

THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:25-cv-00127-JCC

BRIEF OF AMICI CURIAE MEMBERS OF
CONGRESS IN SUPPORT OF
DEFENDANTS

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1 **I. IDENTITY AND INTEREST OF *AMICI*.**

2 *Amici* are 18 members of Congress who serve on the Committee on the Judiciary of the U.S.
3 House of Representatives. Chairman Jim Jordan leads this coalition and is joined by Reps. Andy
4 Biggs, Chip Roy, Brandon Gill, Troy Nehls, Lance Gooden, Victoria Spartz, Mark Harris, Scott
5 Fitzgerald, Robert Onder, Harriet M. Hageman, Tom McClintock, Wesley Hunt, Glenn
6 Grothman, Ben Cline, Russell Fry, Michael Baumgartner, and Brad Knott.

7 *Amici* have a strong interest in the outcome of this case because Congress, as a co-equal
8 branch of government, has an interest in the courts upholding the Constitution. Specifically, the
9 historical record confirms that the Fourteenth Amendment does not confer citizenship on the
10 children of aliens unlawfully present in the United States.

11 Because of this, “[a]n alien who seeks political rights as a member of this Nation can
12 rightfully obtain them only upon terms and conditions specified by Congress,” *United States v.*
13 *Ginsberg*, 243 U.S. 472, 474 (1917), but Congress has never granted citizenship to the children of
14 aliens unlawfully present, *see also* 8 U.S.C. § 1408. Thus, the other branches are forbidden from
15 conferring such citizenship on their own, a limitation that the Executive Order ensures is followed
16 within the executive branch. *See also INS v. Pangilinan*, 486 U.S. 875, 885 (1988) (“Neither by
17 application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other
18 means does a court have the power to confer citizenship in violation of these limitations.”).

19 The Court should deny Plaintiffs’ motion for a preliminary injunction.
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II. INTRODUCTION

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2 The Fourteenth Amendment confers citizenship on any person who is both (1) “born or
3 naturalized in the United States” and (2) “subject to the jurisdiction thereof.” U.S. Const. amend.
4 XIV. Each requirement invokes specialized terms of art. The first clause has been construed to
5 exclude those born in U.S. territories, despite being literally “in” the United States.¹ And
6 “jurisdiction” in the second clause (the “Jurisdiction Clause”) invokes the historic doctrine of
7 “*ligeantia*,” meaning the person must owe direct and exclusive allegiance to the sovereign, which
8 in turn must consent to the person’s presence.

9 Notably, the Jurisdiction Clause does not say that the person must be subject to the *laws* of
10 the United States, but rather subject to its *jurisdiction*. The distinction matters. Even in modern
11 caselaw and statutes, “[j]urisdiction ... is a word of many, too many, meanings,” *Kontrick v. Ryan*,
12 540 U.S. 443, 454 (2004), so it should come as no surprise that the meaning of that term in an
13 amendment written nearly 160 years ago would be nuanced and invoke pre-existing doctrines.

14 As the D.C. Circuit has held, “birthright citizenship does not simply follow the flag.”
15 *Tuaua*, 788 F.3d at 305. Rather, “the evident meaning of the words ‘subject to the jurisdiction
16 thereof’ is, not merely subject in some respect or degree to the jurisdiction of the United States,
17 but completely subject to their political jurisdiction, and owing them direct and immediate
18 allegiance.” *Id.* (quoting *Elk v. Wilkins*, 112 U.S. 94, 102 (1884)) (cleaned up).

19 There is widespread agreement that the Jurisdiction Clause means that children born in the
20 United States to ambassadors or invading soldiers would not receive citizenship under the
21 Fourteenth Amendment. The best reason is because they do not owe total allegiance to the United
22 States, rather than (as Plaintiffs contend) because those groups allegedly have immunity from
23 federal law (in fact, they do *not* have unconditional immunity, as explained below in Part III.F). As
24 explained in more detail below, there is a wealth of support for the proposition that the Clause
25 applies the same to children of those illegally present in the country because they (like ambassadors
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27 ¹ See *Fitisemanu v. United States*, 1 F.4th 862, 877 (10th Cir. 2021); *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

1 and foreign soldiers) do not owe total allegiance to the United States; they remain citizens of their
2 home countries, to whom they owe at least divided allegiance and which often imposes birthright
3 citizenship of its own on the children born to its nationals in the United States. Allegiance is also a
4 reciprocal relationship. The person must be present with the consent of the sovereign, a factor on
5 which the Supreme Court extensively relied in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).
6 But illegal aliens and their children are present in the United States without consent, *i.e.*, only by
7 defying its laws.

8 Early English caselaw supports this concept of total allegiance and its role in citizenship,
9 and even the Senators who drafted and debated the Jurisdiction Clause stated that children of
10 “aliens” or others “owing allegiance to anybody else” would not receive citizenship. That
11 understanding extended for decades after the ratification of the Fourteenth Amendment. And
12 some modern scholars argue that the “core purpose of the citizenship clause [was] to include in
13 the grant of birthright citizenship all who are *lawfully in the United States*,” and scholars have also
14 distinguished the caselaw on which Plaintiffs rely.²

15 Because the Fourteenth Amendment does not confer citizenship on the children of illegally
16 present aliens, and because Congress has not done so by statute, the other branches cannot confer
17 such citizenship on their own. *See Pangilinan*, 486 U.S. at 885; *Ginsberg*, 243 U.S. at 474. The
18 Executive Order at issue here properly ensures that rule is followed within the executive branch,
19 and thus the Order should not be enjoined.

20 III. ARGUMENT

21 A. English Law

22 In *Calvin’s Case*—which the Supreme Court later cited in *Wong Kim Ark*, discussed
23 below—Lord Coke explained what made someone subject to the jurisdiction of English courts.
24 *Calvin’s Case* (1608) 77 Eng. Rep. 377, 385. He noted that “it is *nec cælum, nec solum*, neither the
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26 ² Samuel Estreicher & David Moosmann, *Birthright Citizenship for Children of Unlawful U.S. Immigrants*
27 *Remains an Open Question*, Just Sec. (Nov. 20, 2018), <https://www.justsecurity.org/61550/birthright-citizenship-children-unlawful-u-s-immigrants-remains-open-question/>.

1 climate nor the soil, but *ligeantia* [allegiance] and *obedientia* [obedience] that make” one “subject”
2 to the laws of the country. *Id.* Jurisdiction in that sense does not turn simply on whether the person
3 was present within the territory or subject to its *laws*, but whether he owed allegiance to the
4 sovereign. As the D.C. Circuit has explained, *Calvin’s Case* means “[t]hose born ‘within the
5 King’s domain’ and ‘within the obedience or ligeance of the King’ were subjects of the King, or
6 ‘citizens’ in modern parlance.” *Tuaua*, 788 F.3d at 304 (quoting 77 Eng. Rep. at 399).

7 Lord Coke cited several prior cases to make the point. Most notable was *Perkin Warbeck’s*
8 *Case*, where a Dutchman declared himself the rightful heir to the English throne, then traveled to
9 England in an attempt to take the throne. He was captured, but the English court concluded he
10 “could not be punished by the common law” because he was not subject to the civil courts’
11 jurisdiction. *Calvin’s Case*, 77 Eng. Rep. at 384. There was no state of war between the countries,
12 but his mere presence was unlawful, and thus he had never been under the “protection of the King,
13 nor ever owed any manner of ligeance unto him.” *Id.*

14 As Professor Estreicher explains, “Warbeck’s very setting foot on English soil as a
15 pretender to the throne made him a criminal in the eyes of English law, one who had never claimed
16 the protection of the king by virtue of his lawful presence in the realm. Thus, it was the illegality of
17 Warbeck’s presence that placed him outside of the ordinary jurisdiction of English law.”
18 Estreicher, *supra* note 2.

19 **B. The Understanding of Citizenship During the Drafting of the Fourteenth Amendment**

20 The concept that “jurisdiction” included two concepts—i.e., being subject to a nation’s
21 laws but also holding allegiance to the sovereign—continued into international relations and
22 American practice in the leadup to the Fourteenth Amendment.

23 “The status of dual allegiance, ordinary as it seems today, seemed anomalous and
24 inappropriate” in the 1860s, as “the general view was that ‘no one can have two countries.’”
25 Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the*
26 *Citizenship Clause of the Fourteenth Amendment*, 32 St. Louis U. Pub. L. Rev. 329, 334 (2013). Thus,
27 at the time of the Fourteenth Amendment’s drafting and ratification, the term “immigration

1 status' ... would have been meaningless" because the United States had only minimal immigration
2 laws in the modern sense, and instead the crucial inquiry was "the parents' allegiance to a foreign
3 country." *Id.*

4 That is because the general, albeit not completely uniform, rule at the time was that
5 citizenship of a child followed the parents' citizenship, and their original sovereign would often
6 "claim[] the allegiance of the child" regardless of where he was born, as "British law at the time
7 plainly did." *Id.* at 358. United States law was the same: in 1855, Congress enacted a law dictating
8 that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the
9 United States, whose fathers were or shall be at the time of their birth citizens of the United States,
10 shall be deemed and considered and are hereby declared to be citizens of the United States,"
11 except for "persons whose fathers never resided in the United States." Ch. 71, 10 Stat. 604 (1855);
12 *see Weedin v. Chin Bow*, 274 U.S. 657, 659 (1927). Accordingly, "in 1866 ... a foreigner could be
13 domiciled in the United States but remain subject to a foreign power." Mensel, *supra*, at 356.

14 With this background, the terminology used by the drafters of the Jurisdiction Clause
15 makes more sense to modern readers.

16 The history of the Jurisdiction Clause begins with the Civil Rights Act of 1866, which
17 stated: "[A] persons born in the United States and *not subject to any foreign power*, excluding Indians
18 not taxed, are hereby declared to be citizens of the United States." Ch. 31, 14 Stat. 27, 27 (1866)
19 (emphasis added). Senator John Bingham, a principal author of the future Fourteenth
20 Amendment, said this provision meant that "every human being born within the jurisdiction of the
21 United States of parents *not owing allegiance to any foreign sovereignty*" would be a citizen. Cong.
22 Globe, 39th Cong., 1st Sess. 1291 (1866) (emphasis added). This invoked the concept of total
23 allegiance to the United States—a concept defeated if the parents (and thus their child) owed any
24 allegiance to their home country.

25 There were, however, serious doubts whether Congress had constitutional authority to
26 enact the 1866 Act—President Johnson vetoed it in part on that basis, but the veto was
27 overridden—and so "it was clear to many in the Republican majority that a constitutional

1 amendment would be needed to give the Civil Rights Act a solid foundation on which to survive
2 future legal challenges.” Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the*
3 *Original Meaning of the Citizenship Clause*, 24 Tex. Rev. L. & Pol. 135, 147–48 (2019). Accordingly,
4 it “cannot be seriously doubted” that what would become the Jurisdiction Clause was intended to
5 have the exact same meaning as the Act, which referenced foreign allegiance. *Id.* at 147.

6 The earliest draft of the Fourteenth Amendment originally included no citizenship clause,
7 but in May 1866, Senator Benjamin Wade sought to replace the word “citizen” in the privileges-
8 or-immunities clause with the phrase “persons born in the United States or naturalized by the laws
9 thereof.” Cong. Globe, 39th Cong., 1st Sess. 2768 (1866). This prompted a discussion of whether
10 that was actually the proper definition of “citizen.” *See* Mensel, *supra*, at 362–63.

11 Senator Jacob Howard, a sponsor of the Fourteenth Amendment, soon proposed a new
12 clause that invoked the historic term of art “jurisdiction”: “[A]ll persons born in the United
13 States, and subject to the jurisdiction thereof, are citizens of the United States and of the States
14 wherein they reside.” Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).

15 Importantly, Howard explained that “[t]his will not, of course, include persons born in the
16 United States who are foreigners, aliens, who belong to the families of ambassadors [sic] or foreign
17 ministers accredited to the Government of the United States, but will include every other class of
18 persons.” *Id.* This express reference to “aliens” suggests that even the drafter did not believe it
19 would apply only narrowly to children of ambassadors, who are listed separately.

20 The primary focus of debate during this time was whether the Jurisdiction Clause would
21 extend to Indians, who were not expressly mentioned in the Clause. Senator Edgar Cowan noted
22 that “[i]t is perfectly clear that the mere fact that a man is born in the country has not heretofore
23 entitled him to the right to exercise political power.” *Id.* at 2890. “[S]ojourners” or “travelers,”
24 for example, have a “right to the protection of the laws; but he is not a citizen in the ordinary
25 acceptance of the word.” *Id.* The right to protection of the laws invoked the narrower sense of
26 jurisdiction, but to become a citizen, something more was required.

1 Senator Lyman Trumbull, who was Chair of the Senate Judiciary Committee and seen as
2 the Senate expert on the closely aligned Civil Rights Act of 1866, was asked what the Jurisdiction
3 Clause meant in this context. He replied: “What do we mean by ‘subject to the jurisdiction of the
4 United States?’ Not owing allegiance to anybody else. That is what it means.” *Id.* at 2893. He
5 further stated: “‘subject to the jurisdiction thereof’ ... means ‘subject to the complete jurisdiction
6 thereof.’” *Id.* Any divided loyalty meant no citizenship, just as it did in the Civil Rights Act of 1866.

7 Applying that test to Indians was seen as so straightforward that the drafters decided
8 against including an express exception for “Indians not taxed,” as they had done in the 1866 Act
9 and would also do in Section Two of the Fourteenth Amendment. Federal law had long applied to
10 Indians, *see, e.g.*, 1 Stat. 137 (1790), but they owed at least partial loyalty to their tribes—and thus
11 the Jurisdiction Clause *unambiguously* meant the Fourteenth Amendment would not confer
12 citizenship on their children. Congress later granted Indians citizenship via statute,³ but until that
13 time, “the Indians were regarded as alien people residing in the United States” and thus “were
14 not ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the
15 fourteenth amendment of the Constitution.” *Nunn v. Hazelrigg*, 216 F. 330, 332–33 (8th Cir. 1914).

16 As modern scholars have recognized, “Senator Trumbull and those who agreed with him
17 spoke of the jurisdiction arising from allegiance.” Mensel, *supra*, at 369. Thus, everyone
18 recognized the narrow form of jurisdiction, meaning entitlement to protection of the laws. But it
19 “is clear that the men who drafted and passed the Citizenship Clause ... recognized a second
20 degree of subjection to a country’s jurisdiction—a subjection to its ‘complete’ jurisdiction in ways
21 more closely associated with the rights, duties, and deeply rooted natural allegiance inherent to
22 long-term residence in, and meaningful interaction with, a particular society.” Swearer, *supra*, at
23 150. And that more complete form of jurisdiction was needed for citizenship. Merely being born in
24 the United States and being subject to its laws was insufficient. If the parents or child had divided
25 allegiances, the child would not be a U.S. citizen under the Jurisdiction Clause.

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27 ³ *See, e.g.*, Ch. 233, 43 Stat. 253 (1924).

1 That approach directly tracked the Civil Rights Act of 1866, which the Jurisdiction Clause
 2 constitutionalized, as noted above. Recall that Act excluded those who “ow[e] allegiance to any
 3 foreign sovereignty.” Cong. Globe, 39th Cong., 1st Sess. 1291 (1866). That same limitation was
 4 carried into the Jurisdiction Clause, except the latter was stated affirmatively vis-à-vis the United
 5 States (i.e., must owe allegiance to the United States), whereas the Act had been stated negatively
 6 vis-à-vis foreign sovereigns (i.e., cannot owe allegiance to another sovereign). But they meant the
 7 same thing.

8 As noted, the most common example at the time of someone who lacked complete
 9 allegiance to the United States would be the children of Indians, but the same “rationale that
 10 excluded the children of Indians would exclude the children of Europeans, born in the United
 11 States, if the European power involved claimed the allegiance of the child,” which—most
 12 notably—“British law at the time plainly did.” Mensel, *supra*, at 358. Because no one could owe
 13 allegiance to two sovereigns at that time (*see supra*), such children could not claim total allegiance
 14 to the United States and thus would not be citizens under the Fourteenth Amendment, just as they
 15 would not be citizens under the Civil Rights Act of 1866.⁴

16 This focus on allegiance continued in the years immediately after the Fourteenth
 17 Amendment was ratified, as explained next.⁵

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 19
 20 ⁴ Even now, many countries claim children born abroad to citizens. *See, e.g.*, Venezuela Constitution Ch.
 21 II, § 1, art. 32 (“Are Venezuelans by birth: ... Any person who was born in a foreign territory, and is the
 22 child of a father and mother who are both Venezuelans by birth.”); *Nationality*, Gov’t of Colombia,
 23 https://www.cancilleria.gov.co/tramites_servicios/nacionalidad (Article 96 of the Colombian Political
 24 Constitution deems “Colombian nationals by birth” those “[c]hildren of a Colombian father or mother who
 25 were born in a foreign land and then resided in Colombian territory or registered in a consular office of the
 26 Republic”); Henio Hoyo, Eur. Univ. Inst., *Report on Citizenship Law: Honduras* 5 (Apr. 2016),
 27 https://cadmus.eui.eu/bitstream/handle/1814/40848/EUDO_CIT_CR_2016_06.pdf (Honduran
 Constitution awards “*ius sanguinis* for children born abroad to those born from Honduran citizens by
 birth”); Roberto Courtney, Eur. Univ. Inst., *Report on Citizenship Law: Nicaragua* 4–5 (May 2015),
<https://core.ac.uk/download/pdf/45685706.pdf> (Nicaraguan law grants citizenship to “the children of
 Nicaraguans born overseas regardless of any other nationalities they may have.”).

⁵ For those who may wish to consider contemporaneous public discussion of the Jurisdiction Clause,
 unfortunately “there was little in the newspapers on the technical issue of jurisdiction within the meaning
 of the citizenship clause.” Mensel, *supra*, at 372.

1 **C. Post-Ratification Understanding of Scholars and the Supreme Court**

2 In the years immediately after ratification of the Fourteenth Amendment, scholars and the
3 Supreme Court viewed the Jurisdiction Clause as extending well beyond children of ambassadors
4 and foreign soldiers, confirming the view that “jurisdiction” was a term of art referring to a specific
5 type of relationship between the individual and the sovereign.

6 In 1872, just four years after ratification, the Supreme Court noted that “[t]he phrase,
7 ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers,
8 consuls, and *citizens or subjects of foreign States born within the United States.*” *Slaughter-House Cases*,
9 83 U.S. 36, 73 (1872) (emphasis added). To be sure, this was likely *dicta*, but it reflected the
10 contemporaneous understanding that the Jurisdiction Clause was not a narrow exception solely for
11 “ministers,” “consuls,” and invading soldiers, but applied also to children whose parents
12 remained citizens of another country. All of these groups had one thing in common: they lacked
13 total allegiance to the United States.

14 One year later, the U.S. Attorney General (who had been a Senator during the debates over
15 the Fourteenth Amendment) issued a formal opinion explaining that “[t]he word ‘jurisdiction’
16 must be understood to mean absolute or complete jurisdiction, such as the United States had over
17 its citizens before the adoption of this amendment.” 14 Op. Att’ys Gen. 295, 300 (1873). “Aliens,
18 among whom are persons born here and naturalized abroad, dwelling or being in this country, are
19 subject to the jurisdiction of the United States only to a limited extent. Political and military rights
20 and duties do not pertain to them.” *Id.* Again, note the two different forms of “jurisdiction.”

21 The next year, the House of Representatives issued a report stating that “[t]he United
22 States have not recognized a ‘double allegiance.’ By *our* law a citizen is bound to be ‘true and
23 faithful’ alone to our Government.” H.R. Rep. No. 43-784, at 23 (1874). This again equates
24 citizenship with the concept of total allegiance, not mere partial allegiance by the individual, nor
25 partial authority by the sovereign over that individual.

26 The 1881 *A Treatise on Citizenship* by Alexander Porter Morse adopted the Attorney
27 General’s 1873 view, reiterating that “[a]liens, among whom are persons born here and naturalized

1 abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only
2 to a limited extent,” and thus their children would not be citizens. Alexander Porter Morse, *A*
3 *Treatise on Citizenship* § 198, at 237–38 (1881).

4 Contemporary scholars further confirmed that “jurisdiction” had two meanings, one
5 limited and one more complete. Francis Wharton’s 1881 edition of *A Treatise on the Conflict of Laws*
6 recognized that “[i]n one sense” a child born in the United States is necessarily subject to its
7 jurisdiction in the simple sense that “[a]ll foreigners are bound to a local allegiance to the state in
8 which they sojourn.” Francis Wharton, *A Treatise on the Conflict of Laws* § 10, at 34–35 (2d ed.
9 1881). “Yet the term ‘subject to the jurisdiction,’ as above used, must be construed in the sense in
10 which the term is used in international law as accepted in the United States as well as in Europe.”
11 *Id.* § 10, at 35. And “by this law the children born abroad of American citizens are regarded as
12 citizens of the United States, with the right, on reaching full age, to elect one allegiance and
13 repudiate the other, such election being final. The same conditions apply to children born of
14 foreigners in the United States.” *Id.*

15 George Collins, who was later appointed *amicus* in *Wong Kim Ark*, explained in 1884 that
16 “[t]he phrase ... ‘subject to the jurisdiction thereof’ does not mean territorial jurisdiction, as has
17 been held in some cases, but means national jurisdiction; that is the jurisdiction which a nation
18 possesses over those who are its citizens or subjects as such.” George D. Collins, *Are Persons Born*
19 *Within the United States Ipso Facto Citizens Thereof?*, 18 Am. L. Rev. 831, 837 (1884).⁶

20 In 1884, the Supreme Court decided *Elk v. Wilkins*, 112 U.S. 94, which held that Indians
21 were not citizens under the Fourteenth Amendment, as they owed allegiance to their tribes. The
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24 ⁶ Numerous other contemporaneous law articles reiterated that jurisdiction meant a reciprocal
25 relationship, with the individual owing total allegiance to the sovereign, which consented to that person’s
26 presence. “[B]orn in the United States’ means born, not alone on the soil of the United States, but within
27 its allegiance ... To be a citizen of the United States is a political privilege, which no one not born in it can
assume, without its consent in some form.” G.M. Lambertson, *Indian Citizenship*, 20 Am. L. Rev. 183, 185
(1866); see Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens,
Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. Pub. L. 35, 72 (2011) (collecting
authorities).

1 Court held that the “evident meaning” of the Jurisdiction Clause was that a person was “not
2 merely subject in some respect or degree to the jurisdiction of the United States, but *completely*
3 subject to their political jurisdiction, and owing them direct and immediate allegiance.” *Id.* at 102
4 (emphasis added).

5 Moving beyond the context of Indians, the Court explained that the Fourteenth
6 Amendment would confer citizenship only on those children whose parents are “owing no
7 allegiance to any alien power.” *Id.* at 101. But “an emigrant from any foreign state cannot become
8 a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance
9 by the United States of that renunciation through such form of naturalization as may be required
10 law.” *Id.* Again, note the concepts of total allegiance by the individual and an “acceptance by the
11 United States.” *Id.* “Jurisdiction” in the Jurisdiction Clause invoked that reciprocal relationship.

12 In lectures posthumously published in 1891, Supreme Court Justice Samuel Miller likewise
13 explained the Jurisdiction Clause extended beyond mere ambassadors: “If a stranger or traveller
14 passing through, or temporarily residing in this country, who has not himself been naturalized, and
15 who claims to owe no allegiance to our Government, has a child born here which goes out of the
16 country with its father, such child is not a citizen of the United States, because it was not subject
17 to its jurisdiction.” Samuel F. Miller, *Lectures on the Constitution* 279 (1891).

18 Given this body of evidence, modern scholars have recognized there was “significant
19 agreement among contemporary legal scholars” and “Executive Branch officials during this same
20 time, including Secretaries of State,” that the Jurisdiction Clause invoked the concept of total
21 allegiance to the United States. Swearer, *supra*, at 169–72 (collecting additional examples).

22 **D. Plaintiffs Overread *Wong Kim Ark***

23 Plaintiffs chiefly rely on the Supreme Court’s decision in *United States v. Wong Kim Ark*,
24 169 U.S. 649 (1898), but their reliance is misplaced because—as explained below—the Court tied
25 allegiance to whether the United States had “permitted” or “consent[ed]” to the parents being
26 permanently present in the United States at the time of the child’s birth, *id.* at 684, 686, 694. Illegal
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1 aliens, by definition, are not present with the consent of the United States, and accordingly it makes
2 little sense to argue that *Wong Kim Ark* dictates citizenship for their children.

3 *Wong Kim Ark* involved a person who was born in the United States to alien parents who,
4 at the time of the child's birth, "enjoy[ed] a permanent domicile and residence" in the United
5 States, with the sovereign's permission. *Id.* at 652. The Court held that such a child "becomes at
6 the time of his birth a citizen of the United States." *Id.* at 705. Invoking the old concept of
7 allegiance, the Court held that foreigners present in the United States "are entitled to the
8 protection of and owe allegiance to the United States, *so long as they are permitted* by the United
9 States to reside here." *Id.* at 694 (emphasis added).

10 Continuing with the theme of sovereign consent as an aspect of allegiance, the Court held
11 it was "incontrovertible" that "the jurisdiction of every nation within its own territory is exclusive
12 and absolute" and may only be qualified by the "consent, express or implied," of the sovereign.
13 *Id.* at 686. That traced Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11
14 U.S. (7 Cranch.) 116 (1812), which addressed the rights of Americans whose ship had been seized
15 at sea by Napoleon's agents and then sailed into Philadelphia under a French flag. *Id.* at 117-18.
16 Echoing language later found in the Fourteenth Amendment, the Court held that the "jurisdiction
17 of the nation within its own territory is necessarily exclusive and absolute," and thus "[a]ll
18 exceptions" to it "must be traced up to the consent of the nation itself." *Id.* at 136. Rights could
19 not be gained against the sovereign by those acting in defiance of its laws.

20 *Wong Kim Ark* concluded that foreigners owe the requisite allegiance when the United
21 States permits them to be here permanently. One need not decide whether *Wong Kim Ark* was fully
22 correct on that score because the test it imposes still resolves the question here: by definition, illegal
23 aliens do not have "consent" to be here, are not "permitted" to "reside here," nor have they been
24 given "permanent domicile and residence in the United States." *Wong Kim Ark*, 169 U.S. at 653,
25 686, 694.

26 The Executive Order at issue here notably excludes "children of lawful permanent
27 residents," *Protecting the Meaning and Value of American Citizenship*, Exec. Order § 2(c) (Jan. 20,

1 2025), which is the modern equivalent to the parents in *Wong Kim Ark*. The Court’s holding
 2 extended no further.

3 Plaintiffs rely on a few broad statements in *Wong Kim Ark*, but ironically the opinion itself
 4 cautioned against relying on such statements. “It is a maxim, not to be disregarded, that general
 5 expressions, in every opinion, are to be taken in connection with the case in which those
 6 expressions are used. If they go beyond the case, they may be respected, but ought not to control
 7 the judgment in a subsequent suit when the very point is presented for decision.” *Wong Kim Ark*,
 8 169 U.S. at 679. Accordingly, circuit courts across the country have long read *Wong Kim Ark*
 9 narrowly, in light of its specific facts. *See Tuaua*, 788 F.3d at 305 (citing *Nolos v. Holder*, 611 F.3d
 10 279, 284 (5th Cir. 2010); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d
 11 1449, 1454 (9th Cir. 1994)).

12 One final note: Justice John Marshall Harlan—the patron of interpreting the Constitution
 13 as color-blind and the sole dissenter in *Plessy v. Ferguson*—joined Chief Justice Fuller’s dissent in
 14 *Wong Kim Ark*, arguing that Wong “never became and is not a citizen of the United States.” *Wong*
 15 *Kim Ark*, 169 U.S. at 732 (Fuller, C.J., dissenting). Clearly, Justice Harlan viewed the
 16 government’s position as fully consistent with our Nation’s commitment to equal protection.⁷

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 19 ⁷ Plaintiffs’ reliance on a footnote in *Plyler v. Doe*, 457 U.S. 202 (1982), is also misplaced. *First*, the
 20 footnote “is *dicta* referring to *dicta*,” because it was unnecessary to the analysis in *Plyler* itself and also relied
 21 on *dicta* from *Wong Kim Ark*. Swearer, *supra*, at 198. *Second*, the *Plyler* footnote mentioned the same
 22 limitations that were present in *Wong Kim Ark*, i.e., the concept that “jurisdiction” is “bounded only, if at
 23 all, by principles of *sovereignty and allegiance*.” 457 U.S. at 212 n.10 (emphasis added). *Third*, there are
 24 several textual differences between the equal protection clause (at issue in *Plyler*) and the citizenship clause
 25 (at issue here). The former refers to persons “*within the jurisdiction*” of a *state*, whereas the latter clause
 26 refers to persons “*subject to the jurisdiction*” of the *United States*. If the Framers had intended the two to
 27 mean the same thing, they would have used the same phrase, especially because they used very specific
 terminology throughout Section One of the Fourteenth Amendment. Scholars have argued that “subject to
 the jurisdiction” referred to the concept of “total allegiance” to the national sovereign as discussed above,
 whereas “within the jurisdiction” referred to the separate, “local allegiance to the state in which they
 sojourn,” i.e., the state they are “within.” Wharton, *supra*, § 10, at 34–35; *see* Swearer, *supra*, at 199–200.
 That tracks the historic discussion recounted above, where the Framers and contemporary scholars
 acknowledged that those illegally present might receive protection of the laws and thus were subject to a
 lesser form of jurisdiction, but their children would not receive the permanent status and benefits of
 citizenship because they lacked total allegiance.

1 **E. Contemporary Scholars Support the Government’s Views**

2 Modern scholars and jurists have signaled agreement with the government’s
3 interpretations of the Jurisdiction Clause, *Wong Kim Ark*, or both. As noted above, Professor
4 Estreicher, a nationally renowned scholar, has written that reliance on *Wong Kim Ark* for applying
5 birthright citizenship to children of illegal aliens is “misplaced.” Estreicher, *supra* note 2. “*Wong*
6 by its facts (and some of its language) is limited to children born of parents who at the time of birth
7 were in the United States lawfully and indeed were permanent residents.” *Id.*

8 As Professor Estreicher explains, “the circumstances of *Wong Kim Ark* differ from the
9 unlawful immigration context. Wong’s parents were clearly permitted to be within the United
10 States at the time of his birth. A second respect in which the facts of the case differ is that, unlike
11 for children of unlawful immigrants, there was no U.S. prohibition of Wong’s presence at time of
12 his birth. His birth and presence within the United States was entirely lawful.” *Id.* And that
13 distinction matters given that *Wong Kim Ark* itself repeatedly referred to the importance of the
14 sovereign’s consent.

15 Modern jurisprudence has likewise rejected the notion that the Jurisdiction Clause looks
16 only to whether the child would be subject to the laws of the United States. The D.C. Circuit held
17 just a few years ago that “the concept of allegiance is manifested by the Citizenship Clause’s
18 mandate that birthright citizens not merely be born within the territorial boundaries of the United
19 States but also ‘subject to the jurisdiction thereof.’” *Tuaua*, 788 F.3d at 305. And “the evident
20 meaning of the words ‘subject to the jurisdiction thereof’ is, not merely subject in some respect or
21 degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction,
22 and owing them direct and immediate allegiance.” *Id.* (quoting *Elk*, 112 U.S. at 102) (cleaned up)
23 (emphasis in original).

24 Again, this makes clear that the question is not simply whether “ultimate governance
25 remains” with “the United States Government,” *e.g.*, whether the United States has jurisdiction
26 to prosecute the person, *id.* at 306, but rather whether there is a reciprocal relationship where the
27 person owes total allegiance to the sovereign, which allows the person to be present.

1 Judge Richard Posner, before he retired, also wrote about the Jurisdiction Clause, arguing
 2 in a concurrence that the interpretation espoused by Plaintiffs here “makes no sense,” and he
 3 “doubt[ed]” it was correct even under existing caselaw because many aliens present in the United
 4 States owe no allegiance to it. *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J.,
 5 concurring). He noted that hundreds of thousands of foreign nationals have come to the United
 6 States solely to give birth, without the slightest hint of owing allegiance to the United States.
 7 “[T]here is a huge and growing industry in Asia that arranges tourist visas for pregnant women so
 8 they can fly to the United States and give birth to an American. Obviously, this was not the intent
 9 of the 14th Amendment; it makes a mockery of citizenship.” *Id.*⁸

10 **F. “Subject to the Jurisdiction Thereof” Cannot Mean “Subject to the Laws Thereof”**

11 As recounted above, the historical record and both contemporary and modern scholarship
 12 demonstrate that the Jurisdiction Clause looks beyond the simple question of whether the person
 13 is subject to the laws of the United States. There are additional reasons to reject Plaintiffs’
 14 simplistic view.

15 *First*, it would have been easy enough to say “subject to the laws” of the United States, but
 16 instead the drafters used a different term: “jurisdiction.” That was intentional. And it invoked a
 17 term of art with a nuanced history and understanding, as explained above. But Plaintiffs never
 18 provide an answer for why the drafters did not use far simpler language if they meant only to invoke
 19 the simple concept of being subject to U.S. law.

20 *Second*, the laws surrounding immunity further demonstrate why Plaintiffs’ interpretation
 21 is incorrect. Plaintiffs acknowledge that children of ambassadors and invading soldiers are not
 22 entitled to birthright citizenship under the Fourteenth Amendment. But Plaintiffs are wrong to
 23 contend that this is because those groups are supposedly immune from U.S. law. Federal law *does*

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 25 ⁸ Further, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the detention of a man who
 26 claimed to be a U.S. citizen, Justices Scalia and Stevens wrote separately in part to note that they were
 27 merely “presum[ing]” the plaintiff to be an “American citizen,” even though he had been born in
 Louisiana, *id.* at 554 (Scalia, J., dissenting). Hamdi’s parents were not U.S. citizens nor lawful permanent
 residents but rather were present in the United States only on temporary work visas when Hamdi was born.
 James C. Ho, *Defining ‘American,’* 9 Green Bag 2d 367, 376 & n.42 (2006).

1 apply at least in part to invading soldiers and even more obviously to their newborn children, who
2 would not be enemy combatants. *See Ex Parte Quirin*, 317 U.S. 1, 20 (1942) (upholding convictions
3 of German soldiers captured in the United States). And U.S. law also applies to most diplomatic
4 officials, as only a narrow set has anything approaching full immunity, which itself can always be
5 waived case-by-case by the home country. *See Diplomatic and Consular Immunity*, U.S. Dep't of
6 State, July 2019, [https://www.state.gov/wp-content/uploads/2019/07/2018-](https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf)
7 [DipConImm_v5_Web.pdf](https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf). Further, there is no diplomatic official who is fully immune from all
8 forms of *civil* liability, *i.e.*, being haled into the jurisdiction of a court. *See id.*, App. C (for example,
9 all types of diplomatic officials can be issued traffic citations).

10 This means none of Plaintiffs' examples holds up. Every type of person they list as falling
11 within the Jurisdiction Clause is *already* subject to at least some of the laws of the United States,
12 and they could be subjected to even more laws on a case-by-case basis. At best, they have qualified,
13 partial, or contingent immunity. Plaintiffs have no way to explain how individuals who are clearly
14 subject to at least some of the laws of the United States are nonetheless *not* subject to the laws of
15 the United States. The answer is that Plaintiffs' test is just the wrong one.

16 *Third*, Plaintiffs' interpretation proves too much. If qualified, partial, or contingent
17 immunity were sufficient to render diplomatic officials not subject to the jurisdiction of the United
18 States, then domestic officials who receive such immunity—*e.g.*, judges and prosecutors—would
19 likewise not be subject to the jurisdiction of the United States, and their children would not be
20 citizens under the Fourteenth Amendment. That is wrong, of course. And the reason is because
21 domestic judges and prosecutors—unlike ambassadors and invading soldiers—have total
22 allegiance to the United States and are present with its consent. They are therefore subject to its
23 jurisdiction, and their children born or naturalized in the United States are citizens.

24 * * *

1 For all these reasons, the touchstone for birthright citizenship under the Fourteenth
2 Amendment is allegiance to the United States, rather than merely being subject to its laws or some
3 subset thereof.⁹

4 **IV. CONCLUSION.**

5 The Court should deny Plaintiffs' motion for a preliminary injunction.

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27 ⁹ Plaintiffs' reliance on statutory citizenship fails because it uses the same language as the Jurisdiction Clause. 8 U.S.C. § 1401(a) (requiring the person be "subject to the jurisdiction thereof").

1 February 3, 2025.
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