

No. 25-365

**In the
Supreme Court of the United States**

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

BARBARA, *et al.*,
Respondents.

**On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the First Circuit**

**BRIEF OF AMICI CURIAE SENATOR ERIC
SCHMITT AND REPRESENTATIVE CHIP ROY IN
SUPPORT OF PETITIONERS**

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INTEREST OF AMICI¹

Amici curiae are United States Senator Eric Schmitt and United States Representative Chip Roy. They, respectively, chair the Senate Committee on the Judiciary’s Subcommittee on the Constitution and the House Committee on the Judiciary’s Subcommittee on the Constitution and Limited Government. As the chairmen of these Subcommittees, *amici* have a special interest in ensuring that Congress and the courts correctly interpret the Citizenship Clause, and both Subcommittees have held hearings on the constitutional scope of birthright citizenship.

INTRODUCTION

Joseph Story explained in 1834 that “[p]ersons, who are born in a country, are generally deemed citizens and subjects of that country.” JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 48 (1834). At the same time, Story recognized a “reasonable qualification” to this general rule: “it should not apply to the children of parents who were *in itinere* in the country, or abiding there for temporary purposes.” *Id.* Our Nation decisively established Justice Story’s view of citizenship in the Fourteenth Amendment.

Repudiating this Court’s *Dred Scott* decision, the Fourteenth Amendment’s Citizenship Clause provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof,

¹ No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1. As this phrasing demonstrates, however, not *all* persons born in the United States are citizens at birth. Rather, only persons who are also “subject to the jurisdiction” of this country are constitutionally entitled to birthright citizenship.

The scope of the Citizenship Clause thus turns largely on the meaning of “jurisdiction”—“a word of many, too many, meanings.” *Wilkins v. United States*, 598 U.S. 152, 156–57 (2023) (internal quotation marks omitted). Adopting a narrow definition of that term, one derived from the feudal English doctrine of *jus soli*, the court below, along with certain scholars, dicta in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and the dissent in *Trump v. CASA*, read the Citizenship Clause to guarantee essentially universal birthright citizenship, arguing that anyone who is “subject to” the “authority and . . . laws” of the United States is “subject to the jurisdiction thereof.” *Trump v. CASA, Inc.*, 606 U.S. 831, 881 (2025) (Sotomayor, J., dissenting) (quoting U.S. Const. amend. XIV, § 1); *E.g.*, James C. Ho, *Defining “American,”* 9 GREEN BAG 367, 368–69 (2006); Pet.App.32a–34a. Under this “regulatory jurisdiction” interpretation, the Clause grants citizenship essentially to anyone born within our borders, whether here legally or illegally, fleetingly or permanently. But as the lead author of the Clause, Senator Jacob Howard, put it, the term “jurisdiction” was used in its “full and complete” sense, requiring a permanent reciprocal political bond between the new citizen and the sovereign. That reciprocal bond is defined by the kind of enduring “allegiance” to America that is owed only by those who have made

this country their *lawful and permanent home*—their *domicile*—and thus receive in return the country’s full sovereign “protection.”

The regulatory jurisdiction interpretation of the Clause is founded on the theory that the Constitution adopted the medieval English doctrine of *jus soli*, which *imposes* indissoluble citizenship on those born on the sovereign’s lands, whether they (or their parents) like it or not. *Jus soli* is fundamentally incompatible with the republican principles of a nation founded by free citizens who declared, and then won, their independence from the Crown. The doctrine “no more survived the American Revolution than the same rule survived the French Revolution.” *Wong Kim Ark*, 169 U.S. at 710 (Fuller, C. J., joined by Harlan, J., dissenting). And *jus soli* was certainly not *sub silentio* resurrected in 1868. An amendment designed to realize the Declaration’s principles did not take our Nation back to the medieval doctrine that it threw off generations before.

SUMMARY OF THE ARGUMENT

The text, structure, and history of the Fourteenth Amendment’s Citizenship Clause support the constitutionality of President Trump’s Executive Order. Well-recognized canons of interpretation counsel reading the term “jurisdiction” at full face value—to mean the *complete* jurisdiction of the United States and not temporary or partial jurisdiction. And complete jurisdiction requires a permanent, reciprocal political bond with the sovereign that only citizens and lawful permanent residents have established. The structure of the Citizenship Clause confirms this reading. To be a citizen of a state at birth, one must

“reside” in that state. It is simply not plausible that the Framers of the Fourteenth Amendment would extend *national* birthright citizenship to the child of a foreign sojourner or an illegal alien but deny *state* citizenship to those same individuals.

The history of the Citizenship Clause confirms this interpretation. The Framers of the Fourteenth Amendment modeled it after a similar clause in the Civil Rights Act of 1866. The statutory clause granted citizenship at birth to individuals born in the United States and “not subject to any foreign power, excluding Indians not taxed.” Although this language was altered in the Fourteenth Amendment to avoid confusion about the status of Indians, the drafters expressly stated that the change was not intended to alter the meaning. Thus the 1866 Act’s language demonstrates that when Congress used the term “jurisdiction,” it meant jurisdiction in the full sense, requiring both regulatory and political jurisdiction.

This Court’s first binding interpretation of the Citizenship Clause in *Elk v. Wilkins* confirmed that “jurisdiction” was used in the complete sense, thus excluding those who are born with allegiance to another sovereign. 112 U.S. 94 (1884). And despite the Court’s broad, and incorrect, dictum in *Wong Kim Ark*, that case’s explicit holding is entirely consistent with the Clause’s requirement of complete jurisdiction at birth to qualify for citizenship.

ARGUMENT

I. The Text of the Citizenship Clause

Advocates of the regulatory-jurisdiction interpretation of the Clause are met at the front door with a series of difficult questions regarding its text.

A. First, if “subject to the jurisdiction” of the United States means nothing more than subject to the duty—owed by essentially everyone on American soil—to obey “the laws of the United States,” then why did the Framers of the Clause choose such a strange way to say that? Why did they not just say “subject to the laws thereof”? That the Framers of the Fourteenth Amendment chose the word “jurisdiction” instead of “laws” must mean, at least presumptively, that they intended to condition birthright citizenship on the newborn’s being “subject to” something different from the basic duty owed by everyone on American soil to obey our laws. And indeed, this Court held in its first decision interpreting “subject to the jurisdiction” of the United States that the Framers meant “not merely subject *in some respect or degree* to the jurisdiction of the United States, but *completely subject* to their *political jurisdiction*, and owing [the United States] *direct and immediate allegiance*.” *Elk*, 112 U.S. at 102 (emphases added).

B. Second, the validity of the Executive Order turns on the question whether the term “jurisdiction” is used in a narrow and specific sense to refer only to a small and irreducible part of the jurisdiction of the United States—the regulatory jurisdiction, *see CASA*, 606 U.S. at 881 (Sotomayor, J., dissenting)—or is used in a broader and general sense to refer to the *full and complete* jurisdiction of the United States, comprised of all the benefits and burdens that come with living

lawfully and permanently in *direct and immediate allegiance* to this country.

The most natural reading of the Citizenship Clause is that it requires a person, as Senator Howard insisted when introducing it in the 39th Congress, to be subject to the “full and complete” jurisdiction of the United States. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866). This is in keeping with the standard canon that “[g]eneral words (like all words, general or not) are to be accorded their full and fair scope.” Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF JUDICIAL TEXTS* 101 (2012). The term “jurisdiction” is thus “not to be arbitrarily limited” to only a subset of its natural breadth. *Id.*; JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, § 1057 (1833) (“The words being general, the sense must be general also, and embrace all subjects comprehended under them[.]”); *see Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (interpreting Vesting Clause of Article II in this manner).

Thus, when the Framers of the Citizenship Clause used the term “jurisdiction,” standard tools of interpretation counsel that they meant more than just one’s temporary presence in the United States that creates a “temporary and local allegiance” requiring obedience to our laws. *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 144 (1812); *see Fleming v. Page*, 50 U.S. 603, 615–16 (1850) (describing the “temporary allegiance” owed by “foreigners and enemies” while in United States). As this Court in *Elk* recognized, it requires a person to owe the “direct and immediate allegiance” to the sovereign that renders him subject completely to its “political jurisdiction.” 112 U.S. at 102

(1884); *see also* THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 243 (Boston, Little, Brown & Co. 1880). Accordingly, the children of persons who were merely in the country temporarily are not subject to the full and complete jurisdiction of the United States because their presence (and that of the child) only created an inherently “temporary and local allegiance,” *The Schooner Exch.*, 11 U.S. at 144, and not the permanent “direct and immediate allegiance” required by the Clause, *Elk*, 112 U.S. at 102.

C. Third, given that the Citizenship Clause expressly contemplates that persons eligible for birth-right citizenship “reside” in a state, in what rational sense does a child who is born to a foreign mother during, for example, a “birth tourism” visit to the United States *reside* in the state wherein the child was born?²

1. “Reside” meant the same thing in 1868 as it means today: the place where one lives and makes his home, where he is “domiciled.” As Justice Story

² Because state citizenship explicitly turns on residence and not just place of birth, it is flatly untrue that the United States uniformly applied English principles of *jus soli* without qualification. *Contra, e.g.*, Ho, *supra*, at 369; Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L. REV. 405, 472 (2020). After the passage of the Fourteenth Amendment, if residents of New York went on vacation in Florida and had a child there, the child would undeniably be a citizen of New York, not Florida. Likewise, if a couple from England vacationed in Florida and had a child there, the child would not be a citizen of Florida because neither he nor his parents “reside” there. The Framers of the Fourteenth Amendment did not understand citizenship to depend on residence for state citizenship but not for national citizenship.

explained, “[b]y ‘residence,’ in the constitution, is to be understood . . . such an inhabitancy, as includes a *permanent domicil* in the United States.” STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, § 1473 (emphasis added).

In turn, “the domicil of a person[] [is] where he has his true, fixed, and permanent home . . . and to which, whenever he is absent, he has the intention of returning.” STORY, COMMENTARIES ON THE CONFLICT OF LAWS, *supra*, § 41; *Martinez v. Bynum*, 461 U.S. 321, 330–31 (1983) (same). And as this Court held early on, under the law of nations “a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, . . . so fixed that, as to all other nations, he follows the character of the country, in war as well as in peace.” *The Pizarro*, 15 U.S. 227, 246 (1817) (Story, J.); *see, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) ([A]liens residing in a country, with the intention of making it a permanent place of abode, acquire . . . a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations.”).

A newborn child, of course, is “legally incapable of forming the requisite intent to establish a domicile,” and so the child’s “domicile is determined by that of [its] parents.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *see, e.g., Lamar v. Micou*, 112 U.S. 452, 470 (1884) (same); STORY, COMMENTARIES ON THE CONFLICT OF LAWS, *supra*, § 46 (same). Accordingly, the international law principle that persons “are generally deemed to be citizens and

subjects of [their birth] country,” was subject to the “reasonable qualification,” as Story put it, “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,” although such a qualification was not “universally established.” STORY, COMMENTARIES ON THE CONFLICT OF LAWS, *supra*, § 48; *see* EMMERICH DE VATTTEL, THE LAW OF NATIONS § 212, at 101 (1797 ed.) (same).

It was thus well settled both before and after the Civil War that a person who makes the United States his domicile becomes a kind of quasi-citizen, *subject to the jurisdiction* of the United States in the same way as a citizen. Secretary of State Marcy, in the celebrated Koszta Affair in 1853, put the point well in explaining the United States’s intervention with Austria on behalf of a Hungarian who was domiciled in the United States but not yet naturalized:

This right to protect persons having a domicile, though not nativeborn or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as nativeborn 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. His property is in the same way, and to the same extent, as theirs, liable to contribute to the support of the government.

In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable.”

Kosztla Case, 2 Whart. Int. Law Dig. § 198; see *Fong Yue Ting*, 149 U.S. at 724; *id.* at 735 (Brewer, J. dissenting). A child born to a person domiciled in the United States is thus “subject to the jurisdiction thereof” and is entitled to United States citizenship at birth.

2. It was equally well settled by the time of the Fourteenth Amendment that the enduring bonds of allegiance owed by “those who have become domiciled in a country . . . entitle[them] to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in, it” *Fong Yue Ting*, 149 U.S. at 734 (Brewer, J. dissenting); accord *The Venus*, 12 U.S. 253, 278 (1814) (“The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode.”).

To be sure, foreigners who lawfully visit the United States on “business or caprice” owe the country, in Chief Justice Marshall’s words, a “temporary and local allegiance,” which renders them “amenable to the laws” of the country and thus to the “ordinary jurisdiction of the judicial tribunals.” *The Schooner Exchange*, 11 U.S. at 144, 146. But obedience to our laws is all that such temporary visitors owe the United States. They do not owe it unqualified permanent allegiance, unlike those who have made the United States their permanent domicile and have thus joined the American body politic. Instead, they

continue to owe their home countries their unqualified permanent allegiance.

Elk adopted this interpretation of the Citizenship Clause, holding that “the evident meaning of [‘subject to the jurisdiction thereof’] is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely subject* to their *political* jurisdiction and owing them direct and immediate allegiance.” 112 U.S. at 102 (emphases added). And a person is “completely subject to [the United States’s] political jurisdiction” if he “has severed his . . . relation to [his home country], and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a *bona fide* resident [there]of.” *Id.* at 98, 102. The Court was unanimous in this reading of the Citizenship Clause. *See id.* at 121–22 (Harlan, J. dissenting).

3. Finally, although there were generally no laws at the time of the Fourteenth Amendment limiting immigration of foreigners into the United States (the first such law was the Chinese Exclusion Act of 1882), it was nonetheless uniformly understood by both courts and scholars that citizenship by birth required not only *permanent* residence in the United States but *lawful* permanent residence. “[N]o one can become a citizen of a nation without its consent.” *Id.* at 103. This principle is inherent in sovereignty. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions”); *accord Ping v. United States*, 130 U.S. 581, 609–10 (1889). It

follows that the United States can “preclude[] alien[s] from establishing domicile in the United States,” *Toll v. Moreno*, 458 U.S. 1, 14 (1982), and it has done just that with respect to aliens whose very presence in the country has been prohibited. For this reason, *Elk* described only “*bona fide* residents” as possessing the requisite relationship. 112 U.S. at 111.

After all, the very idea of a domicile requires the consent of both alien and sovereign to a reciprocal relationship—lawful permanent allegiance from the person seeking to establish domicile in return for the sovereign’s full and permanent protection. See Ilan Wurman, *Jurisdiction and Citizenship* at 42–48 (MINN. L. STUD. RSCH. PAPER, No. 25-27, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216249; see generally Peter H. Schuck & Rogers M. Smith, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); cf. *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813) (Kent, J). And a person who has entered or remained in the United States illegally is not entitled to *any* of the benefits granted to lawfully admitted aliens, let alone the full sovereign protection that attends such lawful domicile. See, e.g., ROBERT PHILLIMORE, THE LAW OF DOMICIL 63 (T. & J. W. Johnson 1847) (explaining that a person cannot establish domicile in a place from which he has been exiled).

In accord with these principles, the Court has long recognized that to “reside permanently” in the United States, an alien must have “‘legally landed’ ” here. *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (quoting *Zartarian v. Billings*, 204 U.S. 170, 175 (1907)). Thus, a person who is not eligible to be admitted to the United

States, is detained at the border, and then paroled into the country while awaiting deportation, “never has entered the United States within the meaning of the law,” *id.* at 231, and thus “never has begun to reside permanently in the United States,” *id.* at 230. See, e.g., *Gonzales v. Holder*, 771 F.3d 238, 244–45 (5th Cir. 2014); see also *Park v. Barr*, 946 F.3d 1096, 1099–100 (9th Cir. 2020) (*per curiam*).

Although illegal aliens are bound like anyone else on American soil to comply with our laws, their very presence here is in intentional defiance of them. They cannot legally “reside” in any state and thus can owe no genuine allegiance to the United States, much less an enduring “direct and immediate allegiance.” In short, only aliens who have been permitted to make the United States their domicile can be “subject to the jurisdiction thereof.”

D. Other provisions of the Fourteenth Amendment confirm this understanding. The Equal Protection Clause, for instance, invokes the regulatory jurisdiction of each state by using the territorial phrase “within its jurisdiction.” U.S. Const. amend. XIV, § 1 (“nor deny to any person within its jurisdiction the equal protection of the laws”). Although both clauses use the word “jurisdiction,” their textual difference explains the difference in meaning. When the Framers simply meant regulatory power to enact and enforce the laws on American soil, they used the term “within,” which carries a spatial or territorial connotation, not the phrase “subject to.” Thus, members of Indian tribes are entitled to the equal protection of the laws, *United States v. Antelope*, 430 U.S. 641, 647–49

(1977), even though they are not constitutionally entitled to citizenship at birth, *Elk*, 112 U.S. at 102.

II. The History of the Citizenship Clause

The history of the Fourteenth Amendment confirms that the Framers of the Citizenship Clause in the 39th Congress intended to guarantee birthright citizenship only to American-born persons whose parents permanently and lawfully reside in the United States.

A. The history of the Fourteenth Amendment is inextricably bound up with that of Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which was debated in and passed by the 39th Congress just two months before it adopted the Fourteenth Amendment. The 1866 Act guaranteed the newly freed slaves property rights, contract rights, access to courts, and equal treatment under the law. Most importantly here, it contained a citizenship provision establishing 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,” without distinction of color. *Id.* § 1 (emphasis added). But the constitutionality of the Act was debatable (as even its proponents acknowledged), and because it was ordinary legislation, it could be repealed by a future Congress. *See McDonald v. City of Chicago*, 561 U.S. 742, 775 & n.24 (2010) (plurality op.). Congress thus proposed and the states ratified the Fourteenth Amendment. Given this history, “it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.” *Id.* at 775.

The citizenship provision of the 1866 Act explicitly excludes from birthright citizenship American-born persons “subject to any foreign power.” That phrase, on its face, precluded the birthright citizenship of children of temporary foreign visitors and illegal aliens because the child’s foreign parents would continue to owe their permanent and dominant allegiance to their home country, where they (and therefore their child) were permanently domiciled citizens. *See The Pizarro*, 15 U.S. at 246 (Story, J.); *The Venus*, 12 U.S. at 278. The Act’s legislative history confirms this understanding.

The citizenship provision of the 1866 Act was authored and introduced by Illinois Senator Lyman Trumbull, who announced in his opening remarks that “the meaning of the provision . . . is 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). He admitted to his colleagues, however, that “[t]here is a difficulty in framing the [statute] so as to make citizens of all the people born in the United States and who owe allegiance to it.” *Id.* Trumbull explained that he initially thought the provision should state that “ ‘all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;’ but upon investigation it was found that *a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens*, and that that form would not answer.” *Id.* (emphasis added).

Trumbull was plainly referring to the principle that foreigners sojourning in this country owe it a “temporary and local allegiance” rendering them

“amenable to the laws” and “the ordinary jurisdiction of the judicial tribunals” of the United States. *The Schooner Exchange*, 11 U.S. at 144, 146. But the important point is that the Act was not intended to extend birthright citizenship to a child born to foreign parents while temporarily visiting the United States, and the words “not subject to any foreign power” were chosen to make that clear. To the contrary, it was intended to *affirmatively exclude* such children from birthright citizenship. This understanding of the provision’s meaning was not at all controversial: no one, proponent or opponent, objected to Trumbull’s description of the provision’s intended scope nor expressed the view that an American-born child of foreign visitors should be an American citizen at birth. Indeed, when Chairman of the House Judiciary Committee James Wilson introduced the bill in the House, he explained “that every person born in the United States is a natural-born citizen of such States, except . . . children born on our soil to *temporary sojourners* or representatives of foreign Governments.” CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (emphasis added).

What *was* controversial was the effect of the citizenship provision on Native Americans, and the meaning of the words “excluding Indians not taxed” was the dominant focus of debate. There was general agreement among the Senators that Indians “who yet . . . belong to the Indian tribes” owed their allegiance primarily to the tribe and thus were excluded from birthright citizenship under the Act. *See* CONG. GLOBE, 39th Cong., 1st Sess. 571–74 (1866). Assimilated Indians, however, “who are no longer connected with their tribes” and are residing and “earning a

livelihood in the white settlements”—that is, Indians who joined the American body politic—would be within the Act’s scope. *Id.* at 572. As Trumbull explained, tribal Indians were “[c]onsidered virtually as foreigners” who “belonged to a foreign Government” and therefore were “not regarded as part of our people” and were “not counted in our enumeration of the people of the United States.” *Id.* But “[w]henver they are separated from those tribes, and come within the jurisdiction of the United States so as to be counted, they are citizens of the United States.” *Id.*

In response to the question why an “Indian not taxed” is excluded from citizenship when an American-born “white man or a negro [can] be a citizen without being taxed,” Trumbull made clear that the Act’s disqualification from birthright citizenship of persons subject to a foreign power applies to *everyone*: “If a negro or a white man belonged to a foreign government he would not be a citizen; we do not propose that he should be. *Id.*; see *id.* at 573 (“[A]ll black persons born in the United States, who are not subject to any foreign Power, would become citizens by virtue of birth” under the Act.) (Sen. Johnson).

Consistent with his statement about those temporarily in the United States, Trumbull stated in a letter to President Andrew Johnson that the Act declared citizens those “born of parents *domiciled* in the United States, except untaxed Indians.” Letter from Sen. Lyman Trumbull to President Andrew Johnson (in Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress) (emphasis added).

B. The debate over the 1866 Act was still fresh in the minds of the members of the 39th Congress in May

1866, when the Fourteenth Amendment was taken up in the Senate. The version of the Fourteenth Amendment passed by the House did not contain a citizenship provision, and Michigan Senator Jacob Howard moved to add the Citizenship Clause to Section 1. The language he proposed differed from that of the citizenship provision in the freshly passed Civil Rights Act: the phrase “not subject to any foreign power, excluding Indians not taxed,” was replaced with the phrase “subject to the jurisdiction thereof.”

It is clear from the debate over the proposed clause, however, that the change in language was not intended to change the scope of birthright citizenship established under the Civil Rights Act. Rather, the Citizenship Clause simply states in positive terms (“subject to the jurisdiction thereof”) what the Act stated in negative terms (“not subject to any foreign power”). Trumbull accordingly emphasized to his colleagues that while the language of the proposed clause differed from that of the Act, “[*t*]he object to be arrived at is the same.” CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (emphasis added). And the Clause’s leading proponents emphasized that the Clause drew a sharp distinction between the citizenship status of “Indian[s] belonging to tribe[s],” which the United States had “always regarded . . . as foreign Powers,” *id.*, at 2895, and Indians who had left their tribal reservations and had domiciled and assimilated in the American body politic. The distinction was based on *allegiance*.

Noting that the Senators had previously “so fully discussed [citizenship] in this body as not to need any further elucidation,” Senator Howard stated that his

proposed addition to Section 1 “is simply declaratory of what I regard as the law of the land already,” i.e., the 1866 Act’s citizenship provision. *Id.*, at 2890. He then emphasized that the proposed clause “will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.” *Id.*

Some commentators have argued that Howard meant by this statement that only persons who are born into the families of foreign ambassadors or ministers while posted here are not included in the clause, as though he had said that the clause *will include* “persons born in the United States who are foreigners, aliens, *except* those who belong to the families of ambassadors or foreign ministers.” *Id.* (emphasis added); *see, e.g.*, Ramsey, *supra*, at 448; Ho, *supra*, at 370. This is not a remotely plausible interpretation of Howard’s statement given that the ink was not yet dry on the 1866 Act’s express exclusion from birthright citizenship of American-born persons “subject to any foreign power.” Such an abrupt and dramatic reversal of so fundamental a policy would surely have required explanation, ignited fierce debate, and undoubtedly been roundly rejected. But even assuming that such a reading of Howard’s statement could reasonably be offered, the rest of his extensive remarks in the debate leave no doubt that his reference to American-born “foreigners, aliens” was intended to identify a class of American-born persons distinct from, and excluded from birthright citizenship in addition to, those born into “families of ambassadors or foreign ministers.”

The debate over the proposed Citizenship Clause turned immediately to the citizenship rights of American Indians, when Wisconsin Senator James Doolittle moved to amend the clause by adding the phrase “excluding Indians not taxed.” CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). He asked, “[w]hat does it mean when you say that a people are subject to the jurisdiction of the United States?” *Id.* at 2896. He complained that “[a]ll the Indians upon reservations within the several states are most clearly subject to our jurisdiction, both civil and military,” and that the clause, as framed, would thus confer on all Indians “the rights, the responsibilities, the duties, the immunities, the privileges of citizenship.” *Id.* at 2892–93. Senator Hendricks shared this concern, adding that “[i]f the Indian is bound to obey the law he is subject to the jurisdiction of the country.” *Id.* at 2894. Both Senators emphasized that the text of the Civil Rights Act (as well as Section 2 of the proposed Fourteenth Amendment) used the words “excluding Indians not taxed,” and they asked “[w]hy not insert them in this constitutional amendment” to avoid any ambiguity. *Id.* at 2896 (Sen. Doolittle); *see id.* at 2895 (Sen. Hendricks); *id.* at 2894 (Sen. Johnson).

Senator Trumbull, author of the 1866 Act’s citizenship provision, answered first. He admitted that he had included the phrase “excluding Indians not taxed” in the Act, but had since become concerned that “mak[ing] a distinction . . . on the ground of taxation” was “objectionable . . . because it would make of a wealthy Indian a citizen and would not make a citizen of one not possessed of wealth under the same circumstances.” *Id.* at 2894. As he further explained: “I am not willing, if the Senator from Wisconsin is, that the

rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen.” *Id.*

Senator Howard added that the language “excluding Indians not taxed” would effectively grant the states a de facto naturalization power because states controlled who was taxed. *Id.* at 2895. Trumbull and Howard had therefore come to believe that the “language proposed in the constitutional amendment is better than the language of the civil rights bill. *The object to be arrived at is the same.*” *Id.* at 2894 (Sen. Trumbull) (emphasis added).

As to the meaning of “subject to the jurisdiction” of the United States, Senator Howard spoke first: “Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations.” *Id.* at 2890.

Senator Trumbull followed, arguing that the new language “means ‘subject to the *complete* jurisdiction thereof.’ . . . What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing *allegiance* to anybody else. That is what it means.” *Id.* at 2893 (emphasis added). And tribal Indians on reservations are not “in any sense subject to the *complete* jurisdiction of the United States.” *Id.* (emphasis added). To further clarify, he added: “It cannot be said of any Indian who *owes allegiance*, partial allegiance if you please, to some other Government that he is ‘subject to the jurisdiction of the United States.’ . . . It is only those persons who come *completely* within our jurisdiction,

who are subject to our laws, that we think of making citizens.” *Id.* (emphasis added).³ Later in the debate, Trumbull reiterated that tribal Indians “are not subject to our jurisdiction in the sense of owing allegiance solely to the United States.” *Id.* at 2894.

Senator Howard then reiterated Trumbull’s argument, again noting that “The Government of the United States have always regarded and treated the Indian tribes within our limits as foreign Powers”:

I concur entirely with [Senator Trumbull] in holding that the word “jurisdiction,” as here employed, ought to be construed so as to imply a *full and complete* jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every

³At least one respected commentator has seized on Trumbull’s reference in this passage to those “who are subject to our laws” as supporting the regulatory jurisdiction interpretation of the Citizenship Clause. See Ho, *supra*, at 373; see also Ramsey, *supra*, at 449–50. In light of Trumbull’s authorship of the 1866 Act’s exclusion from birthright citizenship of persons “subject to any foreign power,” and his comments during the debates on that provision and on the Citizenship Clause, as discussed in text, the notion that Trumbull supported the regulatory jurisdiction interpretation of the Clause is untenable. His full and complete comments in the debates make clear that his reference to “those persons who come completely within our jurisdiction” meant those who have chosen our country as their permanent domicile and thus have become *permanently* subject to *all* our laws.

citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within a limits of a state, is subject to this full and complete jurisdiction.”

Id. at 2895 (emphasis added); *see id.* at 2893 (Sen. Johnson) (“[A]ll 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 as citizens of the United States.”); *id.* at 2897 (Sen. Williams) (“I understand the words here, ‘subject to the jurisdiction of the United States,’ to mean fully and completely subject to the jurisdiction of the United States.”).⁴

⁴ An exchange in the Senate debate over the citizenship status of the children of Chinese and “Gypsy” *immigrants permanently residing* in the United States is similarly revealing. Senator Edgar Cowan of Pennsylvania, in a virulently racist speech, opposed the Citizenship Clause because he worried that it would prohibit Pennsylvania from removing immigrant Gypsies from its territory and would cause California to be “overrun by a flood of immigration” of Chinese laborers. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866). California Senator Conness, a leading supporter of the proposed Citizenship Clause, acknowledged that the clause would make no distinctions based on race, and thus the American-born children of Chinese immigrants domiciled in California would not be excluded from birthright citizenship based on their race. *Id.* at 2891–92. And he made clear that, just as the Civil Rights Act had “declared” that “children begotten of Chinese parents in California . . . shall be citizens,” he supported the Citizenship Clause’s “incorporat[ion of] the same provision in the fundamental instrument of the nation.” *Id.* at 2891. This exchange shows that the race of domiciled immigrants would play no role in birthright citizenship under the

Almost as revealing as what was said by the drafters and leading proponents of the proposed clause is what was not said—by anyone. No one who spoke in the Senate debate suggested that American-born children of visiting foreigners would, or should, become American citizens at birth.

The congressional history of the Citizenship Clause thus confirms, as renowned jurist and constitutional scholar Thomas Cooley put it, that the words “subject to the jurisdiction thereof, . . . meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.” Cooley, *supra*, at 243. Accordingly, “when any individual [Indian] withdraws [from his tribe] and makes himself a member of the civilized community, adopting the habits of its people and subjecting himself fully to the jurisdiction,” his children are no less citizens than those of “any other native-born inhabitant.” *Id.* And if the children of Indians “belong[ing] to their tribes” were not entitled to citizenship at birth under the clause, it follows “a fortiori [that] the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians.” 1 WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 237 n. 1 (4th ed. 1895).

The Ninth Circuit cast aside the 1866 Act as irrelevant because its citizenship language was not “ultimately adopted in the text of the Fourteenth

Fourteenth Amendment, but it does not show that anyone understood sojourners or illegal aliens would be so entitled.

Amendment.” *Washington v. Trump*, 145 F.4th 1013, 1033 (9th Cir. 2025); *cf. also Doe v. Trump*, 157 F.4th 36, 68, 75 (1st Cir. 2025). But Congress reauthorized the 1866 Act in 1870 without changing its language. Civil Rights Act of 1870, ch. 114, § 18, 16 Stat. 140, 144. The Ninth Circuit thus came to the wholly untenable conclusion that the 39th Congress impliedly invalidated the Act’s citizenship provision and then immediately reenacted the same unconstitutional statute. To the contrary, the clause was intended to constitutionalize the *same* scope of birthright citizenship established in the 1866, not to render *unconstitutional* the Act’s facial exclusion from birthright citizenship of children born to temporary foreign visitors.

The short of it is this: “The [1866] act was passed and the amendment proposed by the same congress, and it is not open to reasonable doubt that the words ‘subject to the jurisdiction thereof’ in the amendment, were used as synonymous with the words ‘and not subject to any foreign power,’ of the act.” *Wong Kim Ark*, 169 U.S. at 721 (Fuller, C. J., joined by Harlan, J., dissenting).

III. This Court’s Precedent Interpreting the Citizenship Clause

This Court’s interpretation of the Citizenship Clause in *Elk* confirms what the Clause’s text and history make clear: the Clause requires a newborn to be “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to the[] political jurisdiction, and owing the [United States] direct and immediate allegiance.” 112 U.S. at 102. Thus, because the plaintiff, John Elk, was born on a reservation to tribal Indians, he did not have

a valid claim to citizenship by birth alone. Despite being “within the territorial limits of the United States,” the Indian tribes “were alien nations” whose members “owed immediate allegiance to the several tribes, and were not part of the people of the United States.” *Id.* at 99. Accordingly, even though Elk had “voluntarily separat[ed] himself from his tribe and tak[en] up his residence” in the body politic, he was born “owing immediate allegiance” to the tribe and thus was not entitled to birthright citizenship under the Fourteenth Amendment. *Id.* at 99, 102. *Elk* is a binding precedent of the Court, and it is squarely on point.

Though commonly misunderstood, the holding in the *Wong Kim Ark* case is not to the contrary. Indeed, *Wong Kim Ark* had nothing to do with the children of illegal aliens or aliens lawfully but temporarily admitted to the country. The plaintiff in *Wong Kim Ark* was born and raised in California by Chinese parents who “had established and enjoyed a permanent domicile and residence” in the United States,” 169 U.S. at 651, and thus enjoyed a “more distinct and larger measure of [sovereign] protection than those who are simply passing through,” *Fong Yue Ting*, 149 U.S. at 734 (Brewer, J. dissenting). Upon returning from a temporary visit to China, he was denied reentry under the Chinese Exclusion Act, which barred aliens “of the Chinese race . . . from coming into the United States.” *Wong Kim Ark*, 169 U.S. at 653. The Court held that he was a natural-born United States citizen and therefore not subject to exclusion under the Act. The Court was especially careful to frame the “single question” presented, which it repeated verbatim *twice* in the opinion, as follows:

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

Id. at 653, 705 (emphasis added).

The Court held that this “question must be answered in the affirmative.” *Id.* at 705. As the Court explained, “[t]he amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, *domiciled* within the United States.” *Id.* at 693 (emphasis added); *see id.* (“Every citizen or subject of another country, while *domiciled here*, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.”) (emphasis added).

The holding of the case was thus confined, by its own terms, to the birthright citizenship of children born to parents *lawfully domiciled* in the United States. And it was the plaintiff’s own lawful permanent domicile in the United States, inherited from his parents, that gave rise to the duty of allegiance that he owed to the country where he was born and where he was raised by his parents.

To be sure, the Court majority opined at length, in dicta, that our Nation’s Founders adopted the English feudal principle of *jus soli*, under which “every person

born within the dominions of the crown, no matter whether of English or of foreign parents, and ... whether the parents were settled, or merely temporarily sojourning ... was an English subject” *Id.* at 657 (quoting Cockburn Nat. 7). Accordingly, “before the enactment of the civil rights act of 1866 ... all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, ... were native-born citizens of the United States.” *Id.* at 674–75.⁵

But the Court’s dictum is not binding and, more fundamentally, is wrong. Chief Justice Fuller, in a dissenting opinion joined by Justice Harlan, thoroughly and convincingly refuted the facially implausible idea that, “in the matter of nationality [the Framers of the Constitution in 1789] intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.” *Id.* at 709. To the contrary, “when the sovereignty of the crown was thrown off, and an independent government was established, every rule of the common law ... in derogation of the principles on which the new government was founded, was abrogated.” *Id.*

After a careful and objective analysis of the text and history of the Citizenship Clause, the dissenting

⁵ The majority recognized four “exceptions” to the doctrine: “children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.” *Wong Kim-Ark*, 169 U.S. at 693. The “additional exception” was not derived from *jus soli*, but rather was contrived by the majority to navigate around the congressional history of the Citizenship Clause.

Justices concluded that “no such [common-law] rule obtained during the [pre-1866] period referred to . . . ; that the act of April 9, 1866, expressed the contrary rule; that the fourteenth amendment prescribed the same rule as the act; and that, if that amendment bears the construction now put upon it, it imposed the English common-law rule on this country for the first time” *Id.* at 707.

Even after *Wong Kim Ark*, eminent authorities, such as Henry Campbell Black and retired Supreme Court Justice Samuel Miller, continued to express the complete-jurisdiction view. *See* HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 634 (3d ed. 1910) (3d ed. 1910) (“This jurisdiction ‘must at the time be both actual and exclusive.’ . . . So if a stranger or traveler passing through the country, or temporarily residing here, but who has not himself been naturalized and who claims to owe no allegiance to our government, has a child born here, who goes out of the country with his father, such child is not a citizen of the United States, because he was not subject to its jurisdiction.”); Samuel Freeman Miller, *Naturalization and Citizenship*, in *Lectures on the Constitution of the United States* 275, 279 (J. C. Bancroft Davis ed., 1893) (same); *See, e.g.*, Hannis Taylor, *A TREATISE ON INTERNATIONAL PUBLIC LAW* 220 (1901); HENRY BRANNON, *A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 25 (W. H. Anderson & Co. 1901).

CONCLUSION

Text, structure, congressional history, binding precedent, and common sense all point in the same

direction. The Citizenship Clause applies only to those who have been allowed to adopt our country as their permanent and lawful home. This Court should reverse.

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Respectfully submitted,

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