Nos. 25-364 & 25-365

IN THE
Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,

v.

STATE OF WASHINGTON, ET AL.,
Respondents.

DONALD J. TRUMP, ET AL.,
Petitioners,

v.

BARBARA, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF OF TENNESSEE, IOWA, AND 22 OTHER STATES IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

Recent years have seen an influx of illegal aliens—over 9 million—overwhelming our nation's infrastructure and its capacity to assimilate. U.S. Customs and Border Protection, *Nationwide Encounters* (Feb. 5, 2024), https://perma.cc/EDU3-98CP. And many noncitizens proceed to interior States after crossing the border illegally. Tennessee and Iowa, along with Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming, thus face significant economic, health, and public-safety issues from policies holding out a "powerful incentive for illegal migration," Pet. 9, beyond what the Citizenship Clause requires.

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[1] The States of Tennessee and Iowa, et al., notified Counsel of Record for No. 25-364 and No. 25-365 of their intent to file this brief and requested their consent on October 19, 2025. Counsel for all parties in both cases consented to the filing of this brief, waiving any objections to the timing of notice under Sup. Ct. R. 37.

INTRODUCTION AND SUMMARY OF ARGUMENT

Judicial review of a President's policies should rest on sound legal analysis, not prejudgments. Yet plaintiffs and the court below dismissed any need for a deep dive here, casting their reading of the Citizenship Clause as settled and beyond debate. Never mind that plaintiffs' mere-presence-at-birth rule cannot be right all the time, as all agree. Or that it is contrary to the expressed view of many contemporaneous court cases and commentators. Or that it rewards illegal behavior in a manner no drafter or ratifier of the Citizenship Clause endorsed. Courts have viewed plaintiffs' correctness as a foregone conclusion, but that is seriously mistaken.

Not only is the plaintiffs' conception of the Citizenship Clause not obvious—as the Solicitor General's petition persuasively explains—text, history, and Supreme Court precedent foreclose plaintiffs' "mere-presence" reading of the Clause. Contra plaintiffs' thin historical arguments, contemporaneous sources instead support what common sense suggests: Conferring United States citizenship requires a more meaningful connection than mere presence by happenstance or illegality. That connection, originalist evidence repeatedly instructs, was parental domicile. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), does not dictate otherwise. Plaintiffs and the court below overread that decision to reach their preferred mere-presence rule. But in reality, *Wong Kim Ark* cuts against them. Meanwhile, the plaintiffs erroneously rely on political-branch practice long post-dating

ratification and ignore this Court's immigration precedents, which further cuts *against* a mere-presence rule.

The States also write to reiterate the importance of holding litigants to the stringent requirements attending facial challenges. Evolving litigation strategies after *CASA* reinforce the need for dogged adherence to *Salerno*'s exacting test for facial challenges. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Anything less, and courts risk recreating many of the same harms that *CASA* put to rest. This case presents a scenario where, no matter what conclusion the Court ultimately reaches on the merits, it is doubtful that "no set of circumstances exists" under which the Government can constitutionally enforce the executive order. *Id.* At the very least, the Court should limit relief to any unconstitutional aspects and applications of the EO.

ARGUMENT

I. Plaintiffs' Mere-Presence Position Has Serious Merits Flaws.

Plaintiffs would have us all believe that this is an easy case. Its briefing below calls the Government's position "fringe," "flatly contrary to the Fourteenth Amendment[]," and "plainly unconstitutional." States' Ans. Br., at 2, 26, *Washington v. Trump*, 145 F.4th 1013 (9th Cir. 2025). It even accuses President Trump of "seek[ing] to impose a modern version of *Dred Scott*." *Id.* at 1. But that puffery cannot cure the glaring deficiencies in plaintiffs' merits arguments. Examining the relevant text, history, and precedent, the

plaintiffs' mere-presence position is *anything but* a foregone conclusion.

Start with a few broader points that most accept. *First*, the Fourteenth Amendment aimed to constitutionally "ingraft" the protections of the Civil Rights Act of 1866. Cong. Globe, 39th Cong., 1st Sess. App. 82 (1867) (statement of Rep. Miller). Relevant here, the 1866 Act directed 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," no matter their "race and color" and "without regard to any previous condition of slavery or involuntary servitude." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added). Given their close relationship, the Act's history and ordinary public meaning have long been understood to bear on interpretation of the Citizenship Clause. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 31-33 & n.13 (1948).

Second, there is "near-universal consensus" that both the Citizenship Clause and the Civil Rights Act of 1866 sought to overturn the Supreme Court's odious holding in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which treated U.S.-born descendants of African slaves as property rather than persons entitled to U.S. citizenship. Amy Swearer, *Subject to the (Complete) Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 Tex. Rev. L. & Pol. 135, 145 (2019). The provisions also sought to redress the "systematic denial of civil rights to freed slaves" by prohibiting race-based discrimination in the conferral of citizenship or provision of civil rights. *Id.*

at 146. But parental race or alienage is *not* parental residency—a distinction the lower courts have failed to grasp. *See, e.g.*, *Washington* Pet. App. 26a.

Third, while plaintiffs advocate for a mere-presence rule, they must at the same time agree that their pure *jus soli* approach does not hold in all cases. Specifically, plaintiffs and their supporters stipulate that presence is not enough for children of (i) Indian tribal members (who obtain citizenship only through statute, *see* 8 U.S.C. § 1401(b)), (ii) foreign diplomats, and (iii) at least some others, like enemy combatants, who are immune from U.S. law. This means that the core question is not, as many commentators cast it, whether all persons born within U.S. borders obtain citizenship—even plaintiffs agree that's not right. *See Washington* Pet. App. 18a. It's whether "born ... in the United States, and subject to the jurisdiction thereof" excludes only some unstated set of limited exceptions based on then-prevailing understandings of immunity (plaintiffs' view), or provides a generally applicable rule that bars all those without meaningful residence-based ties to the United States (the Government's view).

Fourth, immigration restrictions as we know them did not arise until the early 1880s, after the Citizenship Clause's ratification. There is thus no contemporaneous discussion supporting plaintiffs' maximalist position applying the Clause to children whose parents are present in the United States only unlawfully and after evading detection. And if rewarding parental illegality had come up, it would have violated the

"deep and firm" legal rule *Ex turpi causâ non oritur actio*, which prohibited enforcing illegal contracts or rewarding illegal acts. *E.g.*, *Brooks v. Martin*, 69 U.S. 70, 75-76 (1864).

To sum up, then, plaintiffs' first-principles position is that a provision that (i) aimed to confer citizenship on freed slaves and thus (ii) does not address nonresidents or those unlawfully present, nonetheless (iii) binds the Executive Branch to automatically confer citizenship in most (but not all) cases (iv) in a manner rewarding those who illegally enter the country. That counterintuitive "fallout" should raise red flags about the "implausibility" of plaintiffs' interpretation. *Van Buren v. United States*, 593 U.S. 374, 394 (2021). And as it turns out, plaintiffs' mere-presence position is textually, historically, and precedentially challenged.

A. The text weighs against plaintiffs.

There are two apparent textual problems with plaintiffs' mere-presence position. At the outset, the Clause directs that covered persons not only must be "born … in the United States"; they also must be "subject to the jurisdiction thereof"—a limitation that was added later to the originally proposed text. U.S. Const. amend. XIV, § 1; *see* Swearer, *supra*, at 143. So the text, as revised, must do something different than adopt England's common-law rule of pure *jus soli*, which turns only on the location of a child's birth. *See* Pet. 15, 25-26. Plaintiffs do not dispute as much.

The parties instead debate precisely *how* the Clause departs from a pure *jus soli* approach. Plaintiffs contend that "jurisdiction" is a low bar, referring

only to the bare sense of being subject to *some* U.S. control. But that narrow meaning doesn't work—after all, tribal members and foreign diplomats are "in some way subject to the basic level of sovereign authority the United States government exerts over its geographical territory," even though their "exclusion from birthright citizenship is uncontested." Swearer, *supra*, at 149 & n.35 (collecting examples of U.S. legal authority over diplomats); *see also* Kurt T. Lash, *Prima Facie Citizenship*, 101 Notre Dame L. Rev. ____ (Forthcoming) (manuscript at 36). Equating "subject to the jurisdiction thereof" with being within the United States' territory collapses two distinct prongs of the Clause's text. *See* Pet. 15.

Plaintiffs' contrary reading further places the Citizenship Clause in collision with the 1866 Act, even though "the object" of them was "the same." Cong. Globe, 39th Cong., 1st Sess. 2894. The 1866 Act afforded citizenship only to those "not subject to any foreign power." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. And Senator Trumbull, the Act's primary architect, specifically adopted that language to exclude the children of "persons temporarily resident" in the country. Cong. Globe, 39th Cong., 1st Sess. 572 (1866). That choice was part and parcel of the Reconstruction Congress' overarching goal "to withhold birthright citizenship from those who did not owe a complete, permanent allegiance to the United States and who were not part of the 'American people.'" Swearer, *supra*, at 157-59 (collecting sources). Historical evidence reflects that the metric for measuring the requisite connection to U.S. jurisdiction was domicile

or lawful permanent residence. *Infra* 9-14. Temporary presence by a parent who legally resided in a foreign country was not enough.

A second textual feature of the Citizenship Clause points to a domicile-based approach: The provision presupposes that persons who have a "State *wherein they reside*." U.S. Const. Amend. XIV, § 1 (emphasis added). The term "reside," in context, connotes a person's legal residence or domicile. *See, e.g.*, "Residence," S. Rapalje & R. Lawrence, 2 *A Dictionary of American and English Law* 1114 (1888) (collecting cases treating "residence" as "synonymous with 'domicile'"). That's particularly so when viewed against then-prevailing concepts of complete jurisdiction and political allegiance, with which domicile's meaning was closely aligned. *See* Pet. 15-19; *see also* Justin Lollman, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 Va. L. Rev. 455, 488-90 (2015) (collecting authorities).

The general rule of "domicile of origin" or "natural domicile," moreover, is that a child inherits his parent's domicile at birth and that domicile prevails until "clearly abandoned and another taken" via "fixed and settled habitation." *Somerville v. Somerville* (1801) 31 Eng. Rep. 839, 840, 842; 5 Ves. Jun. 750, 750, 755. "Thus," as an 1888 American and English law dictionary instructed, "if a husband and wife domiciled in England take a voyage to India, and a child is born to them on the voyage, or in India before they acquire a domicile there, its domicile is English." "Domicile of origin," *A Dictionary of American and English*

Law, *supra*, at 410. The Citizenship Clause's reference to "reside" thus appears to align with a domicile-based approach to the Citizenship Clause and exclude persons whose parents lack permanent or lawful residence in the United States.

B. Contemporaneous history and practice weigh against plaintiffs.

When assessing the Citizenship Clause's meaning, the "history that matters most is the history surrounding the ratification of the text." *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring). The States do not purport to fully survey the complex historical record here. Others have, though. *See* Swearer, *supra*; Lollman, *supra*; Lash, *supra*; Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 Yale L. J. 1351, 1352 (2010); Ilan Wurman, *Jurisdiction and Citizenship* (Minn. L. Stud. Rsch. Paper, No. 25-27, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216249. Suffice it to say, a range of contemporaneous sources cast significant doubt on plaintiffs' mere-presence position.

These include debates and commentary surrounding the passage and ratification of the 1866 Act and the Fourteenth Amendment, which pervasively linked eligibility to legal residency:

- Senator Lyman Trumbull, the primary drafter of the 1866 Act's citizenship provision, explained that the provision excluded "persons *temporarily resident* in [the United States] whom we would have no right to make citizens."

Even though "a sort of allegiance was due to the country from" such persons, they were not those "who owe allegiance to the United States" in the sense the Citizenship Clause was understood to require. Cong. Globe, 39th Cong., 1st Sess. 572 (1866) (emphasis added).

- Representative John Bingham, the principal architect of the Fourteenth Amendment in the House of Representatives, declared in 1858 that "every person born of free parents within the jurisdiction of the United States, and who are *residents* thereof, is a citizen of the United States, and therefore of the state of his residence." Lash, *Prima Facie Citizenship*, at 18 (emphasis added). Later, during the debates on the Act, he asserted that the citizenship provision meant that "every human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign sovereignty* is, in the language of your Constitution itself, a natural-born citizen." Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (emphasis added).

- Summarizing the Civil Rights Act for President Johnson, Senator Trumbull explained that the Act "declares 'all persons' born of *parents domiciled in the United States* … to be citizens of the United States." Swearer, *supra*, at 158-59 (quoting Letter from Sen. Lyman Trumbull to President Andrew Johnson, *in* Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress, Washington, D.C., Doc. No. 28152) (emphasis added).

- In explaining how the Citizenship Clause tracked the Civil Rights Act, Senator Jacob Howard emphasized that the Clause "will not, of course, include persons born in the United States *who are foreigners, aliens*, [or] who belong to the families of embassadors or foreign ministers accredited to the Government of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (emphasis added).

Early Executive Branch practice was in accord:

- In the 1880s, two different Secretaries of State denied citizenship to persons born in the United States. The reason? Their parents had "remained domiciled" overseas. Swearer, *supra*, at 170. Letters setting out their reasoning confirmed that "[t]he fact of birth" in the United States, "under circumstances implying alien subjection, establishes of itself no right of citizenship." Letter from Mr. Frelinghuysen, Sec'y of State, to Mr. Kasson, Minister to Ger. (Jan. 15, 1885), *in* 3 John Bassett Moore, LL.D., *A Digest of International Law* § 373, at 279 (1906); Letter from Mr. Bayard, Sec'y of State, to Mr. Winchester, Minister to Switz. (Nov. 28, 1885), *in* 3 John Bassett Moore, LL.D., *A Digest of International Law* § 373, at 280 (1906); *see* Lolling, *supra*, at 479-80.

- The Secretary of the Treasury applied similar reasoning in an 1890 opinion letter, which denied "citizenship of a child born to a would-be

> immigrant who had not 'landed' but was awaiting immigration approval." Swearer, *supra*, at 171. The Secretary explained: "I am, therefore, of the opinion that the child in controversy born during the temporary removal of the mother from the importing vessel to a lying-in hospital for her own comfort, pending further examination as to whether she belongs to the prohibited class of immigrants, did not become, by reason of its birth, under such circumstances, an American citizen." Letter from F.A. Reeve, Acting Solicitor of the Treasury (Mar. 4, 1890), *in* XI Documents of the Assembly of the State of New York, 113th Sess., No. 74, 6, 47.

Likewise, 1800s and early 1900s commentary recognized parental domicile as a distinguishing feature between the British and U.S. rules on citizenship:

- Justice Joseph Story, writing in his *Commentaries on the Conflict of Laws*, urged in 1834 that "[a] reasonable qualification o[n] the rule" of *jus soli* "would seem to be, that it should not apply to the children of parents … who were abiding there for temporary purposes." Joseph Story, *Commentaries on the Conflict of Laws* § 48 (Boston, Little, Brown & Co. 6th ed. 1865) (quoted in Lollman, *supra*).

- Alexander Porter Morse asserted in 1881 that "[t]he words 'subject to the jurisdiction thereof' exclude[d] the children of foreigners transiently within the United States … as … subjects of a

foreign nation." Alexander Porter Morse, *A Treatise on Citizenship* 248 (Boston, Little, Brown & Co. 1881).

- In a late 19th-century law review article, Supreme Court Justice Samuel Freeman Miller observed: "If a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction." Samuel Freeman Miller, LL.D., *Naturalization and Citizenship*, *in* Lectures on the Constitution of the United States 275, 279 (J. C. Bancroft Davis ed., 1893).

- An 1898 comment in the *Yale Law Journal* wrote: "[I]n this country, the alien *must be permanently domiciled*, while in Great Britain birth during a mere temporary sojourn is sufficient to render the child a British subject." Comment, 7 Yale L.J. 365, 367 (1898) (emphasis added).

- Constitutional scholar Henry Campbell Black distinguished between U.S.-born children of "a stranger or traveler passing through the country, or temporarily residing here," who are not entitled to citizenship, and "children, born within the United States, *of permanently resident aliens*, who are not diplomatic agents or

otherwise within the excepted classes," who are entitled to citizenship no matter their race. *Handbook of American Constitutional Law* 634 (3d ed. 1910) (emphasis added).

- International law treatises reached the same conclusion. *See, e.g.*, William Edward Hall, M.A., *A Treatise on International Law* 224-25, 227 (5th ed. 1904) ("In the United States it would seem that the children of foreigners in transient residence are not citizens."); Hannis Taylor, LL.D., *A Treatise on International Public Law* 220 (1901) ("It appears, therefore, that children born in the United States to foreigners here on transient residence are not citizens, because by the law of nations they were not at the time of their birth 'subject to the jurisdiction.'").

At the very least, the excerpts above and sources collected by scholars show that plaintiffs' mere-presence position was not the uniform historical consensus.

C. Supreme Court precedent weighs against plaintiffs.

Nor does this Court's precedent mandate plaintiffs' maximalist reading of the Citizenship Clause. Quite the contrary: Caselaw emphasizes the importance of parental domicile to birthright citizenship and shuns mere-physical-presence rules in the immigration context.

1. The earliest cases interpreting the Fourteenth Amendment point towards a domicile-based approach.

In 1872, the Court's decision in the *Slaughter-House Cases* stated that the Citizenship Clause "was intended to *exclude* from its operation children of ministers, consuls, and *citizens or subjects of foreign States born within the United States*." 83 U.S. 36, 73 (emphasis added). Two years later, the Court observed that "common-law" principles informed "who shall be natural-born citizens" and noted "doubts" as to whether children of "aliens or foreigners" born in the United States constituted "natural-born citizens." *Minor v. Happersett*, 88 U.S. 162, 167-68 (1874). The Court recognized that "it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also." *Id.* at 167. After observing that "[s]ome authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents," the Court noted that "[a]s to this class there have been doubts." *Id.* at 168.

Elk v. Wilkins, 112 U.S. 94 (1884), also counsels against a mere-presence approach. There, the Court assessed how the Citizenship Clause applied to an Indian born into a tribe who then severed tribal relations. *Id.* at 99. The Court held that "Indians born within the territorial limits of the United States, … although in a geographical sense born in the United States" were not "'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment." *Id.* at 102. The Indian must have been "completely subject to [the United States'] political jurisdiction, and owing them direct and immediate allegiance." *Id.* But Elk was not, so he would not receive citizenship, just as

"the children of subjects of any foreign government born within the domain of that government" would not. *Id.*

Wong Kim Ark—on which plaintiffs principally rely—cuts against them too. The Court there decided how the Citizenship Clause applied to a U.S.-born child of Chinese aliens lawfully present and permanently domiciled in the United States. *Wong Kim Ark*, 169 U.S. at 652-53. So unlawful presence was not at play. Still, the Court emphasized throughout that the alien parents were "resident[s]" and "domiciled within the United States." *Id.* at 652, 653, 693, 696, 705. It reasoned that "[e]very citizen or subject of another country, *while domiciled here*, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States" for purposes of the Clause. *Id.* at 693 (emphasis added). And it held that "Chinese persons … *so long as they are permitted by the United States to reside here*" enjoy the same birthright protections "as all other aliens residing in the United States." *Id.* at 694 (emphasis added). In so doing, the Court expressly drew from *Benny v. O'Brien*, 32 A. 696 (N.J. 1895), which interpreted the Citizenship Clause to require that parents be "domiciled here," and thus to exclude "those born in this country of foreign parents who are temporarily traveling here." *Id.* at 698.

Wong Kim Ark's emphasis on parental domicile was no accident. It responded directly to the parties' briefing and to the dissent's concern about covering persons "born of aliens whose residence was merely temporary, either in fact or in point of law." *Id.* at 729

(Fuller, C.J., dissenting). Not surprisingly, "[i]n the years immediately following *Wong Kim Ark*, several commentators read the Court's reference to domicile as actually doing work in the opinion." Lollman, *supra*, at 462, 471. So did the Court and the Department of Justice. *See* Pet. 27.

2. More precedent clashes with plaintiffs' treatment of mere physical presence in the United States as determinative.

In the immigration context, this Court has long recognized that not every alien physically present within U.S. soil, water, or airspace "has *effected an entry* into the United States" for "constitutional purposes." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *Kaplan v. Tod*, 267 U.S. 228 (1925), is instructive. There, the Court rejected a mere-presence rule when considering whether children obtain citizenship through their parents' naturalization. A mother brought her daughter to Ellis Island to join her father, who legally resided in the country. *Id.* at 229. The daughter was denied admission, but the outbreak of the First World War prevented her deportation. *Id.* After detaining the girl for nearly a year, the government paroled her. *Id.* She then lived with her father in the United States for the better part of a decade. *Id.* During this time, the girl's father naturalized. *Id.* at 230. And when the government later sought to deport the girl, she argued that she had obtained citizenship because she was "dwelling in the United States" when her father naturalized. *Id.*

The Court disagreed. It held that the girl never "lawfully … landed in the United States," and "until she legally landed," she "could not have dwelt within the United States." *Id.* (quotations omitted). Legally, she remained "at the boundary line and had gained no foothold in the United States." *Id.* Absent a permissible "entry," the Court concluded, "an alien can neither 'dwell' nor 'reside' within the United States, as those words are understood in the immigration context." *Lopez-Sorto v. Garland*, 103 F.4th 242, 252 (4th Cir. 2024) (quoting *Kaplan*, 267 U.S. at 229-30).

This Court has invoked the at-the-border legal fiction time and again. *E.g.*, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139 (2020); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953); *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958). Under it, an alien may be "physically within our boundaries," but treated under the law "as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate." *United States v. Ju Toy*, 198 U.S. 253, 263 (1905). And that rule applies to aliens who "arrive at ports of entry" or are detained "after unlawful entry," for example, even if later "paroled elsewhere in the country" pending removal. *Thuraissigiam*, 591 U.S. at 139.

The at-the-border legal fiction aligns with the historical domicile-based approach to the Citizenship Clause. It makes no sense to recognize the "legal fiction of extraterritoriality, wherein ambassadors and diplomats, though literally present on United States soil, were considered to be still living in the sending state," Swearer, *supra*, at 143, yet ignore the similarly

well-established legal fiction when it comes to aliens paroled into the country.

D. Plaintiffs' reliance on post-ratification practice is not dispositive.

Plaintiffs and the courts below have sought to support their merits position with congressional and Executive Branch practice, which they say has applied a mere-presence approach for over a century. To be sure, "the longstanding practice of the government can inform our determination of what the law is." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (citation and quotations omitted). But for a few reasons here, plaintiffs' historical-practice points prove little about the interpretive question.

To begin, much of the evidence cited by plaintiffs and the courts below comprises sources—including a 1995 Office of Legal Counsel memo—stemming from the late 1900s. This creates a "timing problem": Evidence arising over a century after the Fourteenth Amendment's adoption is "far too late to inform the meaning" of the Citizenship Clause "at the time of" its ratification. *Samia v. United States*, 599 U.S. 635, 655 (2023) (Barrett, J., concurring in part and concurring in the judgment).

Nor is closer-in-time practice evidence merely "inconclusive." *Samia*, 599 U.S. at 656 (Barrett, J., concurring in part and concurring in the judgment). As discussed, *see supra* 11-12, administrative actions "surrounding the ratification" weigh against plaintiffs by highlighting that Executive Branch officials viewed parental domicile as relevant to the Citizenship

Clause's application, *Rahimi*, 602 U.S. at 737 (Barrett, J., concurring). As far as practice goes, those incidents are on point: As here, they involve executive officials asserting that citizenship does not automatically attach based on a child's place of birth alone, but instead turns on assessing parental connection to the United States. *See supra* 11-12. Neither plaintiffs nor the courts below have offered any counters to that "contemporaneous and weighty evidence of the Constitution's meaning." *Bowsher v. Synar*, 478 U.S. 714, 723 (1986).

Plaintiffs' limited body of earlier 20th-century "practice" is not persuasive on its own terms, either. Congress's 1940 choice to codify the Clause's language only begs this case's dispute over what phrases like "subject to the jurisdiction of" and "in the United States" are best read to mean. Nor do cases making passing references to broader conceptions of birthright citizenship move the needle. *Cf.* 19 Op. O.L.C. at 346 n.15 (1995) (collecting such cases). Many arise only well into the 1900s, so likewise suffer timing flaws. Others either overread *Wong Kim Ark* to conflate alienage and "race" with lawful residency,[2] assume without deciding that presence at birth suffices under the Clause,[3] or mention birthright citizenship only in describing the factual background or in other dicta.[4]

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[2] *See, e.g.*, *Morrison v. California*, 291 U.S. 82, 85 (1934) (discussing race).

[3] *See United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957).

[4] *See, e.g.*, *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985).

No case "directly" addresses the interpretive question here.

That leaves later Executive Branch practice from the mid-1900s to now, which plaintiffs assert has generally adopted a mere-presence view. But in a case about the constitutional floor on Fourteenth-Amendment citizenship, it is not determinative that the Executive Branch has been willing to "provide greater protection than the Constitution demands." *Cf.* Brandon L. Garrett, *Misplaced Constitutional Rights*, 100 B.U. L. Rev. 2085, 2087 (2020).

And to the extent the Executive Branch has read *Wong Kim Ark* as governing beyond its holding about parental domicile, its practice is minimally probative. This case centers on the President's attempt to *alter* past Executive Branch practice, so a 1990s-era O.L.C. opinion doesn't advance the ball—it merely begs the question of who has it right. And to the extent that the O.L.C. opinion is, in fact, wrong, the Court is not obligated to carry forward modern misunderstandings. After all, "evidence of 'tradition' unmoored from original meaning is not binding law." *Rahimi*, 602 U.S. at 738 (Barrett, J., concurring) (quoting *Vidal v. Elster*, 602 U.S. 286, 322-25 (2024) (Barrett, J., concurring in part)).

Along the same lines, even if plaintiffs are right that some recent federal-government tradition supports their reading, that could not override or alter the meaning of the Clause as ratified. "The first and most important rule in constitutional interpretation is to

heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood." *Rahimi*, 602 U.S. at 715 (Kavanaugh, J., concurring). That fixation principle is plank one of originalism; the second rule speaks to interpretive constraint—that "the discoverable historical meaning … has legal significance and is authoritative in most circumstances." *Id.* at 737 (Barrett, J., concurring). Tethering meaning to the ratified text reflects that "[t]he text of the Constitution is the 'Law of the Land'" that controls "unless and until it is amended." *Id.* at 715 (Kavanaugh, J., concurring).

Asked to select among historical sources supporting original public meaning and practice of more recent vintage, this Court should favor the former. To be sure, the "[h]istorical analysis" an original-meaning methodology requires "can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult." *McDonald v. City of Chicago*, 561 U.S. 742, 803-04 (2010) (Scalia, J., concurring). But such constraints serve a vital purpose in a system governed by a written Constitution legitimated by popular ratification, with judges empowered to exercise "neither FORCE nor WILL but merely judgment." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

II. Plaintiffs Cannot Justify Facially Invalidating the Executive Order.

Now more than ever, it's crucial that this Court scrupulously hold plaintiffs and lower courts to the demanding requirements of facial challenges and limit relief to the unconstitutional applications of a challenged law.

1. The States have a unique interest in holding parties and courts accountable to the "demanding requirements" of facial challenges. *Moody v. NetChoice, LLC*, 603 U.S. 707, 778 (2024) (Alito, J., concurring in the judgment). States routinely find themselves defending democratically enacted laws against facial challenges. And to prevent federal courts from invading the States' core sovereignty, facial invalidation must remain rare and "hard to win." *Id.* at 723.

That is especially true now, given this Court's holding in *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025). After this Court limited universal injunctions in *CASA*, parties have deployed strategies to nonetheless seek universal relief—often successfully. *E.g.*, *Barbara* Pet. App. 1a-41a (putative class-actions); *Doe v. Trump*, No. 25-1169, 2025 WL 2814730, at *9-11 (1st Cir. Oct. 3, 2025) (third-party standing). While "lax enforcement" of class-certification and third-party standing rules risks creating a "significant loophole" in the rule against universal injunctions, *CASA*, 145 S. Ct. at 2566-67 (Alito, J., concurring), so too does a failure to adhere to *Salerno*'s stringent facial challenge requirements. After all, if parties can creatively wield these tools to assert thousands (or millions) of

injuries simultaneously and then win a facial challenge, they can effectively simulate a universal injunction. *See Moody*, 603 U.S. at 756 (Thomas, J., concurring).

That threat is especially acute nowadays when many challenges (like this one) arise in the pre-enforcement posture. With a limited factual record and no history of enforcement to guide the inquiry, pre-enforcement facial challenges often ask the courts to issue sweeping relief despite a "basic uncertainty about what the law means and how it will be enforced." *Arizona v. United States*, 567 U.S. 387, 415 (2012). Wielded unsparingly, "this provides federal courts a general veto power upon the legislation of Congress" and State legislatures. *Moody*, 603 U.S. at 757 (Thomas, J., concurring) (cleaned up). And in a way not unlike the universal injunction, it "threaten[s] to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways." *Moody*, 603 U.S. at 723 (quotations omitted).

The plaintiffs' choice to facially attack the Executive Order "comes at a cost." *Moody*, 603 U.S. at 723. "A facial challenge" is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists" in which the challenged provision "would be valid." *Salerno*, 481 U.S. at 745; *see Nat'l Treasury Emps. Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989) (applying "difficult" facial standard from *Salerno* to an Executive Order). Plaintiffs cannot clear that bar.

As discussed, evidence supports reading the Citizenship Clause to turn on parental domicile or lawful residency. But at a minimum, this Court's immigration precedents strongly suggest that persons encountered at illegal border crossings have not effectuated legal entry "in the United States," no matter if later paroled. *See supra* 17-19. And considering that the previous administration paroled in over 2.8 million illegal aliens, that fact alone creates millions of possible lawful applications of the EO. *See* Andrew R. Arthur, *Did Joe Biden Really Parole In Nearly 3 Million Aliens?*, Center for Immigration Studies (2025), https://perma.cc/XLJ8-MNCZ. Similarly, under any plausible reading, the U.S. may refuse to reward illicit "birth tourists." Pet. 10. These "birth tourists" ordinarily have no ties whatsoever to the United States and enter the country temporarily, typically on fraudulently obtained visas, for the sole purpose of obtaining citizenship for their children. Minority Staff, U.S. Sen. Comm. on Homeland Sec. & Governmental Affairs, *Birth Tourism in the United States* (2022) 1, 19, https://perma.cc/C8SAZG8X.

The bottom line: Plaintiffs cannot satisfy the stringent requirements of a facial challenge.

2. This Court should also hold lower courts to established remedial principles. Generally, courts "enjoin only the unconstitutional applications of a statute" or "sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). To that end, an injunction "must … be limited to the inadequacy that produced the injury in fact that the plaintiff has established."

Gill v. Whitford, 585 U.S. 48, 68 (2018) (quotation omitted).

As with statutes, the constitutionality of Executive Orders should be assessed provision by provision, and courts are "obligat[ed]" to use severance "to maintain as much of the order as is legal." *Washington v. Trump*, 858 F.3d 1168, 1172 (9th Cir. 2017) (Kozinski, J., dissenting); *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (assuming "the severability standard for statutes also applies to executive orders"). Applied here, that rule restricts any remedy to "enjoin[ing] the unconstitutional *applications* of the [Order] while preserving the other valid applications." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 342 (6th Cir. 2009) (en banc).

This means, at minimum, that the lower court erred in enjoining every application of the EO. As discussed, *supra* 25, the EO can surely be legally applied to those in the country illegally (including parolees) and to "birth tourists." So even if *some* unconstitutional applications exist, injunctive relief should be tailored to "enjoin only the unconstitutional applications … while leaving other applications in force." *Ayotte*, 546 U.S. at 329.

CONCLUSION

The Court should grant the petition for certiorari.

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