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.*,

Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit

BRIEF OF CHINESE AMERICAN LEGAL DEFENSE ALLIANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The Chinese American Legal Defense Alliance

The Chinese American Legal Defense Alliance was founded in 2021 by several Chinese-American lawyers, who having beaten back the Government's attempt to ban the Chinese communications app WeChat, saw a need for a civil rights organization that could combat racial discrimination and hate crimes through strategic legal action. CALDA has since become a leading force nationwide for civil rights for Chinese Americans and for all Americans. It has challenged the harm caused by the Government's "China Initiative" unfairly targeting and prosecuting Chinese-American professors and scientists. It also challenged the Government's recent attempt to cancel en masse foreign students' rights to study at American schools, disproportionately targeting Chinese students. And it has brought lawsuits against state laws trying to resurrect the racist alien land laws of the late 19th and early 20th century, as well as state laws prohibiting Chinese scholars and students from engaging in paid academic opportunities.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel funded its preparation or submission.

SUMMARY OF ARGUMENT

The Government claims the mantle of original understanding by citing a number of post-ratification articles that it claims show that "[c]ontemporary commentators" understood that the meaning of the Citizenship Clause excluded "temporarily present aliens."[2] Most prominently, they rely on two Democratic lawyers, Francis Wharton and Alexander Porter Morse, who were writing about 15 years after Congress passed the language of the Citizenship Clause in 1866. The Amicus Brief of Senator Ted Cruz relies on a third lawyer, George Collins.[3] But those lawyers were not merely interpreting the Citizenship Clause. Instead, relying on decidedly non-originalist arguments based on policy and evolving international law, these lawyers were trying to weaponize anti-Chinese racism in order to relitigate the very passage of the Citizenship Clause.

Chinese-Americans have a long history in this country. They first arrived in large numbers in the 1800s, driven by poverty at home and opportunity in the United States. They arrived poor and in debt. They provided the engine of labor to the American economy, including most famously building the railroad system that connected Americans personally and

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[2] *See* Petitioner's Brief at 25-28.

[3] Cruz Brief at 16.

economically. Meanwhile, they were increasingly hated by a populace that saw them as foreigners, pagans, and barbarians. They were seen as transient migrants, rather than American immigrants. They were discriminated against legally, including being subjected to a complete immigration ban. They suffered terrible violence.

Anti-Chinese hatred was still in its early stages when the Citizenship Clause passed Congress in 1866. Though some Senators specifically opposed the Citizenship Clause on the basis that Chinese people born in the United States should not be granted citizenship, its proponents defended the Clause's breadth and affirmed that Chinese people born in the United States would indeed be natural born citizens.

A decade and a half later, three lawyers—Francis Wharton, Alexander Porter Morse, and George Collins—tried to ride the rising tide of anti-Chinese animus to relitigate the meaning of the Citizenship Clause. Relying on new theories of international law and anti-Chinese policy arguments, the arguments of these three lawyers were unoriginalist. They were racist. And, in *Wong Kim Ark*, these arguments ultimately lost. Like Congress, this Court determined not to draw a race line in the Fourteenth.

This Court should not allow the writings of anti-Chinese racists of the late 19th Century to harm the

rights of Chinese and other people here in the United States today by adopting their reasoning. After all, if anti-Chinese scholarship can be laundered into the Constitution in this case, it can in other civil rights cases, including ones challenging the newly revived alien land laws. *See Shen v. Fla. Commissioner of Agriculture*, 158 F.4th 1227, 1269-70 (11th Cir. 2025) (Wilson, J., dissenting) (criticizing the majority for upholding the continued validity of *Terrace v. Thompson*, 263 U.S. 197 (1923), which was part of a disgraced history of restricting the rights of Asians in the United States).

ARGUMENT

I. Chinese migration to the United States begins to grow in the mid-19th century.

In the late 1840s, desperate economic conditions at home and the prospect of gold in the American west drove thousands of Chinese migrants to seek opportunity in California.[4] Most had no money to fund the trip and were forced to take out passage loans; these loans required them to repay as much as $100 for a

[4] Terry E. Boswell, *A Split Labor Market Analysis of Discrimination Against Chinese Immigrants*, 1850-1882, 51 American Sociological Review, 352, 357 (1986).

$40 ticket.[5] Trapped in contract labor, Chinese migrants worked for pennies to pay off their debt.[6] By 1852, more than 20,000 Chinese immigrants had arrived on the west coast, up from 2,700 the year before.[7] White gold miners, threatened by the influx of cheaper labor, rioted. After a recession in 1853 tanked gold prices, white miners drove many Chinese immigrants out of their leases altogether.[8]

Chinese migrants crashed against an increasingly hostile west coast throughout the 1850s and 60s. White miners and railroad workers would even form anti-Chinese clubs.[9] In the face of legal discrimination and a lack of citizenship, Chinese workers were confined to certain jobs, including hard labor, cooking, and laundry services,.[10] In 1852, California passed a law requiring Chinese miners to purchase a $3 license, without which they could not even challenge

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[5] *Id.*
[6] *Id.*
[7] *Id.* at *356.*
[8] *Id.*
[9] Kerry Abrams, *Polygamy, Prostitution, and Federalization* 105 Columbia Law Review 641, 651 (2005).
[10] Lea VanderVelde & Gabriel J. Chin, *Sowing the Seeds of Chinese Exclusion As the Reconstruction Congress Debates Civil Rights Inclusion*, 25 UCLA Asian Pacific American Law Journal Vol. 29, 39-40 (2021).

the law in the courts.[11] In 1854, the California Supreme Court expanded a state law barring African Americans from testifying for or against a white person to include Chinese citizens, who the court labeled "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point."[12] Laws like this in California and elsewhere led to attacks on Chinese workers, who had no effective recourse to justice given this inability to access the courts.[13]

White people in the U.S. looked down on these indentured migrant workers as "coolies," Chinese peasants who were supposedly willing to submit themselves to a kind of slavery and who, therefore, could never be capable of participation in democratic society.[14] Because of the high cost of travel and harsh labor conditions, most Chinese workers in the U.S. at the time were men. In 1852, of 2,954 Chinese people

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[11] Anna O. Law, M*igration and the Origins of American Citizenship: African Americans, Native Americans and Immigration* 41-43 (Oxford University Press) (pub. forthcoming 2026), at 157.

[12] *People v. Hall*, 4 Cal. 399, 404-05 (1854).

[13] Caroline Jordan, *Remaking Life: The Culture of Chinese Transcontinental Railroad Workers* 12 The Purdue Historian 1, 5-6 (2025).

[14] Abrams, *above* note 9, at 658-59.

in San Francisco, only 19 were women.[15] When Chinese women did arrive, locals characterized them all as second wives, concubines, and prostitutes, just as prone to voluntary slavery as Chinese men.[16] California and other states effectively banned all female Chinese migration by prohibiting prostitution and polygamy and then overenforcing the laws to apply to all Chinese women.[17]

Throughout the 1850s and 60s, California, Oregon, and Washington passed more statutes targeting Chinese immigrants, ranging from manifest, bond, and approval requirements for ship captains bringing Chinese migrants to the U.S., to strict Chinese immigration bans.[18] In 1862, the California legislature commissioned a study to answer the "Chinese question." When the study concluded Chinese workers provided an economic benefit to the state, the legislature disregarded it and passed "An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California" which required migrants to pay a $2.50 per month "Chinese Police Tax."[19]

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[15] *Id.* at 649.
[16] *Id.* at 652-53.
[17] *Id.* at 651-53.
[18] Law, *above* note 10, at 157-58.
[19] *Id.*

At the federal level, the U.S. government initially welcomed the influx of low-cost Chinese workers, but its support was fickle. In February 1862, Congress passed the Anti-Coolie Act, hoping to quell the flow of immigrants by prohibiting the passage loans that brought so many Chinese migrants to the U.S.[20] A few months later, however, in the heat of the Civil War, Congress passed the Pacific Railroad Act of 1862, authorizing construction of the transcontinental railroad to begin on the west coast.[21] Realizing construction would require an immense labor force, and eyeing a lucrative trade route for Asian goods, Congress reauthorized immigration recruitment through the passage loans and indentured servitude it had just outlawed two years earlier.[22] In the end, 90 percent of the workers who built the Central Pacific Railroad were Chinese.[23] Congress ultimately replaced the servitude authorization four years later with the Burlingame Treaty, under which China received "most favored nation" trade status in exchange for unrestricted immigration to America for its citizens.[24] Though the

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[20] 12 Stat. 340.
[21] 12 Stat. 489.
[22] VanderVelde & Chin, *above* note 11, at 43-45.
[23] Abrams, *above* note 9, at 649.
[24] Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898: States' Rights, The Law of Nations, and Mutual Consent* 521, Georgetown University Law Journal Vol. 15:519 (2001); *see also* Act of July 4, 1864, 13 Stat. 385 (repealed 1868).

Treaty recognized "the inherent and inalienable right of man to change his home and allegiance," whether for "curiosity … trade … or permanent residents," the U.S. government withheld any path to citizenship for Chinese immigrants.[25]

II. Congress passes the Citizenship Clause over racist anti-Chinese objections.

A. Congress passes the Civil Rights Act of 1866, including Chinese children in citizenship.

As other briefs document in more detail, the precursor to the Fourteenth Amendment's Citizenship Clause was part of the Civil Rights Act of 1866.[26] Some of the opposition, led by Senators Edgar Cowan, Garrett Davis, and George Williams, invoked anti-Chinese sentiment as a means of attacking the breadth of the citizenship provisions in the Act. Senator Cowan asked if the law will "not have the effect of naturalizing the children of Chinese and Gypsies born in this country?"[27] When Senator Lyman Trumbull responded "[u]ndoubtedly," Cowell responded by protesting that "the day may not be very far distant when California, instead of belonging to the Indo-European race, may belong to the Mongolian, may

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[25] Burlingame Treaty, July 28, 1868, U.S.-China, 16 Stat. 739.
[26] *See, e.g.,* Brief of Respondents at 17-20.
[27] *See* Cong. Globe, 1st Sess. 39th Cong. 498 (Jan. 30, 1866).

belong to the Chinese."[28] "I cannot consent to say that California, or Oregon, or Colorado, or Nevada, or any of those States shall be given over to an irruption [sic] of Chinese."[29]

Senator Davis was even more vocal: "I deny that a single citizen was ever made by one of the States out of the negro race. I deny that a single citizen was ever made by one of the States out of the Mongolian race. I controvert that a single citizen was ever made by one of the States out of the Chinese race, out of the Hindoos, or out of any other race of people but the Caucasian race of Europe."[30] "[N]one of the inferior races of any kind were intended to be embraced or were embraced by this work of government in manufacturing citizens."[31] "Does the honorable Senator from Illinois [Trumbull] mean to assume the position that he declared with so much distinctness and emphasis a day or two ago, that everybody born in the United States is a citizen?"[32] Senator Williams then asked rhetorically if "negroes and Indians and Chinese and all persons of that description shall be eligible to the office of President,"[33] before Senator Davis again complained

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[28] *Id.*
[29] *Id.* at 499.
[30] *Id.* 523 (Jan. 31, 1866).
[31] *Id.*
[32] *Id.*
[33] *Id.* 573 (Feb. 1, 1866)

that "[w]hen a negro or Chinaman is attempted to be obtruded into [our system of government], the sufficient cause to repel him is that he is a negro or Chinaman."[34]

President Johnson's (overridden[35]) veto of the Act contained more of the same. "This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of' African blood. Every individual of those races, born in the United States, is by the bill made a citizen of the United States."[36] It was not meant as a compliment.

B. Congress passes the Fourteenth Amendment, including Chinese children within citizenship.

After passage of the Act, some members of Congress moved to amend the Constitution, in part to eliminate any doubts about the Act's constitutionality.[37]

The debates were much the same. For instance, Senator Cowan, now rhetorically, asked once again

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[34] *Id.* 575.
[35] *See Jones v. Alfred Mayer Co.*, 392 U.S. 409, 435 (1968).
[36] Cong. Globe, 1st Sess. 39th Cong. at 1679 (Mar. 27, 1866).
[37] *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948).

"[i]s the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?"[38] Do "they have any more rights than a sojourner in the United States?"[39]

Senator Conness ultimately responded that "in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation."[40] Conness explained, under the Fourteenth Amendment, that "the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States."[41]

III. Anti-Chinese lawyers attempt to relitigate the Citizenship Clause.

A. Chinese migration and anti-Chinse racism rise.

After the Fourteenth Amendment became law, Chinese migration continued to increase. By 1880,

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[38] Cong. Globe, 1st Sess. 39th Cong. at 2890 (May 30, 1866).
[39] *Id.*
[40] *Id.* at 2891.
[41] *Id.*

nearly 140,000 Chinese people lived in the U.S.[42] Hostility and legal discrimination also continued to increase. In 1874, in President Grant's Sixth Annual Message, he complained that Chinese people in the United States do not "perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled, and to the great demoralization of the youth of those localities."[43] In 1880, the U.S. entered into a new treaty permitting it to limit or suspend Chinese immigration.[44] Two years later, Congress passed the Chinese Exclusion Act, barring any new Chinese migrants from entering the country for 10 years, and asserting that the migration of Chinese laborers to the U.S. "endangers the good order" of the nation.[45] The next year, President Arthur used part of his Third Annual Message to complain China was violating the Exclusion Act.[46] In 1892, the Geary Act extended exclusion for another 10 years, and required all Chinese people to register with the federal government, with stiff penalties for any who could not prove they had complied.[47] In 1902,

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[42] Law, *above* n. 11, at 156.
[43] From Francis Wharton, *Digest of the International Law of the United States* 461 (1886) ("Wharton's Digest").
[44] Law, *above* n. 11 at 257.
[45] Act of May 6, 1882, 22 Stat. 58.
[46] Wharton's Digest, *above* n. 40, at 469.
[47] 27 Stat. 25 (1892).

Congress made the Chinese Exclusion Act permanent.[48]

Meanwhile, anti-Chinese violence and sentiment continued to flourish. In 1885, for instance, the Rock Springs Massacre saw white miners kill at least 28 Chinese immigrants and burn down the town's entire Chinese quarter.[49] Violence like this was made all the worse due to the incapacity, as noted above, of Chinese people to act as witnesses in court against white assailants.

Even those otherwise on the right side of history gave in to anti-Chinese racism, In his *Plessy v. Ferguson* dissent, Justice Harlan noted that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."[50]

Chinese immigrants remained excluded from naturalization until 1943.[51]

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[48] Act of April 29, 1902, 32 Stat. 176.
[49] Michael Lao, *When an American Town Massacred its Chinese Immigrants*, The New Yorker (Mar. 3, 2025), *available at* https://www.newyorker.com/magazine/2025/03/10/when-an-american-town-massacred-its-chinese-immigrants.
[50] 163 U.S. 537, 561 (1896).
[51] VanderVelde & Chin, *above* note 10, at 523-25.

B. Wharton uses anti-Chinese arguments in support of the new international law concept of jus sanguinis.

At around the same time the 14th Amendment was passed, Europe itself debated the definition of citizenship. In 1858, Cambridge Professor John Westlake noted that there was "'no rules of quite universal acceptance' for attributing nationality at birth," but "the mechanisms of birthplace and descent predominated."[52] A few years later, the French jurist Charles Demolombe coined the terms jus sanguinis and jus solis.[53] As that debate occurred, a number of international law experts began pushing for a theory of citizenship based on jus sanguinis, often backed by xenophobic reasoning.[54]

Back in the States, and despite the language of the 1866 Act and the Citizenship Clause, several well-known lawyers entered the fray in an attempt to make jus sanguinis the law of the land. Why they did so, in their heart of hearts, may be unclear. They may have opposed the Reconstruction Amendments. They may

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[52] Sam Erman and Nathan Perl-Rosenthal, *Jus Soli Nation to Jus Soli Evasion: International Lawyers for White Supremacy and the Road through Wong Kim Ark*, 3 J. Am. Const. Hist. 615, 630 (2025) ("JACH") (quoting John Westlake, *A Treatise on the International Law* 5 (1858)).

[53] *Id.* at 631.

[54] *Id.* at 631-35, 637-39.

have simply believed that international law was trending towards jus sanguinis and wanted the United States to follow suit. They may have simply hated foreigners. They may have been white supremacists. Ultimately, their motives are less important than how they pressed their case.

Francis Wharton was already into his late 40s during the passage of the Fourteenth Amendment.[55] A Pennsylvania Democrat, he was a scholar, mostly known for his contributions to criminal law.[56] Still, he had an interest in international law and relations. He took a position as a claims examiner with the Department of State from 1885-1888, and was ultimately elected to the Institute of International Law.[57]

He was also prone to the racial prejudices of the Democratic party of the day. One contemporary describing him as "a Democratic in politics, of the old States-rights school."[58] Though he was a Civil War unionist, he had "serious question how far immediate emancipation would really help the colored race."[59]

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[55] Helen Elizabeth Moore, *Francis Wharton: A Memoir* 7 (1891).
[56] *Id.* at 16; *Iannelli v. United States*, 420 U.S. 770, 773-74 (1975).
[57] 1 *Institut De Droit International: Annuaire* xiv-xv (1994) [1877]).
[58] A Memoir, *above* n. 55, at 254 (1891).
[59] *Id.*

Wharton took an interest in the meaning of citizenship in his Treatise on the Conflict of laws. And, although what he wrote was careful and concise—he wrote general treatises, after all, rather than opinion based articles—anti-Chinese sentiment seeped in.

Initially, in his attempt to reframe the Citizenship Clause as espousing a theory of jus sanguinis, Wharton focused on the concept of domicile.[60] For this approach to work within the framework of the Democratic political worldview that wanted to encourage European (but not Asian) migration, he required a view of birthright citizenship that included European immigrants but excluded the Chinese. And so Wharton argued that Chinese people were insufficiently "civilized" for Americans to tolerate them being deemed domiciled in the United States.[61] They "come in vast masses, and are permitted by treaty to disperse themselves over the whole land."[62] "To admit such rights to an emigrating nation, would be not merely to establish a foreign sovereign, but a foreign

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[60] Francis Wharton, *Treatise on the Conflict of Laws, or Private International Law, including a Comparative View of Anglo-American, Roman, German, and French Jurisprudence* 25-26 (1872).
[61] *Id.*
[62] *Id.*

barbarism, within our national domain."[63] So, Wharton theorized, citizenship must, at minimum, require a domicile status that Chinese people could not attain: "Undoubtedly, domicil must be the test, among Christian nations, so far as concerns the capacity to make wills, and the law by which succession is governed." But the Chinese could be excluded based on the (racist) preconception that the Chinese themselves "regard themselves simply as strangers and sojourners."[64] This idea would later, in a way, find its way into the briefing in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), where the Government argued that "*all* Chinese persons, as a rule, are but temporary residents of this country,"[65] even as it admitted that Wong Kim Ark's parents were domiciled in the United States.[66]

Wharton evolved his Citizenship Clause arguments in his Treatise of the Conflict of Laws or Private International Law.[67] This evolution was likely based on two likely problems with using domicile. First, the phrase was simply not one present in the Citizenship Clause. So, for instance, he admitted that the plain

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[63] *Id.*
[64] *Id.*
[65] *Wong Kim Ark* Brief for the United States at 26 (emphasis original).
[66] *Id.* at 3.
[67] (2nd ed. 1881) ("Conflict of Laws 1881").

language of the Amendment would permit "a child [] born in the United States of French parents temporarily resident but not domiciled in the place of birth" to be deemed an American citizen.[68] Second, Wharton likely was aware that it may not always be possible to divide European immigrants from Chinese ones forever on the mere basis of domicile. So instead, Wharton argued that the plain language of "subject to the jurisdiction" should be construed in terms of the (later-evolving, as noted above) "international law."[69] As for what international law required, Wharton went on to admit that most Britain and France still followed jus solis to at least some extent, but argued that because such citizenship was renounceable, it was based on consent; and because minors could not consent, this should be seen as citizenship by naturalization.[70] This worked better as a way to include Europeans but exclude the Chinese, as the United States had just recently re-excluded Chinese people from being able to claim citizenship by naturalization.[71] So the "Chinese born of Chinese-non naturalized parents, such parents not being here domiciled, are not citizens of the United States."[72] And because "only *whites* can be naturalized" under an 1804 statute, the Chinese were not

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[68] *Id.* at 32-34.
[69] *Id.* at 34.
[70] *Id.* 36-39 & n.2
[71] Chinese Exclusion Acts, *above* n. 45.
[72] Conflict of Laws 1881, *above* n. 67, at 41;

"comprehended within the federal naturalization statutes."[73] Wharton then went on to favorably cite anti-Chinese findings made in the House of Representatives, including that Chinese migrants were homeless, unsanitary, baby-killers, and, unlike "[r]espectable persons," unafraid of punishment[74]. China was, in Wharton's words, a "semi-barbarous state[]" rather than a "Christian state[]."[75]

Similarly, in his separate treatise International Law Digest, Wharton stated that "Chinese also are not citizens in the contemplation of the fourteenth amendment, since they are not capable of naturalization under our system."[76]

C. Morse sees an opportunity in rising anti-Chinese sentiment.

Alexander Porter Morse was a Louisiana Democrat and a confederate veteran.[77] Like Wharton, Morse was also interested in international law.[78] A

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[73] *Id.*; *see also In re Ah Yup,* 1 F. Cas. 223 (C.C.D. Cal. 1878) (interpreting naturalization law as limited to white people and excluding the Chinese)
[74] *Id.* at 42-43 n.1.
[75] *Id.* at 47.
[76] (1881) at Vol. II 481; *see also Wong Kim Ark* Brief of United States at 42 (citing Wharton).
[77] JACH, *above* n. 52, at 622, 635.
[78] *Id.* at 635-36.

white supremacist, he is perhaps most famous for being part of the team arguing *Plessy v. Ferguson*, 163 U.S. 537 (1896), for Louisiana, enshrining the doctrine of separate but equal into our interpretation of the Fourteenth Amendment for over 50 years.[79] After the Civil War, he returned to Louisiana, and soon became something of an expert on international law.[80] He rose to prominence as an able lawyer on the legal team for Democratic presidential candidate Samuel Tilden before the Electoral Commission.[81] Then and later, he became a well-known advocate for limiting the Reconstruction Amendments, often under the mantra of states' rights.[82]

Morse found within international law "opportunities to relitigate aspects of the Civil War and its settlement."[83] This included the use of international law to seek damages for Union appropriation and destruction of property.[84] And it was especially true of adopting Wharton's international theory of jus sanguinis.[85]

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[79] *Id.* at 655.
[80] *Id.* at 617, 627.
[81] *Id.* at 635.
[82] *Id.* at 636.
[83] *Id.*
[84] *Id.*
[85] *Id.*

Jus sanguinis was a relatively recent (or at least recently popularized) concept in international law.[86] And in the dispute between jus sanguinis and jus solis, there was a movement to "create a global jus sanguinis standard."[87] Among the leaders of that movement were John Westlake, David Dudley Field and Alexander Cockburn.[88] These views were themselves seeped in a certain racism. For instance, Westlake stated that jus sanguinis was preferrable because doing so would match citizenship to a person's "mental and moral habits."[89] And Field was, like Morse, an opponent of Reconstruction who believed in the inherent inferiority of blacks.[90]

If there seemed to be a racial aspect to jus sanguinis, for Morse at least, that was the point.[91] In 1881, Morse wrote "A Treatise of Citizenship."[92] That treatise "mixed comparative and international law analy-

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[86] *Id.* at 637; *see generally above* at 15-16.
[87] *Id.*
[88] *Id.* 634-36; *see also* Appendix (showing Government here relying on these authors).
[89] John Westlake, *A Treatise on the International Law* at 16 (1858).
[90] *See, e.g.*, Henry M. Field, *The Life of David Dudley Field* at 161, 166, 199-200, 265, 290 (1898).
[91] JACH, *above* n.52, at 639.
[92] (1881).

sis with racist arguments favoring disenfranchisement."[93] Adopting racist stereotypes, Morse referred disparagingly to the "fecundity of the blacks," for which he stated emancipation had only increased.[94] He warned about extending the vote to black people, stating that there is a "danger to the republic as a result of the indiscriminate extension of the franchise to ignorant and unqualified masses, whether white or black, native or foreign."[95] He referenced favorably the racist musings of another author, Page McCarty, as having said that "one half of the dual character of American citizenship was paralyzed, and he foreshadowed that under the care of the black nurse it would cease to exist and slough off."[96] He further argued for segregation,[97] and for prohibiting interracial marriage and criminalizing sex between people different races.[98]

Morse was more outspoken in his formal writings about his anti-black racism, but his views on the Chinese were no more enlightened. "The negro question—so far, at least, as political status is concerned—has been finally disposed of. But the Indian problem and

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[93] JACH, *above* n. 52, at 363.
[94] *Treatise on Citizenship*, above n. 92, at 173
[95] *Id.* at 214.
[96] *Id.* at 183.
[97] *Id.* at 253.
[98] *Id.* at 253 (fornication) and 293 (marriage).

the Chinese question remain," he wrote.[99] Morse approved of laws prohibiting Chinese people from testifying where a white person is a party.[100] In a later article he wrote in the Albany Law Journal in 1904, he warned that if jus solis was used to determine citizenship, this would mean that a child of Chinese persons born in the United States might one day rise to become President.[101]

Morse, like Wharton, was expressly not relying on the original public meaning of the Citizenship clause. After Wharton and Morse published their 1881 works, Justice Stephen Field (the brother of David Dudley Field) decided the U.S. Circuit Court case *In re Look Tin Sing*, 21 F. 905 (D. Cal. 1884). That case, a habeas case involving a Chinese petitioner born in California, held the Chinese Exclusion Act inapplicable because persons born in the United States were citizens, unless born on a public vessel, or to a diplomat, or unless they renounce their citizenship. *Id.* at 906.

Look Tin Sing angered Morse. He wrote an 1884 letter to the Albany Law Journal lambasting the decision.[102] There, he "conceded" "that the language of the fourteenth amendment, which was under construction

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[99] *Id.* at Preface, xiv.
[100] *Id*. at 253.
[101] 66 Alb. L. J. 99, 100 (1904).
[102] 30 Alb. L.J. 401 (1884).

in the case of Look Tin Sing, is very broad."[103] Still, he argued that his position should be adopted under an evolving understanding of the Constitution because, evoking Wharton, "Citizenship" was "nowadays dependent upon choice rather than status."[104] Morse suggested the Court ignore plain meaning of the Citizenship Clause in favor of evolving international law, where "jus sanguinis" was "now universally accepted by dominant northern [that is, European] States."[105] Indeed, Morse went on to argue that Courts should ignore outright the language of the "less carefully worded" Fourteenth Amendment (compared to the Civil Rights Act of 1866) and instead apply statutory law from 1866: "The former makes citizenship (or national character) of children of aliens dependent upon place of birth; the latter derives it, in case of children of citizens, from parentage."[106]

Morse did not argue just to a domestic audience. He travelled and published internationally to advance his argument, significantly overstating (to be kind) his

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[103] *Id.* at 420.
[104] *Id.*
[105] *Id.* (bracketed language added).
[106] *Id.*

case.[107] And so a combination of this active international lobbying, along with a preference for jus sanguinis themselves, may have led certain foreign writers and international law specialists publishing about American law—such as Hugh Bellott, Boyd Winchester, William Edward Hall, and Hannis Taylor, to believe that America applied some sort of rule of jus sanguinis.[108]

D. George Collins takes anti-Chinese racism to the Supreme Court.

Morse would press his theories of citizenship before the Supreme Court,[109] but did not himself get a chance to overturn *Look Tin Sing* before the Supreme

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[107] Washingtonians Abroad, *Evening Start*, 7 Sept. 1874, 1; *Institut De Droit Interna- Tional: Annuaire: Tome* 1: 1877, at 29 (1994 [1877]); Alexander Porter Morse*, De l'acquisition de la Nationalite aux Etats-Unis, Journal du 'Droit International Prive et de la Jurisprudence comparer* (1887); *see id.* at 32 (falsely stating that the child of a foreigner is a foreigner, "[l]'enfant d'un citoyen des Etats-Unis est citoyen des Etats-Unis; l'enfant d'un étranger est étranger," and that the United States has adopted jus sanguinis in full, "[l]es Etats- Unis, en présence du *jus soli* et du *jus sanguinis*, ont fini par donner une adhésion entière à la doctrine du *jus sanguinis*").

[108] *See* Brief of Petitioners at 27-28.

[109] *State of Missouri ex rel Carey v. Andriano*, 138 U.S. 496 (1891); *Contzen v. U.S.*, 179 U.S. 191 (1900).

Court. That fell to George Collins, a California Republican who grew up among the anti-Chinese hostility then prevalent in California.[110]

Although Morse's ideas formed the attack on the citizenship clause,[111] Collins's arguments for jus sanguinis were more xenophobic than those of Morse or Wharton. In his article "Are Persons Born Within the United States Ipso Facto Citizens Thereof?" Collins argued that such a rule would be "impolitic."[112] "The Chinese, for instance, are a people foreign to us in every respect."[113] He continued:

> Although all this time surrounded by American civilization it has wholly failed to make any impression upon them; they segregate themselves from the mass of people and establish a colony according to Oriental ideas in order that they may live in a manner similar to those in China; they are antagonistic to our civilization; know nothing and refuse to know anything of our institutions and are utterly incapable of self-government; they do not come here animus

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[110] JACH, *above* n.52, at 647.

[111] *See generally id.* at 648-49; *see also* Lucy Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, Immigration Stories 51, 58-59 (NY Foundation Press 2005) ("Salyer").

[112] 18 Am. L. Rev. 831, 834 (1884)

[113] *Id.*

> manendi, but as soon as they obtain a competency, either by their labor or otherwise, they return to their native land to enjoy it. Their children born upon American soil are Chinese from their very birth in all respects, just as much so as though they had been born and reared in China; they inherit the same prejudices, the same customs, habits, and methods of their ancestors; in short, they are subject to the same civilization and adhere to it with as much tenacity as did their forefathers.[114]

Chinese people were "utterly unfit, wholly incompetent" to be American citizens, "and yet under the common-law rule they would be citizens."[115] Congress's own racism showed that the citizenship was meant to be exclusionary: "Congress has seen fit to confine the privilege of becoming an American citizen to the Caucasian and African races; yet under the common-law rule the children of all persons, irrespective of race, who were born within the United States would be citizens."[116] Such "evils which result from an indiscriminate admission of foreigners into the body politic," Collins implied, could not be tolerated.[117]

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[114] *Id.*
[115] *Id.*
[116] *Id.* at 835.
[117] *Id.*

Collins followed that up with an 1895 article, "Citizenship by Birth."[118] That article was no more egalitarian. For instance, there Collins warned that the government was "oblivious" to the fact that Chinese people "under the claim of citizenship by birth" were invading America and exercising the rights of citizens.[119]

While the Amicus Brief of Senator Cruz modestly describes Collins as appointed amicus in *Wong Kim Ark*, as if he was some neutral observer,[120] Collins organized a lobbying campaign to push for a test case.[121] Due to its own anti-Chinese racism and the effect the Citizenship Clause was having in limiting the Chinese Exclusion Act, the Government shared the same goal.[122] Collins' gambit ultimately resulted in the Wong King Ark case. There, the *Government* expressly "invited" George Collins "to participate as *amicus curiae*" in the case.[123]

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[118] 29 Am. L. Rev. 385, 393 (1895).
[119] *Id.* at 394-95.
[120] at 16.
[121] Salyer, *above* n. 111, at 65-67.
[122] *Id.* at 62-67.
[123] Letter from US Attorney Henry Foote to the Office of the Attorney General (Nov. 23, 1895) (on file with author); *see also In re Wong Kim Ark*, 71 F. 382, 384 (N.D. Cal. 1986) ("The district attorney was assisted by Mr. George D. Collins, of the San Francisco bar, who appeared in the matter as amicus curiae.").

In lower courts, Collins' and the Government's arguments focused on xenophobia.[124] In the Supreme Court, the arguments were more academic, but ultimately Collins' arguments returned to anti-Chinese racism. "Are Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth?" asked Collins' Brief on Behalf of the Appellant (co-signed by the Solicitor General).[125] "If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having."[126] After all, according to Collins, the "offspring" of Chinese "are just as obnoxious" as their parents.[127] The Government would go on to argue in reply that Chinese people would always have "obedience" to China and Chinese culture, and therefore could not be citizens.[128]

But ultimately, these appeals lost. The Supreme Court rejected the Government's jus sanguinis argu-

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[124] Salyer, *above* n. 111, at 68.
[125] *Wong Kim Ark* Brief on Behalf of the United States at 34.
[126] *Id.*
[127] *Id.*
[128] *Wong Kim Ark* Reply Brief for United States at 7.

ments, even though those arguments repeatedly relied on Wharton[129] and Morse.[130] More importantly, it rejected the Government's racial appeal. Just like in Congress, the opponents of birthright citizenship posed the question of would you even allow the Chinese to become citizens, and the Court responded that it would.

IV. The Government is simply recycling the losing arguments of Wharton, Morse, and Collins.

In *Wong Kim Ark*, Wharton, Morse, and Collins lost. And that loss was deserved. Their arguments were built on a racist foundation, attempting to use anti-Chinese sentiment to relitigate, rather than interpret, the Citizenship Clause. These policy-based arguments simply echoed the same arguments made by Senators Cowan, Davis, and Williams.

The Government expressly relies on the approach

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[129] *Wong Kim Ark* Brief for United States at 42, 43; *Wong Kim Ark* Brief on Behalf of the United States at 27-31.

[130] *Wong Kim Ark* Brief for United States at 10, 11. The Brief for the United States (at 18) and the Brief on Behalf of the United States (at 15-16) also relied on Chief Justice Taney's decision in *Dred Scott*. *Id.* at 18; *but see Look Tin Sing*, 21 F. at 909 (noting that one purpose of the Citizenship Clause was "to overrule the doctrine of the Dred Scott case").

of Wharton and Morse.[131] And while it does not cite Collins expressly, it recycles the same arguments Collins made in *Wong Kim Ark*. As the appendix to this brief show, many of the same treatises relied on by the Government come right out of either Collins' *Wong Kim Ark* Brief on Behalf of the United States, or Conrad's Brief for the United States. Likewise, many of the case, statutory, and legislative history citations are the same.

This Court should reject the Government's approach. The writings of Wharton, Morse, and Collins were not contemporary—they occurred 15-40 years after the Fourteenth Amendment was passed out of Congress. They were not commentaries on the public meaning of Citizenship Clause, either. Rather, they were non-textualist attempts to recast the Citizenship Clause in terms of later-evolving international law and a racist and increasingly hostile opposition to Chinese people in the United States.

The Government is inviting this Court to rewrite the Citizenship Clause vindicate exactly what Wharton, Morse, and Collins were trying to do 140 or so years ago. If the Court accepts the invitation, it will overturn a Constitutional amendment, under the guise of interpreting it, in a decidedly non-originalist

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[131] *See* Petitioner's Brief at 26-27; *see also* Cruz Brief at 16-17 (expressly relying on Collins).

manner, to ratify an anti-immigration agenda of the federal Government motivated by xenophobia and racism. The Court refused to do so 140 years ago, and it should refuse again today.

* * *

The history of the Supreme Court is written in stone, but it is also written in moments. In *Wong Kim Ark*, a Supreme Court made up of people who themselves harbored racist anti-Chinese racist beliefs nevertheless stood up to that moment and defended the Constitution. In contrast, in *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court allowed fear and bigotry to subjugate the Constitution, a mistake that this Court would later say was "wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution." *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (cleaned up). This is another moment for the Court. Will it follow the path this Court blazed in *Wong Kim Ark*? Or will it issue another *Korematsu*?

CONCLUSION

The Court should affirm the decision of the District Court.

Respectfully submitted,

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APPENDIX

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[1] Indirectly cited via David Dudley Field, *Outlines of an International Code* 132 n.1 (2d ed. 1876).

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[2] Citing congressional report.