence or domicile three times. See 169 U.S. at 693 ("children here born of resident aliens * * * domiciled within the United States * * * while domiciled here"). In the ensuing decades, this Court, the Executive Branch, and commentators routinely repeated that domicile limitation when discussing *Wong Kim Ark*. See *id.* at 36-37.

Respondents quote (Br. 25) *Wong Kim Ark*'s statement that, "independently of any domiciliation," an alien "owes obedience to the laws." 169 U.S. at 693. But as discussed, citizenship does not turn on whether a person must obey U.S. law—a theory that would eliminate the exception for tribal Indians recognized in *Wong Kim Ark* itself. See pp. 15-17, *supra*. Respondents also quote (Br. 24) the Court's statement that "foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country." 169 U.S. at 683. But that

statement is not comprehensive; it omits the acknowledged exceptions addressing enemy aliens, foreign public ships, and tribal Indians.

In all events, even on respondents' telling, parental domicile was "sufficient" to establish Wong Kim Ark's citizenship, and the statements purportedly addressing non-domiciled aliens were "broader" than necessary to resolve the case. Br. 25-26 (emphases omitted). That makes those statements dicta. Dicta "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.

Finally, respondents cite (Br. 27) cases where this Court assumed that children of illegal aliens born here are U.S. citizens. See, *e.g.*, *INS* v. *Rios-Pineda*, 471 U.S. 444, 446 (1985); *INS* v. *Errico*, 385 U.S. 214, 215 (1966). But because the issue was "neither brought to the attention of the [C]ourt" by the parties "nor ruled upon" in those cases, they do not "constitute precedents" on that point. *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). And unlike the cases and other authorities on which the government has relied, see Gov't Br. 26-28, 36-37, respondents' sources come long after *Wong Kim Ark* (and even longer after ratification).

II. THE CITIZENSHIP ORDER COMPLIES WITH THE INA

The INA provides that persons "born in the United States, and subject to the jurisdiction thereof," are U.S. citizens. 8 U.S.C. 1401(a). Respondents contend (Br. 47-53) that, even accepting the government's reading of the Citizenship Clause, the Citizenship Order violates the nearly identical language of Section 1401(a). "There is a basic interpretive problem with that approach. It would be surprising to discover that Congress departed from the constitutional standard by enacting the exact

constitutional language." Steven J. Menashi, *The Birthright Citizenship Debate*, 49 Harv. J. L. & Pub. Pol'y 301, 313 (2026) (footnote omitted). The statute's verbatim inclusion of the constitutional standard naturally incorporates the Clause's objective meaning.

Section 1401(a)'s history and context underscore that point. As respondents recognize (Br. 49, 51), Congress enacted Section 1401 to codify existing citizenship laws. Section 1401(a) repeats the Citizenship Clause's language, and Sections 1401(b) to (h) then confer citizenship at birth upon various categories of persons who are not guaranteed citizenship under the Fourteenth Amendment. Thus, Section 1401(a) covers those who are covered by the Citizenship Clause itself, while subparagraphs (b) to (h) identify the categories that Congress has added to the constitutional baseline. See Gov't Br. 44-45.

Respondents' theory is especially inexplicable given other parts of the Nationality Act of 1940, ch. 876, 54 Stat. 1137, that reduced the incidence of dual nationality. See Gov't Br. 46 (citing 8 U.S.C. 1401(c), 1448(a) and Nationality Act § 401(a), 54 Stat. 1168). It would be surprising if "congressional enactments which sought to restrict the possibility of dual nationality simultaneously liberalized the circumstances" under which dual nationality arises. Menashi 313-314.

Respondents contend (Br. 48-50) that Section 1401(a)'s scope turns on what Congress assumed the Citizenship Clause meant in 1940 or 1952, not what the Clause actually means. That makes no sense. If a statute had been enacted in the early 20th century guaranteeing "equal protection of the laws," a court today would read it as *forbidding* segregation—even though *Plessy* would

have led the Congress that enacted it to assume, incorrectly, that separate can be equal.

This Court's decision in *United States* v. *Kozminski*, 487 U.S. 931, 945 (1988) (cited at Resp. Br. 48-49), does not suggest otherwise. *Kozminski* read an involuntary-servitude statute to incorporate the understanding of the Thirteenth Amendment that "prevailed at the time of [the statute's] enactment." *Ibid.* The parties did not raise, and the Court did not address, arguments distinguishing between the Amendment's original meaning and its perceived meaning at the time of the statute's enactment. To the contrary, the Court suggested that the Amendment has been interpreted consistently over time. See *id.* at 942-944. The statute in *Kozminski*, moreover, created a new criminal offense; it did not simply codify a constitutional provision that would otherwise have the same legal effect without the statute. See *id.* at 944-945. Section 1401(a), by contrast, codified the constitutional provision itself. That context strongly suggests that Section 1401(a) bears the same meaning as the Citizenship Clause.

Respondents also contend (Br. 50) that Congress enacted the Nationality Act against the backdrop of the Franklin D. Roosevelt Administration's understanding that children of aliens acquire citizenship by birth regardless of parental domicile. This Court, however, presumes that a statute incorporates such a background understanding "only when a term's meaning was 'well-settled'" before enactment. *Kemp* v. *United States*, 596 U.S. 528, 539 (2022) (citation omitted). No such settled understanding existed here. As respondents concede (Br. 51), some authorities in the 1940s and 1950s continued to recognize exceptions to birthright citizenship for children of aliens who were awaiting admission or were

only temporarily in the United States. See Gov't Br. 42-43. One treatise acknowledged that the case law involved "'alien parents who were domiciled in this country'" and explained that the Department of State was not "disposed" "*at the present time*" "to raise a distinction based upon the domicile of the parents." 2 Charles Cheney Hyde, *International Law* § 344 & n.9, at 1070 (2d rev. ed. 1947) (emphasis added).

Respondents next object that the government's reading deprives Section 1401(a) of "independent" effect. Br. 51 (emphasis omitted). But Congress enacted the Nationality Act to "codify the nationality laws of the United States into a comprehensive nationality code." 54 Stat. 1137. As the provision reflecting the Citizenship Clause, Section 1401(a) was not devised to have any "independent" effect; and respondents' own reading would not give it any independent effect if they were correct about the Constitution.

Respondents cross-reference (Br. 48) the First Circuit's reasoning in *Doe* v. *Trump*, 157 F.4th 36 (2025), petition for cert. pending, No. 25-899 (filed Jan. 30, 2026), but that reasoning, too, lacks merit. The First Circuit observed that, in the view of an executive-branch committee that proposed the Nationality Act, U.S. citizenship would extend to "a child born in the United States of parents residing therein temporarily." *Id.* at 61 (citation and emphasis omitted). But that point shows only the Roosevelt Administration's views, not Congress's. Moreover, an Administration official testified before Congress that "[n]o one wants to change" the Citizenship Clause and that "[t]here is no proposal * * * to change the Constitution." *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings Before the House*

Comm. on Immigration and Naturalization, 67th Cong., 1st Sess. 37-38 (1940) (statement of Richard W. Flournoy). That testimony supports the conclusion that Congress understood Section 1401(a) as simply codifying the Citizenship Clause.

The First Circuit also invoked the INA's legislative history, see *Doe*, 157 F.4th at 62-63, but that history does not support respondents' position either. It shows that the INA "carries forward" the provisions of the Nationality Act of 1940 as part of a new "codification" of "existing law" on the subject. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31, 76 (1952). That history is consistent with the government's argument that Section 1401(a) is coextensive with the Citizenship Clause's actual scope.

In sum, it makes little sense to read the statute, which was meant to codify the constitutional standard and repeats the Clause almost verbatim, as enshrining a theory of citizenship that goes far beyond the Clause and that perversely encourages illegal immigration and birth tourism. This Court should read the statute in accord with the Constitution, read the Constitution in accord with its original meaning, and uphold the Citizenship Order.

* * * * *

The judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

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