Nos. 24A884, 24A885, 24A886

In the

Supreme Court of the United States

DONALD J. TRUMP ET AL., *APPLICANTS*,
v.
CASA, INC., ET AL., *RESPONDENTS*.

DONALD J. TRUMP ET AL., *APPLICANTS*,
v.
WASHINGTON, ET AL., *RESPONDENTS*.

DONALD J. TRUMP ET AL., *APPLICANTS*,
v.
NEW JERSEY ET AL., *RESPONDENTS*.

On Applications for Stay of Injunctions

BRIEF OF *AMICUS CURIAE*
THE CLAREMONT INSTITUTE'S
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF APPLICANTS

John C. Eastman, *Counsel of Record*
Alexander Haberbush
CONSTITUTIONAL COUNSEL GROUP
444 W Ocean Blvd, Ste 1403
Long Beach, CA 90802
(909) 257-3869
jeastman@ccg1776.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the importance of extending citizenship only to those who do not owe allegiance to foreign powers. The Center previously appeared before this Court as *amicus curiae* in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in which it argued, in a brief joined by former Attorney General Edwin Meese III, that the foreign enemy combatant Yaser Esam Hamdi was not a citizen under the Fourteenth Amendment's Citizenship Clause merely because he was born to non-citizen parents who were only temporarily in the United States. Claremont Institute scholars have been at the forefront of the scholarly research demonstrating that, as a matter of original public meaning, the Citizenship Clause did not extend to children born to those in the United States only temporarily or illegally. *See, e.g.*, Thomas G. West, *Immigration and the Moral Conditions of Citizenship*, in THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS AND JUSTICE IN THE ORIGINS OF AMERICA (1997); Edward J. Erler, *From Sub-*

[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief. Amicus Center for Constitutional Jurisprudence joined another amicus brief in support of the application for stay, *see* Brief *Amici Curiae* America's Future et al., urging the Court to treat the United States' application for stay as a petition for certiorari before judgment. *See, e.g., Biden v. Nebraska,* 143 S. Ct. 477 (2022). Now that the Court has scheduled oral argument, the Center files this brief as comparable to a merits-stage brief. If that is deemed to be duplicative of it having joined the prior brief, it asks leave to withdraw from the joinder on that brief.

jects to Citizens: The Social Compact Origins of American Citizenship, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT (Pestritto and West, eds., Lexington Books 2003); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167 (2007); and John C. Eastman, *The Significance of "Domicile" in Wong Kim Ark*, 22 CHAP. L. REV. 301 (2019). Amicus believes that this significant body of historical scholarship will be of benefit to the Court.

SUMMARY OF ARGUMENT

The United States has, at this point, only made a "modest" request to "restrict the scope" of multiple, universal preliminary injunctions. *Amicus* agrees that the propriety and constitutionality of such universal injunctions is an issue that desperately needs to be addressed and resolved by this Court, and that these cases present a good vehicle for doing so. *Amicus* also believes that the merits of the underlying issue is ripe for consideration by this Court, however. The lower courts all treated the issue in their rulings below as one of pure law, contending in extensive opinions that the President's executive order was facially unconstitutional. They were right in one respect: the question about whether the Citizenship Clause of the Fourteenth Amendment mandates the grant of citizenship to all but a few persons (children of diplomats and of soldiers in invading armies) is a purely legal issue, and further percolation is really not necessary, particularly given the fact that the scope of the Citizenship Clause has previously been addressed by this Court in several cases. This brief therefore focuses on the substantive legal arguments of that underlying merits question.

ARGUMENT

I. The Assertions by Respondents and the Lower Courts About the Citizenship Clause's Application to Children of Illegal Aliens and Temporary Visitors Being "Well-Settled" Is Patently Erroneous.

A. This Court has never *held* that the children born on U.S. soil to temporary visitors or illegal aliens are automatic citizens.

Contrary to the assertions of Respondents and the lower courts, this Court has never *held* that the Fourteenth Amendment compels the grant of automatic citizenship to children born in the United States to parents who are merely temporary visitors or unlawfully present. Both the District Court for the District of Maryland and the District Court for the Western District of Washington, as well as Respondents, treat the matter as definitively settled, primarily relying on an expansive reading of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and subsequent *dicta*. *See, e.g.*, *CASA, Inc. v. Trump*, No. DLB-25-201, slip op. at 11-19, 27 (D. Md. Feb. 5, 2025); *Washington v. Trump*, No. C25-0127-JCC, slip op. at 7-10 (W.D. Wash. Feb. 6, 2025); Resp'ts Br. 8-10. This reliance is flawed.

As described more fully below, the actual holding in *Wong Kim Ark* was narrow, resolving only the specific question presented: the citizenship of a child born in the United States to parents who were subjects of a foreign sovereign but who had established a "permanent domicil[e] and residence in the United States." *Wong Kim Ark*, 169 U.S. at 653. Any language in that opinion suggesting a broader rule applicable to children of non-domiciled parents constitutes non-binding dicta. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Furthermore, the subsequent cases cited by Respondents and the lower courts—*Hirabayashi v. United States*, 320 U.S. 81 (1943); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *INS. v. Errico*, 385 U.S. 214 (1966); and *INS v. Rios-Pineda*, 471 U.S. 444 (1985)—do not contain holdings on this constitutional question. *See* Resp'ts Br. 9-10; *CASA*, slip op. at 25-26. As demonstrated below, *infra* Section II.E, the statements regarding citizenship in those cases were either *dicta* unnecessary to the decisions or mere background assumptions made without any analysis of the Fourteenth Amendment's requirements, particularly the meaning of the phrase, "subject to the jurisdiction thereof." Such unexamined assumptions cannot establish binding precedent. *See Webster v. Fall*, 266 U.S. 507, 511 (1925). Similarly, while *Hamdi* proceeded on the premise that the petitioner, born in the U.S. to parents present on temporary visas, was a citizen, the Court did not adjudicate the constitutional basis of that citizenship as the government did not contest that issue. The question presented concerned his status as an enemy combatant. *Id*. at 509-10; *see also* Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence at 4-5, *Hamdi*, 542 U.S. 507 (No. 03-6696) (challenging the premise of Hamdi's citizenship).

Because this Court has never squarely addressed and held that the children of temporary visitors or illegal aliens are citizens by virtue of the Fourteenth Amendment, the question remains open for determination based on the Amendment's original public meaning.

B. The Only Question Presented and Decided in *Wong Kim Ark* Was Whether Children Born to Parents Who Were *Permanently Domiciled* In the United States Were Citizens; Everything Else Is *Dicta*.[2]

Both the lower courts and Respondents fundamentally misconstrue the scope of the holding of this Court's decision in *Wong Kim Ark*. They treat the case as conclusively establishing that virtually all persons born on U.S. soil, regardless of parental status, are automatically citizens under the Fourteenth Amendment, subject only to the few narrow exceptions of children born to diplomats or soldiers in occupying armies. *See, e.g.*, *Washington v. Trump*, No. C25-0127-JCC, slip op. at 7–9 (W.D. Wash. Feb. 6, 2025); *CASA, Inc. v. Trump*, No. DLB-25-201, slip op. at 11–19 (D. Md. Feb. 5, 2025); Resp'ts Br. 8–9. In doing so, they dismiss the critical fact of Wong Kim Ark's parents' lawful and permanent domicile as merely incidental, claiming it was "no more vital to the court's reasoning than the fact that Wong Kim Ark was born in California." Resp'ts Br. 9; see also *CASA*, slip op. at 20–21. This characterization is untenable and ignores both the Court's framing of the issue presented in the case and the established principles distinguishing holding from *dicta*.

The *Wong Kim Ark* Court explicitly described the "question presented" as concerning a child born in the United States to parents "who have a permanent domicile and residence in the United States, and are there carrying on business." *Wong Kim Ark*, 169 U.S. at 653 (emphasis added). This fact was not incidental—it was founda-

[2] Amicus contends that Justice Fuller's dissenting opinion in the case accurately reflects the original understanding of the Citizenship Clause, but *Wong Kim Ark*'s actual holding—that children born to parents who were permanently domiciled in the United States—need not be overturned to uphold the President's Executive Order, which applies only to persons *not domiciled* in the United States, but only here temporarily or illegally.

tional to the District Court's certified question, the stipulated record, and the Court's entire analysis. *Id.* at 650–53. The terms "domicile," "domiciled," "permanent domicile," and "domiciled residents" appear nearly thirty times throughout the majority and dissenting opinions, underscoring the centrality of lawful, permanent residence to the Court's reasoning. *See generally id.*; Eastman, *The Significance of "Domicile"*, *supra*, at 304-05.

The legal significance of "domicile" cannot be overstated. It is not mere physical presence, but the lawful establishment of a "permanent home" with an intent to remain indefinitely—something fundamentally distinct from the transient presence of sojourners, visitors, or temporary residents. See *Significance of "Domicile"*, *supra*, at 305–06.. Accordingly, the actual *holding* of *Wong Kim Ark*—the binding legal determination answering the specific question presented—is limited to the citizenship status of children born in the United States to parents who were lawfully and permanently domiciled in the country. Statements in the opinion suggesting a broader application based solely on birth within the territory, without regard to parental allegiance or domicile, exceed the factual predicate of the case and constitute non-binding *dicta*. As Chief Justice Marshall explained in *Cohens v. Virginia*, "general expressions ... taken in connection with the case" but extending "beyond the case ... may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), quoted in *Wong Kim Ark*, 169 U.S. at 679.

The lower courts' and Respondents' reliance on such *dicta* to assert that the citizenship of children born to temporary visitors or illegal aliens is "well-settled" is thus profoundly mistaken. This Court has never held that such children are automatically entitled to citizenship under the Fourteenth Amendment. Nor does the specific and narrow holding of *Wong Kim Ark* compel that conclusion.

Respondents err in dismissing the importance of parental domicile, claiming that a "domicile requirement is nowhere to be found in the text" and portraying domicile as incidental rather than vital to the Court's reasoning. Resp'ts Br. 9. It is true that the word "domicile" does not appear in the Fourteenth Amendment. Yet the constitutional text requires that one be "subject to the jurisdiction" of the United States, and domicile is critical to understanding that phrase. U.S. Const. amend. XIV, § 1. The Court in *Wong Kim Ark* repeatedly emphasized that Wong's parents maintained a "permanent domicil[e] and residence in the United States"—facts that were not merely background but central to both the stipulated record and the Court's ultimate conclusion. See *Wong Kim Ark*, 169 U.S. at 650–53; Eastman, *The Significance of "Domicile," at* 304–05.

Domicile reflects a voluntary and permanent submission to a sovereign's authority—fundamentally different from the transient, limited connection of a mere sojourner. *See id*. at 305–06. This distinction is rooted in the very framing of the Fourteenth Amendment. Its drafters made clear that being "subject to the jurisdiction" meant owing complete, undivided allegiance, not merely being physically present. See *Cong. Globe*, 39th Cong., 1st Sess. 2893, 2895 (1866) (statements of Sens. Trumbull

and Howard). Indeed, the debates explicitly contrasted permanent settlers, such as Chinese immigrants with lawful domicile, with temporary "sojourners" whose presence did not confer citizenship on their children. *See id.* at 2890 (statement of Sen. Cowan).

Thus, far from being an incidental detail, the domicile of Wong Kim Ark's parents was indispensable to the Court's reasoning. The Court's holding rests on the narrow ground of children born to lawfully domiciled parents—not on a broad endorsement of unrestricted *jus soli*. *See* Eastman, *The Significance of "Domicile," supra*, at 306.

II. The Historical Evidence Cited By Respondents Is Inconclusive, at Best.

Respondents attempt to bolster their theory of automatic birthright citizenship by citing a patchwork of historical sources ranging from early Supreme Court cases to fragments of congressional debates and isolated comments from later decisions. But none of these authorities, properly understood, support their position that the law on this subject is "well-settled."

A. Mischaracterization of *Charming Betsy*

CASA's claim that in *Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 119-20 (1804), the Supreme Court "assumed that all persons born in the United States were citizens thereof," is simply false. As the case notes, the individual whose citizenship was at issue, Jared Shattuck, "was born in Connecticut before the American revolution." *Id.* at 65. He was therefore a British subject at birth who was clearly subject to the English rule of *jus soli*. He became an American citizen (through

his parents) as a result of American success in the Revolutionary War, not because of some American rule of birthright citizenship. The issue in the case was whether his subsequent removal to the island of St. Thomas, "where by his own act he ha[d] made himself the subject of a foreign power," had taken him out from under an Act of Congress prohibiting trade by American citizens with France and her territories. The case had nothing to do with birthright citizenship.

B. Misunderstanding of the limited import of *Lynch v. Clarke* and Exaggeration of its solitary citation in the Congressional Globe

Respondents' reliance on *Lynch v. Clarke* fares no better. *See Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844). The CASA brief asserts that *Lynch* "conclusively show[ed] that all children born here are citizens without any regard to the political condition or allegiance of their parents." *See* Resp'ts Br. 7. But *Lynch* was merely a state court decision, issued pursuant to an express provision of the New York state constitution that specifically adopted the English common law as controlling in New York unless and until changed by the legislature. *See* N.Y. Const. art. I, § 14; Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, at 19 n.70 (Feb. 22, 2025, rev. Apr. 17, 2025).[3]

Moreover, the citation of *Lynch* that CASA attributes generally to the Congressional Globe appears to originate from a single reference by Representative William Lawrence during the 1866 *Civil Rights Act* debates, where Rep. Lawrence cited a supposed note in Kent's Commentaries that does not mention *Lynch*. *See* Cong. Globe,

[3] Available at Available at https://ssrn.com/abstract=5140319.

39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence) (citing, *e.g.*, 2 Kent Comm. 278 note). Kent's Commentaries stand for the opposite proposition, namely, that not just birth but allegiance as well was necessary to confer automatic citizenship. *See*, Kent, 2 Commentaries on American Law 4 n.(b) (1860) (10th ed.) ("Natives are all persons born within the jurisdiction *and allegiance* of the United States" (emphasis added); Lash, *supra*, at 44 & n.230.

Moreover, Representative Lawrence's isolated reference to *Lynch* stands in stark contrast to the text of the 1866 Civil Rights Act ("all persons born in the United States *and not subject to any foreign power*" (emphasis added)), as well as explicit statements made by the primary sponsors of the bill. Representative John Bingham, explaining the 1866 Act's language, clarified that it applied to those "born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham). Senator Lyman Trumbull, the Act's sponsor, repeatedly echoed this, stating the goal was "to make citizens of everybody born in the United States who owe allegiance to the United States." Cong. Globe, 39th Cong., 1st Sess. 572 (1866) (statement of Sen. Trumbull); *see also id.* at 527. The same is true during the follow-on debate over the Fourteenth Amendment by that Amendment's primary sponsors. Senator Jacob Howard, who introduced the "subject to the jurisdiction thereof" language, stated it meant "a full and complete jurisdiction … the same jurisdiction in extent and quality as applies to every citizen of the United States now." Cong. Globe, 39th Cong., 1st Sess.

2895 (1866) (statement of Sen. Howard). He explicitly noted this would *exclude* children of "foreigners, aliens" born in the U.S. (along with diplomats)[4] precisely because they did not fall under this complete jurisdiction. *Id.* Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, strongly concurred, defining "subject to the jurisdiction of the United States" as requiring "complete jurisdiction," "[n]ot owing allegiance to anybody else." Cong. Globe, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull). This requirement, rooted in consent and political allegiance rather than the feudal concept of *jus soli* underlying *Lynch*, necessarily excluded those whose allegiance was owed, through their parents, to a foreign power. *See, e.g.*, *id.*; Erler, *supra,* at 190-91 John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, Heritage Found. Legal Mem. No. 18, at 7 (2006).

C. Misreading of Justice Story's *Commentaries on the Conflict of Laws*

Respondents similarly mischaracterize Justice Joseph Story's views on citizenship as reflected in his *Commentaries on the Conflict of Laws*. Resp'ts Br. 7. While acknowledging Story's view that a "reasonable qualification" of the birthright citizenship general rule was "that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business," Respondents turn Justice Story's caveat—that "[i]t would be

[4] The actual phrase recorded in the Congressional Globe is "foreigners, aliens, who belong to the families of ambassadors or foreign ministers …." The sentence structure, as recorded in the Globe, creates some ambiguity as to whether Senator Howard was referencing only an exception for diplomats or more broadly an exception for temporary sojourners. In light of his other statements expressly requiring a complete jurisdiction, there is no ambiguity when the phrase recorded in the Globe, even if recorded correctly, is considered in context.

difficult, however, to assert, that in the present state of public law such a qualification is universally established"—on its head, implying that Story meant that the general rule of *jus soli*, rather than the exception for temporary sojourners, was what was nearly universally established. *Id.* (quoting Joseph Story, *Commentaries on the Conflict of Laws* § 48, at 48 (1834)). Story's observation that this specific qualification was not "universally established" in the "present state of public law," foreshadowing the New York court decision in *Lynch v. Clark* and perhaps recognizing the provision in the New York Constitution that required application of the common law (including the rule of *jus soli*) until changed by the legislature, did not diminish the importance he assigned to the principle itself—citizenship based on consent rather than mere territorial birth. *Id.*

Story's broader jurisprudence confirms this understanding. He recognized significant limitations on the application of English common law in America, explaining that Americans adopted "only that portion which was applicable to their situation." *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829); *see also* Erler, *supra*, at 179. In cases such as *Inglis v. Trustees of Sailor's Snug Harbor*, Story emphasized the revolutionary shift from the English doctrine of perpetual allegiance to a citizenship founded upon consent and election. See *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155–61 (1830) (Story, J.). There is hardly any greater conflict between the Common Law and the principles of the American founding than the repudiation of *jus soli*'s command of perpetual and non-renounceable allegiance to the King. *See*

Decl. of Ind. § 32 (declaring that the new American states are absolved of all allegiance to the King). Thus, Respondents' reliance on Story's remark concerning the contemporary state of public law to support near-automatic *jus soli* ignores the fundamental direction and principles of his analysis regarding American citizenship.

D. Mischaracterization of Senator Conness's Remarks on Citizenship

Respondents' brief erroneously quotes Senator Conness's statement about "children of all parentage whatever" becoming citizens to suggest that Senator Conness supported a sweeping rule of birthright citizenship divorced from parental allegiance. Resp'ts Br. 8 (quoting Cong. Globe, 39th Cong., 1st Sess. 2891 (1866)). Read in context, however, just the opposite is the case. Senator Conness's statement arose during an exchange initiated by Senator Cowan, who raised concerns that the proposed constitutional language was too broad. In an attempt to politically derail the Fourteenth Amendment, Senator Cowan asked whether it would extend citizenship to the children of Chinese immigrants and Gypsies, and he specifically asked whether, under the proposed Citizenship Clause, they were to have "more rights than sojourners." *See* Cong. Globe, 39th Cong., 1st Sess. 2890-91 (1866) (statements of Sens. Cowan and Conness). Senator Cowan's question, distinguishing children born to Chinese immigrants and Gypsies from "sojourners," necessarily presumes that the children of mere sojourners would not be entitled to automatic citizenship. Senator Conness's response, therefore, also necessarily only applies to Chinese immigrants and Gypsies who were not mere sojourners. As this is the only reference to "sojourners" in the entire debate, the distinction drawn by Senator Cowan and apparently

embraced by Senator Conness is extremely important, and it fully supports the provision in President Trump's executive order acknowledging that the Fourteenth Amendment does not confer automatic citizenship on the children born to temporary visitors.

Moreover, the concerns raised by Senator Cowan prompted immediate and unambiguous clarification from the amendment's principal sponsors. Senators Trumbull and Howard reaffirmed that the phrase "subject to the jurisdiction thereof" imposed a requirement of "complete jurisdiction" and undivided allegiance, thereby excluding children whose parents owed allegiance to a foreign power. See *id*. at 2893 (statement of Sen. Trumbull); *id*. at 2895 (statement of Sen. Howard).

E. Overreliance on *Dicta* in several mid-20th century cases.

Respondents also rely on statements in several mid-20th century cases, including *Hirabayashi*, 320 U.S. at 96; *Hintopoulos*, 353 U.S. at 72; *Errico*, 385 U.S. at 215–16; and a 1985 case, *Rios-Pineda*, 471 U.S. at 446.. Resp'ts Br. 9-10. Although all four include statements by the Court regarding the birth citizenship of children born in the United States, in none of the cases are those statements a binding holding.

The Court in *Hirabayashi*, for example, stated that approximately two-thirds of persons of Japanese descent subject to the challenged curfew order were "citizens because born in the United States," *Hirabayashi*, 320 U.S. at 90, 96. But this statement must be viewed in light of the case's context and the status of Hirabayashi's parents. Both parents appear to have become domiciled in the United States prior to

the time of his birth. The Supreme Court decision itself acknowledges that Hirabayashi "was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan." *Hirabayashi*, 320 U.S. at 84. The Densho Encyclopedia, a well-respected authority on Japanese-American ancestry, reports that Hirabayashi's father emigrated to the United States in 1907, more than a decade before Hirabayashi's birth, and that his mother followed in 1914, still four years before his birth. Densho Encyclopedia, "Gordon Hirabayashi."[5] This evidence and acknowledgement by the Court strongly suggests that Hirabayashi's parents, like Wong Kim Ark's parents, had established permanent domicile in the United States prior to his birth. The Court's general statement about the citizenship of the larger group, made without analyzing the jurisdictional requirement for that group, is best understood as *dicta* simply applying the established holding of *Wong Kim Ark* regarding children born of parents lawfully domiciled in the United States, not as an extension of automatic citizenship to children of temporary or unlawful aliens.

Hintopoulos and *Rios-Pineda* likewise involved statements about the citizenship of children born in the United States. *See Hintopoulos*, 353 U.S. at 73 (the child is, of course, an American citizen by birth"); *Rios-Pineda*, 471 U.S.at 446 ("By that time, respondent wife had given birth to a child, who, born in the United States, was a citizen of this country."). But in both cases, the statements are pure *dicta*.

[5] Available at https://encyclopedia.densho.org/Gordon_Hirabayashi/.

The issue in *Hintopoulos* was whether the parents could be deported even if the child was an American citizen, as the Court stated ("assumed" would be the more appropriate word) was the case. Had the Court responded negatively to that question, then whether or not the child was in fact a citizen would have been necessary to decide, as the statute at issue required that the potential deportee have a close familial relationship with a U.S. citizen. But the Court upheld the deportation order anyway, despite its statement about the child being a citizen.

So, too, with *Rios-Pineda*. The Attorney General's decision not to suspend deportation was expressly premised on the statutory discretion afforded to the Attorney General, which could be exercised without "consider[ing] whether the threshold statute eligibility requirements [such as close familiar relationship to a citizen] are met." *Id*. at 449 (citing *INS v. Bagamasbad*, 429 U.S. 24 (1976)). The citizenship status of the child—a statutory prerequisite—was therefore not at issue in the case, and the Court's statement about the child's citizenship is therefore the purest form of *dicta*. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used").

Errico is a bit different. The Court's statements in the consolidated cases that the children were citizens (in *Errico*, that "A child was born to the couple in 1960 and acquired United States citizenship at birth," *Errico*, 385 U.S. at 215, and in *Scott*, that "After entering the United States in 1958, she gave birth to an illegitimate child, who became an American citizen at birth," *id*. at 216), were necessary in light of the

Court's ultimate holding that the respective parents could not be deported, as a close familial relationship to a citizen was one of the prerequisites for the statutory exemption from deportation at issue. These statements are thus not technically *dicta*, as was the case with the statements in *Hintopoulos* and *Rios-Pineda* discussed above. But the statements are not a binding holding for another reason. The citizenship of the children was not contested, and the Court conducted no analysis whatsoever of whether children born to immigrants in the country illegally (in *Errico*, by making a material misrepresentation on his visa application; in *Scott*, by entering into a sham marriage) were automatically citizens by virtue of the Fourteenth Amendment. It is well established that questions merely assumed or passed over without consideration do not establish binding precedent. *See, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Therefore, the unanalyzed assumption in *Errico* cannot be treated as binding precedent affirming automatic citizenship for children born under such circumstances.

Moreover, even if otherwise, these cases show that, at most, the more expansive reading of *Wong Kim Ark* advanced by Respondents had begun to take root by the 1950s—more than a half century after the *Wong Kim Ark* decision and more than 80 years after adoption of the Fourteenth Amendment. They tell us little, therefore, about the original public meaning of the Fourteenth Amendment, particularly when the *obiter dictum* statements stand in such stark contrast to Supreme Court decisions

in *The Slaughter-House Cases* and *Elk v. Wilkins* that were issued in much closer proximity to the adoption of the Amendment.

III. The Contrary Evidence is Compelling.

A. The American Revolution Rejected the Feudal Doctrine of Birthright Subjectship in Favor of Citizenship Based on Consent and Allegiance

Understanding the Citizenship Clause of the Fourteenth Amendment requires appreciating the revolutionary break from English feudal concepts of subjectship. The modern notion of automatic birthright citizenship based solely on the accident of location at birth is an inheritance from the English common law doctrine of natural-born subjectship—a doctrine fundamentally at odds with American constitutional principles. See Erler, *supra*, at 170–72.

i. English Common Law and Perpetual Allegiance

Under English common law, as articulated in *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B. 1608), and William Blackstone's *Commentaries*, birth within the King's dominions automatically rendered one a "natural-born subject." *See* Blackstone, Commentaries 1:366–70 (1765). Blackstone described this natural allegiance as a "debt of gratitude" that could not be "forfeited, cancelled, or altered, by any change of time, place, or circumstance." *Id.* at 357-58. This bond of allegiance was perpetual and indissoluble—a feudal tie grounded in the hierarchical relationship between subject and sovereign, rather than in any voluntary act of consent.

This conception explicitly denied the right of expatriation. Once born a subject, a person remained a subject for life, regardless of any later wishes or actions. *See id.*; *see also*, Erler, *supra*, at 179.

ii. The American Revolution and the Shift to Citizenship by Consent

The American Revolution constituted a fundamental repudiation of this feudal model. The Declaration of Independence proclaimed that governments derive "their just powers from the consent of the governed," and that the people possess an inherent right to "alter or abolish" any government destructive of their rights. *The Declaration of Independence* ¶ 2, 1 Stat. 1 (1776). And if that were not a clear enough repudiation of the English rule of perpetual allegiance, the Declaration's closing paragraph is unmistakable. It declared "That these United Colonies are, and of Right ought to be Free and Independent States; [and] that they are *Absolved from all Allegiance to the British Crown* …." *Id.* ¶ 32 (emphasis added).

As Jefferson wrote even prior to 1776, the right of expatriation—the right "of departing from the country in which chance, not choice, has placed them"—is a natural right inherent in all men. See Thomas Jefferson, *A Summary View of the Rights of British America* (1774), quoted in Erler, *supra*, at 169. The very act of declaring independence, absolving the colonies from all allegiance to the British Crown, was an exercise of this natural right, and a rejection of perpetual allegiance imposed by mere accident of birth and the English doctrine of *jus soli*.

Thus, the Revolution transformed the legal conception of political membership from one based on birthright subjectship to one based on mutual consent. Citizenship

in the American republic became predicated not on geographical happenstance, but on voluntary allegiance to a political community that itself consents to the individual's membership. *See* Erler, *supra*, at 182; *see also* James Madison, Essay "On Sovereignty" (ca. 1835), (discussing the need to "consult the Theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights and the safety & the interest of each may be under the safeguard of the whole"), quoted in Erler, *supra*, at 181.

The Expatriation Act of 1868, enacted contemporaneously with the Fourteenth Amendment, confirmed this understanding. It declared that "the right of expatriation is a natural and inherent right of all people," and that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of the Republic." Act of July 27, 1868, ch. 249, § 1, 15 Stat. 223. Congress thereby decisively repudiated the feudal doctrine of perpetual allegiance upon which the English rule of *jus soli* had rested.

Accordingly, any interpretation of the Citizenship Clause must proceed from this foundational principle of mutual consent and allegiance, not from the feudal doctrine of perpetual subjectship imposed by location of birth.

B. Antebellum Law Confirmed That Citizenship Depended on Allegiance, Not Mere Birthplace

The revolutionary shift from perpetual subjectship to citizenship by consent was not merely rhetorical. It shaped American law throughout the antebellum period. Courts, lawmakers, and legal commentators recognized that allegiance—often determined by parental status and the voluntary assumption of political obligations—was critical to citizenship.

Early decisions illustrate that the place of birth was not always dispositive for determining citizenship. In *Inglis, 28 U.S. (3 Pet.) at 99.*, the Court considered the citizenship of a person born in New York near the time of the Declaration of Independence. The Court held that the son's "election and character followed that of his father," who had remained loyal to Britain. *Id*. at 126. Because the father maintained allegiance to Britain, the son was deemed a British subject—despite being born within the United States—unless he affirmatively disavowed that allegiance upon reaching majority, which he failed to do. *Id*. at 159–61. This approach, focusing on parental allegiance overriding birthplace, sharply departed from the English rule of automatic and irrevocable allegiance based solely on location of birth.

Similarly, in *Minor v. Happersett*, 88 U.S. 162 (1875), decided several years *after* the Fourteenth Amendment's ratification, this Court reviewed the understanding of citizenship as it existed *prior* to the Amendment. Chief Justice Waite, writing for the Court, observed that while it was "never doubted that all children born in a country of parents who were its citizens became themselves ... citizens," as for the

distinct group of those "born within the jurisdiction without reference to the citizenship of their parents ... there *have been doubts*." *Id*. at 167-68 (emphasis added).

C. The 1866 Civil Rights Act, which the 14th Amendment was designed to codify and constitutionalize, clearly excluded children who, through their parents, were subject to a foreign power.

Further compelling evidence that the Fourteenth Amendment was not intended to grant automatic citizenship based merely on birth location comes from its direct statutory precursor, the Civil Rights Act of 1866. Enacted by the same Congress that framed the Fourteenth Amendment, the Act sought to secure citizenship for the freedmen following the abolition of slavery. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. Its opening sentence defined the prerequisites for citizenship: "That all persons born in the United States and *not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States ...." *Id*. (emphasis added).

This language explicitly links birthright citizenship to allegiance. By conditioning citizenship on being "not subject to any foreign power," the Act plainly excluded children born on U.S. soil to parents who remained citizens or subjects of another nation and thus owed allegiance elsewhere. Lash, *supra*, at 35-41. During the debates, Senator Lyman Trumbull, the Act's sponsor, confirmed this understanding, explaining that the clause referred to those who owed allegiance solely to the United States. *See id*. at 38-40 (citing Cong. Globe, 39th Cong., 1st Sess. 572 (1866)). Representative John Bingham, a key figure in drafting the Fourteenth Amendment, was even more direct, stating the understanding derived from the Constitution itself was

that "every human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign sovereignty* is ... a natural-born citizen." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham) (emphasis added), *quoted in* Lash, *supra*, at 42.

Recognizing that a statute might be repealed or declared unconstitutional (particularly in light of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)), the framers sought to embed these principles, including the allegiance requirement, into the Constitution via the Fourteenth Amendment. Erler, *surpa,* at 170. The shift in phrasing from the Act's "not subject to any foreign power" to the Amendment's "subject to the jurisdiction thereof" was considered by Senator Trumbull to be a "better" formulation intended to achieve the "same object"—namely, ensuring citizenship was conferred only upon those owing full allegiance to the United States. Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull); *see also* Lash, *supra*, at 48. Thus, the Civil Rights Act of 1866 demonstrates the contemporaneous congressional understanding that citizenship required more than birth; it required an allegiance inconsistent with being subject, through one's parents, to a foreign power.

D. Key Proponents of the 14th Amendment expressly stated that "subject to the jurisdiction" meant complete jurisdiction, not merely partial, territorial jurisdiction.

Any ambiguity surrounding the phrase "subject to the jurisdiction thereof" was definitively resolved during the Senate debates by the Amendment's chief proponents. They made their intended meaning abundantly clear: the phrase required the full political allegiance associated with citizenship, not merely the partial, territorial

jurisdiction applicable to all persons physically present within the United States. This crucial distinction was not hinted at; it was explicitly articulated.

Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, when pressed on the phrase's meaning, particularly concerning Indian tribes, was unequivocal: "What do we mean by 'subject to the jurisdiction of the United States?' *Not owing allegiance to anybody else*. That is what it means." Cong. Globe, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull) (emphasis added). He reinforced this by stating it excluded those owing even "partial allegiance ... to some other Government," because they were not subject to the "*complete* jurisdiction of the United States." *Id*. (emphasis added); Lash, *supra*, at 52. Trumbull specifically distinguished this required "complete jurisdiction" from the mere amenability to laws or treaties that might apply to those not fully within the political community. Cong. Globe, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull).

Senator Jacob Howard, who introduced the specific language of the Citizenship Clause, was equally clear. He insisted that "jurisdiction" as used in the amendment "ought to be construed so as to imply *a full and complete jurisdiction* ... that is to say, the same jurisdiction in extent and quality as applies to every *citizen* of the United States now." Cong. Globe, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard) (emphasis added); *see also id*. at 2890. This understanding was so apparent to those present that Senator Reverdy Johnson could confidently state, "Now, all that this amendment provides is, that all persons born in the United States and *not subject to some foreign Power*—for that, no doubt, is the meaning of the committee who have

brought the matter before us—shall be considered citizens of the United States." *Id.* at 2893 (statement of Sen. Johnson) (emphasis added).

These explicit, contemporaneous explanations by the Amendment's leading proponents leave no room for doubt. They intended "subject to the jurisdiction thereof" to signify a complete political attachment and allegiance to the United States, fundamentally distinct from the mere temporary or territorial jurisdiction that obligates aliens and visitors to obey local laws. Erler, *supra,* at 167–68.

E. This Court's initial decisions interpreting the Citizenship Clause recognized that the "subject to the jurisdiction" restriction excluded children whose parents owed allegiance to a foreign power or a domestic Indian tribe.

This Court's earliest interpretations of the Fourteenth Amendment's Citizenship Clause align with the framers' understanding that being "subject to the jurisdiction" meant complete political allegiance. In *The Slaughter-House Cases*, decided just four years after the Amendment's ratification, the Court observed (albeit in *dicta*) that the phrase "subject to its jurisdiction" was intended precisely "to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872) (emphasis added).

This understanding, requiring more than mere birth on U.S. soil, became holding in *Elk v. Wilkins*, 112 U.S. 94 (1884). There, the Court held that John Elk, an American Indian born within the territorial United States but who owed allegiance to his tribe at birth, was not a citizen under the Fourteenth Amendment. *Id.* at 109. The Court reasoned that being "subject to the jurisdiction thereof" required being

"completely subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id.* at 102. Because Elk owed allegiance at birth to his tribe—an "alien, though dependent, power"—he was not subject to the complete jurisdiction of the United States in the manner required by the Amendment. *Id.* at 99, 102. Thus, this Court's initial encounters with the Citizenship Clause recognized that the jurisdictional requirement excluded those, like Elk, whose allegiance lay with another sovereign, whether foreign or domestic tribal. *See* Lash, *supra*, at 66–68.

F. The leading treatise writer and the Secretary of State in the years shortly after the adoption of the 14th Amendment agreed.

This interpretation, requiring complete allegiance for birthright citizenship, was shared by leading commentators and executive officials in the years immediately following the Fourteenth Amendment's adoption. Thomas Cooley, perhaps the most prominent constitutional treatise writer of the era, explicitly adopted the view articulated by Senators Trumbull and Howard. Cooley wrote that being "subject to the jurisdiction thereof" meant "that full and complete jurisdiction to which citizens generally are subject, and not any qualified or partial jurisdiction, such as may consist with allegiance to some other government." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 243 (1880).

The Executive Branch, responsible for implementing citizenship law, initially concurred. Decisions by Secretaries of State in the 1880s concluded that children born to parents only temporarily within the United States, lacking the intent to establish permanent domicile and thus not fully submitting to U.S. jurisdiction, were not citizens by birth. *See Wong Kim Ark*, 169 U.S. at 719 (Fuller, C.J., dissenting) (citing

opinions of Secretary Frelinghuysen in *Hausding's case* (1885) and Secretary Bayard in *Greisser's case*). These early interpretations by leading jurists and executive officers charged with applying the law further demonstrate that the original understanding of the Citizenship Clause required more than mere birth within the territorial boundaries of the United States; it required being born subject to its complete political jurisdiction and allegiance. *See* Lash, *supra*, at 61-64.

IV. For Nearly 100 Years After Adoption of the 14th Amendment, Both Congress and the Executive Branch Recognized That More Than Birth Alone Was Necessary For Automatic Citizenship.

A. Indian Citizenship Act of 1924

Perhaps the clearest legislative example that the political branches of government did not read *Wong Kim Ark* or the 14th Amendment itself as conferring citizenship based on birth alone is the Indian Citizenship Act of 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)). This Act declared that "all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States." *Id*. The very necessity of this Act demonstrates that Congress did not believe the Fourteenth Amendment had automatically conferred citizenship upon all Native Americans born within the United States after 1868, or that *Wong Kim Ark* had done so, either.

If the broad interpretation of the Citizenship Clause advanced by Respondents—equating "subject to the jurisdiction" with mere territorial presence—were correct, the 1924 Act would have been entirely superfluous. Those individuals whom it

purported to make citizens would have already been citizens by virtue of the Fourteenth Amendment itself. However, Congress understood, consistent with this Court's decision in *Elk v. Wilkins*, 112 U.S. 94 (1884), that Native Americans born into tribal allegiance were *not* automatically "subject to the jurisdiction" of the United States in the complete political sense required by the Amendment. *See id*. at 102. The 1924 Act was thus a legislative grant of citizenship under Congress's Article I naturalization power, enacted precisely because the Fourteenth Amendment's constitutional grant did not reach all Native Americans born within U.S. territory. Lash, *supra*, at 26. This congressional action, nearly 60 years after the Fourteenth Amendment's ratification, powerfully confirms that the Amendment's scope was understood to be limited by allegiance, not defined solely by birthplace. *See* Brief Amicus Curiae of The Claremont Institute Center for Constitutional Jurisprudence at 16, *Hamdi*, 542 U.S. 507 (2004) (No. 03-6696) (arguing the 1924 Act would be redundant under an expansive reading of *Wong Kim Ark*).

Ipso facto, then, children born to parents who continued to owe allegiance to their home countries—foreign powers—are necessarily not "subject to the jurisdiction" of the United States in the full, complete sense intended by that clause. The Indian tribes were, after all, considered at the time to be "domestic dependent nations" "in a state of pupilage." *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831); *see also, e.g.*, *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 572 (2018) ("Tribes are 'domestic dependent nations'"). If anything, children born to members of Indian tribes had a stronger claim to being "subject to the jurisdiction" of the United

States than children born to foreign subjects temporarily in the United States because the tribes themselves, unlike foreign nations, were "completely under the sovereignty and dominion of the United States." *Elk*, 112 U.S. at 122. Yet this Court held even that did not qualify for automatic citizenship.

B. The Depression-Era Repatriation

A negative inference can also be drawn from the historical example of the repatriation of Mexican workers that occurred following the stock market crash in October 1929 and the ensuing "Great Depression." As the California legislature has recently recognized, an estimated "two million people of Mexican ancestry were forcibly relocated to Mexico, approximately 1.2 million of whom had been born in the United States" and would therefore be citizens under the expansive interpretations of the Fourteenth Amendment and *Wong Kim Ark* advanced by Respondents here. *See* SB 670, Apology Act for the 1930s Mexican Repatriation Program, Cal. Gov't Code § 8720 *et seq*. (added by Stats. 2005, ch. 663, § 1).[6] Yet to our knowledge, not a single case was ever brought at the time claiming that the children born in the United States to those who had come as temporary workers in the "Roaring Twenties" and who retained their Mexican citizenship could not be removed because they were citizens. Such silence is deafening.

[66] Available at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0651-0700/sb_670_bill_20051007_chaptered.html.

C. Passport forms requiring "status of parents at birth" until changed, inexplicably, in 1966

Another indication that mere birth on U.S. soil was not understood to confer automatic citizenship appears in pre-1966 passport application requirements. At that time, regulations required applicants to disclose not only their own birth details but also their father's name, date and place of birth, and residence. If the father was foreign-born, the application required information on his immigration and naturalization status. See, e.g., 22 C.F.R. § 20 (1938), citing Rev. Stat. § 4076 (1878), codified at 22 U.S.C. § 212. If place of birth alone sufficed under a well-settled interpretation of the Citizenship Clause, such disclosures would have been unnecessary. The federal government's continued emphasis on parental status confirms that it did not view birthplace as dispositive. The 1966 change—unaccompanied by any contemporaneous legal development—reflects a bureaucratic revision, not a constitutional one.[7]

CONCLUSION

This Court should not only stay the universal injunctions issued by the lower courts, it should resolve the merits question, and hold that the "subject to the jurisdiction" requirement of the Fourteenth Amendment's Citizenship Clause requires, as its drafters expressly noted, a complete jurisdiction, not merely a territorial jurisdiction, and therefore does not confer automatic citizenship on the children of temporary sojourners or those present in the United States illegally.

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[7] The questions about parental status were dropped from the application regulations in 1966, and only evidence of birth in the United States was then required—primary evidence such as a birth or baptismal certificate, or secondary evidence such as census records, newspaper files, or family Bibles. 31 Fed.Reg. 13537, 13542, (§ 51.43); *see also* 22 C.F.R. § 51.42.

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Respectfully submitted,

John C. Eastman
Alexander Haberbush
CONSTITUTIONAL COUNSEL GROUP
444 W Ocean Blvd, Ste 1403
Long Beach, CA 90802
(909) 257-3869
jeastman@ccg1776.com

Counsel for Amicus Curiae
The Claremont Institute's
Center for Constitutional Jurisprudence