

Statement of Hon. Ken Cuccinelli, II

Before the House Judiciary Subcommittee on the Constitution

Hearing on Birthright Citizenship After *Trump v. Barbara*

September 2, 2026

Introduction

Chairman Roy, Ranking Member Scanlon, and Members of the Subcommittee: thank you for the opportunity to appear. I have been asked to address what the Supreme Court decided in *Trump v. Barbara*, No. 25-365 (June 30, 2026), and what options remain available to Congress short of a constitutional amendment.

This statement is deliberately built in two separable parts. Parts I through IV describe the decision, what it leaves unresolved, and the legal tools available to Congress. I have tried to state those accurately, including where the accurate answer is unfavorable to the policy position I hold. Part V states my own view — that *Barbara* was wrongly decided — and what I recommend. A Member who rejects Part V should still be able to rely on Parts I through IV.

Two conclusions at the outset.

First, *Barbara's* constitutional holding is binding law and carries the ordinary force of precedent. It commanded five votes rather than six. That fact bears on prediction — on what a differently composed Court might do — and not at all on whether the holding binds today. It binds. No ordinary statute changes who is a citizen at birth while it stands. Every bill in this fight should be built with that in mind.

Second, two Justices identified avenues. Justice Kavanaugh invited Congress to legislate; Justice Gorsuch drew a line between children of temporary visitors and children of families permanently settled here. Both invitations are real. Neither presently commands five votes, and they point in different directions — a point I develop in Part III, because it is routinely missed.

I. What the Court Held

A. The lineup, stated precisely

The case is widely reported as 6–3. That is correct as to the judgment and incomplete as to the reasoning. The syllabus records the following:

ROBERTS, C. J., delivered the opinion of the Court, in which SOTOMAYOR, KAGAN, BARRETT, and JACKSON, JJ., joined. JACKSON, J., filed a concurring opinion, in which SOTOMAYOR, J., joined as to the introduction and Part I. KAVANAUGH, J., filed an opinion concurring in the judgment and dissenting in

part. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined. ALITO, J., and GORSUCH, J., filed dissenting opinions.

So there are two numbers. Six Justices agreed that Executive Order 14160 could not stand. Five joined the constitutional rationale. Justice Kavanaugh concurred in the judgment on statutory grounds, resting on 8 U.S.C. § 1401(a), and did not join the opinion of the Court.

I state both numbers together because either alone misleads. Reporting only the 6–3 obscures that the constitutional rule rests on five votes. Reporting only the 5–4 implies a fragility that does not exist as a matter of law — and I want to be clear that I am not making that argument. A five-vote constitutional holding is as binding as a unanimous one. *Miranda*, *Heller*, and *Obergefell* were each decided by a single vote, and no one supposes Congress may legislate around them for that reason. The vote count tells you something about how a future Court might rule. It tells you nothing about what today's law is.

B. The holding

The Court held that children born in the United States to parents unlawfully or temporarily present are subject to the jurisdiction of the United States and are thus citizens at birth under the Citizenship Clause.

The reasoning turns on the meaning of "subject to the jurisdiction thereof." The Chief Justice read the phrase as describing territorial sovereign power rather than allegiance: to be subject to the jurisdiction is to live under the nation's dominion, and jurisdiction refers to the power of the United States to govern those within its territory, an understanding the opinion traces to Chief Justice Marshall's decision in *Schooner Exchange v. McFaddon*. On that reading, the historical exclusions are narrow: children of foreign ministers, and members of nineteenth-century tribes standing in a distinct sovereign relationship to the United States.

The Government's proposed domicile requirement was rejected on two grounds. The Court found scant evidence for what it called a dramatically revisionist view, observing that domicile and national citizenship are distinct concepts and that the term appears twice in the Civil Rights Act debates and once in the Citizenship Clause debates. It added a workability objection: a Congress intent on putting the question of citizenship once and forever to rest would not have chosen a standard introducing significant uncertainty.

The sentence in the majority opinion that Members should attend to most closely is not about immigration at all. At page 9 of the slip opinion, describing the Reconstruction Congress's purpose, the Court writes that the goal was to put the "great question of citizenship" "beyond the legislative power" altogether. That is the majority anticipating this hearing. Any statute Congress enacts will be met with that sentence.

C. The separate opinions

Justice Kavanaugh would have decided the case on the statute and reached no constitutional question. His opinion contains the sentence that has generated the most legislative activity: Congress could, "consistent with the Fourteenth Amendment — amend § 1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country." I address the limits of that invitation in Part III.

Justice Thomas, joined by Justice Gorsuch, dissented at length — the opinion runs to roughly ninety-one pages — arguing that the Citizenship Clause requires domicile, that a person was a citizen of the state where he had his domicile, and that a person born here but domiciled abroad was as much a stranger to the country as his father. The opinion grounds citizenship in shared civic sacrifice, quoting Frederick Douglass on those who "fought and bled in the same battles" and "gained and gloried in the same victories."

Justice Alito dissented separately, applying an allegiance test under which citizenship extends only to children owing allegiance solely to the United States, and emphasizing both birth tourism and the incentive the majority's rule creates to enter or remain unlawfully.

Justice Gorsuch also wrote separately — three pages — and his opinion is the one I would commend to the Committee's closest attention. He asks: "Is a child born here to parents who have long chosen to make this Nation their permanent home not a citizen under the Fourteenth Amendment solely because his parents' presence violates statutory law?" He would sustain the order as to genuinely temporary visitors and doubts it as to families settled here permanently.

II. What the Decision Forecloses

I take these first because the Committee's time is better spent on live questions than dead ones.

Section 5 of the Fourteenth Amendment does not authorize narrowing legislation. This is the route most often suggested to me and it is the most clearly foreclosed. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) — the case that established the most expansive reading of congressional enforcement power ever adopted — says at footnote 10: "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." The ratchet runs one way by the terms of the decision that built it, and *City of Boerne v. Flores*, 521 U.S. 507 (1997), forecloses the remainder by holding that Section 5 is remedial rather than definitional. A Section 5 bill would not survive a motion to dismiss.

Ordinary legislation cannot lower a constitutional floor. Section 1401(a) restates the Citizenship Clause; it does not create the right. Amending the statute does not amend the Constitution, and after *Barbara* the constitutional rule is stated in terms that reach precisely the population any such amendment would target.

III. What the Decision Leaves Open

A. Justice Kavanaugh's statutory invitation, and its limits

Three bills now pending take up this invitation: H.R. 9633, the Birthright Citizenship Clarification Act of 2026 (Rep. McGuire, introduced July 9, 2026); Senator Banks's Citizenship Act of 2026 (July 13, 2026); and Senator Schmitt's American Citizenship Act (July 14, 2026). Each amends or replaces the operative statutory provision. Senator Schmitt has described his bill as the statutory fix Justice Kavanaugh laid out.

The Committee should understand precisely what such a statute can and cannot do.

Counting votes: Justice Kavanaugh's position, added to the three dissents, is four. The fifth vote must come from a Justice who joined the constitutional holding weeks ago. That is the arithmetic, and it falls short by one.

The deeper difficulty is one Marty Lederman has identified in print and which I think is correct. A statute of this kind requires a court to set aside two decisions — *Wong Kim Ark* and *Barbara*. Justice Kavanaugh has an articulated three-part test for when precedent may be revisited. He did not argue in his own opinion that the test was satisfied here. He extended the invitation without doing the work that would allow a court to accept it, and a Justice who has not argued that his own standard is met is not a Justice who has committed to a result.

The contrary view is worth the Committee's attention. Jonathan Adler has argued that the statutory theory is stronger than it appears precisely because none of the dissenting Justices engaged it — they wrote at length about the Constitution and said essentially nothing about the statute — and that a statutory disposition might have drawn six votes had the Court taken that path. I do not think Professor Adler is obviously wrong. I do think a Member should know that serious analysts disagree about this, rather than hearing only the half that supports the bill in front of them.

My assessment: a statute's realistic function is to create a vehicle — to force the Court to address *stare decisis* squarely rather than in dicta. That is a legitimate thing for Congress to do and I say so in Part V. It is not the same thing as changing the rule, and legislation sold to the public as changing the rule will be understood as a failure when it is enjoined.

B. Justice Gorsuch's reservation, and why it inverts the obvious strategy

Justice Gorsuch's three pages describe a line the majority had no occasion to draw: between children of genuinely temporary visitors and children of parents who have made a permanent home here, whatever their immigration status. He would sustain restriction as to the first and doubts it as to the second. At argument he indicated that the fact that a person might be unlawfully present is immaterial to domicile.

The consequence is counterintuitive and, I think, insufficiently appreciated. The category most often discussed in political debate — children of long-settled families present without authorization — is the category Justice Gorsuch's own reasoning protects. The category his reasoning reaches is the narrow one: commercial birth tourism and paid surrogacy arrangements involving genuinely transient presence.

This is not merely academic. The Executive Branch appears to have reached the same conclusion. The two executive orders issued August 6, 2026 are dramatically narrower than Executive Order 14160: they reach children of foreign government employees, of members of designated foreign terrorist organizations, and of parties to paid commercial birth-tourism or surrogacy arrangements, and they expressly exclude holders of the common employment and student visa categories, lawful permanent residents, and the unlawfully present generally. Their stated theory is that the majority's list of historical exceptions is non-exhaustive. A motion to bring those orders within the existing judgment was filed in the District of New Hampshire on August 11, 2026; I am not aware of a ruling.

I would also state plainly what a Member should ask me if I did not volunteer it. Justice Gorsuch's separate opinion is a three-page passage in a solo dissent, unnecessary to the judgment, written by a Justice who joined a broader dissent in the same case. It binds no one, including him. It is a signal, not a commitment, and testimony that treats it as a fifth vote in waiting is overreading it.

IV. The Remaining Mechanisms, Assessed

The Committee asked for options regardless of how aggressive they appear. I have set them out. I have also rated them honestly, and for several the honest rating is that they impose costs without producing the legal result sought.

Jurisdiction-stripping. Article III's Exceptions Clause gives Congress substantial authority, and after *Patchak v. Zinke*, 583 U.S. 244 (2018), a category-based statute that changes the law rather than dictating a result in a named case will likely survive the rule of *United States v. Klein*. But stripping federal jurisdiction does not touch the right. State courts are courts of general jurisdiction, obliged under *Testa v. Katt* to hear federal claims and bound by the Supremacy Clause to apply *Barbara*. The realistic outcome is fifty forums applying the same rule less uniformly, together with substantial litigation under the avoidance canon of *INS v. St. Cyr*. I do not recommend it. I note that its constitutionality is genuinely contested rather than settled, and that its one certain effect is friction.

Appropriations riders. A rider that changes an underlying legal standard stands on the footing of *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). A rider that simply withholds funds for issuing documents to persons the courts have declared citizens is closer to obstruction,

carries contempt exposure as to a certified class, and would in practice mean withholding passports and Social Security numbers from American citizens. I do not recommend it.

Administrative documentation and evidentiary standards. This is the tool most likely to have practical effect, and it is the one I most strongly urge the Committee to avoid. We have run this experiment. Between roughly 2008 and the 2010s the State Department subjected citizens born along the Texas border with midwife-attended deliveries to escalating documentary demands, discarding facially valid birth certificates; the practice fell disproportionately on Hispanic-surnamed American citizens, took more than a decade and class litigation to curb, and was resolved by settlement in 2023. It did not change the law. It imposed years of hardship on people who were citizens throughout, and it generated a litigation record that strengthened the rule it was aimed at. *Department of Commerce v. New York*, 588 U.S. 752 (2019), also establishes that a stated administrative rationale diverging from the actual purpose is independently fatal.

Executive non-acquiescence. The Social Security Administration's refusal in the 1970s and 1980s to apply adverse circuit rulings beyond named plaintiffs drew judicial findings of systematic defiance and threats of personal contempt against the Secretary, and ended with the agency adopting formal acquiescence rulings. *Trump v. CASA, Inc.* (2025), by narrowing universal injunctions, widens the space in which such a policy could operate as to persons outside a certified class. It remains contempt as to those within one. I do not recommend it.

V. My Own Assessment and Recommendations

The preceding parts are offered as analysis. What follows is argument, and Members should weigh it as such.

I believe *Barbara* was wrongly decided. The strongest version of that view is not the maximal one. It is Professor Wurman's: that the Citizenship Clause's jurisdictional requirement descends from a law-of-nations conception of complete municipal jurisdiction resting on reciprocal protection and obedience, and that children of parents present in violation of law occupy a materially different position from children of parents lawfully admitted. That argument was cited three times in the Thomas dissent. It is a serious argument and the Court did not answer it as fully as it deserved.

It is also hard to square the majority's opinion related to the meaning of the 14th Amendment in 1866-68 – when there literally was no illegal immigration – to our circumstances today. This opinion is constitutional sovereign suicide. It's a slow suicide, but suicide nonetheless.

In the absence of a constitutional amendment, I recommend the following.

1. Legislate against the birth-tourism industry rather than against citizenship status. Congress has ample and uncontested authority over visa issuance, admission, fraud in obtaining benefits,

and commercial brokerage. A statute reaching the marketing, brokerage, and financing of travel undertaken to obtain citizenship — targeting the commercial arrangement rather than anyone's citizenship status — raises no Citizenship Clause question at all, and would reduce the conduct at issue more reliably than a statute that will be enjoined. This is the recommendation I would press hardest, precisely because it does not depend on the Court changing its mind.

2. If Congress wishes to test the constitutional question, do so deliberately and narrowly. A statutory amendment confined to children of parents with no domicile and no intention to establish one — drafted to Justice Gorsuch's line rather than beyond it, with a severability clause and a provision for expedited review — is the version most likely to reach a Court willing to engage. Congress should enact it understanding that its function is to present the question and that it will very likely be enjoined in the interim.

3. Use oversight rather than riders. The agency directives issued under the August 6 orders carry a September 5 deadline. Oversight of their implementation is a legitimate and effective congressional function; conditioning appropriations on withholding documents from persons the courts have declared citizens is neither.

4. Decline the remaining measures. Section 5 legislation, jurisdiction-stripping, documentation friction, and non-acquiescence should be rejected — the first because it is foreclosed, the others because their only reliable product is delay and expense imposed on persons whose citizenship has been decided, even if I don't agree with it.

5. I would be remiss if I didn't note that the single best solution is the one I have not addressed, that being to amend the Constitution to deny citizenship to anyone not born of at least one American parent.

VI. Conclusion

Sadly, *Barbara* is binding, and it will remain binding until the Court revisits it or the Constitution is amended. Congress can legislate against conduct it may lawfully reach. It can construct a vehicle and present the question honestly. It can conduct oversight. What it cannot do is legislate the holding away, and I would rather say so to this Committee now than have the Committee discover it from a district court in six months.

The answer is not to live with it. Shut the birth-tourism industry down now, and never return to the open-borders policies that produced the present scale of illegal presence. Put the constitutional question back before the Court on the strongest footing available, and stay at it until the law matches what the Constitution says. It took forty-nine years to correct *Roe*. This decision is nine weeks old. The time to start fixing it is now.

I appreciate the opportunity to testify and welcome the Committee's questions.