

GORSUCH, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 25–365

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

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

[June 30, 2026]

JUSTICE GORSUCH, dissenting.

At the heart of today’s dispute lie two competing views of the Fourteenth Amendment’s Citizenship Clause. On one account, the Clause incorporated the English common law rule of *jus soli* (literally, the “right of the soil”). That rule, developed in feudal times, had more to do with being a subject than a citizen. It was based on the notion that a “man owed personal service to the lord of the soil, the same as his master owed it to the king; and it was born with the child and only ended in the grave.” 2 Cong. Rec. 3282 (1874); see also 1 W. Blackstone, Commentaries on the Laws of England 369 (1768); *ante*, at 2–4 (majority opinion). On the other account, the Clause adopted a distinctly American settler’s view of citizenship. One that promises the full “dignity and glory of American citizenship” to any child born in this country to parents who have made this Nation their permanent home, regardless of their race, religion, or national origin. *Plessy v. Ferguson*, 163 U. S. 537, 555 (1896) (Harlan, J., dissenting); see also *ante*, at 1–3 (THOMAS, J., dissenting). To my eye, the latter understanding better accords with the Clause’s original public meaning and that leads me to join JUSTICE THOMAS’s dissent.

I write only to emphasize a few points. First, the understanding JUSTICE THOMAS and I share of the Citizenship Clause is consistent with this Court’s holding in *United*

GORSUCH, J., dissenting

States v. Wong Kim Ark, 169 U. S. 649 (1898). That case involved parents born in China who had made their home in this country lawfully, even though they never became naturalized citizens and statutes then in effect made that impossible. See *id.*, at 652, 701. The question the Court faced was whether the parents' child, born in this country, was himself a citizen. The government argued that the child was not a citizen because his parents were not. *Id.*, at 666. This Court—rightly—rejected the government's position. Throughout history, many other nations have restricted citizenship by birth to the children of citizens. See *ante*, at 13, n. 1 (THOMAS, J., dissenting). But the American settler's view of citizenship reflected in the Citizenship Clause is not so parsimonious. What matters isn't whether a child's parents are citizens. What matters is whether they (and, by law, their child at birth) have made this place their home and are thus "domiciled within the United States." *Wong Kim Ark*, 169 U. S., at 693.

Second, respondents chose to pursue a facial challenge to the executive order at issue in this case and secured below a preliminary injunction barring every one of the order's potential applications. Under this Court's precedents, we can sustain that injunction only if "no set of circumstances exists" in which the order may be applied lawfully. *United States v. Salerno*, 481 U. S. 739, 745 (1987). That is a demanding standard, and it is not met here. Among other things, the executive order holds that children born to temporary visitors in this country, whether here lawfully or unlawfully, are not citizens. And at least to that extent, the order is consistent with the Citizenship Clause as JUSTICE THOMAS and I read it. By definition, temporary visitors to this country do not choose to make a permanent home here, and their children thus cannot claim the privilege of citizenship. Because the executive order is lawful at least to this extent, respondents' facial challenge must fail. See *ibid.*; *ante*, at 56–57 (THOMAS, J., dissenting).

GORSUCH, J., dissenting

Finally, just because the executive order has some lawful applications and can survive a facial challenge does not mean it is lawful across the board and immune from narrower legal challenges. Besides addressing temporary visitors, the order also denies the benefits of citizenship to children born in this country to parents who make their permanent home here, but do so in defiance of federal immigration laws. The government insists that aspect of the order can survive any possible legal challenge, too, because individuals can secure domicile in this country only if they do so in compliance with federal law. See *ante*, at 57–58, n. 10 (THOMAS, J., dissenting).

About that, however, I harbor doubts. Perhaps *Wong Kim Ark* does not squarely foreclose the government’s position. After all, that case addressed a child born to parents who lawfully resided in this country. Still, I wonder: Is a child born here to parents who have long chosen to make this Nation their permanent home not a citizen under the Fourteenth Amendment solely because his parents’ presence violates statutory law? If those parents are not domiciled here, then where *are* they domiciled? And if the answer is nowhere, how can we reconcile that conclusion with this Court’s longstanding recognition that every person is domiciled somewhere? See *Desmare v. United States*, 93 U. S. 605, 610 (1877). Because the executive order is not facially invalid, these questions may not be properly before us. But their answers are undeniably important to a Nation committed to a view of citizenship open to all children born here to parents who can call this country their home.