B. The Plaintiff States Are Extremely Likely to Succeed on the Merits

The plain text of the Fourteenth Amendment and the INA guarantee citizenship to all born in the United States and subject to its jurisdiction, regardless of one's race, ethnicity, alienage, or the immigration status of one's parents. The Citizenship Clause's history confirms this understanding. *See* States' Mot. at 10-11. Binding precedent confirms this understanding. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898); *see also Plyler v. Doe*, 457 U.S. 202, 211-15 (1982). And every branch of government has confirmed this understanding for the past 150 years. *See* 8 U.S.C. § 1401; *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 Op. O.L.C. 340, 342 (1995); States' Mot. at 9-14. Defendants' counterarguments are meritless.

1. The Citizenship Stripping Order is blatantly unconstitutional

Die Trump-Regierung =

Defendants' core contention is that children born to undocumented and many legal immigrants are not actually "subject to the jurisdiction" of the United States, and thus not entitled to birthright citizenship, under a theory never before adopted by any court. They are wrong as a matter of constitutional text and history, and their arguments are foreclosed by the Supreme Court's decision in *Wong Kim Ark*.

As the Supreme Court explained in *Wong Kim Ark*, "[t]he real object" of including the "subject to the jurisdiction thereof" language was "to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases . . . recognized [as] exceptions to the fundamental rule of citizenship by birth within the country." 169 U.S. at 682. Those two classes are "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state[.]" *Id.* The Court explained at length how in each of these cases, the United States' exercise of sovereign power was limited either in fact, as a matter of common law and practice, or in the case of Native American tribes, as a result of their tribal sovereignty. *Id.* at 683 (discussing *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819)

Das ist wahr! Aber die wirkliche Streitfrage in dem Verfahren ist nicht dies, sondern die Frage, ob die Formulierung "subject to the jurisdiction [of the United States]" eine Aussage bzgl. des Aufenthaltsstatus impliziert. Mir scheint es auf Dauer nicht erfolgsträchtig zu sein, diesem Unterschied auszuweichen.

ja, so argumentiert die Regierung.

(regarding hostile invasion and the suspension of sovereign power over occupied territory), and *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (explaining why diplomats are not subject to the United States' jurisdiction even though the Nation's sovereign power is necessary and absolute in its territory)); *see also* Ramsey, *Originalism*, *supra*, at 436-58 (detailing mid-Nineteenth Century understanding of what it meant to be "subject to the jurisdiction" of the United States).

The Supreme Court, reviewing many of the authorities Defendants now cite, concluded that "[t]he fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens[.]" *Wong Kim Ark*, 169 U.S. at 693. The *only* individuals understood not to be subject to the United States' jurisdiction at birth were children born to diplomats or enemies during hostile occupation, those born on foreign ships, and those born to members of Native American tribes. *Id.* The Court made clear, in language that forecloses Defendants' modern-day interpretation:

ja, aber die Trump-Regierung möchte ja auch nicht Kinder von "aliens" schlechthin ausschließen; sondern ausschließlich Kinder von solchen "aliens", die keinen dauerhaften, legalen Aufenthaltsstatus haben. Darauf sollte m.E. konkreter eingegangen werden.

ja. Die Frage ist aber, ob das eine abschließende Aufzählung ist oder nur Beispiel sind.

> The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every 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. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is . . . "strong enough to make a natural subject, for, if he hath [a child] here, that [child] is a natural-born subject"; and his child . . . "[i]f born in the country, is as much a citizen as the natural-born child of a citizen . . . ."

Id. (cleaned up). The Court reiterated that "[i]t can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides[.]" *Id.* "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance," the Court stated, "it is well known that by the public law an alien, or a stranger born, for so long

ja, das steht da. Aber es müßte sich mit dem der Behauptung der Trump-Regierung auseinandergesetzt werden, daß das bloße obiter dicta (nebenbei Gesagtes) seien.

a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government[.]" *Id.* at 693-94. That is, such persons are subject to the United States' jurisdiction.

The Court's reasoning is complete and its holding dispositive. None of the individuals targeted in the Citizenship Stripping Order today enjoy any type of immunity from general laws or represent another sovereign nation or political entity. The Defendants' "surplusage" argument, Opp. at 19-20, is accordingly resolved by simply reading the Fourteenth Amendment's plain text. Without "subject to the jurisdiction thereof," the Citizenship Clause would extend to the narrow categories that have long been recognized by courts, Congress, and the Executive to be exempt from the Citizenship Clause's grant of birthright citizenship.

Defendants nonetheless attempt to import two new non-textual requirements, complete "allegiance" and "lawful domicile," by chaining together selective quotes from cases unrelated to the interpretation of the Citizenship Clause. Opp. at 20-25. But allegiance and lawful domicile appear nowhere in the Fourteenth Amendment. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text . . . ."). And with respect to the requirement of being "subject to the jurisdiction thereof," it was clear at ratification that this phrase included all non-citizens who were physically present in the United States, absent the very narrow exceptions recognized at common law and noted above. *Wong Kim Ark* interpreted the Citizenship Clause's language and directly forecloses Defendants' argument. 169 U.S. at 693.

Nor do those non-textual requirements comport with the Citizenship Clause's history. Illegally imported enslaved individuals were not "lawfully domiciled" in the United States under Defendants' interpretation, yet there is no question that the Citizenship Clause applied to their children. *See, e.g.*, Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. Davis L. Rev. 2215,

2250 (2021) ("This history demonstrates that there were clearly 'illegal aliens,' both free migrants banned under the 1803 law and illegally imported slaves, in the United States before and during the consideration of the Fourteenth Amendment."); Gerald L. Neuman, *Back to* Dred Scott*?*, 24 San Diego L. Rev. 485, 497-99 (1987) (detailing the history of enslaved individuals who were imported illegally and recognizing that the Fourteenth Amendment was intended to grant citizenship to all native-born individuals of African descent).[4]

Defendants also turn to *Elk v. Wilkins*, 112 U.S. 94 (1884), the *Slaughter-House Cases*, 83 U.S. 36 (1872), and a slew of nonbinding authorities that predate *Wong Kim Ark* and *Plyler* to try to read extra requirements into the Citizenship Clause. Opp. at 20-21, 28-30. Defendants' arguments re-hash well-trodden and widely rejected bases for attempting to adopt exclusionary views of the Citizenship Clause. *See, e.g.*, Ramsey, *Originalism*, *supra*, at 436-58 (analyzing common arguments for reading "subject to the jurisdiction thereof" narrowly with respect to undocumented immigrants and concluding they are all contrary to the Fourteenth Amendment's text and history). In short, *Wong Kim Ark* cemented the meaning of the Citizenship Clause in a manner consistent with *Elk*. *See Wong Kim Ark*, 169 U.S. at 682 (recognizing that *Elk* "concerned only members of the Indian tribes within the United States and had no tendency to deny citizenship to children born in the United States of foreign parents . . . not in the diplomatic service of a foreign country"); *accord* Ramsey, *Originalism*, *supra*, at 419-20 (discussing *Elk*). The Supreme Court likewise dismissed the dicta in the *Slaughter-House Cases* that suggested a narrow view of the Citizenship Clause. *Id.* at 677-80.

Nowhere in *Wong Kim Ark* did the Supreme Court recognize a "lawful domicile" or "exclusive allegiance" requirement for one to be subject to the United States' jurisdiction. Indeed, the dissent made similar arguments to those Defendants offer today. *Id.* at 729 (Fuller, C.J., dissenting) ("If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely

[4] Available at: https://digital.sandiego.edu/sdlr/vol24/iss2/8/.

temporary, either in fact or in point of law."). Those arguments were rejected, and the Citizenship Clause's broad scope was established. *Id.* at 694.

Defendants further point to the Civil Rights Act of 1866, but that Act confirms that they are wrong. The Act provided that "[a]ll persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color." Civil Rights Act of 1866 § 1; *see* Cong. Globe, 39th Cong., 1st Sess. 474, 498 (1866). All involved in its passage understood that this language included the children of immigrants, regardless of their background. When one senator asked whether this language "would have the effect of naturalizing the children of Chinese and Gypsies born in this country[,]" for example, Senator Trumbull, the Act's author, responded, "Undoubtedly." Cong. Globe, 39th Cong., 1st Sess. 498.[5] This was true even though, at the time, Chinese immigrants could not become naturalized U.S. citizens and "Gypsies" were, if present, likely present unlawfully. *See* Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 Am. U. L. Rev. 331, 350-52 (2010); Ramsey, *Originalism*, *supra*, at 451-52 (discussing 1866 Act).

Finally, even if the Civil Rights Act of 1866 did not include immigrants in its citizenship clause—and it did—the Fourteenth Amendment's Citizenship Clause certainly confers citizenship to the children subject to the Citizenship Stripping Order. All involved in its passage understood that the Citizenship Clause guaranteed citizenship to virtually all U.S.-born children regardless of the race or citizenship of their parents. Indeed, it was introduced to confirm that "every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (statement of Sen. Howard). Senator Cowan, notably, argued against ratification because "[i]f the mere fact of being born in the country confers that right," of citizenship, then

[5] Defendants stitch the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment's ratification debates together to argue that Senator Trumbull equated being "subject to our jurisdiction" with "owing allegiance solely to the United States." Opp. at 21-22. Senator Trumbull made the latter statement in explaining why Native American tribes are not subject to the jurisdiction of the United States, not as a blanket statement about the Citizenship Clause. *See* Cong. Globe, 39th Cong., 1st Sess. 2894; *see also* Ramsey, *Originalism*, *supra*, at 449.

Im Regierungs-Schriftsatz von Freitag hieß es über den Civil Rights Act of 1866, daß dieser "defined citizenship to cover those born in the United States, not 'subject to any foreign power'"). Dieser Definition habe der 14. Verfassungszusatz etwas später zu Verfassungsrecht gemacht. (Dort ist allerdings NICHT von "foreign power" die Rede!)

the children of parents "who have a distinct, independent government of their own," "who owe [the state] no allegiance," and who would "settle as trespassers" would also be citizens. *Id.* at 2891; *id.* at 2890 (statement of Sen. Cowan) ("Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? . . . Have they any more rights than a sojourner in the United States?"). All agreed that Senator Cowan properly understood the Citizenship Clause's broad scope, and the Senate adopted that broad language anyway. *See id.* at 2891 (Senator Conness confirming that the Clause as proposed would provide citizenship to "children begotten of Chinese parents in California," because the 1866 Act made that the case by law and "it is proposed to incorporate the same provision in the fundamental instrument of the nation" and "declare that the children of all parentage whatever . . . should be regarded and treated as citizens of the United States.").

Ultimately, the Citizenship Clause was adopted to "remove[] all doubt as to what persons are or are not citizens of the United States." *Id.* (statement of Sen. Howard). *Wong Kim Ark* confirmed the Citizenship Clause's proper interpretation, and there is still no doubt today. The Plaintiff States are likely to succeed on the merits.

2. The Citizenship Stripping Order independently violates the INA

Defendants argue that the Plaintiff States' INA claim fails "because [it] depend[s] on the plaintiffs' incorrect construction of the Fourteenth Amendment." Opp. at 40. But they miss the point. Because Congress "employ[ed] a term of art obviously transplanted from another legal source," the INA brought "the old soil with it." *George v. McDonough*, 596 U.S. 740, 746 (2022) (cleaned up). The "old soil" was, and is, the established understanding of the Citizenship Clause set forth in *Wong Kim Ark*. *See* States' Mot. at 14-15. Because Defendants do not dispute that the Citizenship Stripping Order attempts to exclude a *new* category of individuals from the Citizenship Clause's reach based on a theory that has never been accepted, it is contrary to the INA as properly construed. The Plaintiff States are likely to prevail on their INA claim.