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 SCHOLARS OF CONSTITUTIONAL LAW AND IMMIGRATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose research focuses on constitutional law and immigration. *Amici* have an interest in ensuring that the Fourteenth Amendment is interpreted in a manner consistent with its text and history.

A list of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In clear and sweeping language, the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, cl. 1. This Clause was written to establish a rule under which citizenship depended on birth, rather than "parentage." Cong. Globe, 39th Cong., 1st Sess. 2891 (1866) (Sen. Conness). In adopting this rule, the Clause's Framers sought to embed a concept of national citizenship into the Constitution and provide a clear and easily administrable rule for determining who was a citizen, "settl[ing] the great question of citizenship" and placing it beyond the reach of anyone who "would pull the whole system up by the roots and destroy it." *Id.* at 2890, 2896 (Sen. Howard).

Despite this constitutional guarantee, Petitioners argue that an executive order purporting to limit birthright citizenship to children who have at least one

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

parent who is a citizen or is lawfully admitted for permanent residence, Exec. Order No. 14160, 90 Fed. Reg. 8449, § 1 (Jan. 20, 2025) ("Order"), is constitutional because the Citizenship Clause uses the word "jurisdiction" to refer to "political jurisdiction" and therefore requires "primary allegiance" to the United States. Pet'rs Br. 11-12. Children of "illegal aliens" and those who are "temporarily present," they argue, lack this allegiance because, in their view, their parents cannot establish domicile in the country. *Id.* at 21-32.

To make this argument, Petitioners rely primarily on isolated statements that, when read in full and in context, do not support the crabbed understanding of the Amendment's broad language that they advance. *See infra* at 7, 13 n.3, 16 n.4, 17, 20-22, 24-26, 27-28. Petitioners rely on these out-of-context quotations to support their focus on domicile and "political jurisdiction" while neglecting what the Framers and ratifiers of the Citizenship Clause said.

The *actual* history of the Citizenship Clause tells a different story. The Clause was drafted and ratified after the passage of the Civil Rights Act of 1866 (CRA), Pub. L. No. 39-26, 14 Stat. 27, which was enacted to confer American citizenship "by birth alone," rather than making it dependent on "the laws of the State in which [a person] is born," Cong. Globe, 39th Cong., 1st Sess. 1776 (1866) (Sen. Johnson); *see id.* at 600 (Sen. Trumbull) (describing the desire to ensure that "every free-born person in this land is, by virtue of being born here, a citizen of the United States").

Two months later, Congress drafted the Fourteenth Amendment, "evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress." *United States v. Wong Kim Ark*, 169 U.S. 649, 675

(1898). In drafting that Clause, its Framers used the phrase "subject to the jurisdiction thereof," a phrase that, at the time of the Amendment's drafting and ratification, simply meant "subject to the authority of the U.S. government." James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 Green Bag 367, 368 (2006); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 437-38 (2020); *see also, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2893-95 (1866) (equating "jurisdiction" with "authority" and "power" in conversations about the Clause).

This standard definition of "jurisdiction" called upon a common-law tradition of birthright citizenship in which anyone who was born within a sovereign's territory and was subject to its jurisdiction—that is, owed it "obedience"—was entitled to citizenship. *See Lynch v. Clarke*, 1 Sand. Ch. 583, 670 (N.Y. Ch. 1844) (quoting *Inglis v. Trs. of Sailor's Snug Harbor*, 28 U.S. 99, 164 (1830) (Story, J., dissenting)). The only children who did not receive birthright citizenship were those who, despite being born on U.S. soil, were seen as largely exempt from the application or enforcement of U.S. law. Under the common law, birthright citizenship did not attach to the children of foreign ambassadors, foreign ministers, and hostile occupying forces, as well as the children born into Indian tribes, who were viewed as members of distinct political communities. *See* Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 Harv. J.L. & Pub. Pol'y 459, 467-69 (2026).

The Fourteenth Amendment's Framers thus deliberately used broad language to enshrine in the Constitution a citizenship regime based on birth, not parentage. Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).

And while Members of the 39th Congress debated whether the Amendment *should* guarantee citizenship to the children of noncitizen parents—even those they viewed as "trespassers" and temporary residents, *id.* at 2891 (Sen. Cowan)—those members assumed that it did exactly that, *see id.* at 2890-91.

In short, Petitioners' reading of the Citizenship Clause, which makes citizenship dependent on parentage and sows "doubt as to what persons are or are not citizens of the United States," Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (Sen. Howard), would be completely unrecognizable to the Americans who drafted and ratified it. This Court should reject it.

ARGUMENT

I. The Fourteenth Amendment's Framers Used Clear Language that Called Upon the Common Law and Guaranteed Birthright Citizenship to Children Born in the United States Without Regard to Their Parents' Immigration Status.

A. By extending citizenship to persons "subject to the jurisdiction" of the United States, the Clause sweeps broadly to include anyone who is generally "subject to the authority of the U.S. government." Ho, *supra*, at 368. According to contemporary dictionaries, "jurisdiction as applied to nations meant the '[p]ower of governing or legislating,' 'the power or right of exercising authority,' the 'limit within which power may be exercised,' or 'extent of power or authority.'" Ramsey, *supra*, at 437 (alteration in original) (quoting Noah Webster, *An American Dictionary of the English Language* 732 (Chauncy A. Goodrich & Noah Porter eds., Springfield G. & C. Merriam 1865)).

This understanding of "jurisdiction" accords with international law at the time of the Fourteenth

Amendment's drafting and ratification. *See id.* at 437-38 (according to Henry Wheaton, "[t]he leading U.S. international law writer of the pre-Civil War period," "'subject to the jurisdiction' of the United States meant under U.S. sovereign authority"). And under prevailing international law, "a nation's sovereign authority was closely linked to territory," meaning that persons within the United States were generally subject to its jurisdiction. *Id.* at 438. The few exceptions were "foreign rulers themselves and their property, foreign diplomats, and foreign military forces," all of whom were uniquely situated with respect to U.S. law because of the United States's international law obligations to non-U.S. sovereigns while they were within U.S. borders. *Id.* at 439 (citing *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 137-40 (1812)). Foreign travelers within the United States—authorized or not—remained "amenable to the jurisdiction" of the United States while within U.S. territory. *Schooner Exch.*, 11 U.S. at 144.

B. In tying citizenship to birth within the United States's jurisdiction, the Clause's drafters drew on a robust common-law tradition that assigned citizenship by birth, not parentage. This tradition originated in British common law, in which people born within the King's realm were considered natural-born subjects. *See* 1 William Blackstone*, Commentaries on the Laws of England* *366-75 (1791).

American courts followed this common-law tradition. Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 Yale J.L. & Humans. 73, 139 nn.353-54 (1997) (collecting cases); *Lynch*, 1 Sand. Ch. at 639 n.a. In *Lynch*, a New York court considered whether Julia Lynch, who was born in New York but raised in Ireland by her Irish parents, qualified as a natural-born citizen capable of owning real

property in New York. *Lynch*, 1 Sand. Ch. at 583. The Vice Chancellor's opinion recounted the common-law rule that "birth in this country[] does of itself constitute citizenship," *id.* at 663, and specifically rejected the argument that she should be denied citizenship because her parents had no "settled intention" of remaining in the country, *id.* at 638.

The opinion in *Lynch* was cited by commentators, members of Congress, and Supreme Court justices. 2 James Kent, *Commentaries on American Law* 36 n.b (6th ed. 1848) (describing the opinion as "learned"); *In re Look Tin Sing*, 21 F. 905, 909 (C.C.D. Cal. 1884) (Field, J.); *United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (Swayne, J.); *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1832, 1836 (1866) (Rep. Lawrence); Cong. Globe, 42d Cong., 1st Sess. 575 (1871) (Rep. Trumbull); Cong. Globe App., 40th Cong., 2d. Sess. 355 (1868) (Rep. Delano). Executive branch lawyers also relied on the case, in opinions that would prove influential for the 39th Congress. *See* 9 Op. Att'y Gen. 373, 374 (1859) (citing *Lynch* and concluding that birth in the United States conferred citizenship, at least for "free white person[s]"); 10 Op. Att'y Gen. 328, 329 (1862) (citing *Lynch* to conclude that a "child born in the United States of alien parents, who have never been naturalized, is, by the fact of birth a native-born citizen of the United States"); *see generally* 2 Francis Wharton, *Digest of the International Law of the United States* 394 (2d ed. 1887) (excerpting letter from Secretary of State Marcy). In one widely-circulated opinion, Attorney General Bates relied on *Lynch* to explain that at common law, the "accident of birth" gave rise to citizenship for African Americans. *See* 10 Op. Att'y Gen. 382, 395 (1862); *News From Washington*, N.Y. Times, Dec. 19, 1862 (describing the "great demand for copies" of Bates' opinion).

Notwithstanding all this, Petitioners argue for a different common-law rule, citing two authorities that allegedly undermine *Lynch*'s significance. *See* Pet'rs Br. 41. They misread both. First, *Ludlam v. Ludlam* addressed the citizenship of a child born in Peru to an American citizen father. The court held that the child was an American citizen, but also suggested that he might be "claim[ed]" as a citizen of Peru via birthright citizenship. *See* 31 Barb. 486, 503-04 (N.Y. Gen. Term. 1860). Indeed, the Court of Appeals cited *Lynch* for that very point when affirming on appeal. *Ludlam v. Ludlam*, 26 N.Y. 356, 376 (1863) ("[i]f we assume that the laws of Peru are similar to ours on the subject of citizenship, there is no doubt that Maximo Ludlam would be, in that country, regarded as a citizen").

The second, David Dudley Field's *Outlines of an International Code*, was not a compendium of existing law, but rather a proposed code that included "modifications and improvements" on that law, including several "changes" regarding citizenship. *See* 1 *Outlines of an International Code* iii, 129-30 (1872). Field's analysis of *Lynch* is particularly weak, given that he cites a New York lower court opinion but omits the resolution of that case by the state's court of last resort, which fully endorsed *Lynch*. *See* Resps. Br. 13; *see also* Herbert Whittaker Briggs, "David Dudley Field and the Codification of International Law," *in Institut de Droit International: Livre du Centenaire 1873-1973*, at 67, 70 (Inst. Int'l L. ed., 1975) ("Field constructed [the Code] to the satisfaction of his own high sense of rectitude, at times in complete disregard of the practice of States.").

II. The History of the Citizenship Clause Confirms that the Clause Guarantees Citizenship to Children Born in the United States, No Matter Their Parents' Immigration Status.

A. Civil Rights Act of 1866

Congress first affirmed the principle of citizenship by birth through the CRA. As originally written, the Act proclaimed that all persons of "African descent" in the United States were citizens. Cong. Globe, 39th Cong., 1st Sess. 474 (1866). The next day, Lyman Trumbull, Chair of the Senate Judiciary Committee and the bill's sponsor, withdrew this language and proposed an amendment stating that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared citizens of the United States." Cong. Globe, 39th Cong., 1st Sess. 527 (1866).

Senator Trumbull described his proposal as "declaratory of what the law now is" and sought to put it beyond question that "every free-born person in this land is, by virtue of being born here, a citizen of the United States." *Id.* at 600; *see id.* at 1115 (Sen. Wilson) (characterizing the provision as "merely declaratory of what the law now is"). Other Senators, though, understood the provision as an exercise of Congress's "positive and absolute power to change the law" by conferring American citizenship by "birth alone," rather than making it dependent on "the laws of the State in which [a person] is born." *Id.* at 1776 (Sen. Johnson); *see id.* at 528 (Sen. Davis) ("every state made its own citizens"). But all agreed that the CRA's citizenship provisions would make practically everyone citizens by "virtue of ... birth alone." *Id.* at 570 (Sen. Morrill); *see id.* ("birth by its inherent energy and force gives

citizenship"); *id.* at 600 (Sen. Trumbull) ("birth entitles a person to citizenship").

Debates followed a similar pattern in the House. Republican representatives emphasized that the proposal was not "the enunciation of any new principle," but rather "reiterat[ed]" and "acknowledg[ed]" an existing one, *id.* at 1152 (Rep. Thayer), i.e., that "every native shall be a citizen of the country on whose soil he is born," *id.* at 1266 (Rep Raymond); *see id.* at 1124 (Rep. Cook) ("I think this is the law now."); *id.* at 1291 (Rep. Bingham) (same). Democrats viewed the proposal as an intrusion into states' authority that could only be achieved by constitutional amendment. Nevertheless, all lawmakers agreed on who would be covered by the proposal. *See, e.g.*, *id.* at 1124 (Rep. Cook) (describing the application to people "subject to our laws").

Legislators recognized that this language would confer citizenship on children whose parents were temporarily present in the country. Senator Cowan, for example, objected to the provision because he feared that the children of foreigners would "overwhelm" the country "if they [we]re to be made citizens." *Id.* at 497-99. He asked whether the bill "will not have the effect of naturalizing the children of the Chinese and Gypsies born in this country," *id.* at 497-99—identifying populations that he, like many Americans, viewed as inherently temporary, *see Governor's Special Message*, Daily Alta California, Apr. 25, 1851 ("I am not aware that a single subject of the Chinese Empire ever acquired a residence or a domicil in any of the States of the Union ... their habits have been migratory ...."). Senator Trumbull responded to Cowan that it would, "[u]ndoubtedly." Cong. Globe, 39th Cong., 1st Sess. 498 (1866). The Senate passed Trumbull's proposal several days later. *Id.* at 607.

President Johnson shared this view of the Civil Rights Act—that was why he vetoed it. His veto message stated that the bill "comprehends the Chinese of the Pacific States" and "the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood." *Id.* at 1679. He rejected the bill because "[e]very individual of those races, born in the United States, is by the bill made a citizen of the United States." *Id.* Congress then overrode Johnson's veto. *See id.* at 1809 (Senate); *id.* at 1861 (House).

B. Drafting of the Citizenship Clause

Two months after the CRA's passage, Congress drafted the Fourteenth Amendment, so that such an "important a declaration of rights [would not] depend upon an ordinary act of legislation." *Wong Kim Ark*, 169 U.S. at 675.

The constitutional provision that would become the Fourteenth Amendment was drafted by the Joint Committee of Fifteen and introduced in and adopted by the House of Representatives without any citizenship language. When debate reached the Senate in May 1866, many lawmakers thought it wise to "fortify and make it very strong and clear" who qualified as a citizen, especially given the risk that the CRA could be repealed or misinterpreted. Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (Sen. Wade); *id.* at 2896 (Sen. Howard) (the Committee "desired to put this question of citizenship … beyond the legislative power of such gentlemen ... who would pull the whole system up by the roots and destroy it").

During the Senate's consideration of the Amendment, Senator Howard, a member of the Joint Committee and the Senate sponsor of the draft Amendment, proposed adding the language that would

ultimately be ratified as the Citizenship Clause. The proposal stemmed from Senator Howard's "consultation" with the Joint Committee and other "friends" of the Amendment. *See id.* at 2869. Because the Committee was drafting a constitutional amendment, rather than legislation, "it did not worry about the limits of congressional power under the Thirteenth Amendment" or the possibility of another presidential veto. *See* Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 Am. U. L. Rev. 331, 349 (2010); *see also id.* at 350 (describing the political outlook of the Joint Committee); *id.* at 352 (comparing the Citizenship Clause and the CRA and noting that the former "has different wording; it emerged from a different political situation; it was adopted under different procedures and had different authors, and it was approved by different voting bodies"). *But see* Pet'rs Br. 42 (castigating Respondents for "fail[ing] to reconcile their position" with Petitioners' reading of the CRA).

The Joint Committee thus traded the CRA's "foreign power" language for something more straightforward. As Howard explained, its proposal would declare "that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). This language would create a clear, easily administrable rule governing birthright citizenship, "settl[ing] the great question of citizenship and remov[ing] all doubt as to what persons are or are not citizens of the United States." *Id.*

When debating this proposal, Senators made clear that the "subject to the jurisdiction" language referred to the extent of sovereign authority over a person. *See id.* at 2893 (Sen. Johnson) ("subject to the authority of the United States"). The term "jurisdiction"

referenced the government's exercise of its ability to "extend our laws" and "compel obedience." *Id.* at 2894 (Sen. Hendricks); *id.* (Sen. Trumbull) ("extend the laws of the United States over ... and govern"); *id.* at 2895-96 (Sen. Howard) ("power [of U.S. courts] to punish"); *cf. id.* at 2765 (Sen. Howard) (a "citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws").

Accordingly, ambassadors and their children would be excluded from birthright citizenship because of their unique relationship to American authority. As Senator Williams put it, the "child of an embassador" was not "fully and completely subject to the jurisdiction of the United States"—the child could not fall into that category "until they [we]re brought, by proper process, within the reach of the power of the court." *Id.* at 2897; *id.* at 2890 (Sen. Howard) (the proposal would not "include persons born in the United States who are foreigners, aliens, who belong to the families of embassadors or foreign ministers accredited to the United States, but will include every other class of persons").[2]

But people who were subject to the ordinary operation of the law would receive birthright citizenship,

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[2] Petitioners' *amici* rely on Howard's reference to "aliens" in this quote, arguing that it "is best interpreted as endorsing a broad view of non-citizen exclusion" from birthright citizenship. Kirkwood Br. 8-9; *see* Epstein Br. 17. But if *amici* were right, *all* children of "aliens" would be excluded from birthright citizenship—a position that Petitioners disavow, *see* Pet'rs Br. 20 ("children of aliens with a 'permanent domicil and residence in the United States' likewise become citizens by birth here")—and Howard's reference to ambassadors would be "redundant." Ramsey, *supra*, at 448. It is far more natural to read Howard as simply referring to "foreigners [or] aliens who belong to the families of ambassadors or foreign ministers."

no matter who their parents were. Lawmakers distinguished the children of ambassadors and ministers from those of other foreigners, even "traveler[s]" in the country on a temporary basis. *Id.* at 2790 (Sen. Cowan). In an exchange about the Privileges or Immunities Clause, Senator Fessenden asked his colleagues to "[s]uppose a person is born here of parents from abroad temporarily in this country." *Id.* at 2769. Senator Wade responded that "the case of the children of foreign ministers" was the "one instance" in which "a person may be born here and not be a citizen," because they, "by fiction of law ... are not supposed to be residing here." *Id.*; *see id.* at 2890 (Sen. Cowan) (objecting that the "subject to the jurisdiction" language would apply "[i]f a traveler comes here from Ethiopia, from Australia, or from Great Britain" because "he is entitled, to a certain extent, to the protection of our laws").[3] Neither Fessenden nor any other Senator registered disagreement with Wade's characterization of the common law.

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[3] Petitioners characterize Fessenden's statement as an "object[ion]" to a proposal that would extend citizenship to "'persons born in the United States,' (without the requirement of being 'subject to the jurisdiction')." Pet'rs Br. 24. But they misunderstand entirely the significance of that exchange. The proposal in question was Senator Wade's suggestion that what would eventually become the Privileges or Immunities Clause (not the Citizenship Clause) should refer to "persons born in the United States or naturalized by the laws thereof," rather than to "citizen[s]." Cong. Globe, 39th Cong., 1st Sess. 2768 (1866). That his proposal was not accepted has nothing to do with the meaning of the Citizenship Clause, and Fessenden's reference to children of temporary visitors—together with Wade's reaction (which Petitioners omit entirely, *see* Petr's Br. 24)—only confirms that temporary visitors and their children were "part of the existing citizenship debate." Ramsey, *supra*, at 464.

Indeed, supporters and opponents alike assumed the proposal would include the children of foreigners in the country, however temporary or unauthorized their stay. Senator Cowan, for example, objected to giving citizenship "broadly" to "everybody who shall be born in the United States." *Id.* at 2891. He worried that the proposal would result in more people of Chinese descent in California and more "Gypsies" in his home state of Pennsylvania, whom he deprecated as "trespassers where ever they go," by granting birthright citizenship to their children. *Id.* "If the mere fact of being born in the country confers [citizenship]," he objected, "they will have it." *Id.*

The proposal's supporters did not take issue with Cowan's understanding of its reach and instead argued that it was sound policy. Senator Conness responded that he was "in favor" of making "the children begotten of Chinese parents … citizens." *Id.* For Conness, it did not matter that Chinese migrants were not necessarily living in the United States permanently, *see id.* (Chinese migrants "all return to their own country at some time or another"), because the Clause ensured citizenship for all "human beings born in the United States," *id.* at 2892. No one, including Senator Howard, who had proposed the language, registered disagreement. Ramsey, *supra*, at 448.

Instead, the debate predominantly focused on whether children born within American Indian tribes would be subject to the jurisdiction of the United States under the Clause, with some Senators supporting a specific provision excluding "Indians not taxed" from birthright citizenship. *See* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 Cardozo L. Rev. 1185, 1196-99 (2016). Prior to the Fourteenth Amendment's ratification, people born into a tribe generally

were not considered U.S. citizens, and the Fourteenth Amendment's Framers sought to maintain that status quo. *Id.* at 1201. The Senate rejected the "Indians not taxed" proposal, Cong. Globe, 39th Cong., 1st Sess. 2897 (1866), because Senators believed that the "subject to the jurisdiction" language would better ensure that "Indians in tribal relations [did] not involuntarily become citizens," Berger, *supra*, at 1198; Ramsey, *supra*, at 443-44; Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (Sen. Trumbull) (objecting to "uncertainty in regard to the meaning of ['Indians not taxed']"). These discussions say nothing about the Clause's application to the children of unauthorized or temporary visitors.

Soon after these debates, the Senate approved the Amendment with the Citizenship Clause. *Id.* at 3068; *see id.* at 3184 (passage in House).

C. Ratification of the Citizenship Clause

While the Clause's ratification history is "sparse," Ramsey, *supra*, at 448 n.206, it also supports reading the Clause to extend citizenship to virtually all children born in the country. The Amendment's proponents explained that it "declar[ed] that all persons born in the United States ... shall be citizens." *The Constitutional Amendment*, Chicago Tribune, Aug. 14, 1866, at 2; *see Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 col. 5 (Cincinnati Commercial ed., 1866) (reprinting speech of Schuyler Colfax, Aug. 7, 1866, stating that the Clause "declares that every person—every man, every woman, every child, born under our flag or nationalized under our laws, shall have a birthright in this land of ours"); *id.* at 23 col. 3 (speech of Hon. Columbus Delano, Aug. 28, 1866, stating that "all persons born or naturalized in the United States shall be citizens"). They were explicit that it would apply regardless of parentage. Hence, a "foundling ... at your doorstep"

who "may never know who gave him birth," was "just as much an American citizen as the Chief Magistrate of the nation." *Gov. Baker's Speech*, Evansville Daily J., Aug. 13, 1866, at 2.[4]

Commentators echoed these conclusions immediately after ratification. The Grant Administration, for example, concluded that even children of temporary visitors were born citizens under the Citizenship Clause because it "asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage." 2 Wharton, *supra*, at 394 (quoting Secretary of State Fish). Jurists agreed. *Look Tin Sing*, 21 F. at 910 ("It is enough that he was born here, whatever was the status of his parents"). Even those that opposed the policy took the same position. *See, e.g.*, Editorial, 5 Am. L. Rev. 779, 780 (1871) (explaining that the Citizenship Clause "makes the place of birth alone determine the duties of citizenship" and would "cover th[e] case" of a "child born of French or English parents temporarily travelling in America," but objecting that it "arbitrarily imposed" the duties of citizenship on the children of foreign visitors).

Members of Congress agreed. During their 1870 debates on whether to allow "natives of China" to naturalize, legislators presumed that the Fourteenth Amendment had already declared that the "children" of these migrants "would be citizens." Cong. Globe, 41st Cong., 2d Sess. 5151 (1870) (Sen. Stewart); *see id.*

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[4] Petitioners point to a lone newspaper article as "ratification-era evidence" purportedly supporting the position that the ratifying public understood the Clause not to apply to temporary sojourners, *see* Pet'rs Br. 24, but that article merely inaccurately paraphrased President Johnson's message vetoing the CRA before calling the veto a "betrayal of the national faith." *The Chicago Republican*, Mar. 30, 1866, at 4.

at 5173 (Sen. Stewart) (children of Chinese migrants are "treat[ed] just the same as anybody else" under the Fourteenth Amendment and could "certainly" vote); *id.* at 5159 (Sen. Schurz) ("Chinese children born upon the soil of this Republic will be American citizens *ipso facto* as well as other natives of the soil"), even as the belief that Chinese migrants had "not renounced their allegiance" to China and did "not profess to make this country their home" remained pervasive, *see, e.g.*, *id.* at 5152 (Sen. Stewart).

III. Petitioners' Arguments about the Text and History of the Clause Are Without Merit.

Petitioners half-heartedly attempt to use the Amendment's text and history to argue that the Citizenship Clause uses "subject to the jurisdiction thereof" to refer not to regulatory jurisdiction or authority, but instead to "political jurisdiction" or "primary allegiance"—statuses that, they say, are only available to the children of parents who can establish a "lawful permanent domicil and residence here." Petr's Br. 12. This is wrong.

A. To start, Petitioners' argument trades the well-established definition of the phrase "subject to the jurisdiction thereof" for a theory of "political jurisdiction" and "primary allegiance" that has no basis in the original meaning of that text. *See supra* Section I. Indeed, Petitioners point to just one reference to "primary allegiance" from the ratification era, Pet'rs Br. 23 (citing George Bancroft, *Oration* (Apr. 25, 1865)), and that reference was in a historian's funeral oration that addressed the relationship between enslaved people and the U.S. government. And when it came to citizenship, that same historian recognized that "every one who first saw the light on the American soil was a natural-born citizen." 9 George Bancroft, *History of the United*

States, from the Discovery of the American Continent 439 (1866).

Failing to make their case on the Clause's text, Petitioners next turn to history, but they ignore the Framers' repeated insistence that the Clause would make birth—not parentage—the measure of citizenship. If Petitioners were correct, legislators would have been wrong when they described how "birth by its inherent energy and force gives citizenship," Cong. Globe, 39th Cong., 1st Sess. 570 (1866) (Sen. Morrill), and wrong to repeatedly quote Attorney General Bates, *Lynch*, and other common-law authorities that established a child's right to citizenship by birth "without any regard to the political condition or allegiance of their parents," *id.* at 1832 (Rep. Lawrence) (referencing *Lynch*); *id.* at 1115-17 (Rep. Wilson) (citing "the English law," Blackstone, Rawle, Kent, and opinions of Bates and Marcy); *id.* at 2102-03 (Rep. Shellabarger) (quoting Bates, *Lynch*, Blackstone) *id.* at 41 (1865) (Rep. Wilson) (quoting Bates); Cong. Globe App., 42d Cong., 1st Sess. 257-59 (1871) (Rep. Holman) (citing Bates); *id.* at 151-52 (Rep. Garfield) (citing Bates, Kent).

Furthermore, under Petitioners' reading, the Framers would not have achieved their goal of "settl[ing] the great question of citizenship and remov[ing] all doubt as to what persons are or are not citizens of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (Sen. Howard). Instead, the question of citizenship would be left to complex individualized inquiries about domicile and intent. As the Framers well knew, basing citizenship on parentage required "remote and difficult" examinations of parental immigration status, *Lynch*, 1 Sand. Ch. at 658, and the law of domicile was an area of "varying and conflicting customs" that had yielded many "elaborate

commentaries" of law, 4 Robert Phillimore, *Commentaries Upon International Law* 37 (2d ed. 1874); *id.* at 152 (listing eleven factors "principally ... relied upon" as "criteria of domicil").

Moreover, Petitioners' reading fails to explain legislative exchanges about the application of the CRA and the Citizenship Clause to the children of foreigners—including "gypsies," who were specifically described as "invade[rs]" and "trespassers" in the United States, Cong. Globe, 39th Cong., 1st Sess. 2891 (1866) (Sen. Cowan); Magliocca Br. 7 (describing the prevailing view that "gypsies ... lacked a domicile"). These conversations confirmed that even U.S.-born infants in those populations would be "subject to the jurisdiction" of the United States. Moreover, there would have been no reason to repeatedly distinguish children born to diplomats, whose presence is necessarily temporary, if the Framers had in fact understood the Clause to deny citizenship to the children of *all* temporary immigrants.

Notably, if Petitioners were right, the citizenship of more than a dozen members of the 39th, 40th, and 41st Congresses could have been called into question, providing an opportunity to challenge their eligibility to serve. Tellingly, not a comment was made about the citizenship of these lawmakers, even by political opponents who had every motivation to do so. *See* Amanda Frost & Emily Eason, *The Dog that Didn't Bark: Eligibility to Serve in Congress and the Original Understanding of the Citizenship Clause*, 114 Geo. L.J. Online 69, 85-86 (2026).

Finally, Petitioners' argument is inconsistent with their own description of the Framers' plan for the Citizenship Clause, Pet'rs Br. 2 ("[t]he Citizenship Clause of the Fourteenth Amendment was adopted to grant citizenship to newly freed slaves and their children"),

because many formerly enslaved people were descended from parents who were present in the United States in violation of laws prohibiting migration and importation of Black people into the United States. *See* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. Davis L. Rev. 2215, 2250 (2021).

B. Petitioners also misread various references to "allegiance," "temporary sojourners," and "domicile" by members of the 39th Congress. Examining these references in context reveals how weak they are.

Allegiance. To be sure, lawmakers "recognized that citizenship requires allegiance," *see* Pet'rs Br. 17-18, but that is because under the common law, *birth* created allegiance. *See* Cong. Globe, 39th Cong., 1st sess. 1757 (1866) (Sen. Trumbull) ("every person born in these United States owes allegiance to the Government"); *id.* at 1152 (Rep. Thayer) ("It is a rule of universal law ... that they who are born upon the soil are the citizens of the State. They owe allegiance to the State …."); *id.* at 1262 (Rep. Broomall) ("What is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government?"); Cong. Globe, 35th Cong., 1st Sess. 210 (1858) (Rep. Bliss) ("Citizenship, as well as allegiance, is the incident of birth ...."); *cf. Lynch*, 1 Sand. Ch. at 670 (describing the principle of "[a]llegiance by birth" (quoting *Inglis*, 28 U.S. at 164 (Story, J., dissenting)); 2 Kent, *supra*, at 44.

Putting aside the fact that children who are born in the country owed it allegiance by virtue of their birth, Petitioners also discount the multiple layers of allegiance that existed at common law. Under the common law, a temporary visitor with allegiance to another country could *also* be subject to the jurisdiction

of, or owe allegiance to, the United States—and therefore be expected to obey its laws—while present in the country. *See* Whittington, *supra*, at 507 (describing the "conceptual error" of a "no foreign allegiance" rule). Even foreigners visiting the country owed it a "limited form [of] allegiance, one 'wrought by the law,' which required their obedience" during their presence in the country. *Id.* (quoting *Calvin v. Smith*, 77 Eng. Rep. 377, 383 (1608) (KB)); 2 Kent, *supra*, at 66 (describing the "local allegiance" owed by "aliens," who are "equally bound as natives to obey all general laws"); *Ludlam*, 26 N.Y. at 371, 376 (noting that a child born to temporary visitors may have "dual allegiance").[5]

Petitioners also misunderstand Representative Bingham's explanation that the CRA "extended citizenship to children born here 'of parents not owing allegiance to any foreign sovereignty.'" *See* Pet'rs Br. 17 (quoting Cong. Globe, 39th Cong., 1st Sess. 1291 (1866)). Bingham's reference to children of "parents not owing allegiance to any foreign sovereignty" likely referred to the common-law exceptions for children of

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[5] Several of Petitioners' *amici* misread a statement of Senator Trumbull's during debates about the CRA. There, Trumbull explained that he initially thought that Act 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." *See* Schmitt Br. 17 (citing Cong. Globe, 39th Cong., 1st Sess. 572 (1866)); Tennessee Br. 9. Trumbull was likely referring not to all temporary visitors, as *amici* contend, but instead to the children of foreign diplomats. *See* Cong. Globe, 39th Cong., 1st Sess. 572 (1866) (Sen. Trumbull noting that "[w]e cannot make a citizen of the child of a foreign minister"). After all, no one disputes that Congress has the *power* to confer citizenship on the children of temporary residents.

diplomats or invading armies. After all, Bingham elsewhere described the rule of birthright citizenship without reference to allegiance. *See, e.g.*, Cong. Globe, 35th Cong., 2d Sess. 984 (1859) ("natives born to free parents within the limits of the Republic"); Cong. Globe, 40th Cong., 2d Sess. 2212 (1868) ("every person born within the limits of the Republic"); *Bingham's Speech*, Summit Cnty. Beacon, Sept. 26, 1867, at 1 ("[i]f a man is not a citizen of the country in which he was born, in God's name of what country is he a citizen?"). And it is unclear how a broader reading of Bingham's statement would support Petitioners' position, as it would seem to withhold birthright citizenship from anyone whose parents are foreign citizens, *see* Cong. Globe, 40th Cong., 2d Sess. 946 (1868) (Bingham using "nationality" and "allegiance" synonymously); Cong. Globe, 39th Cong., 1st Sess. 1160 (1866) (Rep. Shellabarger) (describing naturalization as the "process by which [a noncitizen] renounces his foreign allegiance"); Pet'rs Br. 29, 41 (noting that birthright citizenship extends to the children of permanent residents).

Temporary sojourners. Petitioners also rely heavily on statements that, they allege, support an exception to birthright citizenship for children of temporary sojourners. Pet'rs Br. 23. But these statements only emphasize the paucity of Petitioners' evidence. For example, Representative Wilson's statement that "*it may be* that children born on our soil to temporary sojourners or representatives of foreign governments, are native-born citizens of the United States," Cong. Globe, 39th Cong., 1st Sess. 1117 (emphasis added), must be read in the context of his citation of authorities confirming the broad common-law rule that, other than the few exceptions discussed earlier, "every person born in the United States is a natural-born citizen

of such States," *see id.* at 1115-17 (citing "the English law," Blackstone, Rawle, Kent, and opinions of Bates and Marcy). Whether his reference to "temporary sojourners" was an inartful description of "representatives of foreign governments" or simply a misstatement of the scope of the exception, it certainly is not evidence of any intent to depart from the common-law rule.

Petitioners point to a speech made by Representative Bliss during his last year in Congress, eight years before the drafting of the Fourteenth Amendment. Petr's Br. 23 (describing a passing reference to an exception for "temporary sojourners" (citing Cong. Globe, 35th Cong., 1st Sess. 210 (1858)). But Representative Bliss's speech is a thin reed on which to rest an additional exception to the common-law rule. After all, Bliss cited the British common law—which, as Petitioners explain, recognized the "children of temporarily present aliens" as subjects, *see* Pet'rs Br. 40—in the same speech, Cong. Globe, 35th Cong., 1st Sess. 210 (1858) ("all free persons born within the dominion of the King of Great Britain ... were native born British subjects"). He also "advise[d] caution" against a rule that would exclude people from citizenship based on the status of their "ancestors," *id.* at 211. And his reference to "temporary sojourners" was made in passing and omitted from some publications of the speech. *See* Citizenship, *Anti-Slavery Bugle*, Feb. 6, 1858, at 1 (publishing the speech without any reference to "temporary sojourners").

One of Petitioners' *amici* reads Senator Cowan as "presum[ing] that the children of mere sojourners would not be entitled to automatic citizenship." Eastman Br. 15. But Cowan's statement, read in full, reveals the opposite presumption. Cowan asked: "Is a child of a Gypsy born in Pennsylvania a citizen? If so,

what rights have they? Have they any more rights than a sojourner in the United States?" Cong. Globe, 39th Cong., 1st Sess. 2890-91 (1866). As this passage makes clear, Senator Cowan was comparing the *children* of "gypsies" and "Chinese immigrant[s]" to "sojourners" themselves, and he believed that the children *would* be entitled to birthright citizenship under the proposed amendment, giving them more rights than "sojourners." *Id.* at 2891 (contrasting the rights of citizenship with sojourners' "entitle[ment] to the protection of the laws while … within and under the jurisdiction of the courts").

Domicile. Petitioners get no further by highlighting isolated statements about "domicile" as "ratification-era evidence." Pet'rs Br. 23-24 (quoting statements including a private letter about the CRA purportedly written by Senator Trumbull, *see* Resps. Br. 19 n.2).[6]

To start, many of these statements came from conversations where referencing parental domicile made sense in context. For example, when Major General Hurlburt gave his "opinion" that "children born in this country are citizens by birth" when their "parents of foreign birth become permanently domiciled in the U.S.," *see* Pet'rs Br. 23 (internal citation omitted), he was responding to French objections concerning the propriety of conscripting a specific individual whose French father was "permanently domiciled in this

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[6] Notably, several of Petitioners' citations are to private letters. *See, e.g.*, Pet'rs Br. 23 (references to Hurlburt, Trumbull). Thus, even if Petitioners' suggestions about their meaning were correct, they would simply reveal "private intentions," rather than the Amendment's "original public meaning." *Khorrami v. Arizona*, 143 S. Ct. 22, 25 (2022) (Gorsuch, J., dissenting from denial of certiorari).

country." *See* Letter from Col. Robinson, Feb. 5, 1865, *in* 27-29 *Notes From the French Legation in the U.S. to the Dep't of State*, 1789-1906, at 68-70. He was not suggesting that children born in this country are citizens by birth *only* when their parents of foreign birth are permanently domiciled in the United States.

And when Representative Bingham referred to people "born and domiciled" in the United States, *see* Pet'rs Br. 23 (citing Cong. Globe, 35th Cong., 2d Sess. 984 (1859)), he too was discussing the citizenship of specific people who were "born and domiciled" in the United States—African Americans who were long-time residents and were deprived of their civil rights by Oregon's Constitution.

Furthermore, it is unclear that these scattered references to "domicile" even refer to the legal definition of domicile. Representative Bingham, for example, at times used "domicile" to mean something broader than its legal definition. In the same speech Petitioners quote, Bingham described the "law of domicile," as a requirement that "every free man is entitled to *live* in the land of his birth." Cong. Globe, 35th Cong., 2d Sess. 985 (1859); *see* Cong. Globe, 36th Cong., 1st Sess. 1837 (1860) (Rep. Bingham) (describing a "sacred right of domicile" as a right to "live unmolested in the spot of [one's] origin").

In the end, Petitioners' attempts to draw upon the "oracles of legislative history" get them nowhere. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). They have "enter[ed] a crowded cocktail party and look[ed] over the heads of the guests for [their] friends," *id.*, but they do not even understand what those purported friends are saying.

And that is all the more true because the position Petitioners use these statements to support—that

birthright citizenship was available *only* to children whose parents were domiciled in the United States—would have been in tension with the Framers' other statements describing the Clause's application to populations of "trespassers" that they viewed as unlikely to remain in the country.

Moreover, the text of the Clause uses the term "jurisdiction" rather than "domicile." And the very sources that Petitioners cite when describing the alleged importance of domicile, *see*, *e.g.*, Pet'rs Br. 20 (quoting Phillimore, *supra*, at 32), illustrate the difference between domicile and jurisdiction. *See*, *e.g.*, Phillimore, *supra*, at 229 ("there are other causes and sources of jurisdiction besides ... Domicil"). These sources confirm the view that a state had "jurisdiction" over "all persons ... within its territories," *id.* at 2, even people who lacked domicile there, *id.* at 796-97 (describing the "temporary allegiance" owed by "commorant persons"); *id.* at 537 (defining people who were "merely commorant" as "not domiciled"); *id.* at 493 (noting that one could be "temporarily commorant or transient" and distinguishing that from "domiciled").

C. Finally, Petitioners are wrong to contend that the definition of "jurisdiction" as "regulatory jurisdiction" would "nullify" that term. Pet'rs Br. 38-39. The Framers of the Citizenship Clause repeatedly described the children of foreign ministers as not "fully and completely subject to the jurisdiction of the United States." *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2897 (1866) (Sen. Williams). While Petitioners contend otherwise, *see, e.g.*, Petr's Br. 39 (objecting that diplomats are required by treaty to "respect the laws and regulations of the receiving State"), the Framers described these people as "not subject to our laws," Cong. Globe, 39th Cong., 1st Sess. 1124 (Sen. Cook), perhaps because they believed that the children of

foreign ministers could not be "brought, by proper process, within the reach of the power of the court." *Id.* at 2897 (Sen. Williams); *see* Ramsey, *supra*, at 441-42 (describing this view). And immediately after the Amendment's ratification, commentators reiterated this understanding, explaining that the "children of ambassadors" were among the few people who were not "'subject to the jurisdiction' of the country within which they were born." Editorial, 5 Am. L. Rev. at 780; Wharton, *supra*, at 394 (quoting Secretary of State Fish's conclusion that "subject to the jurisdiction thereof[] was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality" (internal quotation marks omitted)).

Petitioners raise another red herring when they posit that the Clause's Framers rejected the common-law rule of birthright citizenship because it stems from "British law." Pet'rs Br. 40. To start, all they cite for the startling pronouncement that Americans rejected the common-law theory of birthright citizenship is a congressional report on the rights of American citizens to expatriate. *See id.* at 40-41 (citing *Report of House Comm. on Foreign Affairs Concerning the Rights of American Citizens in Foreign States*, *in* Cong. Globe App., 40th Cong., 2d Sess. 95 (1868)). But the report describes congressional antipathy toward a different common-law rule: the rule that "natural allegiance" could not be "forfeited" through expatriation, *see Report of House Comm.*, Cong. Globe App., 40th Cong., 2d Sess. 95 (1868) (quoting 1 Blackstone, *supra*, at 368); *see*, *e.g.*, *id.* (complaining that this approach "left to the subject nothing but servile submission"). It says nothing about the "rule of the common law" on birthright citizenship. 2 Kent, *supra,* at 38 n.1; *compare id.* at 42-50 (noting American courts had "relaxed" the

"doctrine of the English law" that held that subjects of a country could not "divest[]" themselves of allegiance by any act of their own"), *with id.* at 38 n.1 (describing the adoption of the common law approach to birthright citizenship); Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (Rep. Lawrence) (referencing the "common law of England" on birthright citizenship); *id.* at 1116-17 (Rep. Wilson) (quoting Blackstone on birthright citizenship).

And when American authorities addressed the question, they affirmed the principle that "all 'children born here are citizens without any regard to the political condition or allegiance of their parents.'" *Id.* at 1832 (Rep. Lawrence) (quoting *Lynch*). That is why contemporaries summarized the Clause as "an affirmance of the common law of England *and of this country*, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage." 2 Wharton, *supra*, at 394 (quoting Secretary of State Fish) (emphasis added); *Look Tin Sing*, 21 F. at 909 (describing "[t]he clause as to citizenship" as "an authoritative declaration of the generally recognized law of the country").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

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