IN THE
SUPREME COURT OF THE UNITED STATES

Nos. 24A884, 24A885, 24A886

DONALD J. TRUMP, President of the United States, *et al.*,
Applicants,
v.
CASA, Inc., *et al.*,
Respondents

DONALD J. TRUMP, President of the United States, *et al.*,
Applicants,
v.
WASHINGTON, *et al.*,
Respondents

DONALD J. TRUMP, President of the United States, *et al.*,
Applicants,
v.
NEW JERSEY, *et al.*,
Respondents

On Applications for Stays Pending Appeal

BRIEF *AMICUS CURIAE* OF AMERICA'S FUTURE, GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA, CITIZENS UNITED, LEADERSHIP INSTITUTE, U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND, THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPLICATIONS FOR STAYS OF INJUNCTION

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Citizens United, Leadership Institute, U.S. Constitutional Rights Legal Defense Fund, The Claremont Institute Center for Constitutional Jurisprudence, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income taxation under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code, which have filed numerous *amicus curiae* briefs in federal and state courts. These *amici* filed *amicus* briefs in support of stays in each of the three cases from which these applications for stay arise. *See* Brief *Amicus Curiae* of America's Future, *et al.*, *Washington v. Trump*, Ninth Circuit No. 25-807 (Feb. 17, 2025), Brief *Amicus Curiae* of America's Future, *et al.*, *CASA v. Trump*, Fourth Circuit No. 25-1153 (Feb. 21, 2025), and Brief *Amicus Curiae* of America's Future, *et al.*, *New Jersey v. Trump*, First Circuit No. 25-1170 (Mar. 4, 2025).[2]

STATEMENT OF THE CASE

On January 20, 2025, President Donald Trump issued an Executive Order noting that being born on American soil has never by itself automatically conferred

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] These *amici* also filed *amicus* briefs opposing the granting of injunctive relief in two of these cases when before the district courts. *See* Brief *Amicus Curiae* of America's Future, *et al*, *State of Washington v. Trump*, W.D. of Wash. No. 2:25-CV-00127 (Jan. 31, 2025) and Brief *Amici Curiae* of America's Future, *et al*, *New Hampshire Indonesian Community Support v. Trump*, D. N.H. No. 1:25-cv-00038 (Jan. 31, 2025)

American citizenship. The Order stated that "[t]he Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not 'subject to the jurisdiction thereof.'" *Id.* Accordingly, the Order contained a narrowly defined directive that federal agencies are not to consider a person born on U.S. soil a citizen when, "at the time of said person's birth," the father "was not a United States citizen or lawful permanent resident..." and:

> "when that person's **mother**" was:
> (1) "**unlawfully present** in the United States" ... or
> (2) ... when [the mother's presence] ... was **lawful but temporary** (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa).... [*Id.* (emphasis added).]

SUMMARY OF ARGUMENT

The Government's Applications for Partial Stays seek only to undo the universal nature of the district court injunctions, but there are compelling reasons for this Court to move directly to address the merits of this case and end the unlawful practice of birth tourism. These *amici* urge the Court to treat the Applications as Petitions for Certiorari, grant it, and order briefing on the merits. In the alternative, the Applications should be granted, as no district court should have the power to bind persons not party to the litigation below on such a matter.

Birthright citizenship may have been long taught in law school, but it is profoundly wrong. Respondents seek to render the language "subject to the jurisdiction thereof" in the Fourteenth Amendment a nullity, and badly misread this Court's decision in *Wong Kim Ark*. The circuit courts erred in ignoring the true

nature of citizenship, which requires reciprocal duties of government protection in exchange for the allegiance of the citizen. The framers of the Fourteenth Amendment were clear that citizenship would not be extended to foreigners and aliens who simply happened to be in the United States at the time of their birth.

Lastly, two of the injunctions below run against the President of the United States, in direct conflict with this court's decision in *Franklin v. Massachusetts.* No judge can enjoin the President in such a matter, and no such injunction can be allowed to stand by this Court.

ARGUMENT

I. THE APPLICATIONS FOR PARTIAL STAY SHOULD BE TREATED AS A PETITION FOR CERTIORARI AND GRANTED, ALLOWING THE CASE TO BE DECIDED ON THE MERITS WITHOUT DELAY.

The United States has filed three Applications for a Partial Stay of the Injunctions issued by the district courts for the Western District of Washington, the District of Maryland, and the District of Massachusetts pending the consideration and disposition of the government's appeal to the United States Courts of Appeals for the First, Fourth, and Ninth Circuits,[3] "and pending any further review in this Court." *Trump v. Washington*, Application at 1. The government explains its request as follows:

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[3] All three circuit courts of appeals denied the Government's motions for stay pending appeal. *See New Jersey v. Trump*, 2025 U.S. App. LEXIS 5580 (1st Cir. 2025); *CASA, Inc. v. Trump*, 2025 U.S. App. LEXIS 4856 (4th Cir. 2025); *Washington v. Trump*, 2025 U.S. App. LEXIS 3983 (9th Cir. 2025).

> These cases — which involve challenges to the President's January 20, 2025 Executive Order concerning birthright citizenship — raise **important constitutional questions with major ramifications for securing the border**. But at this stage, the government comes to this Court with a **"modest" request:** while the parties litigate weighty merits questions, the Court should "restrict the scope" of multiple preliminary injunctions that "purpor[t] to cover every person * * * in the country," limiting those injunctions to parties actually within the courts' power. [*Id.* at 1-2 (citation omitted) (emphasis added).]

These *amici* fully agree that this Court should not allow district court judges to issue universal injunctions in cases such as this. A universal injunction transforms the act of a district judge from deciding a case and controversy before him to rendering a sweeping decree that is more akin to legislating. Nevertheless, these *amici* believe that it would be unwise to allow **any** injunctions to stay in effect for months, if not years, while these cases are litigated on the merits. Therefore, these *amici* respectfully request this Court treat the Government's Application for a Partial Stay as a Petition for Certiorari, grant the Petition, and then order briefing on the merits.

This case has already been extensively briefed in several district courts and courts of appeals. There are no factual issues in dispute. These *amici* have already filed five briefs, two in district court and three in courts of appeals, on these issues. Numerous other parties and *amici* also have filed briefs on the legal issues. The issue of birthright citizenship is before this Court now, and there is no reason to delay in resolving the merits, which it ultimately will be required to do.

It is unlikely that further percolation in these particular circuits will result in different views being presented, as these circuits were clearly chosen to achieve a particular result. Was it an accident that the challenge brought by the State of New Jersey was filed in Massachusetts, where its appeal would be decided by the First, rather than the Third, Circuit? Was it an accident that the challenge brought in the District of Columbia was dropped as soon as it was assigned to a judge who had been appointed by President Trump? *See OCA-Asian Pacific American Advocates v. Rubio*, No. 1:25-cv-00287.

As the Acting Solicitor General has stated, these challenges to President Trump's executive order raise "important constitutional questions with major ramifications for securing the border." If this Court delays, the magnet of birthright citizenship will continue to draw foreigners with no allegiance to our country, who engage in "birth tourism" to deliver an "anchor baby" who then could help the parents and other family members gain legal residency and avoid deportation.

Treatment of an Application for Stay as a petition for certiorari may not be routine, but it certainly is not unusual. In the last two years, there have been three cases in which these *amici* filed *amicus* briefs where this Court did just that. On December 1, 2022, in *Biden v. Nebraska*, No. 22-506, this Court treated an application for stay filed by the United States as a petition for certiorari before judgment and granted it. On January 5, 2024, in *Moyle v. United States*, No. 23-726, this Court treated an application for a stay filed by Speaker of the Idaho House Mike Moyle as a petition for a writ of certiorari before judgment and granted it. On

February 28, 2024, in *Trump v. United States*, No. 23-939, this Court granted the Special Counsel's request to treat a stay application filed on behalf of now-President Trump as a petition for a writ of certiorari and granted it.

II. THE NATIONWIDE INJUNCTIONS BELOW EXCEED THE JUDICIAL POWER OF THE UNITED STATES.

The Fourth Circuit never analyzed the scope of the Maryland District Court injunction, but allowed it to stand over the dissent of Judge Niemeyer. *See CASA v. Trump*, 2025 U.S. App. LEXIS 4856, at *6, *13. The Ninth Circuit allowed the universal injunction to stand without analysis, only concluding that the Government had not demonstrated a likelihood of success on the merits. *See Washington v. Trump*, 2025 U.S. App. LEXIS 3982, at *5. The First Circuit applied each of the *Nken* factors as to the universal scope of the injunction, and found that the Government failed to demonstrate a strong showing on the merits. *See New Jersey v. Trump*, 2025 U.S. App. LEXIS 5580, at *30-31. What makes these decisions curious is that the Government had not addressed the merits in its motions for stay, focusing only on the universal nature of the injunction.

Article III, Section 2 provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity [and] to Controversies to which the United States shall be a Party..." Madison's Notes indicate that the convention believed that Article III power of the judiciary is "limited to cases of a Judiciary Nature,"[4] not a political nature. *See Marbury v. Madison*, 5 U.S. 137, 163-67 (1803). Judicial power is "'the

[4] J. Madison, The Debates in the Federal Convention of 1787, Aug. 27, 1787.

power of a court to decide and pronounce a judgment and carry it into effect **between persons and parties who bring a case** before it for decision.'" *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (emphasis added). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Cases and controversies are disputes between litigants, and it is the very nature of the judicial power to resolve disputes between parties rather than to make laws of general applicability.

The injunctions approved by the circuit courts were not limited to the Plaintiffs as they should have been. Under Rule 65 of the Federal Rules of Civil Procedure, injunctions affect "the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation" with them if they have received "actual notice" of the injunction. The injunctions below exceeded the scope of Rule 65, granting relief to nonparties who had no involvement whatsoever in the litigation. And, they impaired the ability of the President to carry out the important responsibilities entrusted to him by the Constitution and the laws of the land. As this Court has stated: "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Injunctions which compel government action with respect to nonparties violate this principle.

To be sure, nationwide injunctions are issued in class action litigation to give relief to nonparties, but at least that relief is subject to protections afforded by federal law and the Federal Rules of Civil Procedure. Also, the act of striking down a regulation under the Administrative Procedure Act ("APA") has a similar effect to a nationwide injunction, but in that situation, Courts act pursuant to the APA grant of authority to "set aside" the regulation.

Allowing the lower federal courts to enjoy such free-wheeling authority to trump the political decisions of the President provides a compelling incentive for plaintiffs to forum shop and find that one (or three) friendly district court judge(s), situated in a friendly circuit.

During the Founding Era, and well into the history of our country, "[t]he decisions ... of courts [were] held in the highest regard," but as Blackstone warned, they were not "law" themselves, but only "evidence" of law, "[s]o that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." I Blackstone's *Commentaries* at 71 (emphasis original). In Federalist 78, Alexander Hamilton, cautioned that the judiciary has "neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The public confidence in the judiciary is harmed when the judiciary exceeds its authority.

III. THE DECISIONS BELOW WERE PREDICATED ON ERRORS OF LAW.

The decisions of the courts below were consistent with the view taught in law school attended by lawyers and judges. However, that view is fundamentally wrong on the law as to virtually every point. There was a time that *Dred Scott v. Sandford*[5] was considered good law, and so also was *Korematsu v. United States*,[6] and more recently *Roe v. Wade*.[7] This is a time not to reflect on what was once the prevailing teaching by law professors, but for this Court to engage the issues and seriously re-examine what is assumed to be true. This *amicus* brief seeks to present a comprehensive opposing view which demonstrates the errors of the lower courts.

First, some of the courts below assumed that the **text** resolves the legal issue without any more analysis. For example, the Massachusetts District Court stated:

> Each of the defendants' theories focuses on the parents, rather than the child whose citizenship is at stake. In so doing, these interpretations **stray from the text** of the Citizenship Clause. [*Doe v. Trump*, 2025 U.S. Dist. LEXIS 27523, at *11 (D. Mass. 2025) (emphasis added).[8]]

The relevant text states: "All persons born or naturalized in the United States, **and subject to the jurisdiction thereof**, are citizens of the United States and of the State wherein they reside." Fourteenth Amendment, Sec. 1 (emphasis added). None of the district courts actually dealt with the text, but simply adopted

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[5] 60 U.S. 383 (1857).

[6] 323 U.S. 214 (1944).

[7] 410 U.S. 113 (1973).

[8] *See also CASA v. Trump*, 2025 U.S. Dist. LEXIS 20921, at *16 (D. Md. 2025), and *Washington v. Trump*, 2025 U.S. Dist. LEXIS 24892, at *8 (W.D. Wash. 2025).

what they thought was this Court's view in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), which one court characterized as:

> the Supreme Court concluded that "subject to the jurisdiction thereof" was meant "to exclude, by the fewest and fittest words," the following categories of persons: "children of members of the Indian tribes," "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state." [*Doe* at *26.]

The district courts never addressed why such persons would not be U.S. Citizens according to the text. Does it matter that the persons covered by the Executive Order are also citizens of other countries as well as the United States, under the law of other nations? Does a person become "subject to the jurisdiction thereof" simply by being subject to arrest for the commission of a crime? Such an interpretation renders the phrase a nullity. According to plaintiffs' rule, children born to those working in foreign embassies who do not have diplomatic immunity, are U.S. Citizens. What about those born to a woman who is from and a citizen of a nation on our State Department's list of State Sponsors of Terrorism[9] (Cuba, North Korean, Iran, and Syria) or others like Russia or China, which are not here "in hostile occupation"? As of this date, could there be any children born who would not be citizens under the district court's "hostile occupation" test? With all these unanswered questions, what is the validity of the contention that the text resolves the issue for the Plaintiffs?

Second, the Massachusetts District Court stated:

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[9] *See* https://www.state.gov/state-sponsors-of-terrorism/.

> In a lengthy 1898 decision, the **Supreme Court** examined the Citizenship Clause, **adopting** the interpretation the plaintiffs advance and rejecting the interpretation expressed in the EO. [*Doe* at *9-10 (emphasis added).[10]]

However, the *Wong Kim Ark* decision did not in any way decide the issue presented here, and on the issues it addressed, it was fundamentally flawed. Consider the several cases decided during that time frame. In 1873, just five years after ratification of the Fourteenth Amendment, this Court interpreted the Citizenship Clause:

> That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "**subject to its jurisdiction**" was intended to **exclude** from its operation children of ministers, consuls, and **citizens or subjects of foreign States born within the United States**. [*Slaughter-House Cases*, 83 U.S. 36, 73 (1873) (emphasis added).]

Two years later, the Court again questioned acquiring citizenship, focusing on British citizenship:

> At **common-law**, ... it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. **Some authorities go further** and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. **As to this class there have been doubts**.... [*Minor v. Happersett*, 88 U.S. 162, 167-68 (1875) (emphasis added).]

Just 14 years before *Wong Kim Ark*, writing for the Court, Justice Gray had highlighted the critical difference between the children of citizens and the children of aliens owing allegiance to foreign powers. This Court declared:

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[10] *See also CASA* at *17; *Washington* at *12.

> [t]he main object of the opening sentence of the Fourteenth Amendment was to settle the question ... as to the citizenship of free negroes ... and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and **owing no allegiance to any alien power**, should be citizens of the United States.... [*Elk v. Wilkins*, 112 U.S. 94, 101 (1884) (emphasis added).]

Because the Plaintiff in *Elk v. Wilkins* was a member of a Native American tribe to which he owed allegiance, and had never been naturalized, the Court found that he was **not a citizen** despite being born on U.S. soil. Should *Wong Kim Ark* be read to overrule these cases?

Despite some unduly broad dicta, *Wong Kim Ark* did not even address those specific children covered by the Executive Order — those born to a mother either **illegally or temporarily present** in the United States. The question addressed in *Wong Kim Ark* was:

> whether a child born in the United States, of parents of [foreign] descent, who, at the time of his birth, are subjects of [a foreign government], but have a **permanent domicil** and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the [foreign government], becomes at the time of his birth a citizen of the United States. [*Wong Kim Ark* at 653 (emphasis added).]

However, if *Wong Kim Ark* viewed that "subject to the jurisdiction" of the United States simply meant to be present "within the jurisdiction" thereof, equating (i) children born to aliens who owe allegiance to foreign governments to (ii) children of citizens, then that decision was in error, an outlier, inconsistent with this Court's decisions in the *Slaughter-House Cases, Minor,* and *Elk*.

Third, the Massachusetts District Court assumed that *Wong Kim Ark* was later validated by the courts and Congress, stating:

> The rule and reasoning from that decision were reiterated and applied in later decisions, adopted by Congress as a matter of federal statutory law in 1940.... [*Doe* at *10.]

There is no reason to believe that, when Congress enacted a law which used the same words as the Fourteenth Amendment, it was ratifying a decision of this Court which did not resolve the issue, and certainly did not equate the Citizenship Clause's commandment with a mistaken reading of *Wong Kim Ark*, rather than the Clause itself. As the First Circuit noted, "the parties both agree that 8 U.S.C. § 1401 and the Citizenship Clause of the Fourteenth Amendment are 'coterminous.'" *New Jersey* at *7 n.5. Thus, the INA simply incorporates that Amendment, but not Respondents' mistaken reading of *Wong Kim Ark*.

Fourth, the courts below demonstrated a fundamental misunderstanding of citizenship in finding that allegiance and parentage are irrelevant: "First, allegiance in the United States arises from the fact of birth. It does not depend on the status of a child's parents...." *Doe* at *10.[11] The Massachusetts District Court's position is identical to the common-law principle of *jus soli*, but that common law is completely inapplicable, as it was developed under the British view of "subjectship," not the American view of citizenship. In *Wong Kim Ark*, Justice Gray accurately described the English common law's presumption that everyone born on English

[11] *See also CASA* at *37; *Washington* at *14.

soil was a subject of the King for life, whether he wished to be or not. "By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject." *Wong Kim Ark* at 657.

Justice Gray incorrectly assumed the British rule of citizenship that he described also applied in America when it does not. As Justice Story explained in 1829, "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright. But they brought with them, and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 27 U.S. 137, 145 (1829).

This distinction between British and American citizenship was addressed in an article originally published in January 2001, now updated and published by America's Future. It explained the legal principle of *jus soli* was based on the idea that the king owned the land, and thus anyone born on the land, whether to a citizen or an alien, became by birth a subject of the king, to whom that person now owed allegiance for life, being permanently a subject by birth on the king's land.[12]

The shift to the American notion of citizenship occurred when our forefathers declared their land and persons "Absolved from all Allegiance to the British Crown" in 1776, the Framers expressly rejected the notion of being unalterably subjects by

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[12] W. Olson & J. Tuomala, "Citizenship by Accident of Birth: the Bogus Theory of Birthright Citizenship," *America's Future* (Mar. 2025).

birth: "The Declaration of Independence is not just a thorough repudiation of that old feudal idea of 'permanent allegiance' [to the king by accident of birth], but perhaps the most eloquent repudiation of it ever written.... The notion that the English common law of *jus soli* therefore continued unabated after the Declaration of Independence could not be more mistaken."[13]

Actually, citizenship is a reciprocal duty of protection. Only those persons who can be expected to have a "**permanent allegiance**" to our country can become citizens, because only on that permanent allegiance does the country's reciprocal duty of protection arise. No such relationship exists with the two classes of persons addressed by the Executive Order:

> By **allegiance** is meant the obligation of **fidelity and obedience** which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an **absolute and permanent allegiance** to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a **local and temporary allegiance**, which continues during the period of his residence. [*Carlisle v. United States*, 83 U.S. 147, 154 (1872) (emphasis added).]

These and other flaws with the extreme theory advanced by respondents and adopted by courts below that everyone born on U.S. soil — but for two tiny exceptions which might cover an infinitesimal fraction of 1 percent of births covered by the Executive Order — are U.S. citizens are discussed in the following sections.

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[13] J. Eastman, "The Significance of 'Domicile' in *Wong Kim Ark*," 22 CHAP. L. REV. 301, 308-09 (Spring 2019).

IV. "BIRTHRIGHT CITIZENSHIP" VIOLATES THE TEXT AND THE ORIGINAL INTENT OF THE FOURTEENTH AMENDMENT.

The courts below gave little consideration to the views of the Framers of the Fourteenth Amendment but rather cited to case law. Following the Civil War, Congress took action to overrule *Dred Scott*, which held that slaves and their descendants, even as freedmen, were excluded from U.S. citizenship. Congress first moved to override *Dred Scott* by enacting the **Civil Rights Act of 1866**, which provided 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." 14 *Stat*. 27 (emphasis added).

Due to concerns that this Court might rule the Civil Rights Act unconstitutional or that a subsequent Congress might repeal the Act, Congress initiated the process required to amend the Constitution. *See* Raoul Berger, Government by the Judiciary: The Transformation of the Fourteenth Amendment at 48 (Liberty Fund: 1997). The resulting Fourteenth Amendment included this language:

> Section 1. All persons born or naturalized in the United States, and **subject to the jurisdiction thereof**, are citizens of the United States and of the State wherein they reside.... No State shall ... deny to any person **within its jurisdiction** the equal protection of the law. [Emphasis added.]

The language "**subject to the jurisdiction thereof**" in the Fourteenth Amendment was understood as conveying the same meaning as the language "**and not subject to any foreign power**" as used in the Civil Rights Act of 1866. Most

countries claim as citizens those children born to parents who are their citizens. Consequently, even if born on American soil, those children are **subjects of a foreign power** and thus **not subject to the jurisdiction of the United States**. That being the case, children born in the United States of parents who are not U.S. citizens have no lawful claim of citizenship simply because they are born in U.S. territory.

The Declaration of Independence not only freed the new country from the notion that persons born in America were British citizens with allegiance to England, it also demonstrated the solemn, binding, and covenantal action undertaken on behalf of the people, which was later confirmed by the People's ratification of the Constitution which begins "We the People."

> We, therefore, the Representatives of the united States of America, in General Congress, Assembled, **appealing to the Supreme Judge of the world for the rectitude of our intentions**, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be **Free and Independent States**; that they are **Absolved from all Allegiance to the British Crown**, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved…. [Declaration of Independence (emphasis added).]

The Declaration of Independence declared that Americans were shifting from their previous "**allegiance to the British Crown**" to allegiance to the new nation formed of "**Free and Independent States**." Likewise, the ratification history of the Fourteenth Amendment, discussed *infra*, demonstrates that "**subject to the jurisdiction**" entails an obligation of allegiance to the United States and not

simply an obligation of obedience to the laws of the United States. The **obligation of allegiance** signified in the Citizenship Clause is different in kind from the obligation of every person in the territory of the United States to obey the laws of the land.

Citizens subject to the jurisdiction of the United States are entitled to corresponding privileges and immunities of citizenship. Constitution, Article IV, Sec. 2, cl. 1. On the other hand, all persons who "come within its jurisdiction" have a duty to obey the law, together with a corresponding right to the equal protection of the law. The meaning of the phrase "subject to the jurisdiction" as used in the Fourteenth Amendment context is very different from the meaning of "within its jurisdiction."

Congress's deliberations on the Fourteenth Amendment reveals the limited objective for which the Citizenship Clause was adopted — to reverse *Dred Scott* and to ensure that the citizenship of freedmen was recognized on the same basis as other Americans born in the United States. The purpose was not to change the law regarding citizenship, but rather to affirm its proper understanding. The deliberations addressed the issue of children born in the United States to non-citizens and assumed that they did not qualify as natural born citizens. It was understood by the Framers that the best evidence that a person will bear true faith and allegiance to America is birth in the United States to American parents.

Senator Jacob Howard of Michigan, who authored the Citizenship Clause, explained its meaning:

> This … is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. **This 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. [Congressional Globe, 39th Cong., 1st Sess., 2890 (emphasis added).]

Senator Howard also explained what he meant by use of the term "jurisdiction":

> "jurisdiction" as here employed, ought to be construed so as to imply a **full and complete jurisdiction** on the part of the United States ... that is to say, the **same jurisdiction in extent and quality** as applies to every citizen of the United States now. [*Id*. at 2895 (emphasis added).]

Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee, concurred with Senator Howard regarding his characterization of the meaning of "jurisdiction":

> That means "subject to the complete jurisdiction thereof".... **Not owing allegiance to anybody else**. That is what it means.... It cannot be said of any [person] 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 are completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens. [*Id*. at 2893 (emphasis added).]

Senator George Williams of Oregon concurred:

> In one sense, all persons born within the geographical limits of the United States, are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense.... 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. [*Id*. at 2897 (emphasis added).]

Senator Edgar Cowan of Pennsylvania specifically expressed concern that the amendment should not be interpreted to grant citizenship to Chinese immigrant workers in California and went on to discuss the rights of travelers in the United States from foreign nations:

> If a **traveler** comes here from Ethiopia, from Australia, or from Great Britain, he is entitled to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the laws; but he is **not a citizen** in the ordinary acceptation of the word. [*Id*. at 2890 (emphasis added).]

Before the debate on Senator Howard's proposal to add the qualifying phrase "subject to the jurisdiction thereof," Senator Saulsbury concisely stated the Senate's object with regard to this amendment, and in so doing, removed all doubt as to the limited purpose of the amendment as drafted:

> I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that negroes shall be citizens of the United States. [*Id.* at 2897.]

V. THE VIEW THAT "BIRTHRIGHT CITIZENSHIP" SHOULD BE HANDED OUT IRRESPECTIVE OF ALLEGIANCE HAS BIZARRE RESULTS.

The preliminary injunctions issued in these cases omitted discussion of one of the most important aspects of Citizenship — the **allegiance** that a person owes to his own country, sometimes described as loyalty or fidelity to the nation. Most countries recognize citizenship based on the principle of *jus sanguinis* — that a child acquires the citizenship of the child's natural parents. *See* Edward J. Erler, The Founders on Citizenship and Immigration (Claremont Inst: 2007) at 28-29.

Thus, children born anywhere in the world to citizens of most other countries acquire the citizenship of their parents at birth. Under Respondents' notion of "birthright citizenship" — a term of recent origin that cannot be sourced to the Declaration, Constitution, or statute — almost all such children automatically would be citizens of multiple countries. To which country do these children owe their allegiance?

The United States has long required naturalized citizens to disavow allegiance to all foreign sovereigns, but not so with those benefitting from "birthright citizenship." Most children born in the United States to parents with foreign citizenship are recognized as foreign nationals under international law, and not any more "subject to the jurisdiction" of the United States than are the children of diplomats, Native Americans (before the Indian Citizenship Act of 1924), or foreign invaders, who Respondents concede are not citizens.

The importance of allegiance is most acutely felt during time of war when the obligations of citizenship are most consequential. An American citizen is "subject to the jurisdiction" of the United States and may be drafted into the military even if outside the country. Citizens who take up arms against the United States may be prosecuted for treason. *See* U.S. Constitution Article III, Sec. 3. Non-citizens who take up arms against the United States are prisoners of war if captured, and they are not subject to prosecution simply for waging war against the United States. A person who is a citizen of two different countries that are at war will be placed in an untenable position. The problems that arise with dual citizenship were acutely felt

by U.S. citizens who were impressed into service with the British navy leading up to the War of 1812.

Neither of the two categories of children born to aliens in the United States that are addressed by the Executive Order can be expected to demonstrate allegiance to our nation. First, those children born of parents who are not legally in the United States cannot be expected to be nurtured in the values of American citizenship by parents who entered the country illegally — being here not "subject to" but rather "in defiance of" our nation's laws. Second are those children of birth tourists, who travel to the United States for the purpose of giving birth and thereby obtaining cheap and easy citizenship for their children. They too are unlikely to have any allegiance to nurture their children in values of American citizenship.

Indeed, as explained *supra*, only those persons who can be expected to have a "**permanent allegiance**" to our country can become citizens, because based on that permanent allegiance, the country then owes to its citizens a reciprocal duty of protection. But no such relationship can be said to be established with the two classes of persons covered by the Executive Order.

If *Wong Kim Ark* is read to support the preliminary injunctions, it contravenes common sense and our sense of justice. According to the lower courts' theory, under *Wong Kim Ark*, a person born in the United States of alien parents is constitutionally entitled to American citizenship, whereas a person born outside the United States to American citizens is entitled to such citizenship only by statute.

Why should there be an irrebuttable legal presumption of allegiance in the former case, but not in the latter?

Under the Respondents' theory of the case and the district courts' preliminary injunctions, children of the 9/11 hijackers, human traffickers, and enemy combatants captured overseas and held in the United States who are born on U.S. territory would be entitled to citizenship.[14] Birth tourism from Turkey, China, Nigeria, and Mexico has received considerable attention.[15] The problems associated with the theory of birthright citizenship are exacerbated by statutes that facilitate immigration of family members of lawfully naturalized citizens, known as "chain migration."

VI. THE CASE AGAINST PRESIDENT TRUMP SHOULD BE DISMISSED.

All Respondents named President Trump as a defendant in his official capacity and the Washington and Maryland district courts actually enjoined the

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[14] *See, e.g.*, DOJ Office of the Inspector General, "A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks," ch. 5 (Nov. 2004); U.S. Department of Justice, "Two sent to prison for roles in cartel-linked human smuggling scheme" (Oct. 30, 2024); U.S. Department of Justice, "Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System" (June 9, 2009).

[15] *See, e.g.*, J. Feere, "Birthright Citizenship in the United States: A Global Comparison," *Center for Immigration Studies* (Aug. 31, 2010); I. Egrikavuk, "Birth tourism in U.S. on the rise for Turkish parents," *Hurriyet Daily News* (Mar. 12, 2010); K. Richburg, "For many pregnant Chinese, a U.S. passport for baby remains a powerful lure," *Washington Post* (July 18, 2010); D. Iriekpen, "Citizenship Rights: American Agitations Threaten a Nigerian Practice," *This Day* (Aug. 16, 2010); N. Nnorom, "Birthright citizenship: Nigerians in diaspora kick, say Trump's action illegal," *Vanguard* (Jan. 23, 2025).

President. Only the Massachusetts District Court understood it had no authority to enjoin the President, but it left the issue unresolved. *See Doe* at *48.

In *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), this Court explained that, while a district court could enjoin an executive branch official, it could not enjoin the President himself. In striking down an injunction against a President, the Court bluntly stated that "the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows." *Id*. at 802. Concurring in *Franklin*, Justice Scalia went even further, asserting that "[i]t is a commentary upon the level to which judicial understanding — indeed, even judicial awareness — of the doctrine of separation of powers has fallen, that the District Court entered this order against the President without blinking an eye." *Id*. at 826. Justice Scalia noted that, up until at least 1984, "'[n]o court has ever issued an injunction against the president himself or held him in contempt of court.'" *Id*. at 827.

In 1838, the High Court observed that "[t]he executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." *Kendall v. United States*, 37 U.S. 524, 610 (1838). An injunction against the President was considered by this Court in *Mississippi v. Johnson*, 71 U.S. 475 (1866), involving Mississippi's suit to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Although leaving open the question of whether the President could be ordered to perform

mere ministerial acts, the Court made clear that "this court has no jurisdiction ... to enjoin the President in the performance of his official duties...." *Id.* at 501.

The President's Executive Order constituted an act in the performance of his official duties. *See Marbury v. Madison*, 5 U.S. 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). *See also Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). For official acts, the President is not subject to the jurisdiction of the judiciary — a coequal, not superior, branch of government.

CONCLUSION

For the foregoing reasons, the Applications for Stays should be treated as Petitioners for Certiorari Before Judgment and granted. In the alternative, the Applications for Stays should be granted.

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