

Hiroshi: On this episode we are absolutely delighted to have a new member of our team, Amanda Frost of the University of Virginia's School of Law.

Amanda we've long admired your work in immigration and citizenship and we're so fortunate that you'll be sharing your insights going forward. Welcome, Amanda.

Amanda: Thank you. I'm delighted to be here.

Hiroshi: For this episode, we look at two cases that the Supreme Court heard in March and April of this year. They're significant cases. They address very different aspects of immigration and citizenship. They're worth a close look, not only in and of themselves, but also for what they say in composite about the Supreme Court and immigration citizenship. We'll start by looking at *Noem v. Al Otro Lado*, which was argued before the Supreme Court on March 24. This is a case that addressed the practice of "metering," which was a way for the government to limit the number of asylum seekers at the southern border of the United States.

This particular policy is no longer in place, but the government sought and obtained Supreme Court review for the purpose, as the Solicitor General explained in oral argument, of having the latitude to adopt similar policies if circumstances warrant.

So according to the statute, a non-citizen who is "physically present in the United States," or who "arrives in the United States," may apply for asylum. So the question is, what? Do those words mean? The Solicitor General opened for the government by explaining what was wrong with the argument by Al Otro Lado and the individual asylum seekers.

CLIP:

Mr. Chief Justice, and may it please the Court: Respondents' position is that when Congress said "arrives in the United States," it meant stopped outside the United States. That theory is wrong for the simple reason that it defies the statutory text. You can't arrive in the United States while you're still standing in Mexico. That should be the end of this case. But, even if you see some ambiguity in the text, the Court's decision in *Sale* should clinch the case for us. In *Sale*, this Court determined that the protections of the refugee convention and the withholding-of-deportation statute do not extend to aliens outside the United States and, further, that it is entirely lawful for the executive branch to prevent aliens from reaching U.S. soil and claiming those

protections. If Congress meant to depart from that territorial approach when it adopted the statute here, just three years after *Sale*, it would have said so. It didn't. This Court should, therefore, uphold the metering policy and reverse the Ninth Circuit's judgment.

Kelsi Corkran arguing for the respondents *Al Otro Lado* and the asylum seekers, read the statute quite differently.

Clip

the Act requires immigration officers to process claims not only for noncitizens already present in the country but also for those arriving at ports and elsewhere along the border. For decades, port officers followed the statutory procedures designated by Congress for inspecting and processing arriving asylum seekers. It was not until 2016 that the government asserted for the first time that it can wholly avoid these mandatory duties simply by blocking asylum seekers just as they are about to step over the port threshold. Petitioners' theory of the statutory text isolates the word "in" at the expense of making the rest of the statute nonsensical.

Joining us today to discuss this case in the oral argument is Lucas Guttentag who teaches at both Stanford Law School and Yale Law School. Lucas is one of the country's foremost experts on immigration law and the rights of non-citizens.

And he has been a leading voice in a unique combination of roles in litigation, academia, and government. Lucas founded the ACLU Immigrants Rights Project in 1985. He led it for 25 years, and in that period, I think it's fair to say it became a foremost, perhaps the foremost, immigrant rights litigation organization.

He served in senior policy positions in the Obama administration at the Department of Homeland Security and in the Biden administration at the Department of Justice. Thank you Lucas, for taking the time to be with us today to talk about *Noem v. Al Otro Lado*.

Lucas: Thank you very much for having me. It's a pleasure to be here.

Hiroshi: So Lucas, let's just get into this case. Can you describe what the central issue or topic in the case is—what they call “metering” on the US Mexico border?

Lucas: The fundamental issue in the case is whether the so-called metering is a violation of the Immigration and Nationality Act and specifically what the metering is, or was, that's at issue in this case—is posting DHS officials at the border, literally at the borderline and preventing persons who are seeking to enter to apply for asylum from physically touching the United States.

So the so-called metering was a prohibition on accessing the asylum process and accessing the territory of the United States by blocking the admission at the borderline.

The purpose was to so-called meter, which is to regulate who could access the port of entry in order to apply for asylum. But I think it's important to understand that this metering applied only to people who were applying for asylum. In other words, everyone else was allowed to enter the port of entry and to pursue whatever admission they sought, but persons who were seeking asylum were physically prevented, and the purpose of that was to not allow them to pursue the asylum process that exists at the border—the expedited removal and the asylum screening process that exists at the border—on the theory that if they have not physically touched land, they're not eligible to apply.

And the question was whether under the statute that's permissible, whether it's a violation of the duty to inspect someone and a violation of the asylum statute, and both of them turned on particular phrases in those two provisions and whether and how they should be interpreted.

Alex: It seems that the case turned on what the meaning of "in" is. Can you help us with that, Lucas? What was the statutory language at issue?

Lucas: Yeah, the specific statutory language is whether a person who's in the situation of someone who's being metered “arrives in the United States.” But I think it's important to understand exactly where that language appears and what it says. And the statutes at issue, there are two of them. One is the duty of DHS to inspect individuals.

The other one is the right to apply for asylum. And this turns on hypertextual interpretation as to this aspect. But the statute provides that the DHS shall inspect someone who arrives in or is present in the United States. And a

person's entitled to apply for asylum if they arrive in or are physically present in the United States.

And so the question is, what does “arrive in” mean or “arrives in” mean, in addition to physically present. The government's argument was that it means one thing and one thing only, which is that the person has to be inside the territory of the United States.

The plaintiff's argument was, well, that makes it completely redundant of “physically present.” The statute says a person arrives in or is physically present. Then what's the difference? And that rather “arrives in” means the process of arriving. So when someone has reached the point where they are being inspected or where DHS has a duty to inspect, namely when they approach that port of entry, they are arriving in the United States, or they arrive in the United States and therefore are covered by the statute and are entitled to pursue the asylum claim under the border asylum process.

Amanda: So Lucas, thank you for that explanation. And you made this point that it's a hypertextual argument and that is certainly clear from listening to that oral argument. But did anyone discuss another reasonable approach to statutory interpretation, which is more purposivist? What were the goals of the statute implementing international agreements, providing an opportunity for those fleeing persecution to seek asylum? Was there any discussion of this broader purpose and the degree to which that metering policy would defeat that purpose?

Lucas: That was fundamentally what the question is. We have the hypertextual of how to understand the statute, and then the plaintiffs argued that it needs to be understood against the international obligations under the Refugee Convention that the United States incorporated into US law in the Refugee Act of 1980, –what the purpose of that provision was, and also what the 90 years of practice have been prior to the metering policy being adopted. And that persons who arrived at the border were entitled to be inspected and had the right to apply for asylum. I think importantly, the plaintiffs argued that the treaty in the convention was very much directed at addressing the failure of the West to provide protection to persons fleeing the Holocaust.

And this came up in oral argument, particularly from Justice Sotomayor invoking the example of the *St. Louis* that arrived at the United States or in the waters of the United States with Jews fleeing the Holocaust that was turned away, and that the treaty was intended to impose an obligation on countries on signatories, that if a person appeared at the border, then the government has an

obligation to assess their claim for protection and to give them protection if they meet the refugee definition. And that by preventing persons from accessing that process, it's a violation of the treaty obligations as well as the statute.

Hiroshi: Well, one of the things that came up in the oral argument, although much of it was exceedingly focused on the difference between “arrives in” versus “arrives at.” One of the things that came up several times was the so-called *Sale* case, *Salel v. Haitian Centers Council*, from the 1990s. It's one of the cases that the lawyer for the government led off with in his opening statement. Why doesn't that case take care of the issue? Because that was a case involving the interdiction of boats on the high seas for the express purpose of preventing them from reaching the shores of Florida. Is this different?

Lucas: The plaintiffs argued, and I think they are correct, that the *Sale* case is fundamentally different in one critical respect, and that is that in the *Sale* case, the United States was operating in international waters. They were operating wholly outside the territory of the United States. And when the Supreme Court decided the case, what it held was that neither the statute nor the treaty applies to the United States acting outside the United States.

In this case, very importantly, the DHS officers are in the United States on United States land and acting to prevent someone who's at that immediate line from taking one step further, or as Justice Sotomayor pointed out, an arm, a leg, a nose not getting anywhere onto the territory of the United States.

Alex: There was a long discussion about what if people are in line and so the first person has the right to apply, but the fifth person doesn't? Or they're swimming across the Rio Grande and if they don't get halfway. And there was an extraordinary amount of attention to the people in the queue. And the plaintiff's lawyer ended up saying, no, it's only the very first person, the one in front who's asking, and the folks in the back of the line are treated differently. What did you think about that response to that question?

Lucas: Well, I think it reflects a couple of things. One is, and this came up in argument as well, is that this case is being litigated essentially in the abstract. The policy is no longer in place. It was suspended a long time ago. The litigation doesn't have any practical effect at this point other than perhaps with regard to a tiny number, maybe one class member.

It's very unclear. And that the government is seeking to overturn a decision that is not prohibiting from doing anything they seek to do at the present time. And they said simply, well, we may want to do this in the future. And so one of the

questions that repeatedly came up is all these hypotheticals could be addressed in actual litigation where the government's actually adopting and implementing a policy, and then they would be squarely presented.

As to the more fundamental point, I think what the plaintiff's lawyer was saying is that the specific statutory duty to inspect applies to the person who's at the front of the line, who's seeking to be inspected and to assert their claim for asylum, and that it's impermissible to block that person from going through that process.

Once that person has gone through the process, then the next person in line will be at the front of the line, and then they're covered by the same provision and have the same entitlement. So I think it's really a response saying it's a one-at-a-time obligation—but without the impermissible so-called metering that individuals who are seeking protection would eventually get to the front of the line.

It does raise, I think, an important point. When the conversation is about metering it's a misnomer because what the plaintiffs are challenging is a prohibition on persons entering and to seek asylum without any mechanism by which they could preserve their place in line or receive an opportunity to apply at some designated future time.

The plaintiffs' position was that if there were what one might think is actual metering, which is like controlled access or regularized access where the government says we can only handle so many people today, but you can come back tomorrow or the day after, that that would be an entirely different situation.

And the plaintiffs seem to accept that as a permissible regulation for operational reasons. But what they complained about and what the lawsuit was about was a prohibition without any opportunity ever to get to the point of applying for asylum or protection.

Hiroshi: Just to take you back for a minute to the relevance of the *Sale* case, the case involving interdiction on the high seas and the distinction the plaintiffs are trying to draw in this case between that situation and someone acting essentially at the physical border, though possibly a meter outside of it or a yard outside of it.

What if the government loses this case on the theory that someone is acting at the border and effectively preventing people, even if they're second, third, or fifth in line, from accessing the border and claiming asylum. Wouldn't it just try

to push the enforcement further from the border? One of the things we're seeing right now in Mexico is the Mexican government doing a lot of things that are making it difficult for people to travel through Mexico to the US Mexico border. And one of the possible scenarios here is that the Mexican government, at the behest of the US government, will do more of those things. And then it becomes much like interdiction on the high seas. What is your sense of that in the larger picture of access to humanitarian protection?

Lucas: I think this raises the much broader question that was central to *Sale*, which is both the externalization of control, if you will, which is to move the border away from the border. And then to use that as a way of prohibiting people from physically accessing the territory of the United States in order to avoid the obligations that then apply.

I think there is still a difference in one respect, at least between international waters and Mexico and asking Mexico, because there may be some practical limits on the United States' ability to engage or encourage the Mexicans to engage in that kind of enforcement.

It requires the cooperation of another country to engage in immigration enforcement outside the territory, whereas in international waters, it can be done unilaterally. We saw a similar situation with the remain in Mexico, the migrant protection protocol policy where the ability of the United States to return people to Mexico depended on Mexico agreeing with it.

But the larger point is important, which is that once the US courts or others, decide that the obligation, the *nonrefoulement* obligation, does not apply to governmental acts outside the territory of the government, the diminution of protection is very significant, and that's really the legacy of *Sale*, and that was very much at issue and was recognized in the *Sale* case, especially by the dissent, of course. And I think we've seen after *Sale* that the policy of interdiction spread from the United States to other parts of the world.

Once it was endorsed by the United States, it became acceptable to others. And so the danger of externalization to diminish rights and protections for people fleeing is really significant and in that respect also it's overwhelmingly a burden that's imposed on countries in Africa and Latin America. Overall, the United States does not have a significant flow of displaced people or refugees compared to other parts of the world. And so for us to adopt these policies under circumstances, where we're in a much better position to handle adjudications and in fact benefit from the immigrants who come, overwhelmingly, then that

sends a signal to other places to engage in practices that diminish the protections and erode the protections of the treaty.

Hiroshi: I think it's worth acknowledging that there's a difference here between people who are Mexican citizens, Mexican nationals, and people who may be coming up through Mexico from, whether it's Northern Triangle or from China or from Senegal or wherever in the world they may come from. The Mexican government's situation as a transit country might be quite different from its role as the government of the country of origin for asylum seekers.

Lucas: I think that's a really critical point and that the interpretation of the statute here and the extent to which the protections apply and the extent to which a person who's in Mexico, but at the US border is covered by the statute entitled to seek protection—the government's position in this case applies exactly the same to a Mexican who's fleeing persecution in Mexico. Imagine a Mexican government that's engaging in genocide or imagine cartels in Mexico that the government can't control that are systematically killing their political opponents. If those people fleeing persecution under those circumstances are fleeing directly to the border of the United States and seeking protection in the United States, under the government's theory, they would be denied protection. They have no claim, and that seems diametrically inconsistent or opposed to what the *nonrefoulement* treaty was designed to prevent and the obligation that the treaty was designed to impose. This came up very indirectly at oral argument only in the sense that there was discussion about the other parts of the statute prohibiting return of a person to a country, and the whole case came to the court with the assumption that these are all third-country nationals. They're being returned to Mexico. They're not being returned to the place of persecution. But in fact, the statute and the interpretation would apply identically to a person fleeing persecution in Mexico, and they would be returned directly to Mexico, the place from which they're seeking to flee.

Amanda: Lucas, several times you've mentioned incentives, the different incentives created by different statutory interpretations, and it seems that one incentive that could come out of this case would be for people not to line up in an orderly way at ports of entry, but to surreptitiously enter. That obviously wouldn't be an incentive that the government would say it wants to encourage, but it does seem the result would be to encourage people to actually make their way into the United States rather than to go to ports of entry.

Lucas: Yes. And the plaintiffs did make that point and said that this is another reason why the statute shouldn't be interpreted the way the government was advancing precisely because of that incentive. The government's view, I think

was essentially that's a problem for another day, and we're not, we're incentivizing people to enter lawfully. But they didn't really have an answer to that question, and it seemed like at least some of the justices, similarly, their reaction was, well, maybe that's the effect, but we'll deal with that if and when we have to. As I said, it's like this hypertextual case.

They really seem to want to grapple only with the language, not with the implications or the principles behind it, especially the international obligations and the consequences for the protection regime as a whole, which is very frustrating in terms of thinking about how the system and how the law actually ought to work. It's frustrating in terms of thinking about what Congress actually had in mind in 1980, what it enacted the statute.

Alex: Lucas, having listened to the oral argument, two questions. Do you think that the argument elucidated anything for the Court? And two, can you read the oral argument tea leaves and tell us how you think the case is going to come out?

Lucas: I'm always very reluctant to predict based on oral argument. I will say that it seems like a very challenging case for the plaintiffs to prevail. It's hard to see getting a majority of the Court. I think the bigger question is if the plaintiff's claim is rejected, then how the Court rules— whether it does so very narrowly based on these very technical textual arguments that we've been talking about, what exactly “in” means in this context, or whether it rules more broadly on either general broad executive power or with regard to deferring to an agency interpretation, notwithstanding the demise of *Chevron*. I think it's hard to predict in any kind of concrete way, but as I said, I think it's a difficult case. At a minimum, I think we'll see some vigorous dissents.

Hiroshi: Lucas, thanks so much for sharing your insights with us today. We really appreciate it.

Lucas: Thank you very much for having me.

Amanda: So the second case we'll discuss in this podcast is the Trump administration's effort to restrict access to birthright citizenship, *Trump versus Barbara*, which was argued before the Supreme Court on April 1st. President Trump attended that oral argument making him the first sitting president to do so and declaring to the world how important this initiative is to him and his administration.

So the first sentence of the 14th Amendment, which is known as the Citizenship Clause, states “all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the state wherein they reside.” And all the action focuses on that language “subject to the jurisdiction thereof,” the carve out from automatic birthright citizenship.

So the Supreme Court has addressed this question before, way back in 1898 in a case called *United States vs. Wong Kim Ark*. The Supreme Court held that the Citizenship Clause applied to nearly everyone born in the United States, with the only groups being excluded as not being “subject to the jurisdiction” of the United States, being the children of diplomats, the children of invading, occupying armies, of which, thankfully there haven't been many, and children born into Native American tribes.

And I'll just add that today, those children born into Native American tribes are automatic citizens at birth by statute.

So on the first day of his presidency, President Trump signed an executive order that claimed to restore the original understanding of the 14th Amendment's Citizenship Clause. He said it's been misinterpreted for decades and that it should exclude not only those groups just listed and noted in *Wong Kim Ark*, but also anyone born in the United States who does not have a parent who is a citizen or a green card holder. So that would exclude children born to parents who are undocumented immigrants, as well as children born to parents who are lawfully present, but temporary immigrants, which would include not only tourists, but also children born to F1 holders who are students, or H-1B skilled workers and similar temporary visa holders. About a quarter million children a year would lose citizenship going forward, where the Trump administration's executive order to go into effect prospectively only, or if it was to be applied retroactively, which the Trump administration says it wouldn't do, millions could lose citizenship. So the ACLU among other groups sued on behalf of expectant parents whose children would lose citizenship. And the Supreme Court, as I said at the outset, heard argument on this question on April 1st.

So today we'll be talking about this case and the oral argument with Professor Rachel Rosenblum. Rachel is a professor of law at the Northeastern Law School where she teaches and writes about immigration and citizenship. She co-authored an amicus brief in *Trump vs Barbara*, and we'll talk about the arguments she made there. And she's also at work on a book on birthright citizenship.

So welcome, Rachel.

Rachel: Thank you for having me.

Amanda: So Rachel, let's get right into it. So the Trump administration argues that qualifying language “subject to the jurisdiction thereof” excludes children born in the United States to undocumented immigrants and temporary immigrants, arguing that the children's parents must be both lawfully present and domiciled for the children to have citizenship. So we're going to play a quick clip of the SG's argument and then I'm going ask you to try to explain what he means by these terms he's using—domicile and allegiance.

CLIP

The Citizenship Clause was adopted just after the Civil War to grant citizenship to the newly freed slaves and their children, whose allegiance to the United States had been established by generations of domicile here. It did not grant citizenship to the children of temporary visitors or illegal aliens, who have no such allegiance. This conclusion reflects the original public meaning of the clause. When Congress used the term "not subject to any foreign power" in the Civil Rights Act of 1866, it rejected the British conception of allegiance. Senator Trumbull explained that "subject to the jurisdiction thereof" in the clause means not owing allegiance to anybody else. And in 1884, this Court recognized that "subject to the jurisdiction" means owing direct and immediate allegiance. The clause thus does not extend citizenship to the children of temporary visa holders or illegal aliens.

All right. So Rachel, what is the SG trying to say here? I think this is a complicated argument, so we could use your help in parsing the terms he's using—“allegiance” and “domicile”—and how he thinks they affect access to birthright citizenship under the 14th Amendment.

Rachel: Sure. So that clip is really the government's argument in a nutshell, right? They're arguing that the purpose of the 14th Amendment was to guarantee Black citizenship, that it didn't reach nearly as broadly as it has been interpreted to reach, and that it should not cover the children of temporary visitors or undocumented immigrants.

So just to break down a couple of those terms, we'll start with allegiance. I think people hear that and they think a pledge of allegiance or sort of an individual loyalty oath. That is not what it means. It's, and it, I will say it's not in the 14th Amendment, the 14th Amendment uses different language, but the word allegiance does come up a lot in the 19th century cases and treatises, and then also in earlier English sources, which are relevant to the United States because

we inherited a lot of principles from English common law. So what allegiance means in this context is really the bond between a person and a government, either a person's own government or some other government.

So there's two types of allegiance. There's temporary and local allegiance. If I go on vacation to another country, I owe temporary and local allegiance to that country, which is really just a fancy way of saying I have to obey the laws when I'm there. And another way of saying that is I'm subject to the jurisdiction of that country when I'm there. I have some kind of relationship to that country, but it ends when I leave.

My relationship to my own country is different from that, and we call that permanent allegiance. Now, that still doesn't answer who's a citizen and who isn't, right? You also need a citizenship rule for that. And so who has that permanent allegiance? The United States traditionally followed the English common law rule, which was that birth within the United States or within the territory of the country gives that kind of permanent allegiance except for in a very small number of exceptional circumstances.

And so what this really comes down to is what did the framers of the 14th Amendment mean to do in 1866 when they drafted that language. Were they simply trying to take away the racial restrictions on birthright citizenship on this traditional English common law rule? That's what most people think. Or were they also in the process completely changing the way that citizenship works in the United States, which is really what the government is arguing there.

And then in terms of domicile, first of all, domicile just means someone living in a place and intending to stay in that place. That is the traditional understanding of domicile. And so what the SG says there refers to formerly enslaved people having allegiance because of generations of domicile in the United States.

I was really struck by that. What he's talking about is generations of slavery. I find that using domicile a very problematic word, really whitewashing that. But in any case, domicile does not; it doesn't come up in those older cases and treatises. It doesn't come up in the debates on the 14th Amendment. Where it does come up is in the Supreme Court's decision in *United States vs. Wong Kim Ark*. The word is there a lot. I think it's not part of the holding of that case.

The government is arguing that it is part of the holding and that the holding of that case is limited to people who are domiciled.

Amanda: Thank you. That's very helpful for unpacking that SG's opening statement. But one follow up is many people would say, right, that undocumented immigrants are domiciled in the United States and that they intend to remain. They don't have a legal right to remain, but they intend to.

So what's the SG's answer to that?

Rachel: They're not just arguing that there's a domicile rule, which most people don't think that there is, and that's not what the *Wong Kim Ark* decision meant, and it's never been interpreted that way. But not only is the government saying there's a domicile rule, they're also arguing that it's a very specific definition of domicile that is much narrower than this kind of traditional conception of people who are just intending to remain.

So for the people who are on a very temporary visa, like a tourist visa, sure it's clear they're not here permanently. But many undocumented immigrants are here for decades. They certainly intend to remain here. So even if the government prevailed there would be lots of questions about what domicile actually meant and who was covered under that or not.

It would open up a whole can of worms if we ever got to that point.

Amanda: And of course that led to a question that I know you've written about in a couple blog posts by Justice Gorsuch who asked the Solicitor General where he comes up with that term "domicile," which Justice Gorsuch wasn't sure he could find in those original 1866 debates. So we'll play a clip of that and then I'd love to get your comments on this.

Neil Gorsuch

-- I'm talking about in the debates over the Fourteenth Amendment and --and the Civil Rights Act, it's striking that these concepts aren't discussed in them.

D. John Sauer

I think domicile is discussed. I mean, it's --it's brought up in many --

Neil Gorsuch

Allegiance, jurisdiction, complete jurisdiction.

D. John Sauer

Well, I mean, here's just a few examples: Page 1679 of the Congressional Record, President Johnson vetoes the first version of the Civil Rights Act, and he says, I'm -- I can't sign this because it would extend alien -- citizenship to the children of "all domiciled aliens and foreigners," even if not naturalized.

So, that was the Solicitor General's response to that question, and I know you have some thoughts on this, Rachel, so why don't you share them.

Rachel: Yes, I definitely do. I was stunned by that moment. There's a lot of places where I might disagree with the Solicitor General, but they're within the bounds of regular legal debates. This was way out of bounds. That is not what the veto message said. It in fact said exactly the opposite of that.

And so I was just really stunned. So let me tell you what President Johnson's veto message said. So this is the Civil Rights Act of 1866. It uses different language than the 14th Amendment, but it has always been interpreted to be trying to do exactly the same thing: To broaden birthright citizenship.

And so first President Johnson vetoes it. He doesn't want to give all these people citizenship. And he first talks about the various the various racial groups that were actually discussed in the debates. So he says, this provision of the Civil Rights Act "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."

So he's just named all these groups and then he says: "Every individual of these races born in the United States is by the bill made a citizen of the United States." Every individual born in the United States. He doesn't say domicile, he doesn't say parents. It is exactly the opposite.

The language that the SG quotes there, it does appear somewhere in that message, in a totally different place about a totally different thing. And so, that was either an egregious error or a deliberate misstatement and either way there should be a letter.

The SG owes the Supreme Court notice that was a totally false statement that was made.

Amanda: I doubt a letter will be forthcoming from the SG, but we'll see. Well, I will say that the justices seemed very skeptical. I'm pretty sure you agree a majority of the justices seemed skeptical of the government's arguments. Everyone agrees some small number of groups at least are excepted from birthright citizenship. That's why we have that language "subject to the jurisdiction thereof." And there's that understanding from *Wong Kim Ark* and other sources that there's a few groups that are excluded.

The Chief Justice commented on those exclusions in a way that suggested he was skeptical of the SG's argument. So we'll play that brief clip right now.

CLIP

Well, starting with that theory, you obviously put a lot of weight on "subject to the jurisdiction thereof," but the examples you give to support that strike me as very quirky, you know, children of ambassadors, children of enemies during a hostile invasion, children on warships, and then you expand it to a whole class of illegal aliens are -- are here in the country. I'm not quite sure how you can get to that big group from such tiny and sort of idiosyncratic examples.

We didn't include in that clip the SG's response. And of course, listeners, if you're curious, you can go listen to it. But I will say I did not think his response was convincing the Chief Justice. But Rachel, I will say that I, I think explaining those exceptions and fitting them all within the "subject to the jurisdiction thereof" language is also hard for the challengers.

Can you describe what the challengers' explanation is for those idiosyncratic, as the Chief Justice said, idiosyncratic exceptions to birthright citizenship and how they fit within the "subject to the jurisdiction thereof" language under the challenger's view of this.

Rachel: I have to say I agree with the Chief Justice. It is a quirky list. It's a list that comes from centuries of common law cases that have said here are exceptions that relate to this or that group. But I thought that Cecillia Wang, the ACLU attorney who was representing the people challenging this executive order, I thought she did a great job of explaining what links all of them together. What she said is that term "subject to the jurisdiction thereof" excludes only those cloaked with a fiction of extraterritoriality because they are subject to another sovereign's jurisdiction, even when they're in the United States. So she's

saying this is a disparate group, but what they all have in common is these are people who are physically here within our borders, but for one reason or another they are treated as people who are still under a different sovereign, even though they're here.

So go back to my example of if I go on vacation somewhere, I'm considered to be under the jurisdiction of that country while I'm there.

But there are certain categories that are different. So, a diplomat for example there's diplomatic immunity and diplomats and foreign heads of state are not considered to be submitting to the jurisdiction or to have this allegiance to a country that they're in. They're essentially bringing their own country with them.

So if the French ambassador has a baby in the United States, that baby is not considered to be a citizen. And I think Chief Justice Roberts is correct that if in fact no one was a citizen if they didn't have domicile, why would you bother to mention the ambassador? Because the ambassador is not domiciled, the ambassador's just here being an ambassador.

So the only way that those exceptions really make sense, and they're everywhere. They're in all the cases. They're in *Wong Kim Ark*, and they get mentioned some of them in the debates on the 14th Amendment. The only way those make sense is if the broader exception that the government's trying to establish doesn't exist.

Amanda: Yes. I think you put that very well. And Chief Justice Roberts was agreeing with that logic. So, I just wanted to talk about the *Wong Kim Ark* case.

This was the precedent on the books in which the Court directly addressed the Citizenship Clause way back in 1898. The argument there was a child born to Chinese immigrant parents who had not naturalized, indeed, who could not naturalize under the racial exclusions to naturalization law at the time.

They had a child born in San Francisco in 1870, *Wong Kim Ark*. And the question was he a citizen? And the government argued in that case that no child born to non-citizens could be a citizen, which was a pretty extraordinary argument. And the Court rejected it. What did the Trump administration want to do with that case today?

Was it arguing it should be overruled? Was it distinguishing it? What was the government's approach?

Rachel: Well, I think the government's in a little bit of a bind here. They really don't want to say that they're asking the Supreme Court to overturn *Wong Kim Ark*. That would be a very big deal. So what they're saying is that Wong Kim Ark is different because Wong Kim Ark himself was the child of parents who were lawfully admitted and were living in the United States, they were domiciled in the United States. Now that fact about Wong Kim Ark has not ever been seen to limit the holding. You have got plenty of cases in which the Supreme Court has commented, here and there in cases about children who are here whose parents are undocumented, they've said things like, oh, that, of course, that child is a citizen. So nobody has read *Wong Kim Ark* that way, but the government is trying to get the Supreme Court to read it that way. And I think the Justices were skeptical.

So, Justice Sotomayor said, well, you're really trying to get us to overturn Wong Kim Ark. And then Justice Gorsuch actually had a little quip about it.

Amanda: And I think, Rachel, you've already said this, but the best argument it has is that the word domiciled appears significant number of times in Wong Kim Ark's case and his parents were domiciled so they're attempting to distinguish the case on the facts, but the rationale of the case is clearly against them, as at least a majority of the justices seem to agree.

Alex: Rachel, can you say a little bit about the difficulties that would occur if the Supreme Court went with a domicile test? Because that would then turn on the status of the parents or maybe even the grandparents. What were the kinds of issues that were raised around that?

Rachel: Domicile is a fuzzy fact-based inquiry. It is not a bright line rule. I will say that the way the government is arguing domicile, it's not really domicile. They're saying immigration status or citizenship status. So I'm not even sure they're really saying domicile, but since they are making such a big deal of domicile and pointing to that so much in *Wong Kim Ark*, there was some pushback from the justices about that.

Like how would that actually work? Would we have to litigate these cases, right? How do you figure out what is domicile, who is domiciled; and the executive order is supposedly prospective. That's how it's worded. But the only part that's worded that way in the Executive Order is actually about giving people documents.

It doesn't say that the citizenship rule is prospective. And so there were also questions about that. What happens if another president comes in and says, well,

now we're going to apply it retrospectively. Well, how are you going to figure out, I'm descended from, someone's got four generations back, let's say someone who immigrated here, their great-great grandparent or something. Well, were they domiciled here when the grandparent was born, et cetera. It could be a huge mess.

Hiroshi: Let me just follow up a bit on what Alex raised. The Solicitor General said that the court could apply the constitutional rule only prospectively. How would you react to that? Was that a persuasive argument or are we really talking about a rule that is going to have to be retrospective in its application?

Rachel: The Supreme Court can do whatever it wants, unless I guess there's been criticism by conservatives historically about constitutional rules. The Warren Court, for example, that the Supreme Court has only applied prospectively. If the Supreme Court wants to reach a holding that says here, we don't think that "subject to the jurisdiction" means what we've always thought it meant, but we are only going to apply it prospectively, I guess they could do that. It doesn't make a whole lot of sense, it doesn't seem like it would appeal to this Court, if what we're really talking about is the original public meaning of the Constitution, of the 14th Amendment.

Amanda: And that brings me to the question that didn't get, I think, enough airtime at oral argument, which is the question you wrote an amicus brief on, along with Professor Gerry Neuman and Kris Collins. Because there's a statute at issue here as well, and I'd love you to tell our audience about what that statute says and how that should play into this decision.

Rachel: Yeah, so this is a provision of the Immigration and Nationality Act. It's codified at 8 USC section 1401, and it was enacted in 1940 and then it was reenacted in 1952. And it uses the same language as the 14th Amendment. So it says people who are born in the United States and subject to the jurisdiction of the United States are citizens. So it's the same language, but it's a different moment of time. In 1940 and in 1952, we really do have these categories and Congress is very aware that there are undocumented immigrants.

It's very aware of their children, and so you have a much more robust record to show that Congress in 1940, and then again in 1952, absolutely understood itself to be affirming the citizenship of people born to undocumented immigrants and to temporary visitors.

There's a lot of legislative history on that. That was really our argument. So that could be a basis for a decision by the Court—could hold that the executive order

is unlawful under the statute. It could hold that it's unlawful under the Constitution. It could hold that it's unlawful under both.

Amanda: That tees up my last question, which is what do you think the Court will do?

Rachel: I think it's dangerous to try to predict this particular Supreme Court but I will say, based on the oral argument, I think we've got a majority on the constitutional question here.

I'm going to go out on limb and say that, I'm not going to say how many people I think we've got, but I mean we've certainly got, I think, the three liberal justices. I think we've probably got Chief Justice Roberts and Justice Barrett, and maybe Justice Gorsuch. And I don't know how far it will go, and it's quite possible that we will have a majority opinion on the constitutional issue and then a couple of other conservative justices joining in just on the statutory issue and not reaching the constitutional issue. But I think that this one's going to be decided on the constitutional issue. I don't think the court wants to have it come back, which would be what it would be inviting if it didn't reach the constitutional issue and just said, we're going to decide this on the statute. So that's what I think.

Hiroshi: Rachel, can I ask you to step away from the case and this litigation in particular and ask you about the context in which the executive order was issued? I've heard a lot of people say that Trump administration wins even if it loses this case. What do they mean by this, and do you agree?

Rachel: Well, I think there's different ways to understand what that might mean. I think if the court decided just on the statutory grounds and didn't reach the constitutional grounds, I think the Trump administration might not mind losing in that way because it might ramp up legislative action in this direction or something.

Or it's always been a way for Trump to give something to his base, right? That it's popular, this issue, he campaigned on this issue. It gets people riled up. I think another way to think about it, the Trump administration winning, even if they lose, is the Trump v. CASA decision. So that is going to have long-term effects on all kinds of challenges. It's going to make it, it's making it already very difficult to challenge some Trump administration policies.

It got rid of nationwide injunction, so everybody has to litigate their case on their own or have a class action, which is difficult. But I think this will be a win..

I'm writing a book about effort, the history of efforts to restrict birthright citizenship. There've been three moments in American history since 1868, where these efforts have been made. They all have different theories, they all have different children they're targeting.

But in each one of them, they've gone on for a couple of decades, maybe more than that, until a court case. And then they end. We've been in this for 50 years now. It's really the mid-seventies when people start talking about this idea of temporary visitors and undocumented immigrants and birthright citizenship.

And so I'm eager for it to end. It's been a long time and I hope that we get a decision that definitively puts an end to those theories.

Alex: Rachel, this is really terrific. Thanks so much.

Amanda: Thank you so much

Rachel: Thank you for having me.

Alex: I have two thoughts on this. I mean, these are very big cases, even though they turn on very technical language. The first, the border case that Lucas talked about.

If they lose the case, if the government prevails here, it really means that the government can stop people just short of the border and basically end asylum in the United States. And there was just a recent court of appeals decision after we interviewed Lucas, saying that once you're in the country, the government can't take away your right to apply for asylum under the statute, which the government tried to do. So getting in is going to be the key, but if you're not in, you're not going to be able to apply. That is such a dramatic change on how we think about asylum in the United States.

The birthright citizenship case is obviously of huge import here for a lot of reasons. But my narrower thought on this is how weird the government's argument is in the birthright citizenship case. The language is "subject to the jurisdiction thereof," and we're talking about allegiance and then we're talking

about allegiance in terms of domicile. And it seems to get so far away from the language.

It may be a sensible rule if we were starting over and thinking about what a citizenship rule might be, we might want to say you have to have a green card to have your child be a US citizen if born in the US. But that's not what we have. And it seems like a tortured argument on the part of the government.

Amanda: Alex, I entirely agree that the government's argument in the birthright citizenship case is just weird and tortures that language of the citizenship clause to try to fit within immigration categories that exist today but did not exist back in 1866. And it's also at odds with the original understanding and purpose of that clause, which was to prevent the creation of caste system in which some people and their families were forever excluded from membership in the United States.

Hiroshi: I think it's right to characterize this as moving toward more of a caste system, naturalization notwithstanding, but I think that actually the intent of the executive order. I consider it antithetical to so much that's foundational to this country, but I'm not so sure that the Trump administration agrees with my view on this.

Going back to Alex, what you were saying about the border: I agree with you that this win, if it's a win for the government, will be profound for the asylum system. But I also feel we need to pay attention to the tremendous number of initiatives that the United States has essentially coerced or incentivized other countries to adopt with regard to externalization of borders. The United States has gotten Mexico to do so much to keep people from reaching the point where they would be turned back. So in other words, the United States seems to be filling in the gap between the interdiction on the high seas and turning back people at the physical border. We're seeing this in other parts of the world as well notwithstanding a decision one way or the other in the *Al Otro Lado* case.

Amanda: Alex, I'm curious whether, your view of the *Al Otro Lado* case what kind of incentives it will create, because it seems of course, the incentive to start enforcing immigration law beyond the US border, but also incentives for migrants who, the Biden administration, I guess unsuccessfully, but was trying to push people, to have more orderly pathways to coming into the United States.

And this seems like it might create the opposite incentive. What do you think?

Alex: I think that's exactly right, and I think that's what the lawyers for the migrants were arguing, is that under the government's theory people who enter unlawfully have rights and people who came to the border saying, please let me in to apply for asylum can be pushed away with no process at all. It's a very perverse result.

Hiroshi: That came up in oral argument in *Al Otro Lado* and the Solicitor General said, well, that looks at this whole situation more expansively than we should in this particular case, because it turns on the meaning of the statute.

Alex: Right. And I think actually on the meaning of the statute I think the the lawyers for the migrants here have a difficult job. But if you look beyond plain meaning to the purpose of respecting the right of people to gain safety from persecution, then it makes sense to find the person in the front of the line able to enter the country and make the claim. So this is going to be a fight really about purpose and plain meaning. And I fear that with the current Court, plain meaning is likely to win.

Amanda: I was curious at the Trump administration's choice in the birthright citizenship case to exclude from birthright citizenship, not just the children of undocumented immigrants, but the children of lawful temporary immigrants.

If you look at polling of Americans, they're divided on the question of whether children of undocumented immigrants should be citizens, but they're practically unanimous in the idea that the children of lawful immigrants should get citizenship. 92% or something like that. And so I wonder if the Trump administration made a political error and I feel like they could have actually framed an argument that said, we're going to treat the children of undocumented immigrants, as the children of invading armies.

Judge Ho on the Fifth Circuit has made that argument in an interview, and I wonder whether the Trump administration, if looking back, should have politically at least, if not legally, made that different argument.

Alex: I think the reason they took the broader argument was that this idea of birth tourism. The Solicitor General talked about the potentially hundreds of thousands of people who get visas, that there were dozens of companies in China that sort of advertise, go to the United States if you're pregnant and have a kid.

That's been in the news for a long time and I think appeals to the base that, and that does strike people as odd, that someone comes here, is here for two weeks,

has their baby, and the baby's automatically a citizen of the United States. I think most people will accept that because we want a broad reading of the 14th Amendment, but there's something a little strange about it.

Amanda: I agree with you that people are concerned about that. This is an issue that comes up again and again. Birth tourism, and I'll just point out there is actually a regulation might be hard to enforce, but that bars people from coming in on a tourist visa for the purpose of giving birth.

And that is potentially a way to limit that problem, which I do think is, while not a huge problem, something that concerns some of the American public.

Hiroshi: And the way things turned out, most of the argument, at least on the Solicitor General side, turned on this particular question of children of lawful temporary visitors rather than the children of the undocumented.

Alex: Yeah, I found that strange. I agree. I was surprised that there wasn't more on the undocumented, and maybe because as, as Rachel said, the undocumented folks are likely to be quite domiciled, and so you'd have to go from "subject to jurisdiction" to "allegiance," to "domicile," to "lawful domicile" in order to, to get to that.

And that may have just been too much, I don't know.

Hiroshi: But the claim that their children of invading armies would be consistent with the use of invasion repeatedly in executive orders from the administration.

Alex: Amanda, so great to have you join us here, we're going to have fun going forward, and this was a great conversation.

Hiroshi: Welcome, Amanda.

Amanda: Thank you. Happy to be here.