No. 25-365

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

BARBARA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

The Citizenship Clause of the Fourteenth Amendment provides that those "born * * * in the United States, and subject to the jurisdiction thereof," are U.S. citizens. U.S. Const. Amend. XIV, § 1. The Clause was adopted to confer citizenship on the newly freed slaves and their children, not on the children of aliens temporarily visiting the United States or of illegal aliens. On January 20, 2025, President Trump issued Executive Order No. 14,160, *Protecting the Meaning and Value of American Citizenship*, which restores the original meaning of the Citizenship Clause and provides, on a prospective basis only, that children of temporary visitors and illegal aliens are not U.S. citizens by birth. The Citizenship Order directs federal agencies not to issue or accept citizenship documents for such children born more than 30 days after the Order's effective date.

The question presented is whether the Executive Order complies on its face with the Citizenship Clause and with 8 U.S.C. 1401(a), which codifies that Clause.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Donald J. Trump, President of the United States; U.S. Department of State; Marco Rubio, Secretary of State; U.S. Department of Agriculture; Brooke Rollins, Secretary of Agriculture; U.S. Department of Homeland Security; Kristi Noem, Secretary of Homeland Security; Centers for Medicare and Medicaid Services; and Mehmet Oz, Administrator, Centers for Medicare and Medicaid Services.

Respondents (plaintiffs-appellees below) are "Barbara," "Sarah" (by her guardian, parent, and next friend "Susan"), and "Matthew" (by his guardian, parent, and next friend "Mark"), on behalf of themselves and all those similarly situated.

RELATED PROCEEDINGS

United States District Court (D.N.H.):

Barbara v. *Trump*, No. 25-cv-244 (June 10, 2025)

United States Court of Appeals (1st Cir.):

Barbara v. *Trump*, No. 25-1861 (pending)

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The Solicitor General—on behalf of Donald J. Trump, President of the United States, and others—respectfully petitions for a writ of certiorari before judgment in this case. The Solicitor General is concurrently filing a petition for a writ of certiorari in *Trump* v. *Washington*. From the following section onward, the two petitions are identical.

OPINIONS BELOW

In *Washington*, the court of appeals' opinion (*Washington* Pet. App. 1a-82a) and order denying a partial stay (*id.* at 83a-89a) are available at 2025 WL 2061447 and 2025 WL 553485. The district court's order granting a preliminary injunction (*Washington* Pet. App. 90a-106a) and temporary restraining order (*id.* at 107a-111a) are reported at 765 F. Supp. 3d 1142 and 764 F. Supp. 3d 1050.

In *Barbara*, the district court's opinion (*Barbara* Pet. App. 1a-41a) is available at 2025 WL 1904338.

JURISDICTION

In *Washington*, the court of appeals issued its judgment on July 23, 2025. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

In *Barbara*, the district court issued a preliminary injunction on July 10, 2025. The government filed a notice of appeal on September 5, 2025. The court of appeals' jurisdiction rests on 28 U.S.C. 1292(a)(1). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. Amend. XIV, § 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 8 U.S.C. 1401(a) provides:

> **Nationals and citizens of United States at birth**
>
> The following shall be nationals and citizens of the United States at birth:
>
> (a) a person born in the United States, and subject to the jurisdiction thereof[.]

INTRODUCTION

The Citizenship Clause of the Fourteenth Amendment was adopted to grant citizenship to newly freed slaves and their children—not to the children of temporary visitors or illegal aliens. See *Slaughter-House Cases*, 16 Wall. 36, 71-74 (1873). The "one pervading purpose" of the Amendment was "the freedom of the slave race, [and] the security and firm establishment of that freedom." *Id.* at 71. "The main object of the opening sentence of the Fourteenth Amendment was to settle the question * * * as to the citizenship of free[d] [slaves]." *Elk* v. *Wilkins*, 112 U.S. 94, 101 (1884). The Clause "put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 676 (1898).

The Clause does not, however, grant citizenship to the children of temporary visitors or illegal aliens. The plain text of the Clause, its original understanding and history, and this Court's cases confirm that the Clause extends to children who are "completely subject" to the "political jurisdiction" of the United States, meaning that they owe "direct and immediate allegiance" to the Nation and may claim its protection. *Elk*, 112 U.S. at 102. As this Court has recognized, children of citizens and of those who "have a permanent domicile and residence in the United States" meet that criterion. *Wong Kim Ark*, 169 U.S. at 652, 705. This Court's earliest cases interpreting the Fourteenth Amendment explicitly rejected the notion that anyone born in United States territory, no matter the circumstances, is automatically a citizen so long as he is subject to U.S. law. *Slaughter-House*, 16 Wall. at 71-72; *Elk*, 112 U.S. at 102.

A substantial body of historical evidence confirms that U.S. citizenship does not extend to "the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business." Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* § 48 (1834). During congressional debates over the Fourteenth Amendment, lawmakers agreed that the Citizenship Clause would not extend U.S. citizenship to a person who "is born here of parents from abroad temporarily in this country." Cong. Globe, 39th Cong., 1st Sess. 2769 (1866). After the Amendment's adoption, Secretaries of State denied passports to children born of foreigners who were temporarily present in the United States. And commentators uniformly acknowledged that the Clause "exclude[s] the children of foreigners transiently within the United States." Alexander Porter Morse, *A Treatise on Citizenship* 248 (1881).

Wong Kim Ark did not hold otherwise. *Wong Kim Ark* recognized that the Citizenship Clause guarantees U.S. citizenship not just to children of U.S. citizens, but also to children of aliens "enjoying a permanent domicil and residence" in the United States. 169 U.S. at 653. That limit was central to the analysis; the word "domicil" appears more than 20 times in the opinion. And the opinion suggests that U.S. citizenship does not extend to the children of aliens who are not "permitted by the United States to reside here." *Id.* at 694.

Yet, long after the Clause's adoption, the mistaken view that birth on U.S. territory confers citizenship on anyone subject to the regulatory reach of U.S. law became pervasive, with destructive consequences. To restore the Clause's original meaning, on January 20, 2025, President Trump issued the Executive Order *Pro-*

tecting the Meaning and Value of American Citizenship, Exec. Order No. 14,160, 90 Fed. Reg. 8449, 8449 (Jan. 29, 2025) (Citizenship Order or Order). The Order advances the President's larger efforts to repair the United States' immigration system and combat the "significant threats to national security and public safety" posed by illegal immigration. *Protecting the American People Against Invasion* § 1, Exec. Order No. 14,159, 90 Fed. Reg. 8443, 8443 (Jan. 29, 2025); see *Securing Our Borders*, Exec. Order No. 14,165, 90 Fed. Reg. 8467 (Jan. 30, 2025); *Declaring a National Emergency at the Southern Border of the United States*, Proclamation No. 10,886, 90 Fed. Reg. 8327 (Jan. 29, 2025).

In the Order, the President recognized that "[t]he privilege of United States citizenship is a priceless and profound gift." 90 Fed. Reg. at 8449. He observed that the Fourteenth Amendment does not "extend citizenship universally to everyone born within the United States," and it "has always excluded from birthright citizenship persons who were born in the United States but not 'subject to the jurisdiction thereof.'" *Ibid.* He directed that the future children of illegal aliens and aliens temporarily present in the United States would not be treated as U.S. citizens by the Executive Branch. *Ibid.*

The issues in this petition are unquestionably certworthy. The government has a compelling interest in ensuring that American citizenship—the privilege that allows us to choose our political leaders—is granted only to those who are lawfully entitled to it. The lower court's decisions invalidated a policy of prime importance to the President and his Administration in a manner that undermines our border security. Those decisions confer, without lawful justification, the privi-

lege of American citizenship on hundreds of thousands of unqualified people.

To enable this Court to resolve that issue during its October 2025 Term, the government is seeking both certiorari in *Washington* and certiorari before judgment in *Barbara*. The court of appeals in *Washington* reached the merits after full briefing and argument, but the dissenting judge correctly concluded that the plaintiffs in *Washington*—four States—lack Article III standing. Simultaneously granting certiorari before judgment in *Barbara*, which involves individual plaintiffs, would allow the Court to avoid that threshold jurisdictional issue of state standing and would ensure that the Court can reach the merits.

The Court should grant these petitions and confirm the original meaning of the Citizenship Clause.

STATEMENT

A. Background

1. From the Founding until after the Civil War, no constitutional provision or federal statute expressly addressed citizenship by birth in the United States. The scope of birthright citizenship was instead "the subject of differences of opinion." *Slaughter-House Cases*, 16 Wall. 36, 73 (1873).

Congress first established a uniform federal rule of birthright citizenship in the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (Civil Rights Act), which provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." § 1, 14 Stat. 27. Months later, Congress proposed the Fourteenth Amendment, which was ratified in 1868. The Fourteenth Amendment's Citizenship Clause provides: "All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. Amend. XIV, § 1. The Civil Rights Act and Citizenship Clause overturned this Court's infamous decision in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), which erroneously denied citizenship to people of African descent based solely on their race. Thus, the "one pervading purpose" of the Clause, *Slaughter-House*, 16 Wall. at 71, was to grant citizenship to newly freed slaves and their children—not to those of temporary visitors or illegal aliens.

The Civil Rights Act's statutory definition of birthright citizenship remained in place until 1940. That year, Congress enacted the Nationality Act of 1940 (Nationality Act), ch. 876, 54 Stat. 1137, which tracks the language of the Citizenship Clause and provides that a "person born in the United States, and subject to the jurisdiction thereof," is a citizen by birth. § 201(a), 54 Stat. 1138. Congress re-enacted that provision verbatim in the Immigration and Nationality Act of 1952 (INA), ch. 477, § 301, 66 Stat. 235-236, a comprehensive "codification" of "existing law on the subject." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31 (1952). That provision remains the governing statute today. See 8 U.S.C. 1401(a).

2. The Citizenship Clause was originally understood to extend birthright citizenship to children of citizens, see *Minor* v. *Happersett*, 21 Wall. 162, 168 (1875), and of aliens with "a permanent domicil and residence" here, *United States* v. *Wong Kim Ark*, 169 U.S. 649, 652 (1898). But in the 20th century, the Executive Branch came to misread the Clause as granting citizenship to nearly everyone born in the United States—even to children of temporarily present aliens or illegal aliens.

On January 20, 2025, President Trump issued an Executive Order correcting the federal government's misreading of the Citizenship Clause and realigning its policy on issuing or accepting citizenship documents with the Clause's original meaning. See Citizenship Order.

Section 1 of the Order identifies two circumstances in which a person born in the United States is not subject to its jurisdiction and so is not a citizen by birth: (1) "when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth," and (2) "when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth." Citizenship Order § 1. Thus, children of illegal aliens and children of temporarily present aliens are not recognized as U.S. citizens under the Order.

Section 2 of the Order directs the Executive Branch (1) not to issue documents recognizing U.S. citizenship to persons in those two categories and (2) not to accept documents issued by state, local, or other governments purporting to recognize the U.S. citizenship of such persons. See Citizenship Order § 2(a). Section 2 specifies that those directives "apply only to persons who are born within the United States after 30 days from the date of this order." *Id.* § 2(b).

Section 3 of the Order directs the Secretary of State, Attorney General, Secretary of Homeland Security, and Commissioner of Social Security to take "all appropri-

ate measures to ensure that the regulations and policies of their respective departments and agencies are consistent with this order." Citizenship Order § 3(a). It also directs the "heads of all executive departments and agencies" to "issue public guidance" within 30 days "regarding th[e] order's implementation with respect to their operations and activities." *Id.* § 3(b).

Some courts enjoined the issuance of such guidance, but this Court stayed those injunctions in *Trump* v. *CASA, Inc.*, 606 U.S. 831, 861 (2025). Since then, U.S. Citizenship and Immigration Services has issued guidance explaining how the Order would apply to various categories of aliens, such as asylees, parolees, and recipients of withholding of removal. See USCIS, U.S. Dep't of Homeland Security, *USCIS Implementation Plan of Executive Order 14160* (July 25, 2025). Other agencies, too, have issued guidance explaining how individuals would be able to prove citizenship. See, *e.g.*, Social Security Administration, *Guidance on Protecting the Meaning and Value of American Citizenship (Executive Order 14160)* (July 25, 2025).

3. The Citizenship Order addresses several key problems perpetrated by the widespread misunderstanding of the Citizenship Clause. First, the President recognized that automatic citizenship for children of illegal aliens operates as a powerful incentive for illegal migration. Not only do such children automatically become full citizens, but their citizenship is often promptly asserted to impede the removal of their illegal-alien parents. And, "by illegally immigrating into and remaining in the country," such aliens "are not only violating the immigration laws, but also jumping in front of those noncitizens who follow the rules and wait in line to immigrate into the United States through the legal

immigration process." *Noem* v. *Vasquez Perdomo*, No. 25A169 (Sept. 8, 2025), slip op. 8 (Kavanaugh, J., concurring).

Second, unqualified birthright citizenship raises national-security concerns. Some illegal aliens enter the United States to engage in "hostile activities, including espionage, economic espionage, and preparations for terror-related activities," and these and other aliens "present significant threats to national security and public safety." Exec. Order No. 14,159, § 1, 90 Fed. Reg. at 8443. Conferring near-automatic citizenship on the children of such aliens creates perverse policy incentives.

Third, near-automatic citizenship has spawned an industry of modern "birth tourism," by which foreigners travel to the United States solely for the purpose of giving birth here and obtaining citizenship for their children. See, *e.g.*, Minority Staff of S. Comm. on Homeland Sec. & Governmental Affairs, *Report on Birth Tourism in the United States* 1 (2022), https://perma.cc/C8SAZG8X (Birth Tourism). "[B]irth tourism companies" reportedly collect hefty fees to facilitate such travel to the United States. *Id.* at 25. That practice defies U.S. law, under which "obtaining U.S. citizenship for a child" is an impermissible basis for a tourist visa. 22 C.F.R. 41.31(b)(2)(i).

Fourth, such practices degrade the meaning and value of American citizenship. In the Order, the President recognized that "[t]he privilege of United States citizenship is a priceless and profound gift." Citizenship Order § 1. This Court has likewise observed that "[c]itizenship is a high privilege." *United States* v. *Manzi*, 276 U.S. 463, 467 (1928). Permitting illegal aliens to obtain that privilege for their children through

wrongdoing—cutting ahead of those who seek entry and citizenship through lawful means—degrades that gift and dilutes its meaning. Likewise, the practice of birth tourism "demeans * * * the privilege of U.S. citizenship," Birth Tourism 39, by extending it to people lacking any meaningful connection to the United States.

Presumably for those reasons, hardly any developed country retains a theory of citizenship similar to the United States' current approach. Even the United Kingdom, which pioneered near-automatic birthright citizenship, abandoned that approach in 1983.

B. *Washington*

1. The day after the Citizenship Order issued, the State of Washington and three other States (state respondents) sued the federal government in the U.S. District Court for the Western District of Washington. See *Washington* Pet. App. 91a-92a. They claimed that the Citizenship Order violates the Citizenship Clause and INA on its face. See *id.* at 92a.[1]

The district court granted state respondents a universal temporary restraining order. *Washington* Pet. App. 107a-111a. Two weeks later, it granted them a universal preliminary injunction prohibiting enforcement or implementation of the Citizenship Order. *Id.* at 90a-106a. The court concluded, as relevant here, that state respondents are likely to succeed on the merits of their constitutional and statutory claims. See *id.* at 96a-102a. In the court's view, "any individual who is born in the

[1] Three individuals filed a separate suit, which the district court consolidated with the state respondents' suit. See *Washington* Pet. App. 92a. One of the individuals later withdrew from the case, see *id.* at 92a n.2, and the court of appeals dismissed the other two individuals because they are covered by the provisionally certified class in *Barbara*, see *id.* at 14a-17a.

territorial United States" is subject to the United States' jurisdiction and so "is a citizen." *Id.* at 96a.

The Ninth Circuit denied the government's motion for a stay pending appeal. *Washington* Pet. App. 83a-89a. This Court granted the government a partial stay with respect to the universal scope of the district court's injunction, recognizing that such universal injunctions exceed federal courts' equitable powers. See *CASA*, 606 U.S. at 861.

2. A divided panel of the Ninth Circuit affirmed the preliminary injunction. *Washington* Pet. App. 1a-82a.

The Ninth Circuit first held that state respondents are proper plaintiffs to challenge the Citizenship Order. See *Washington* Pet. App. 9a-14a. It concluded that state respondents have Article III standing because the Citizenship Order's definition of citizenship will likely reduce the amount of federal funding that state respondents receive and will require them to incur administrative costs in developing new systems to verify citizenship eligibility. See *id.* at 9a-11a. The court also concluded that state respondents have third-party standing to assert individuals' citizenship rights because the Citizenship Order "operates directly as to the States by preventing the States from receiving funding and administrative fees that they would otherwise receive." *Id.* at 14a.

Turning to the merits, the Ninth Circuit concluded that the Citizenship Order violates both the Citizenship Clause and the INA. See *Washington* Pet. App. 17a-37a. The court read the phrase "'subject to the jurisdiction thereof,'" as used in the Constitution and the statute, to mean "subject to the laws and authority of the United States." *Id.* at 19a. The court stated that, under that reading, birthright citizenship extends to all

persons born in the United States other than "children of diplomats, children of invading armies, and children of tribal members." *Id.* at 23a.

Finally, the Ninth Circuit affirmed the universal scope of the injunction. See *Washington* Pet. App. 40a-43a. The court concluded that "the district court did not abuse its discretion in issuing a universal injunction in order to give the States complete relief." *Id.* at 41a.

Judge Bumatay concurred in part and dissented in part. See *Washington* Pet. App. 45a-82a. He concluded that state respondents lack Article III standing, chiefly because their asserted harms are "too speculative and contingent at this stage to constitute injuries in fact." *Id.* at 50a. Judge Bumatay did not address the merits or the scope of the injunction. See *id.* at 71a.

C. *Barbara*

The same day this Court decided *CASA*, a group of individuals (individual respondents), led by a plaintiff proceeding under the pseudonym Barbara, sued the federal government in the U.S. District Court for the District of New Hampshire. See *Barbara* Pet. App. 4a-6a. The court provisionally certified the following class:

> All current and future persons who are born on or after February 20, 2025, where (1) that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth.

Id. at 11a; see *id.* at 7a-31a.

The district court entered a class-wide preliminary injunction prohibiting enforcement of the Citizenship Order. *Barbara* Pet. App. 31a-39a. The court found that individual respondents are likely to succeed on the merits of their claims that the Order violates the Citizenship Clause and the INA. See *id.* at 32a-34a. The court relied on its analysis in *New Hampshire Indonesian Community Support* v. *Trump*, 765 F. Supp. 3d 102 (D.N.H. 2025), an earlier case in which it had issued a preliminary injunction against enforcement of the Order. See *Barbara* Pet. App. 33a.

REASONS FOR GRANTING THE PETITIONS

The Citizenship Clause of the Fourteenth Amendment was adopted to grant citizenship to freed slaves and their children, not to the children of illegal aliens, birth tourists, and temporary visitors. Indeed, that was the Clause's "one pervading purpose." *Slaughter-House Cases*, 16 Wall. 36, 71 (1873).

This case presents the question whether the Clause adopts a rule of citizenship by virtue of birth on U.S. soil and subjection to U.S. law alone or instead bases birthright citizenship on "political jurisdiction," *i.e.*, "direct and immediate allegiance" to the United States. *Elk* v. *Wilkins*, 112 U.S. 94, 102 (1884). The Clause adopts the latter rule. The phrase "subject to the jurisdiction thereof" refers not merely to regulatory jurisdiction but political jurisdiction or allegiance—and the relationship (other than citizenship) that establishes such allegiance is lawful domicile in the United States. That conclusion draws support from the Clause's text, its original understanding, its enactment history, the congressional debates on the Clause's adoption, this Court's contemporaneous cases, and many other sources.

A. The Fourteenth Amendment Grants Citizenship To The Children Of Those With Primary Allegiance To The United States, Such As Citizens And Lawful Permanent Residents

1. For several reasons, the Citizenship Clause does not grant citizenship automatically to everyone born in the United States and subject to U.S. law, but only to those born of parents with primary allegiance to the United States.

First, the plain text of the Clause requires more than birth on U.S. soil alone. The Clause provides, "All persons born or naturalized in the United States, *and* subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. Amend. XIV, § 1 (emphasis added). The plain language of the Clause refers to *two* conditions of citizenship—a child must be both "born * * * in the United States" and "subject to the jurisdiction thereof." *Ibid.* If "jurisdiction" meant merely "regulatory jurisdiction," the second criterion would add nothing to the first, because the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136 (1812). Respondents' interpretation would thus render the second condition meaningless. But see *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the [C]onstitution is intended to be without effect.").

Accordingly, in its first case interpreting the Citizenship Clause, this Court stated that the phrase "subject to the jurisdiction thereof" "was intended to exclude from its operation * * * *citizens or subjects of foreign States born within the United States*." *Slaughter-House*, 16 Wall. at 73 (emphasis added). Soon thereafter, this Court clarified that "subject to the jurisdiction

thereof" does not mean mere *regulatory* jurisdiction, but *political* jurisdiction—*i.e.*, lasting ties to create allegiance. "The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, owing them direct and immediate allegiance." *Elk*, 112 U.S. at 102. Reinforcing that holding, *Elk* reiterated that being "*in a geographical sense* born in the United States" does not suffice for citizenship under the Clause. *Ibid.* (emphasis added). The Court subsequently explained that those covered by the Clause include the children of (1) U.S. citizens, *Minor* v. *Happersett*, 21 Wall. 162, 168 (1875); and (2) aliens who "have a permanent domicile and residence in the United States," *United States* v. *Wong Kim Ark*, 169 U.S. 649, 705 (1898).

The Clause's enactment history, too, refutes respondents' theory. The same Congress that proposed the Fourteenth Amendment enacted the Civil Rights Act just a few months before, and the Clause was designed to adopt the same meaning as the Act. *Wong Kim Ark*, 169 U.S. at 675. The Civil Rights Act provided that "all persons born in the United States and *not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." § 1, 14 Stat. 27 (emphasis added). The Act, like the Clause, contemplated *two* criteria for birthright citizenship, both birth and political allegiance: (1) birth on U.S. soil ("born in the United States"), and (2) having primary allegiance to the United States ("not subject to any foreign power"). *Ibid.*

Substantial authority in the decades preceding the Clause's adoption established that domicile—*i.e.*, lawful, permanent residence within a nation, with intent to

remain—establishes the relevant political allegiance. As Justice Story wrote, a person "owes allegiance" to the country in which he is "domiciled." *The Pizarro*, 2 Wheat. 227, 246 (1817) (Story, J.). Such an individual "places him[self] out of the protection" of his former country, *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 120 (1804), and "becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order * * * but is, nevertheless, united and subject to the society." *The Venus*, 8 Cranch 253, 278 (1814); see Emmerich de Vattel, *The Law of Nations* §§ 212, 213, 215, at 101-102 (1797 ed.). As a result, once someone "has fixed his abode" in another country, he becomes "a member of [that] society, at least as a perpetual inhabitant; and his children will be members of it also." Vattel § 215, at 102.

That understanding—linking domicile with political jurisdiction—prevailed in this Court's cases in the decades following the Clause's enactment. The Court held that "foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country." *Lau Ow Bew* v. *United States*, 144 U.S. 47, 61-62 (1892). As the Court explained, "aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there, and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may invoke its protection against other nations." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724 (1893); accord *id.* at 734 (Brewer, J., dissenting).

The debates on both the Civil Rights Act and the Fourteenth Amendment reflect the same understand-

ing. Senator Lyman Trumbull, the Act's principal sponsor in the Senate, explained that its purpose was "to make citizens of everybody born in the United States who owe[d] *allegiance* to the United States." Cong. Globe, 39th Cong., 1st Sess. 572 (1866) (emphasis added). In a letter to President Johnson, he explained that the Act would make citizens of "'all persons' born of parents *domiciled in the United States*, except untaxed Indians." Letter from Sen. Lyman Trumbull to President Andrew Johnson (entry dated Mar. 2, 1867), *reproduced in* Andrew Johnson Papers, Manuscript Div. (Lib. of Cong. Reel No. 45). During debates on the Amendment, Senator Trumbull explained: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. * * * It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.'" Cong. Globe, 39th Cong., 1st Sess. 2893 (1866). Senator Trumbull went on to equate being "subject to our jurisdiction" with "owing allegiance solely to the United States." *Id.* at 2894.

Other members of Congress shared that understanding. In the debates over the Civil Rights Act, Representative James Wilson explained that a "person born in the United States" ordinarily "is a natural-born citizen," but he recognized "except[ions]" for "children born on our soil to temporary sojourners or representatives of foreign Governments." Cong. Globe, 39th Cong., 1st Sess. 1117 (1866). In the debates over the Amendment, Senator Benjamin Wade—who proposed a version of the Clause that omitted "subject to the jurisdiction thereof"—agreed that the "jurisdiction" language reflected the preexisting rule that "persons may

be born in the United States and yet not be citizen[s]," which would exclude "a person [who] is born here of *parents from abroad temporarily in this country*." *Id.* at 2769 (emphasis added). And Senator Reverdy Johnson agreed that "all that this amendment provides is, that all persons born in the United States and *not subject to some foreign Power* * * * shall be considered as citizens." *Id.* at 2893 (emphasis added).

2. Given its original meaning and history, the Clause does not extend citizenship to the children of transient visitors or illegal aliens.

First, during the debates on the adoption of the Fourteenth Amendment, it was non-controversial that the Clause would exclude the children of temporary visitors. As noted above, Representative James Wilson recognized that "children born on our soil to temporary sojourners" would not be citizens, and Senator Benjamin Wade acknowledged that "a person * * * born here of parents from abroad temporarily in this country" would not be covered. Cong. Globe, 39th Cong., 1st Sess. at 1117, 2769.

That understanding reflected the original meaning of "subject to the jurisdiction thereof": transient visitors are not included because they have not established sufficient ties with the United States to place themselves in a relationship of allegiance and protection. As Justice Story wrote in 1834, a "reasonable qualification of this rule" of birthright citizenship is "that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business." Story § 48. Because temporarily present aliens have not established "permanent domicile" or "residence in the United States," *Wong Kim Ark*, 169 U.S. at 705, they have not

accepted those "rights and * * * duties" similar to "citizens." *Lau Ow Bew*, 144 U.S. at 62. In fact, under the immigration laws, many classes of temporarily present aliens—including tourists, students, and temporary workers—are admitted only on the express requirement that they have "a residence in a foreign country" which they have "no intention of abandoning." 8 U.S.C. 1101(a)(15)(B), (F)(i), (H)(ii)(a)-(b), (H)(iii), (J), (M)(i), (M)(iii), (O)(ii)(IV), (P), and (Q). Such aliens therefore lack "the legal capacity to establish domicile in the United States," *Carlson* v. *Reed*, 249 F.3d 876, 880-881 (9th Cir. 2001), and the requisite political allegiance to the United States. Accordingly, such individuals are not entitled to the United States' diplomatic protection when they travel abroad. Cf. *Fong Yue Ting*, 149 U.S. at 724 (explaining that domiciliaries "may invoke" diplomatic protection).

Thus, the New Jersey Supreme Court explained that the Citizenship Clause excludes "those born in this country of foreign parents who are temporarily traveling here." *Benny* v. *O'Brien*, 32 A. 696, 698 (N.J. 1895). Similarly, before the Fourteenth Amendment, the Supreme Court of Texas found that exclusion from birthright citizenship was "fully sanctioned by law" and "too rational and well settled to admit of a question." *Hardy* v. *De Leon*, 5 Tex. 211, 237 (1849). And a New York court similarly explained that, when an individual "is traveling or sojourning" in another country, he "continues under the obligations of his allegiance" to his home country, and that "his children" accordingly fall within "an exception to the rule which makes the place of birth the test of citizenship." *Ludlam* v. *Ludlam*, 31 Barb. 486, 503 (N.Y. Gen. Term 1860).

Even after the Amendment's ratification, commentators widely agreed. See, *e.g.*, Morse 248 ("The words 'subject to the jurisdiction thereof' exclude the children of foreigners transiently within the United States."); Samuel Freeman Miller, *Lectures on the Constitution of the United States* 279 (1891) (similar); Hannis Taylor, *A Treatise on International Public Law* 220 (1901) ("[C]hildren 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.'"). As one stated, "*a fortiori* the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians." William Edward Hall, *A Treatise on International Law* 237 n.1 (4th ed. 1895).[2]

Contemporaneous executive-branch authorities reinforce that conclusion. In 1885, Secretary of State Frederick T. Frelinghuysen denied a passport to an applicant who was "born of Saxon subjects, temporarily in the United States" because the applicant was "subject to [a] foreign power," and "the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship." 2 *A Digest of the International Law of the United States* § 183, at 397-398 (Francis Wharton ed., 2d. ed. 1887). Later the same year, Secretary Frelinghuysen's successor, Thomas F.

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[2] A growing body of modern scholarship reinforces those views. See, *e.g.*, Ilan Wurman, *Jurisdiction and Citizenship* (May 22, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216249; Kurt Lash, *Prima Facie Citizenship* (Feb. 22, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5140319; Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Constitutional Birthright Citizenship* (Apr. 20, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5223361.

Bayard, denied a passport to an applicant born "in the State of Ohio" to "a German subject" "domiciled in Germany," explaining that the applicant "was on his birth 'subject to a foreign power' and 'not subject to the jurisdiction of the United States.'" *Id.* at 399-400. And the official regulations governing the administration of the Chinese Exclusion Acts exempted any person who had "been born in the United States, of parents who at the time of his birth have a *permanent domicile and residence* in the United States." *Regulations Governing the Admission of Chinese* R. 2 (Feb. 26, 1907), *reprinted in* Bureau of Immigration & Naturalization, Dep't of Commerce & Labor, Doc. No. 54, *Treaty, Laws, and Regulations Governing the Admission of Chinese* 33 (July 1907) (emphasis added).

Likewise, illegal aliens lack the primary allegiance to the United States required for birthright citizenship. Like many temporarily present visitors, illegal aliens are prevented by law from establishing a legal domicile in the United States. Congress may "preclud[e]" classes of aliens "from establishing domicile in the United States." *Toll* v. *Moreno*, 458 U.S. 1, 14 (1982); see *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925) (holding that a statute prohibiting entry precluded an immigrant from legally "dwel[ling] within the United States" even while physically present) (citation omitted). Provisions of the immigration laws that bar individuals from relinquishing their former domiciles leave them without "the legal capacity to establish domicile in the United States." *Carlson*, 249 F.3d at 880-881; accord *Park* v. *Barr*, 946 F.3d 1096, 1099 (9th Cir. 2020) (per curiam). A person whose very presence in a country is unlawful lacks the legal capacity to establish domicile there. See Robert Phillimore, *The Law of Domicil* 62-63 (1847). That con-

clusion draws further support from the principle that no wrongdoer should "profit by his own wrong." *Tilghman* v. *Proctor*, 125 U.S. 136, 145 (1888); see *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959) ("no man may take advantage of his own wrong").

3. The lower courts' contrary decisions rest largely on an overreading of *Wong Kim Ark*. In *Wong Kim Ark*, this Court held that the children of lawful permanent residents domiciled in the United States, as well as those of citizens, fall within the Clause. 169 U.S. at 705. *Wong Kim Ark* left no doubt that the resident-alien parents' domicile—a word the opinion used 22 times—was central to its holding. The Court framed both the question presented and its holding in those terms. *Id.* at 653, 693, 705. At the outset, the opinion stated that "[t]he question presented by the record" is whether citizenship extends to "a child born in the United States" of aliens "who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States." *Id.* at 653, 705. At the end of Section V of the opinion, summarizing its lengthy review of historical and legal sources, the Court announced the governing constitutional principle:

> The Amendment * * * 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.

Id. at 693 (emphases added). Then, at the opinion's conclusion, the Court stated that it had "determine[ed] * * * a single question, * * * namely, whether a child born in the United States, of parents of Chinese de-

scent, who, at the time of his birth, are subjects of the emperor of China, but have *a permanent domicile and residence in the United States* * * * becomes at the time of his birth a citizen of the United States." *Id.* at 705 (emphasis added).

In fact, *Wong Kim Ark* implies that illegal aliens are excluded from the Citizenship Clause. It states that aliens "are entitled to the protection of and owe allegiance to the United States, *so long as they are permitted by the United States to reside here*." *Wong Kim Ark*, 169 U.S. at 694 (emphasis added). Illegal aliens are not "permitted by the United States to reside here," *ibid.*, and thus their children are excluded from citizenship.

Attempts to read *Wong Kim Ark* more broadly than its holding are mistaken. First, those attempts extend beyond the holding of the case. See *Wong Kim Ark*, 169 U.S. at 653, 693, 705. As *Wong Kim Ark* itself warned, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id.* at 679 (quoting *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821)).

Moreover, the emphasis on domicile and permanent residence was central to *Wong Kim Ark*'s reasoning. For example, the Court quoted an opinion in which Justice Story recognized that "the children, even of aliens, born in a country, *while the parents are resident there under the protection of the government*, * * * are subjects by birth." *Wong Kim Ark*, 169 U.S. at 660 (emphasis added) (quoting *Inglis* v. *Trustees of the Sailor's Snug Harbour*, 3 Pet. 99, 164 (1830) (Story, J., dissenting)). The Court quoted with approval the New Jersey

Supreme Court's observation that the Fourteenth Amendment codifies "the general rule, that *when the parents are domiciled here*, birth establishes the right to citizenship." *Id.* at 692 (emphasis added) (quoting *Benny*, 32 A. at 698). The Court explained 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." *Id.* at 693 (emphasis added). And the Court noted that "persons * * * owe allegiance to the United States, *so long as they are permitted by the United States to reside here*; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens *residing in* the United States." *Id.* at 694 (emphases added).

By contrast, statements relating to the citizenship of children born to transitory visitors were plainly not essential to *Wong Kim Ark*'s holding. The opinion cited few, if any, judicial authorities—aside from pre-1789 British common law—where statements about temporary visitors were not themselves dicta within the source cited. Cf. *Wong Kim Ark*, 169 U.S. at 699 (rejecting a statement that "at best, was but obiter dictum" because it was not essential to the holding). Extending *Wong Kim Ark* to decide the citizenship rights of children of illegal aliens and temporary visitors, therefore, relies on dicta-within-dicta.

Accordingly, statements in *Wong Kim Ark* that suggest a broader application of its decision to nearly everyone born on U.S. soil (see, *e.g.*, 169 U.S. at 674-675) are not central to its reasoning—and, to the extent that they imply transient visitors and unlawful aliens are entitled to birthright citizenship, they are not persuasive. Most notably, *Wong Kim Ark* recited statements from pre-Founding sources that reflected Great Britain's

uniquely broad policy of birthright citizenship. *Id.* at 655-658. But the assumption that the Citizenship Clause incorporates the British practice is flawed. First, it overlooks almost 80 years of American history between 1789 and the Clause's adoption in 1868—during which time numerous American sources, including the congressional debates about the Civil Rights Act and the Clause, as well as this Court's cases, expounded the American understanding of citizenship as political allegiance, not the *jus soli* of British law. See pp. 15-19, *supra*. More fundamentally, the assumption overlooks that the Constitution was framed in large part to *reject* the British theory of the King's sovereignty over his subjects and replace it with a social-contract understanding of government and citizenship, premised on mutual consent between person and polity. See, *e.g.*, Report of House Comm. on Foreign Affairs Concerning the Rights of American Citizens in Foreign States, Cong. Globe, 40th Cong., 2nd Sess. App. 95 (1868) (explaining that "the American Constitution is itself proof that Blackstone's [British] theory of allegiance was not accepted by the American governments"); Cong. Globe, 40th Cong., 2nd Sess. 868, 967, 1130-1131 (1868) (statements objecting to British doctrine).

Moreover, the broader interpretation of *Wong Kim Ark* places it at odds with this Court's contemporaneous decisions on the same topic—the rights of Chinese immigrants—which repeatedly focused on the immigrants' domicile. Before *Wong Kim Ark*, the Court had held in *Lau Ow Bew* that "Chinese merchants domiciled in the United States" were exempt from the requirement to obtain a certificate of entry. 144 U.S. at 61. In *Fong Yue Ting*, it had noted that a domiciled Chinese resident could "invoke [America's] protection against

other nations." 149 U.S. at 724. And after *Wong Kim Ark*, the Court continued to treat domiciled Chinese residents differently, see, *e.g.*, *United States* v. *Mrs. Gue Lim*, 176 U.S. 459, 468 (1900), and described and applied *Wong Kim Ark* as addressing domiciled permanent residents, see *Chin Bak Kan* v. *United States*, 186 U.S. 193, 200 (1902); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 457 (1920). Indeed, this Court recognized that *Wong Kim Ark* concerned children born to foreign subjects only "when they were permanently domiciled in the United States." *Kwock Jan Fat*, 253 U.S. at 457; see *Chin Bak Kan*, 186 U.S. at 200 (similar).

Contemporaneous executive practice, too, weighs against a broad interpretation of *Wong Kim Ark.* In 1910, a Department of Justice report explained that "it has never been held, and it is very doubtful whether it will ever be held, that the mere act of birth of a child on American soil, to parents who are accidentally or temporarily in the United States, operates to invest such child with all the rights of American citizenship." Spanish Treaty Claims Comm'n, U.S. Dep't of Justice, *Final Report of William Wallace Brown, Assistant Attorney-General* 124 (1910). The same report explained that the decision in *Wong Kim Ark* "goes no further" than addressing children of foreigners "domiciled in the United States," and that *Wong Kim Ark* did not address the status of children of "parents who are accidentally or temporarily in the United States." *Id.* at 121, 124,

Finally, respondents' reading of *Wong Kim Ark* would render the Clause incoherent. *Wong Kim Ark* itself recognized four exceptions to the rule of citizenship by birth in the United States—*i.e.*, the children of ambassadors, of foreign invaders, of Indians, and of passengers on foreign public ships. 169 U.S. at 693. But

interpreting "jurisdiction" to mean "regulatory jurisdiction" cannot account for those exceptions. Indians, for instance, are fully subject to U.S. law; indeed, "Congress possesses plenary power over Indian affairs." *Haaland* v. *Brackeen*, 599 U.S. 255, 272 (2023) (citation omitted). By contrast, if "subject to the jurisdiction thereof" reflects the concept of "political jurisdiction" and "direct and immediate allegiance," *Elk*, 112 U.S. at 102, then the exceptions make perfect sense. They are all examples of persons who lacked (or were perceived to lack) primary ties of allegiance to the United States.

B. The Citizenship Order Complies With The INA

Though the lower courts focused on the Citizenship Clause, they also determined that the Citizenship Order violates a provision of the INA, 8 U.S.C. 1401(a). See *Washington* Pet. App. 36a-37a; *Barbara* Pet. App. 33a. That alternative holding, too, is wrong.

Section 1401(a) provides that "a person born in the United States, and subject to the jurisdiction thereof," is a citizen. 8 U.S.C. 1401(a). That provision copies the language of the Citizenship Clause almost verbatim. When, as here, a statutory term is "obviously transplanted from another legal source," it "brings the old soil with it." *George* v. *McDonough*, 596 U.S. 740, 746 (2022) (citation omitted). Absent a "well-settled" meaning to the contrary, *Kemp* v. *United States*, 596 U.S. 528, 539 (2022), texts adopting identical wording generally convey the same meaning. Cf. *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 587 U.S. 262, 268 (2019). There is no indication that language parroting the governing constitutional standard was understood to convey a different meaning, and thus no party contends that the two provisions' meanings diverge. As the lower courts acknowledged, Section 1401(a) bears

the same meaning as the Citizenship Clause. See *Washington* Pet. App. 36a; *Barbara* Pet. App. 32a-34a. As discussed above, the Citizenship Clause does not grant birthright citizenship to children of aliens who are temporarily or unlawfully present in the United States. Section 1401(a) therefore does not extend citizenship to those persons either.

The statutory context confirms that reading. Section 1401 contains eight subsections. The first, subsection (a), recites the language of the Citizenship Clause, and the other seven, (b) through (h), define the groups for whom Congress has used its Article I authority to provide for naturalized citizens beyond the Clause's minimum. 8 U.S.C. 1401(a)-(h); see U.S. Const. Art. I, § 8, Cl. 4. The context thus confirms that the statute incorporates the constitutional standard by reference and then defines the classes of persons who receive citizenship beyond those covered by the Clause.

To be sure, in the first half of the 20th century, the Executive Branch came to interpret the Citizenship Clause and Section 1401(a) to confer U.S. citizenship even upon the children of unlawfully or temporarily present aliens. See, *e.g.*, *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 Op. O.L.C. 340 (1995). But those developments do not control the resolution of the question presented. The meaning of Section 1401(a) depends on the meaning of the Citizenship Clause, which in turn depends on how the Clause was understood in 1868. Further, the view that birthright citizenship extends to children of unlawfully or temporarily present aliens was far from well-settled by the time Congress adopted the Nationality Act in 1940, or even by the time it adopted the INA in 1952. To the contrary, the year after the adoption of the

INA, a commentator described the statute as excluding children of "transients or visitors" from birthright citizenship. Sidney Kansas, *Immigration and Nationality Act Annotated* 183 (4th ed. 1953).

C. The Question Presented Warrants This Court's Review

The constitutional and statutory issues raised by this case plainly warrant this Court's review. Citizenship is "a precious right." *Costello* v. *United States*, 365 U.S. 265, 269 (1961). Citizens make up the Nation's political community and elect the Nation's political leaders. The government therefore has "a strong and legitimate interest in ensuring that only qualified persons are granted citizenship." *Berenyi* v. *District Director, INS*, 385 U.S. 630, 637 (1967).

The erroneous extension of birthright citizenship to the children of illegal aliens has caused substantial harm to the United States. Most obviously, it has impaired the United States' territorial integrity by creating a strong incentive for illegal immigration. The United States, as a sovereign, has the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 658 (1892). Violations of those restrictions threaten national security, imperil public safety, strain the public fisc, and undermine the rule of law. Extending citizenship to children of illegal aliens rewards, and thus encourages, such violations.

Similarly, the erroneous extension of citizenship to the children of temporarily present aliens has led to widespread birth tourism. See Birth Tourism 3. Birth tourism "demeans the naturalization process by monetizing the privilege of U.S. citizenship." *Id.* at 39. It also

flouts U.S. law stating that birth tourism is not a valid basis for a visa. 22 C.F.R. 41.31(b)(2)(i).

The Citizenship Order, moreover, is a major policy of the current Administration. The Order forms an integral part of the Administration's broader effort to prevent illegal immigration. This Court has previously granted review when lower courts have blocked similarly significant Administration policies. See, *e.g.*, *Biden* v. *Nebraska*, 600 U.S. 477 (2023); *Department of Commerce* v. *New York*, 588 U.S. 752 (2019); *Trump* v. *Hawaii*, 585 U.S. 667 (2018).

There is no reason to defer granting review. Though these cases arise in a preliminary-injunction posture, further proceedings in the lower courts would have limited utility, given that the cases involve pure questions of law. And given the nationwide scope of the district courts' injunctions, it is unlikely that the question presented will meaningfully percolate in other circuits. See *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges"). Moreover, waiting for the court of appeals to consider *Barbara* is unlikely to assist this Court, as the First Circuit is more likely to explain its views of the merits in other appeals that have already been argued. See *New Jersey* v. *Trump*, No. 25-1170 (argued Aug. 1, 2025); *Doe* v. *Trump*, No. 25-1169 (argued Aug. 1, 2025). This Court should grant these petitions to enable the issue to be decided this Term.

D. This Court Should Grant Review In Both *Washington* And *Barbara*

This Court should grant certiorari in *Washington* and certiorari before judgment in *Barbara*. Certiorari before judgment, to be sure, is an exceptional proce-

dure. But on several previous occasions, the Court has granted certiorari in one case and certiorari before judgment in a companion case, to ensure comprehensive review of a legal question. See *Learning Resources, Inc.* v. *Trump*, No. 24-1287, 2025 WL 2601021 (Sept. 9, 2025); *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S. 181, 198 (2023); *DHS* v. *Regents of the University of California*, 591 U.S. 1, 15 (2020); *United States* v. *Booker*, 543 U.S. 220, 229 (2005); *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2003).

This Court should follow that course here because the only remaining plaintiffs in *Washington* are States. See p. 11 n.1, *supra*. The government argued below, and Judge Bumatay's dissent agreed, that the States lack Article III standing to challenge the Citizenship Order. See *Washington* Pet. App. 9a-14a; *id.* at 45a-71a (Bumatay, J., dissenting). The government also argued that the States lack third-party standing to assert individuals' citizenship rights. See *id.* at 14a (majority opinion). Although the Ninth Circuit rejected those arguments and the government has not asked this Court to review those holdings, the Court would have an independent obligation to consider at least whether the States have Article III standing. See *Summers* v. *Earth Island Institute*, 555 U.S. 488, 499 (2009). If the Court grants review in only *Washington*, therefore, threshold obstacles could prevent it from reaching the merits. At a minimum, the Court would need to expend judicial resources resolving a contested question of Article III standing.

Granting certiorari before judgment in *Barbara* would avoid those concerns. This Court may reach the merits of a case so long as at least one party before it

has standing. See *Rumsfeld* v. *FAIR, Inc.*, 547 U.S. 47, 52 n.2 (2006). The class members in *Barbara*—persons whom the Citizenship Order declines to recognize as citizens—plainly have Article III standing, and their assertion of their own citizenship rights does not raise any third-party-standing issues.

CONCLUSION

The petition for a writ of certiorari in *Washington* and the petition for a writ of certiorari before judgment in *Barbara* should be granted.

Respectfully submitted.

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SEPTEMBER 2025

APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 25-cv-244-JL-AJ
Opinion No. 2025 DNH 079P

"BARBARA," ET AL.

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY, ET AL.

Dated: July 10, 2025

ORDER GRANTING PRELIMINARY INJUNCTION AND PROVISIONAL CLASS CERTIFICATION

This order grants a preliminary injunction and provisionally certifies a class of petitioners.

Pseudonymous petitioners "Barbara," "Sarah," by her guardian, parent, and next friend "Susan," and "Matthew," by his guardian, parent, and next friend "Mark," bring this class action suit asking this court to enjoin the enforcement of an executive order that would exclude certain groups from United States citizenship status.[1] They sue the President, the Secretary and Department of Homeland Security, the Secretary and De-

[1] *See* Compl. (doc. no. 1).

partment of State, the Secretary and Department of Agriculture, and the Administrator of and Centers for Medicare and Medicaid Services (the persons in their official capacities).[2] The petitioners allege that a recent executive order involving birthright citizenship violates the Fourteenth Amendment of the United States Constitution, the Immigration and Nationality Act, and the Administrative Procedure Act. *See* U.S. Const. amend. XIV, § 1; Immigration and Nationality Act, 8 U.S.C. § 1401; Administrative Procedure Act, 5 U.S.C. § 706(B). The court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 as this action arises under the Constitution and laws of the United States.

After reviewing the parties' submissions and holding requested oral argument, the court provisionally certifies a class of petitioners[3] and grants the preliminary injunction.

I. Procedural background

On January 20th, 2025, the President issued Executive Order No. 14160, titled "Protecting the Meaning and Value of American Citizenship."[4] It provides that the Fourteenth Amendment of the Constitution excludes from birthright citizenship "persons who were born in the United States but not 'subject to the jurisdiction thereof.'"[5] It orders that, beginning February 19th, 2025, "no department or agency of the United

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[2] *Id.* at ¶¶ 15-23.

[3] As the court discusses *infra* § III.b., the court certifies a narrower class than that proposed by the petitioners.

[4] Protecting the Meaning and Value of American Citizenship Executive Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

[5] *Id.*

States government shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons" in two circumstances:

> "(1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the 3 person's father was not a United States citizen or lawful permanent resident at the time of said person's birth."[6]

This court and three others preliminarily enjoined the respondents[7] from enforcing the Executive Order in four separate suits.[8] This court enjoined enforcement "with respect to the petitioners, and with respect to any individual or entity in any other matter or instance within the jurisdiction of this court," during the pendency of the litigation.[9] *New Hampshire Indonesian Cmty. Support*, 765 F. Supp. 3d 102, 112 (D.N.H. 2025). The three other courts issued universal preliminary injunctions, which the Supreme Court held were "broader

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[6] *Id.*

[7] All of the four suits name the same respondents named in this litigation.

[8] *See New Hampshire Indonesian Cmty. Support v. Trump*, 765 F. Supp. 3d 102, 112 (D.N.H. 2025); *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723, 746 (D. Md. 2025); *State v. Trump*, 765 F. Supp. 3d 1142, 1154 (W.D. Wash. 2025); *Doe v. Trump*, 766 F. Supp. 3d 266, 290 (D. Mass. 2025) (Sorokin, J.).

[9] Respondents' appeal is now pending before the First Circuit Court of Appeals.

than necessary to provide complete relief to each plaintiff with standing to sue." *Trump v. CASA, Inc.*, 606 U.S. ----, --- S. Ct. ----, --- L. Ed. 2d ----, 2025 WL 1773631, at *15 (U.S. June 27, 2025). The Supreme Court ordered lower courts to ensure that their injunctions comport with the ruling, stayed the injunctions "to the extent that they prohibit executive agencies from developing and issuing public guidance" regarding the Executive Order, and ordered that § 2 of the Executive Order would not take effect until 30 days after the date of the opinion, or July 27, 2025.[10] *Id*. The Court did not rule on the merits of the injunctions.

Within hours of the ruling, the petitioners initiated this class action seeking declaratory and injunctive relief, moving immediately for "certification of a class of all current and future children who are or will be denied United States citizenship by [the] Executive Order . . . , and their parents" and requesting a one-week briefing schedule.[11] The petitioners seek provisional class certification to allow for a class-wide preliminary injunction prohibiting enforcement of the order during the pendency of the litigation.[12]

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[10] The respondents made no argument orally or in writing that this court's consideration of or issuance of orders on these motions violates the stay imposed in *CASA*.

[11] Pet'rs'.' Mot. Class Cert. (doc. no. 5) at 1. Respondents requested a longer timeline but, in apparent recognition of the realities implicated by the Supreme Court's 30-day stay, offered no objection to the court's limited extension to the petitioners' proposal.

[12] Compl. (doc. no. 1) at 16.

II. Class representative petitioners

The class representative petitioners—Barbara, Sarah, Susan, Matthew, and Mark—bring this action under Federal Rules of Civil Procedure 23(a) and 23(b)(2) on behalf of themselves and a nationwide class of all other persons similarly situated.

Petitioner "Barbara" is a is a citizen of Honduras.[13] She currently resides in New Hampshire with her husband and three minor children.[14] Her asylum application is pending with the United States Citizenship and Immigration Services, and she has resided in the United States since 2024.[15] Her husband, the father of her children, is not a U.S.-citizen or lawful permanent resident.[16] They are expecting their fourth child in October 5 2025.[17] Barbara plans to seek for her child Supplemental Nutrition Assistance Program (SNAP), Medicaid, and other benefits for which citizens are eligible.[18]

Petitioner "Sarah" is the daughter of petitioner "Susan," a citizen of Taiwan.[19] Susan and Sarah reside in Utah.[20] Susan has lived in the U.S. for 12 years.[21] She

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[13] Decl. Barbara (doc no. 5-9) at ¶ 2.

[14] *Id.* ¶¶ 2, 4.

[15] *Id.* ¶¶ 3, 5.

[16] *Id.* ¶ 9.

[17] *Id.* ¶ 7.

[18] Suppl. Decl. Barbara (doc. no. 57-1) at 2. The respondents requested at oral argument that the court strike the petitioners' supplemental declarations. The court declines to do so. *See* L.R. 7.1(a)(1).

[19] Decl. Susan (doc. no. 5-10) at ¶ 2.

[20] *Id.*

[21] *Id.* ¶¶ 3, 5.

is currently in the United States on a student visa and is in the process of applying for lawful permanent resident status based on an approved employment-based visa.[22] Her husband, the father of her children, is not a U.S.-citizen or lawful permanent resident.[23] Susan gave birth to Sarah in Utah in April 2025,[24] and applied for a United States passport for the child.[25] She has three other children, all of whom are U.S. citizens.[26]

Petitioner "Matthew" is the son of petitioner "Mark," a citizen of Brazil.[27] Mark resides in Florida.[28] He has lived in the United States for the past five years,[29] and is in the process of applying for lawful permanent status.[30] Matthew, Mark's first child, was born in Florida in March 2025,[31] and has received a U.S. passport.[32] Mark's wife does not have lawful status in the United States.[33]

> The class representative petitioners seek to represent the following proposed class: "All current and future persons who are born on or after February 20, 2025, where (1) that person's mother was unlawfully

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[22] *Id.* ¶¶ 5, 6.

[23] *Id.* ¶ 9.

[24] *Id.* ¶ 7.

[25] Suppl. Decl. of Susan (doc. no. 57-2) at 2.

[26] Decl. of Susan (doc. no. 5-10) ¶ 4.

[27] Decl. Mark (doc. no. 5-11) at ¶ 2.

[28] *Id.*

[29] *Id.* ¶ 3.

[30] *Id.* ¶ 6.

[31] *Id.* ¶ 7.

[32] Suppl. Decl.Mark (doc. no. 57-3) at 2.

[33] Decl. Mark (doc. no. 5-11) at ¶ 9.

> present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, as well as the parents (including expectant parents) of those persons."[34]

The petitioners request that the court provisionally certify the class and immediately issue a class-wide preliminary injunction.[35] The respondents object to both class certification and the preliminary injunction.

III. Class certification

The court grants provisional class certification, but to a narrower class than that proposed by petitioners. The certified class includes only those persons to whom the Executive Order denies citizenship. It does not include their parents.

a. Applicable standard

The petitioners have moved for certification under Fed. R. Civ. P. 23(b)(2). Rule 23(b) certification is permissible only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addi-

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[34] Pet'rs' Mem. Mot. Class Cert. (doc. no. 5-1) at 3.

[35] Pet'rs' Mot. Prelim. Inj. (doc. no. 6) at 4.

tion, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The petitioners seek to certify a class under Fed. R. Civ. P. 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Both the burden and quantum of required proof under this standard are familiar. The burden here rests with the petitioners. The required quantum of evidence is proof by a preponderance. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart*, 564 U.S. at 350. "It is sufficient if each disputed requirement has been proven by a preponderance of evidence." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015) (cleaned up). "'Provisional' certification does not lower the bar with respect to the Rule 23(a) and (b) standards; the court must conduct a rigorous inquiry and satisfy itself that the putative class meets those requirements." *Gomes v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, No. 20-CV-453-LM, 2020 WL 2113642, at *2 (D.N.H. May 4, 2020) (McCafferty, C.J.).

"Courts routinely grant provisional class certification for purposes of entering injunctive relief." *Idaho Org. of Res. Councils v. Labrador*, No. 1:25-CV-00178-AKB, 2025 WL 1237305, at *15 (D. Idaho Apr. 29, 2025) (citing *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041-43 (9th Cir. 2012); *Padres Unidos de Tulsa v. Drummond*, No. CIV-24-511-J, 2025 WL

1444433, at *12 (W.D. Okla. May 20, 2025) (collecting cases); *see also CASA*, No. 24A884, 2025 WL 1773631, at *19 ("[P]laintiffs who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under [Rule] 23(b)(2) and ask a court to award preliminary classwide relief that may, for example, be statewide, regionwide, or even nationwide.") (Kavanaugh, J. concurring). The court does so here, and may later modify or amend the order granting class certification. Fed. R. Civ. P. 23(c)(1)(C).

b. Class definition

The court grants provisional class certification but declines to adopt the class definition proposed by petitioners. As petitioners point out,[36] federal courts have discretion to modify a class definition. *See, e.g. Campbell v. First Am. Title Ins. Co.,* 269 F.R.D. 68, 74 (D. Me. 2010) (Singal, J.) (citing *Slapikas v. First Am. Title Ins. Co.*, 250 F.R.D. 232, 250-51 (W.D. Pa. 2008)) (revising class definition); *Wagner v. Taylor*, 836 F.2d 578, 589-90 (D.C. Cir. 1987) (noting a court's "broad discretion to redefine and reshape the proposed class to the point that it qualifies for certification under Rule 23"); 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1759 (4th ed. 2025) ("[I]f plaintiff's definition of the class is found to be unacceptable, the court may . . . redefine the class to bring it within the scope of Rule 23. . . . "); *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, No. CV 25-306 (RDM), 2025 WL 1825431, at *46 (D.D.C. July 2, 2025) (Moss, J.) (noting the court's authority to alter a class

[36] Pet'rs' Reply (doc. no. 57) at 9 n.8.

definition). Petitioners have not demonstrated by a preponderance of the evidence that the class should include "the parents (including expectant parents)" of the children denied birthright citizenship by the Executive Order. Doubtless the parents of such children would suffer harms following from the denial of United States citizenship to their children, including, but likely not limited to, those detailed in the complaint.[37] But the harms to the parents of children denied citizenship are (a) not the subject of the specific claims in the complaint, which refer to the Executive Order's denial of citizenship to children,[38] and (b) would not necessarily meet Rule 23(a)'s requirements for commonality and typicality, as the enumerated harms are factually and legally diverse. Certifying a class of children without their parents eliminates those potential commonality and typicality issues while still allowing complete relief for the claims as stated in the complaint. This approach is particularly suitable where, as here, the petitioners have requested both preliminary injunctive relief, full briefing, oral argument, and a ruling in an approximately one-week timeframe.[39]

Narrowing the class also sharpens the court's focus on the specific injury for which relief is claimed in Counts 1, 2, 3, and 4: the denial of the children's constitutional right to United States citizenship.[40] This is a cognizable injury applicable to all members of the certified class: if a child is denied citizenship because of

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[37] *See* Compl. (doc. no. 1) at 11-14.

[38] *Id.* at 14-15.

[39] Pet'rs' Mot. Class Cert. (doc. no. 5) at 1 (filing on June 27, 2025, ruling requested by July 7, 2025).

[40] *See id.*

the Executive Order, he or she will suffer the same injury as all other children subject to it. Although other harms may follow from the denial of citizenship, they are not the subject of the claims or requested relief.

The court therefore provisionally certifies and focuses its analysis on the following, narrower, class:

> "All current and future persons who are born on or after February 20, 2025, where (1) that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth."[41]

c. Numerosity

To satisfy this first requirement of class certification, Rule 23 requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a). "[T]he party seeking certification need not establish a precise number of putative class members." *Gomes v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, 561 F. Supp. 3d 93, 99 (D.N.H. 2021) (McCafferty, C.J.). "[G]enerally[,] if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (quoting

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[41] The court informed the parties at oral argument that it would narrow the class to exclude parents. Both parties agreed that the court had authority to *sua sponte* narrow the class.

Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)).

The petitioners argue that the number of children denied American citizenship satisfies the numerosity requirement, and the respondents do not dispute this assertion. The court agrees with the petitioners. The petitioners cite credible evidence estimating that the Executive Order would deny citizenship to thousands of children. *See Repealing Birthright Citizenship Would Significantly Increase the Size of the U.S. Unauthorized Population*, Migration Policy Inst. (May 2025), https://www.migrationpolicy.org/news/birthright-citizenship-repeal-projections.

Respondents object to the inclusion of "future persons" in the class, arguing that "'future persons'—*i.e.*, persons who have not yet been conceived—lack either standing or capacity to sue."[42] As petitioners note, the fact that a policy will continue to harm future class members is relevant to numerosity.[43]

Including future class members is no bar to class certification. Although the future class member children in this case have yet to be born, as soon as they are born, they will join the class and their claims will be ripe. *See A. B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022) (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) (abrogation on other grounds recognized by *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)) ("The inclusion of future class members

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[42] Resp'ts' Mem. Obj. (doc. no 56-1) at 20.

[43] Pet'rs' Reply (doc. no. 57) at 9 (citing *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass.), enforcement granted, 64 F. Supp. 3d 271 (D. Mass. 2014)).

in a class is not itself unusual or objectionable," because "[w]hen the future persons referenced become members of the class, their claims will necessarily be ripe."); *Refugee & Immigrant Ctr. for Educ. & Legal Servs*, No. CV 25-306 (RDM), 2025 WL 1825431, at *46 (certifying a class "consisting of all individuals who are or will be subject to the Proclamation and/or its implementation and who are now or will be present in the United States"). In other cases involving children, the fact that some of the potential future class members had not yet been born was not a bar to certification. *See, e.g., M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018) (upholding class certification that included "all children now, or in the future" in the state's conservatorship program); *Hawaii State Dep't of Educ.*, 30 F.4th at 838 (Rule 23(a) requirements met where class included "all present and future [] female students" who participated or sought to participate in athletics).

Finally, more children will continuously populate the class as they are born, and, where "an influx of future members will continue to populate the class . . . at indeterminate points in the future, joinder becomes not merely impracticable but effectively impossible." *Gomes*, 561 F. Supp. 3d at 99 (citations and quotation marks omitted); *see also Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass.), enforcement granted, 64 F. Supp. 3d 271 (D. Mass. 2014) (Ponsor, J.) (citing William B. Rubenstein, Newberg and Rubenstein on Class Actions § 3.15 (5th ed. 2013) ("Unforeseen members will join the class at indeterminate points in the future, making joinder *impossible.*") (emphasis in original).

The petitioners satisfy the numerosity requirement.

d. Commonality

To certify a class, the court must also find "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). One common question suffices. *Wal-Mart*, 564 U.S. at 359. The proposed class must have a "common contention" that "is capable of classwide resolution." *Id.* at 350. In other words, the "determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Rule 23(a)'s requirement of commonality is a low bar, and courts have generally given it a permissive application." *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (citations and quotation marks omitted). "[T]he focus of the commonality inquiry is not on the strength of each plaintiff's claim, but instead is on whether the defendant's conduct was common as to all of the class members." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013) (citations and quotation marks omitted). "[C]ommon answers typically come in the form of a particular and sufficiently well-defined set of allegedly illegal policies or practices that work similar harm on the class plaintiffs." *Parent/Prof'l. Advocacy League v. City of Springfield*, 934 F.3d 13, 28 (1st Cir. 2019) (citation modified).

The petitioners argue that the putative class members share legal questions about the constitutionality and lawfulness of the Executive Order. Each class member, they contend, will suffer the common injury of denial of citizenship and would receive the same relief: an injunction declaring the Executive Order unlawful and unenforceable.

The court agrees. Petitioners raise several common questions of law, including whether the Executive Order violates the Constitution and § 1401 and whether the respondents have violated the Administrative Procedure Act. Additionally, the petitioners argue that the proposed class members share a common factual connection —the denial of citizenship and its associated benefits. Finally, petitioners contend that if the court decides in their favor on the merits, they will receive the same relief (an injunction) for the same injury (denial of citizenship). *See, e.g.*, *Id.* at 29 (regarding commonality in class action relating to special education, "plaintiffs can satisfy Rule 23(a)'s commonality requirement by identifying a uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the alleged violation"); *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me. 2011) (Woodcock, J.) (finding commonality in class of Maine residents eligible or enrolled in health care program where "questions of [state department of health's] course of conduct are common to all class members, namely its alleged failure to evaluate and provide services to the proposed class members according to federal standards[, because] those factual questions implicate a common set of federal statutes."). Petitioners have shown that a class action in this instance will "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (emphasis in original) (citation omitted).

The respondents argue that divergent factual issues related to parents' domiciles at the time of the children's birth undermine the class's commonality. Reasserting their argument from *New Hampshire Indonesian Cmty. Support* that the phrase "subject to the jurisdiction" of the United States refers, in the Fourteenth Amendment

and § 1401, to a person's domicile at the time of his or her birth, the respondents contend that a person's domicile may determine whether that person is entitled to citizenship under the Executive Order, leading to potentially different outcomes among members of the putative class depending on their domicile.[44] The argument fails here. This court, like others, rejected the argument that the phrase "subject to the jurisdiction thereof" involves domicile. *See United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898); *New Hampshire Indonesian Cmty. Support*, 765 F. Supp. 3d at 110; *see also CASA, Inc. v. Trump*, 763 F. Supp. 3d 723, 739 (D. Md. 2025) (holding the same); *State v. Trump*, 765 F. Supp. 3d 1142, 1150 (W.D. Wash. 2025) (same); *Doe v. Trump*, 766 F. Supp. 3d 266, 272 (D. Mass. 2025) (Sorokin, J.) (same). So domicile has no bearing on the common facts or law relevant to resolution of the suit.[45] *See*

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[44] The court notes that the concept of "domicile" does not meaningfully align with the classes of people singled out by the Executive Order. For instance, all the petitioners could likely show domicile in the United States: they all allege that they live—some for more than 20 years—and intend to stay in the United States. But all of them have or will have children that would be affected by the Executive Order. Thus, the concept of domicile is underinclusive of the groups of people delineated in the Executive Order.

[45] Because domicile and immigration status (outside of the exceptions enumerated in *Wong Kim Ark*, which are not at issue here) have no bearing on the common facts or law relevant to resolution of the suit, discovery on "the class representatives' immigration statuses, how long they have been present in the United States, and facts related to their demonstrated intention to stay and make the United States their lawful home" is not necessary. *See* Resp'ts' Mem. Obj. at 17. Similarly, because the claims and relief requested are limited specifically to the denial of United States citizenship, discovery about "the ways in which [petitioners] intend to utilize the benefits of American citizenship" is not warranted. *Id.*

Parent/Prof'l. Advoc. League, 934 F.3d at 28. The petitioners in the court's narrow class satisfy the commonality requirement.

e. Typicality

Next, petitioners must show "typicality," or that their claims or defenses are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). To be typical, the representative petitioners' claims must "arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and [be] based on the same legal theory." *Garcia-Rubiera*, 570 F.3d at 460 (citation modified); *see also Ouadani v. Dynamex Operations E., LLC*, 405 F. Supp. 3d 149, 162 (D. Mass. 2019) (Saris, J.) ("Typicality requires that the class representative's 'injuries arise from the same events or course of conduct as do the injuries of the class,' but his claims need not be 'identical to those of absent class members.'") (citation omitted).

"The commonality and typicality requirements of Rule 23(a) tend to merge." *Wal-Mart*, 564 U.S. at 349 n.5. Typicality is established when the claims of the named plaintiffs and the class "involve the same conduct by the defendant . . . regardless of factual differences." *Hawkins ex rel. Hawkins v. Comm'r of N.H. Dep't of Health & Human Servs.*, No. CIV. 99-143-JD, 2004 WL 166722, at *3 (D.N.H. Jan. 23, 2004) (DiClerico, J.) (quoting *Johnson v. HBO Film Mgt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001)). "For purposes of demonstrating typicality, '[a] sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 69 (D. Mass. 2005)

(Young, J.) (quoting *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir.1984)). "Even though there may be some differences between [the class representative] and the putative class members, what matters is that they are bound together by a common legal theory." *Ouadani*, 405 F. Supp. 3d at 163 (finding typicality where company applied its independent contractor policy to named plaintiff and other members of the putative class in the same way); *see also Gomes*, No. 20-CV-453-LM, 2020 WL 2113642 (D.N.H. May 4, 2020) (McCafferty, C.J.) (finding typicality where petitioners' claims "[arose] from the same course of conduct: respondents' facility-wide actions or inactions," and were all "based on the legal theory that respondents have violated their Fifth Amendment Due Process rights.").

Petitioners claim that the named representatives' claims are "obviously typical" of the claims of the proposed class,[46] while the respondents argue that, as with commonality, individualized determinations about the class members' domiciles undermine the claims' typicality.

The court agrees with the petitioners with respect to the claims of the class as limited by the court. As in *Ouadani*, and *Gomes*, the putative class members' injuries would be the same—namely, denial of citizenship—and would "involve the same conduct by the defendant[s],"—namely, enforcement of the Executive Order. *See Hawkins ex rel. Hawkins*, 2004 WL 166722, at *3. This is true even if some factual differences may exist between the class members (for instance, their parents' domicile or length of residence in the United States) be-

[46] Pet'rs' Mem. Mot. Class Cert. (doc. no. 5-1) at 9.

cause the respondents' conduct and the petitioners' injuries would be the same in all cases. *Id.* As with commonality, because domicile and "legal presence,"[47] outside of the exceptions enumerated in *Wong Kim Ark*, 169 U.S. at 693, have no bearing on whether a child should receive United States citizenship under the Fourteenth Amendment or § 1401,[48] factual differences in the parents' domiciles or legal presence do not bear on the typicality of the children's claims.

The typicality requirement is met here.

f. Adequacy of representation

Finally, Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This subsection has two requirements: (1) "that the interests of the representative party will not conflict with the interests of any of the class members"; and (2) that chosen counsel "is qualified, experienced and able to vigorously conduct the proposed litigation." *Clough v. Revenue Frontier, LLC*, No. 17-CV-411-PB, 2019 WL 2527300 at *4 (D.N.H. June 19, 2019) (Barbadoro, J.) (cleaned up).

The court has not identified any conflicting or potentially conflicting interests between representatives of the proposed class and those of the unnamed class members. Respondents make two arguments against the adequacy of the proposed class: first, that differences in the parents' domiciles may lead petitioners to focus only on arguments that cover their factual and legal situation; and second, that the petitioners' decision to pro-

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[47] Resp'ts' Mem. Obj., (doc. no. 56-1) at 16.

[48] *See supra* § III.d.; *see also New Hampshire Indonesian Cmty. Support,* 765 F. Supp. 3d at 110.

ceed pseudonymously undermines the ability of putative class members to assess the class representatives' adequacy or potentially conflicting interests.[49]

As to the first argument, the court has rejected the contention that the domiciles of class-member children's parents matter for the purposes of the claims raised in the case.[50] The respondents do not raise any other potential conflicts that could exist between members of the putative class and the class representatives.

As to the second argument, courts have recognized that litigation can proceed pseudonymously in "exceptional cases." *Doe v. Massachusetts Inst. of Tech.*, 46 F.4th 61, 70 (1st Cir. 2022) (quotation marks omitted). In this case, the court found that the "totality of the circumstances" favored allowing the petitioners to proceed pseudonymously for the reasons stated in their motion.[51]

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[49] Respondents make a third argument related to potential claims against certain respondents, including the Department of Agriculture and the Centers for Medicare and Medicaid Services. Resp'ts' Mem. Obj. (doc. no. 56-1) at 18. In response, petitioners provided supplemental declarations about their intent to apply for benefits administered by those respondents, like passports, Medicaid or SNAP benefits. *See* Suppl. Decl. Barbara (doc. no 57-1); Suppl. Decl. Susan (doc. no. 57-2); Suppl. Decl. Mark (doc. no. 57-3). The court views these arguments as better suited to a motion to dismiss, rather than a discussion of the adequacy of representation in a class action. The court notes that petitioners have not made any specific requests for relief regarding SNAP benefits, passports, or otherwise. Although these forms of relief may follow from the relief requested, they are not specifically at issue here. *See* Compl. (doc. no 1) at 14-16.

[50] *See supra* § III.d.

[51] Pet'rs' Mot. Proceed Pseudonymously (doc. no. 7) (granted, without objection, on June 30, 2025). At the conference on June 30, 2025, the respondents agreed to the petitioners' motion, while

See id. And although in Rule 23(b)(3) cases, where class members may opt out, "[p]utative class members have an interest in knowing the identities of all class representatives so that they may assess whether the representatives adequately represent them and whether they wish to participate in the action," *see Rapuano v. Trs. of Dartmouth Coll.*, 334 F.R.D. 637, 649 (D.N.H. 2020) (McCafferty, C.J.), this is a (b)(2) class. Here the putative class members have no way to opt in or out of the class, and thus less need for information about class representatives. No party has identified a way in which the class representatives *could* have conflicts with other class members, other than on factual differences in domicile. The petitioners have alleged facts sufficient to show that they are members of the class they seek to represent.[52] As one court observed, "in putative class actions raising constitutional challenges, the public interest is not being able to identify any one Plaintiff, but in being able to follow the case to determine how the

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"reserv[ing] their right to obtain the identities of the Plaintiffs or to raise objections at a later time" with respect to class certification. Resp'ts' Mem. Obj. (doc. no. 56-1) at 18 n.3. In their objection to class certification they ambiguously state that they "do so now." *Id.* To the extent the respondents' statement makes a request to disclose the identities of the petitioner, it violates L.R. 7.1(a)(1), with which their local counsel is presumably familiar, which prohibits combining multiple motions seeking separate and distinct relief into a single filing. To the extent the respondents are merely objecting to the decision to allow the class representatives to proceed pseudonymously, the court would be willing to order disclosure of the class representatives to putative class members under a protective order, should the respondents make such a motion and the court finds that such disclosure is warranted.

[52] *See* Decl. Barbara (doc. no. 5-9); Decl. Susan (doc. no. 5-10); Decl. Mark (doc. no. 5-11).

constitutional issues are resolved." *Doe v. City of Apple Valley*, No. 20-CV-499 (PJS/DTS), 2020 WL 1061442, at *3 (D. Minn. Mar. 5, 2020) (cleaned up).

Turning to the second factor of the adequacy inquiry, the court is convinced that proposed class counsel, lawyers from the ACLU Immigrants' Rights Project, the ACLUs of New Hampshire, Maine, and Massachusetts, the Asian Law Caucus, the NAACP Legal Defense and Educational Fund, and the Democracy Defenders Fund have sufficient experience and qualifications to serve as class counsel. The petitioners satisfy the adequacy requirement.

g. 23(b)(2) certification

In addition to meeting the requirements of Rule 23(a), class actions must fall into one of the three categories established under Rule 23(b). Petitioners seek certification under Rule 23(b)(2), which allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).[53] "Rule 23(b)(2) ap-

[53] "Rule 23(b)(2) authorizes certification of a class solely for the purpose of *final* injunctive or declaratory relief. Hence, a case seeking only a provisional remedy like a preliminary injunction cannot be certified under Rule 23(b)(2) on that basis alone. This is rarely a problem for proponents of class certification, however, as a class seeking preliminary injunctive relief will typically seek to have that relief embodied in a final injunction as well. Moreover, although (b)(2) certification requires a request for final injunctive relief, a court may issue a classwide preliminary injunction in a putative class action suit prior to a ruling on the class certification motion or in conjunction with it." 2 William B. Rubenstein, New-

plies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Wal-Mart*, 564 U.S. at 360 (emphasis in original).

Petitioners argue that the class meets Rule 23(b)(2)'s requirement because the respondents have engaged in unlawful behavior towards the entire class and they seek a single injunction and declaratory injunction that would provide classwide relief.[54] Respondents, quoting *Wal-Mart*, 564 U.S. at 360 ("[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them"), argue that the petitioners do not meet the requirements for a (b)(2) class because the relief is not truly *indivisible* in the way that, for instance, prohibiting a person from playing loud music provides indivisible relief to all of his neighbors: a court *could not* order different relief to different neighbors at the same time.[55] This is particularly true,

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berg and Rubenstein on Class Actions § 4:30 (6th ed., June 2025 Update).

[54] Pet'rs' Mem. Mot. Class Cert. (doc. no. 5-1) at 11.

[55] Resp'ts' Mem. Obj. (doc. no. 56-1) at 16. At oral argument, the respondents also argued for the first time, and without providing authority, that because the executive branch has yet to fully develop its guidance on implementing the Executive Order, the behavior petitioners seek to enjoin is not sufficiently uniform with respect to the putative class. That argument was not raised with respect to (b)(2) certification in the briefs and thus has been waived. *See Garcia-Ayala v. Parenterals, Inc.*, 212 F.3d 638, 645 (1st Cir. 2000) (failure to brief an argument constitutes waiver de-

the respondents argue, if a court were to find that domicile is relevant to the application of the Executive Order or the merits of the claims, because a court could decide to provide relief to some class members and not others based on domicile.[56]

But the discussion in *Wal-Mart* itself contradicts the respondents' argument. Quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the Supreme Court noted that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture," and explained that "the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order." *Wal-Mart*, 564 U.S. at 361. The Court goes on to explain that "the relief sought must perforce affect the entire class at once." *Id.* at 362. That is the case where, as here, the petitioners seek "a single injunction or declaratory judgment [that] would provide relief to each member of the class." *Id.* at 360. The petitioners request the same, un-individualized remedy: a declaratory judgment that the Executive Order "is unconstitutional and unlawful in its entirety," and a single injunction prohibiting its enforcement.[57] This requested relief aligns with the mandatory nature of the (b)(2) class because it

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spite attempt to raise the argument at oral argument); *United States v. Leoner-Aguirre*, 939 F.3d 310, 319 (1st Cir. 2019), *cert. denied*, No. 19-6820, 2020 WL 129919 (U.S. Jan. 13, 2020) (deeming such new arguments waived); *Frese v. MacDonald*, No. 18-CV-1180-JL, 2020 WL 13003802, at *5 (D.N.H. Feb. 14, 2020) (Not "sufficient to raise an argument for the first time at oral argument.").

[56] *Id.*

[57] Compl. (doc. no. 1) at 16.

does not require, or allow, class members to opt in or out of enforcement.

Because enforcement of the Executive Order would likely constitute unlawful behavior towards the entire class as limited by the court, *see infra* § IV(b), and because a single injunction and declaratory judgment would provide complete relief to every member of the class, the class fits comfortably into the Rule 23(b)(2) category. *See Reid*, 297 F.R.D. at 193 (finding a class fit "firmly in the (b)(2) category" where "Defendants have acted, or refused to act, on grounds generally applicable to all members of the class," "members of the class have all been treated identically," and "seek[] a single injunction or a single declaratory judgment").

h. Catchall arguments on class certification

The respondents make several catchall arguments against class certification at this early stage in the litigation.[58] The court rejects these generalized contentions in favor of the petitioners' suggested course of action.

Provisional class certification. First, the respondents object to the "appropriateness" of seeking provisional class certification and injunctive relief.[59] Respondents argue that courts should only grant provisional certification to classes whose members require "a form of preliminary and emergency relief," under exigent circumstances. The circumstances in this case, they contend, differ. Petitioners emphasize that courts routinely grant certification alongside a preliminary

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[58] Resp'ts' Mem. Obj. (doc. no. 56-1) at Parts I, III.

[59] *See id.* at 7.

junction in many kinds of cases, not just litigation related to imminent deportation or COVID-19.

The court finds petitioners' arguments more persuasive, both with respect to the court's ability to certify classes provisionally for the purpose of injunctive relief, and the petitioners' cited authority for the court's exercise of this ability. *See*, *e.g.*, *Gomes*, 2020 WL 2113642, at *4; *Meyer*, 707 F.3d at 1041-43.[60] Moreover, the court may continue to revise the class certification order until final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C).

Further, this court has no hesitation determining this situation warrants emergency injunctive relief and class certification. The respondents' proposed course of action would reverse a nationally known and recognized government policy in place for over a century and affect thousands of families. Injunctive relief here would only maintain the status quo during the litigation and, at most, delay the policy's implementation. While the respondents attempt to claim that all the petitioners' cited cases provide more exigent circumstances than described here, this court disagrees. As the petitioners claimed in *New Hampshire Indonesian Cmty. Support*, the denial of citizenship status at birth can have immediate, irreversible effects.

The respondents also argue that provisional certification does not lower the bar for class certification. The court agrees. But the petitioners have provided sufficient factual and legal support for class certification.

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[60] The Supreme Court has also indicated that courts can issue temporary injunctive relief to a putative class. *See A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1369 (2025).

Premature certification. Second, the respondents argue that certifying the class would be premature because other lower courts have not yet narrowed the scope of their nationwide injunctions, as ordered by the Supreme Court in *CASA*. They argue that this court should withhold any potential injunction until the review of the other injunctions occurs. Otherwise, the respondents contend, the petitioners cannot show whether the existing injunctions already provide relief to the putative class and representatives. Petitioners contend that the putative class has no assurances that the existing injunctions will protect them once the lower courts have narrowed the nationwide injunctions.

The court agrees with petitioners with regard to certification, but, for reasons stated *infra* Part VI, stays the injunction.

> "[I]n the wake of a major new federal statute or executive action, different district courts may enter a slew of preliminary rulings on the legality of that statute or executive action. Or alternatively, perhaps a district court (or courts) will grant or deny the functional equivalent of a universal injunction—for example, by granting or denying a preliminary injunction to a putative nationwide class under Rule 23(b)(2) . . . [T]he courts of appeals in turn will undoubtedly be called upon to promptly grant or deny temporary stays or temporary injunctions in many cases. . . . [I]n cases where classwide or set-aside relief has been awarded, the losing side in the lower courts will likewise regularly come to this Court if the matter is sufficiently important. When a stay or injunction application arrives [to the Supreme Court], this Court should not and cannot hide

> in the tall grass. When we receive such an application, we must grant or deny. And when we do—that is, when this Court makes a decision on the interim legal status of a major new federal statute or executive action—that decision will often constitute a form of precedent (*de jure* or *de facto*) that provides guidance throughout the United States during the years-long interim period until a final decision on the merits."

CASA, 2025 WL 1773631 at *21-22 (Kavanaugh, J., concurring). Respondents' arguments do not persuade.

Nationwide class. Similarly, the respondents also contend that a nationwide class is not "appropriate," citing warnings in *CASA* against nationwide classes as an "end-run around" universal injunctions.[61] Respondents cite the importance of letting issues "percolate" within other circuits and district courts and claim that nationwide relief here would disrupt other litigation across the United States.[62] They argue that providing a nationwide injunction would "create conflicts with the decisions of putative class members to bring their suits elsewhere and the ability of those courts to address them" and that, at most, this court can certify a class in the District of New Hampshire.[63] Meanwhile, petitioners argue that the grant of certification does not affect other litigation, and therefore, courts can "percolate" the merits after the injunction. They contend that the respondents' conduct warrants a nationwide class, and limiting the order geographically would be arbitrary.

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[61] Resp'ts' Mem. Obj. (doc. no. 56-1) at 21.

[62] *Id.* at 22.

[63] *Id.*

Again, petitioners' argument prevails. At no point in the briefs do the petitioners request a "nationwide class." Petitioners request class certification for a harm that most likely affects class members residing in other states. So long as this court adheres to the requirements of Rule 23, this court does not hesitate to certify a class that may include members in all fifty states. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule."); *Trump v. CASA, Inc.*, No. 24A884, 2025 WL 1773631, at *18 (U.S. June 27, 2025) (Alito, J., concurring) ("Putting the kibosh on universal injunctions does nothing to disrupt Rule 23's requirements . . . Rule 23 may permit the certification of nationwide classes in some discrete scenarios. But district courts should not view today's decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23."); *see also id.* at *19 (Kavanaugh, J., concurring) ("in the wake of the Court's decision, plaintiffs who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under [Rule] 23(b)(2) and ask a court to award preliminary classwide relief that may [be] . . . nationwide.").

This court has rigorously applied Rule 23, carefully considering all of the respondents' arguments. Respondents have made a generalized objection to the appropriateness of nationwide class actions, which are ubiquitous in federal court. Further, the respondents have failed to identify any conflicts between putative class members and current class members. *See* Newberg and Rubenstein on Class Actions S 10:33 (6th ed.)

("[N]either the filing of a class action nor even the grant of a class certification motion has any formal effect on litigation elsewhere . . . the only sure method of coordination is a final judgment in a class suit: such a judgment, and only such a judgment, precludes all other lawsuits."); *Yamasaki*, 442 U.S. at 703 ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.").

Discovery. Respondents argue that the court should order more discovery before granting class certification. The argument fails. As discussed *supra* note 46, respondents fail to identify any discovery that would have a meaningful impact on any issue surrounding certification. Petitioners correctly point out that the respondents' arguments regarding domicile are most likely irrelevant for class certification; that the court may permit discovery after it protects the status quo with a preliminary injunction; and that the court may reconsider class certification up until final judgment. Finally, "discovery may be unnecessary because the 'claims for relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation).'" Newberg and Rubenstein, *supra,* § 7:15 (citations omitted).

The court provisionally certifies the narrowed, children-only class for the purpose of granting injunctive relief.

IV. Preliminary injunction

The petitioners have requested a preliminary injunction precluding the respondents from enforcing President Trump's Executive Order against the class during the pendency of this litigation. Because the petitioners have established entitlement to a preliminary injunction, the court grants the requested relief to the modified class. Petitioners and respondents stipulated to incorporate by reference their prior briefing before this court in *New Hampshire Indonesian Cmty. Support*.[64]

a. Applicable legal standard

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Again, the requisite burden and quantum of proof are familiar. "The plaintiff has the burden at the preliminary injunction stage to establish entitlement to relief by a fair preponderance of the evidence." *Devaney v. Kilmartin*, No. CA 13-510L, 2014 WL 877764, at *5 (D.R.I. Mar. 5, 2014) (Lagueux, J.). *But see Bevis v. City of Naperville*, 85 F.4th 1175, 1188 (7th Cir. 2023) (quotation marks omitted) ("[A]lthough the party seeking the injunction need not demonstrate likelihood of

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[64] *See New Hampshire Indonesian Cmty. Support*, 1:25-cv-00038-JL-TSM, Pls. Mot. for Prelim. Inj. (doc. no. 24); Defs. Obj. (doc. no. 58); Pls. Reply (doc. no. 64).

success by a preponderance of the evidence, that party must nevertheless make a strong showing that reveals how it proposes to prove its case. Similarly, a mere possibility of irreparable harm will not suffice.").

b. Likelihood of success on the merits

"The movant's likelihood of success on the merits weighs most heavily in the preliminary injunction calculus." *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 18 (1st Cir. 2020). The petitioners argue that they have a strong likelihood of success on the merits of their constitutional and statutory challenges to the Executive Order based on Supreme Court precedent interpreting the Fourteenth Amendment in *Wong Kim Ark* and the ordinary meaning of § 1401 at the time of its enactment. The respondents contend that the Executive Order is constitutional because the language "subject to the jurisdiction thereof" in the Fourteenth Amendment interpretively turns on an individual's domicile, rather than place of birth. Therefore, they contend, those affected by the Executive Order are not entitled to birthright citizenship because "citizenship flows from lawful domicile," and children whose parents are not lawful permanent residents fall outside the Citizenship Clause.[65]

[65] Defs. Obj., 1:25-cv-00038-JL-TSM, (doc. no. 58) at 11.

Petitioners will likely succeed in claiming that the Executive Order violates the Fourteenth Amendment[66] and § 1401.[67]

67 This court finds, as it did in *New Hampshire Indonesian Cmty. Support*, that the Executive Order likely "contradicts the text of the Fourteenth Amendment and the century-old untouched precedent that interprets it." 765 F. Supp. 3d at 109. Further, the "Executive Order also likely violates § 1401, which codified the pertinent language from the Fourteenth Amendment." *Id.* at 110. The three other district courts assessing the constitutionality of the Executive Order also found that the plaintiffs would likely succeed. *See Doe v. Trump*, 766 F. Supp. 3d at 285 (finding that plaintiffs are "exceedingly likely to prevail on the merits of their constitutional and statutory claims"); *State v. Trump*, 765 F. Supp. 3d at 1152 (finding likelihood of success on the merits because government's arguments do not have "text or precedent to support its interpretation of the Citizenship Clause [and] rehash[] losing arguments from over a century ago"); *CASA, Inc. v. Trump*, 763 F. Supp. 3d at 743 (finding a strong likelihood of success on the merits because "[t]he Executive Order flouts the plain language of the Fourteenth Amendment to the United States Constitution, conflicts with binding Supreme Court precedent, and runs coun-

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[66] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Const. XIV. § 1.

[67] "The following shall be nationals and citizens of the United States at birth . . . a person born in the United States, and subject to the jurisdiction thereof." 8 U.S.C. § 1401.

ter to our nation's 250-year history of citizenship by birth.").

The respondents do not identify additional arguments in favor of their interpretation of the Citizenship Clause. This court, along with the other courts to address the merits of this issue, agrees with the petitioners. The Executive Order likely violates the Fourteenth Amendment of the Constitution and 8 U.S.C. § 1401.

c. Irreparable harm

"Irreparable injury in the preliminary injunction context means an injury that cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005) (quotation marks omitted). The petitioners argue that the denial of citizenship to newborns would cause irreparable harm stemming from the denial of citizenship and its associated benefits to the newborns in the class. The respondents reiterate their arguments from *New Hampshire Indonesian Cmty. Support* that the petitioners can only speculate about the hypothetical future harms (for instance, Barbara's child is not expected until October, and she does not know that her child will be an immigration enforcement target). Further, they contend that the petitioners have not demonstrated standing to sue particular respondents, such as the Department of State, Department of Agriculture, or Centers for Medicare and Medicaid;[68] and that the court has no jurisdiction to enjoin the President. Finally, respondents state that

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[68] Petitioners submitted additional declarations making allegations specific to these respondents. *See supra* note 50.

the Supreme Court in *CASA* mandated a 30-day window during which DHS must develop and issue public guidance about the Executive Order's implementation, so irreparable harm will not occur.

The court agrees with the petitioners. The putative class would suffer irreparable harm without a preliminary injunction enjoining the Executive Order. As the court stated in *New Hampshire Indonesian Cmty. Support*, "the denial of citizenship status to newborns, even temporarily, constitutes irreparable harm. The denial of citizenship to the plaintffs' members' children would render the children either undocumented noncitizens or stateless entirely. . . . The children would risk deportation to countries they have never visited." 765 F. Supp. 3d at 111*; see also Doe v. Trump*, 766 F. Supp. 3d at 285 ("The loss of birthright citizenship—even if temporary, and later restored at the conclusion of litigation—has cascading effects that would cut across a young child's life (and the life of that child's family), very likely leaving permanent scars."); *State v. Trump*, 765 F. Supp. 3d at 1153 ("The constitutional infringement and the specter of deportation are sufficiently irreparable for the purposes of a preliminary injunction."); *CASA Inc., v. Trump*, 763 F.Supp.3d at 744 ("The denial of the precious right to citizenship for any period of time will cause [petitioners] irreparable harm.").

Respondents' arguments about irreparable harm remain unconvincing to the court, which has no difficulty concluding that the rapid adoption by executive order, without legislation and the attending national debate, of a new government policy of highly questionable constitutionality that would deny citizenship to many thousands of individuals previously granted citizenship un-

der an indisputably longstanding policy, constitutes irreparable harm, and that all class representatives could suffer irreparable harm absent an injunction. To the extent that the respondents challenge the petitioners' standing as to certain respondents, the court will not address these arguments at this time. A motion to dismiss certain respondents from the case, rather than an objection to a preliminary injunction, better suits these arguments. *See supra* note 50. Finally, because the court stays the injunction pending appeal, *see infra* Part VI, respondents' arguments about non-imminent and hypothetical harms do not persuade.

The court finds that the petitioners have shown that they are likely to suffer irreparable harm in the absence of preliminary relief.

d. Equities and public interest

Finally, the court considers the equitable and public interests involved, which "'merge when the Government is the opposing party.'" *Doe v. Trump*, 766 F. Supp. 3d at 278 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The petitioners cite the destabilizing effects of the loss of citizenship and the ease of maintaining the status quo. The respondents do not appear to add any arguments to their briefing in *New Hampshire Indonesian Cmty. Support*.

These merged factors favor preliminary injunctive relief. As this court stated in *New Hampshire Indonesian Cmty. Support*:

> "A continuation of the status quo during the pendency of this litigation will only shortly prolong the longstanding practice and policy of the United States government, while imposition of the Executive Order

> would impact the plaintiffs and similarly situated individuals and families in numerous ways, some of which—in the context of balancing equities and the public interest—are unnecessarily destabilizing and disruptive."

765 F. Supp. 3d at 111-12. The other three district courts considering similar cases have agreed. *See Doe v. Trump*, 766 F. Supp. 3d at 286 ("It is difficult to imagine a government or public interest that could outweigh the harms established by the plaintiffs here."); *State v. Trump*, 765 F. Supp. 3d at 1153 ("First, constitutional violations weigh heavily in favor of an injunction. Second, the Government has no legitimate interest in enforcing an Order that is likely unconstitutional and beyond its authority. Third, the rule of law is secured by a strong public interest that the laws . . . are not imperiled by executive fiat") (cleaned up); *CASA, Inc. v. Trump*, 763 F. Supp. 3d at 745 ("The balance of the equities and the public interest strongly weigh in favor of a preliminary injunction that maintains the status quo during litigation.").

These final factors in the preliminary injunction analysis favor the petitioners. Because they prevail as to all factors, the court grants the preliminary injunction.

V. Bond requirement

The court requires a nominal bond of $1. "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). Petitioners ask the court to exercise its discretion to require a nominal bond of $1, due to the public

interest addressed in this action. Respondents argue that the court should require a substantial bond because of the potential costs of continuing to provide federal benefits to the children who the Executive Order would exclude from citizenship. Here, where it is the government's sudden action, rapidly changing a longstanding policy, and not any conduct by the petitioners, that has created the litigation conditions that require petitioners to seek injunctive relief to preserve the long-established citizenship rights of children born in this country, and where respondents have not demonstrated any potential loss but instead demand security for an amount that they would save if no relief were granted, a nominal bond of $1 is appropriate. *See Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 1000 (1st Cir. 1982) (collecting cases), *rev'd on other grounds*, 467 U.S. 526 (1984); *see also Int'l Assoc. of Machinists & Aerospace Workers v. E. Airlines*, 925 F.2d 6, 9 (1st Cir. 1991) ("[T]here is ample authority for the proposition that the provisions of Rule 65(c) are not mandatory and that a district court retains substantial discretion to dictate the terms of an injunction bond."); *Ambila v. Joyce*, No. 2:25-CV-00267-NT, 2025 WL 1534852, at *7 (D. Me. May 28, 2025) (Woodcock, J.) (concluding that a nominal bond is appropriate where a substantial bond requirement would significantly affect the petitioner's exercise of due process); *Liu v. Noem*, No. 25-CV-133-SE, 2025 WL 1233892, at *12 (D.N.H. Apr. 29, 2025) (Elliott, J.) (waiving the bond requirement where the defendants did not request a specific amount or explain any costs they will incur by complying with the preliminary injunction); *Schiff v. U.S. Off. of Pers. Mgmt.*, No. CV 25-10595-LTS, 2025 WL 1481997, at *13 (D. Mass. May 23, 2025) (Sorokin, J.) (Security is unnecessary "where the

plaintiffs seek to vindicate an important constitutional and federal statutory right, and the injunction will not expose the defendants to financial loss."); *Khalil v. Trump*, No. 25-cv-01963 (MEF)(MAH), 2025 WL 1649197, at *7 (D.N.J. June 11, 2025) (requiring a nominal bond of $1); *A.S.R. v. Trump*, No. 3:25-cv-00113, --- F. Supp. 3d ----, 2025 WL 1649197, at *7 (W.D. Pa. May 13, 2025) (requiring a nominal bond of $1).

VI. Conclusion and stay

As this court observed in its earlier case regarding birthright citizenship, the "ultimate lawfulness of the Executive Order will surely be determined by the Supreme Court. This is as it should be." *New Hampshire Indonesian Cmty. Support*, 765 F.Supp.3d at 112; *see also CASA,* No. 24A884, 2025 WL 1773631 at *14 n.18 (citations omitted) ("The dissent worries that the Citizenship Clause challenge will never reach this Court, because if the plaintiffs continue to prevail, they will have no reason to petition for certiorari. . . . But at oral argument, the Solicitor General acknowledged that challenges to the Executive Order are pending in multiple circuits, and when asked directly 'When you lose one of those, do you intend to seek cert?', the Solicitor General responded, 'yes absolutely.' And while the dissent speculates that the Government would disregard an unfavorable opinion from this Court, the Solicitor General represented that the Government will respect both the judgments and the opinions of this Court.").

The petitioners initiated this litigation with a request that the court issue orders on its preliminary injunction and class certification motions within one week in order to facilitate expeditious appeals for resolution before the Supreme Court's 30-day deadline. *Id.* at *15; *see also*

doc. nos. 5, 6. After convening an immediate conference with the cooperative and highly professional counsel from both sides, a 10-day schedule was adopted, which concludes today with this order. In preliminary deference to the Supreme Court's stay, *id.*, and in order to facilitate the expeditious appellate review of this court's orders,[69] this court's preliminary injunction is STAYED for seven days pending the appeal that both parties expressly contemplate.

Nothing in this order should be construed as conflicting with the Supreme Court's ruling in *CASA,* including its specific holding allowing executive agencies to develop and issue public guidance about the Executive's plans to implement the Executive Order. *Id.*

Based on the above analysis, the court GRANTS the petitioners' motion for class certification (doc. no. 5). The following class is provisionally CERTIFIED:

> All current and future persons who are born on or after February 20, 2025, where (1) that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth.

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[69] Staying the preliminary injunction order will eliminate the need for the Court of Appeals to separately litigate a motion to stay that order, because expeditious handling of the appeal before *CASA*'s 30-day deadline will likely moot this court's stay one way or the other.

Sarah, by her guardian, parent, and next friend Susan; and Matthew, by his guardian, parent, and next friend Mark, are APPOINTED as representatives of the class. Petitioners' counsel from the ACLU Immigrants' Rights Project; the ACLUs of New Hampshire, Maine, and Massachusetts; the Asian Law Caucus; the NAACP Legal Defense and Educational Fund; and the Democracy Defenders Fund are APPOINTED as class counsel.

The court GRANTS the petitioners' motion for a preliminary injunction (doc. no. 6) as to the certified class.

SO ORDERED.

/s/ JOSEPH N. LAPLANTE
JOSEPH N. LAPLANTE
United States District Judge

Dated: July 10, 2025
cc: Counsel of Record