

No. 15-981

IN THE
Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

**BRIEF IN OPPOSITION BY RESPONDENTS
AMERICAN SAMOA GOVERNMENT AND THE
OFFICE OF CONGRESSWOMAN AUMUA
AMATA OF AMERICAN SAMOA**

MICHAEL F. WILLIAMS

Counsel of Record

KATHLEEN A. BROGAN

KIRKLAND & ELLIS LLP

655 Fifteenth St., N.W.

Washington, DC 20005

(202) 879-5000

michael.williams@kirkland.com

Counsel for Respondents

May 11, 2016

QUESTION PRESENTED

Whether the Court of Appeals correctly held, consistent with more than a century of precedent and unbroken historical practice, that the Citizenship Clause of the United States Constitution does not automatically extend birthright citizenship to persons born in the unincorporated territory of American Samoa, over the objections of the elected representatives and government of the people of American Samoa and in violation of the American Samoan people's right to self-determination.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
BRIEF FOR RESPONDENTS	1
STATEMENT	3
A. The United States and Its Territories	3
B. The American Samoan Way of Life	6
C. The Lawsuit.....	8
REASONS FOR DENYING THE PETITION	10
I. The D.C. Circuit’s Ruling Respects <i>Fa’a Samoa</i> and Is the Only Sensible Result.	10
II. The D.C. Circuit’s Ruling Affirms the Political Autonomy and Right to Self-Determination of the People of American Samoa.....	18
A. The People of American Samoa Are Entitled to Choose Their Own Political Arrangements.	18
B. Congress—Not the Courts—Extended Citizenship to Other Territories and Never Over Their Objections.	22
CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-Day Saints v. Hodel</i> , 830 F.2d 374 (D.C. Cir. 1987).....	13
<i>Hirabayashi v. United States</i> , 320 U.S. 81 (1943).....	12
<i>Kennett v. Chambers</i> , 55 U.S. (14 How.) 38 (1852).....	18
<i>King v. Andrus</i> , 452 F. Supp. 11 (D.D.C. 1977).....	24
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	16
<i>Nunez v. City of San Diego</i> , 114 F.3d 935 (9th Cir. 1997).....	16
<i>Qutb v. Strauss</i> , 11 F.3d 488 (5th Cir. 1993).....	17
<i>Ramos v. Town of Vernon</i> , 353 F.3d 171 (2d Cir. 2003)	16
<i>Schleifer v. City of Charlottesville</i> , 159 F.3d 843 (4th Cir. 1998).....	17
<i>Spencer v. Casavilla</i> , 903 F.2d 171 (2d Cir. 1990)	16
<i>United States v. Wheeler</i> , 254 U.S. 281 (1920).....	16
<i>Wabol v. Villacrusis</i> , 958 F.2d 1450 (1990).....	15

CONSTITUTIONAL PROVISIONS

Revised Const. of Am. Samoa art. 1 § 1.....	5
Revised Const. of Am. Samoa art. 1 § 2.....	5
Revised Const. of Am. Samoa art. 1 § 3.....	7
Revised Const. of Am. Samoa art. 1 § 5.....	5
Revised Const. of Am. Samoa art. 2, § 3.....	12
Revised Const. of Am. Samoa arts. 2-4	5

STATUTES

8 U.S.C. § 1101(a)(29)	23
8 U.S.C. § 1406	23, 28
8 U.S.C. § 1407	23, 26
8 U.S.C. § 1408(1).....	23
8 U.S.C. § 1421	23, 26
48 U.S.C. § 1421	26
Act of Mar. 3, 1917, 39 Stat. 1132	28
Act of June 22, 1936, 49 Stat. 1807 (1936) (codified at 48 U.S.C. § 1405 (1936)	28
Act of July 22, 1954, 68 Stat. 497 (1954) (codified at 48 U.S.C. § 1541 (1954)	29
Act of March 24, 1976, 90 Stat. 266.....	23
Am. Samoa Code Ann. § 2.1402(d)	21
Am. Samoa Code Ann. § 37.0204(a)	13
Am. Samoa Code Ann. § 37.0204(a-b)	14
Jones-Shafroth Act of 1917, Pub. L. 64-368, 39 Stat. 951	23, 29

LEGISLATIVE HISTORY

H.R. Rep. No. 1677 (1950).....	27
H.R.J. Res. 549, 94th Cong. (1976).....	26
<i>Civil Government for Porto Rico:</i>	
<i>Hearings on H.R. 8501 Before the H. Comm. on Insular Affairs, 64th Cong. (1916)</i>	29
<i>Civil Government for Guam:</i>	
<i>Hearing on S. 185, S. 1892 and H.R. 7273 Before the Subcomm. of the S. Comm. on Interior and Insular Affairs, 81st Cong. 44 (1950)</i>	27, 28
<i>Revised Constitution of Am. Samoa:</i>	
<i>Hearing Before the Subcomm. on Energy Conservation and Supply of the Comm. on Energy and Natural Res., 98th Cong. 46 (1984).....</i>	14, 17, 21, 24

OTHER AUTHORITIES

1 Joseph Story, <i>Commentaries on the Constitution of the United States</i> (Thomas M. Cooley ed., 4th ed. 1873)	18
Alexander M. Bickel, <i>The Morality of Consent (1975)</i>	19
Arnold H. Leibowitz, <i>American Samoa: Decline of a Culture,</i> 10 Cal. W. Int'l L.J. 220 (1980).....	7, 11, 13
Arnold H. Liebowitz, <i>Defining Status: A Comprehensive Analysis of United States Territorial Relations (1989)</i>	11, 12, 25, 26, 28
Cession of Manu'a Islands, Jul. 16, 1904, U.S.-Manua Samoa, <i>reprinted in Am.</i>	

Samoa Code Ann., Historical Documents and Constitutions (1992)	6
Cession of Tutuila and Aunu'u, Apr. 17, 1900, U.S.-Tutuila Samoa, <i>reprinted in</i> Am. Samoa Code Ann., Historical Documents and Constitutions (1992)	6
Daniel E. Hall, <i>Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories</i> , 2 Asian-Pac. L. & Pol'y J. 3 (2001)	11, 15, 16
Derek Heater, <i>Citizenship: The Civic Ideal in World History, Politics and Education</i> (3d ed. 2004)	19
Ediberto Román & Theron Simmons, <i>Membership Denied: Subordination and Subjugation Under United States Expansionism</i> , 39 San Diego L. Rev. 437 (2002)	20
Jeffrey B. Teichert, <i>Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa</i> , 3 Gonz. J. Int'l L. 35 (2000)	7, 14
John Adams, <i>Answer of the House</i> , <i>reprinted in The Briefs of The American Revolution</i> (John Philip Reid ed., 1981)	22
Jon M. Van Dyke, <i>The Evolving Legal Relationships Between the United States and Its Affiliated U.S-Flag Islands</i> , 14 U. Haw. L. Rev. 445 (1992)	29
Lowell D. Holmes, <i>Quest for the Real Samoa: The Mead/Freeman Controversy & Beyond</i> (1987)	11

Neil Weinstock Netanel, <i>Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory</i> , 88 Calif. L. Rev. 395 (2000)	19
<i>Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands</i> (1961)	25
Stanley K. Laughlin, Jr., <i>Cultural Preservation in Pacific Islands: Still A Good Idea-and Constitutional</i> , 27 U. Haw. L. Rev. 331 (2005).....	7
Statement by the Representative of American Samoa, Pacific Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism: Current Realities and Prospects (June 1, 2012), <i>available at</i> http://www.un.org/en/decolonization/pdf/crp_2012_american_samoa.pdf	20
Statement of Jay Kenneth Katzen on American Samoa, U.S. Mission to the United Nations (Nov. 18, 1976)	20
Statement of Cong. Eni F.H. Faleomavaega, Before the United Nations Special Committee on Decolonization (May 23, 2001), <i>available at</i> http://www.oocities.org/west_papua/Faleomavaega.htm	4
<i>The Future Political Status Study Commission of American Samoa</i> (2007)	21
W. Ofuatey-Kodjoe, <i>The Principle of Self-Determination in International Law</i> 79 (1977).....	20

BRIEF FOR RESPONDENTS

This case presents the question of whether the Court should, for the first time in the nation's history, extend United States citizenship by judicial fiat to residents of an unincorporated territory of the United States. The answer to that question, according to the Court's precedent and historical practice for more than a century, is plainly "no." Whenever the United States has extended citizenship to the inhabitants of an unincorporated territory, it has done so through congressional legislation, not through judicial intervention. This practice is more important than ever today, as only congressional legislation can account for the distinctive political and cultural considerations that should govern whether residents of a territory of the United States may choose to accept the privileges and responsibilities of United States citizenship.

This is an inconvenient brief for Petitioners and their *amici*. The Petitioners—a group of individual United States nationals—urge the Court to extend birthright citizenship to American Samoa. Petitioners' *amici*—a collection of academics, former judges, non-profit organizations, and representatives of *other* states and territories (*i.e.*, not American Samoa)—advance various scholarly theories that such an extension of birthright citizenship is necessary and mandatory under the Constitution.

But the leaders of American Samoa, represented here by the American Samoa government and the Congresswoman from American Samoa, disavow the Petitioners' claims and have opposed this lawsuit at every turn. This is because the people of American Samoa zealously guard their rights of self-

determination and are fiercely protective of *fa'a Samoa*, traditional Samoan ways that might be threatened by a fundamental change in the status of the American Samoan people. Even the most elegant legal theories, and even the most interesting legal scholarship, cannot correct the basic flaw in Petitioners' claims: namely, Petitioners would deprive the people of American Samoa of their rights to determine their own status, even though those rights were an important condition of American Samoa's association with the United States.

At bottom, the arguments advanced by Petitioners and their *amici* thus amount to a plea that this Court extend United States citizenship to the American Samoan people, whether they like it or not. These arguments are untenable, and the Court should deny the petition, for the following reasons:

First, extending birthright citizenship to people who do not want it violates every legal principle of self-determination, sovereignty, and autonomy. Many aspects of *fa'a Samoa*—the Samoan way of life—are truly unique within the United States, and the people of American Samoa are dedicated to preserving their traditional culture. The people of American Samoa believe, with good justification, that a fundamental change in their status, such as the judicial extension of United States citizenship, could threaten *fa'a Samoa*. It would be impractical and anomalous for the Court to impose such a change upon American Samoa against its will.

Second, whether birthright citizenship should extend to the people of American Samoa is a question for the people of American Samoa and its elected representatives, and not for this Court to decide. In

every other case in which people born in overseas territories were granted birthright citizenship, Congress, not the courts, has made that decision in conjunction with the elected representatives of those territories. There is simply no legal or practical basis for upsetting more than a century of precedent establishing that the Citizenship Clause does not automatically apply in every unincorporated territory of the United States.

STATEMENT

A. The United States and Its Territories

Between 1857 and 1947, the United States acquired all of the geographic areas later known as the insular possessions or territories of the United States by purchase, conquest, or cession. The United States first took possession of a series of uninhabited islands in the Pacific containing deposits of guano, which was prized for its use in gunpowder and agricultural fertilizer. In 1899, Spain ceded control of Guam, the Philippines, and Puerto Rico to the United States as a result of the Spanish-American War in the Treaty of Paris. In 1900, the *matai*, traditional Samoan leaders, ceded sovereignty of certain of the Samoan Islands to the United States. In 1917, the United States purchased the U.S. Virgin Islands from Denmark. Finally, in 1947, the United Nations entrusted the United States with the Trust Territory of the Pacific Islands, which included the Marshall Islands, Federated States of Micronesia, Northern Mariana Islands, and Palau. Today, the Territory of Guam, the Territory of American Samoa, the Territory of the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the

Commonwealth of the Northern Mariana Islands (CNMI) all remain territories of the United States.

The United States has always considered each territory individually, basing its territorial policies on a combination of self-determination and particularized economic assistance. Thus, the relationship between the United States and each territory has changed over time in response to the will of each territory's inhabitants. The Philippines gained self-governance and, eventually, full independence. The Marshall Islands, Federated States of Micronesia, and Palau became independent, but freely associated with the United States after the United States' trusteeship ended. And Congress eventually conferred U.S. citizenship on the citizens of the unincorporated territories of Guam, the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands.

American Samoa is unique among these territories. In contrast to all other U.S. territories, "American Samoa has never been taken as a prize of war, and never been annexed against the will of [its] people." See Statement of Cong. Eni F.H. Faleomavaega before the United Nations Special Committee on Decolonization (May 23, 2001), *available at* http://www.oocities.org/west_papua/Faleomavaega.htm. Instead, American Samoa's traditional leaders, the *matai*, voluntarily ceded sovereignty to the United States Government in 1900. See Cession of Tutuila and Aunu'u, Apr. 17, 1900, U.S.-Tutuila Samoa, *reprinted in* Am. Samoa Code Ann., Historical Documents and Constitutions (1992).

From thereon, those same traditional leaders and their successors have maintained their essential role in a predominantly self-governing territory. The American Samoa Constitution establishes a bicameral legislature, elected by the Samoan people; a judiciary appointed by the Secretary of the Interior; and a popularly-elected territorial governor. *See* Revised Const. of Am. Samoa arts. 2–4. It also includes a Bill of Rights that recognizes freedom of speech, freedom of religion, due process under law, freedom from unreasonable searches and seizures, and many other protections of civil rights. *See* Revised Const. of Am. Samoa art. 1 §§ 1, 2, 5. And since 1978, American Samoa has had representation in the U.S. House of Representatives.

Today, American Samoans are born U.S. nationals, not U.S. citizens. They owe allegiance to the United States, can freely enter the United States, and may apply for U.S. citizenship without first becoming a permanent resident. Many American Samoans also serve with distinction in the U.S. Armed Forces. Although American Samoans are proud of their relationship with the United States, they nonetheless have not achieved consensus as to whether they should ask Congress to grant them citizenship.

B. The American Samoan Way of Life

*A lele le Toloa, e toe ma'au lava i le vai.*¹

Even after voluntarily ceding sovereignty to the United States in 1900, American Samoa has retained its own vibrant and distinctive culture. *See* Pet. App. at 23a (“American Samoans take pride in their unique political and cultural practices, and they celebrate its history free from conquest or involuntary annexation by foreign powers.”). The original deeds of cession make express provision for the preservation of Samoan culture. *See* Cession of Tutuila and Aunu'u, Apr. 17, 1900, U.S.-Tutuila Samoa and Cession of Manu'a Islands, Jul. 16, 1904, U.S.-Manua Samoa, *reprinted in* Am. Samoa Code Ann., Historical Documents and Constitutions (1992).

The American Samoan way of life, *fa'a Samoa*, is of critical importance to the American Samoan people. As one author has put it, *fa'a Samoa* is “more than merely a set of laws, norms, and social conventions. The *fa'a Samoa* is the essence of being Samoan, and includes a unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their experience as a distinct race.” Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 Gonz. J.

¹ “Wherever the Toloa bird may travel, it will always return and settle back to its native waters.” American Samoa Proverb.

Int'l L. 35, 4 (2000). Many aspects of *fa'a Samoa* are wholly unlike anything in either the other territories or the continental United States. And this rich and unique cultural heritage permeates every level of Samoan society, from the individual, to the familial, to the institutional.

Samoa households, for example, are notable for their organization according to large, extended families, known as *'aiga*. See Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still A Good Idea—and Constitutional*, 27 U. Haw. L. Rev. 331, 337 (2005). These extended families, under the authority of *matai*, or chiefs, remain a fundamental social unit in Samoan society. See Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int'l L.J. 220, 224–25 (1980). Deep kinship and social ties also contribute to American Samoans' strong sense of community. For example, the *matai* traditionally organize the resources of the *'aiga* to undertake projects for the benefit of the entire community. *Id.* at 224. And communal ownership of land remains the fundamental aspect of Samoan identity; indeed, other important parts of Samoan culture (such as the *'aiga* and *matai*) are intimately and historically predicated upon control of the land. See *id.* at 222–23. As such, the American Samoa Bill of Rights specifically provides for restrictions on alienation of land to prevent “the destruction of the Samoan way of life and language, contrary to [the] best interests [of the Samoan people].” Revised Const. of Am. Samoa art. 1, § 3. These traditions are merely representative of a culture unlike anything in the United States or its other territories—one that Congress has both recognized and preserved for over a century.

C. The Lawsuit

Five U.S. nationals born in American Samoa and the Samoan Federation of America, a private organization serving Samoans in Los Angeles, brought suit in the U.S. District Court for the District of Columbia claiming a right to citizenship under the Fourteenth Amendment's Citizenship Clause by birth. Pet. App. 24a–25a. The complaint also alleged that the failure of the U.S. government to recognize this right had caused them various harms. *Id.* at 28a. For purposes of resolving the complaint on a motion to dismiss, the courts have assumed that these alleged harms exist.

The Government moved to dismiss these Petitioners' complaint, and the Honorable Eni Faleomavaega, former Congressman from the American Samoa, submitted an *amicus* brief in support of the motion. *Id.* at 25a–26a. In that pleading and related argument, Congressman Faleomavaega explained that extending birthright citizenship to the Petitioners by judicial fiat would have unanticipated and potentially harmful consequences for American Samoa culture and cautioned the court not to interfere with the political autonomy and democratic process of self-determination to which the American Samoa government is entitled. *Id.* at 26a–27a, 42a–43a.

The district court dismissed the complaint. *Id.* at 43a. Specifically, it held that the Citizenship Clause of the Fourteenth Amendment did not guarantee birthright citizenship to the Petitioners based on the plain language of the Constitution, longstanding jurisprudence interpreting the Fourteenth Amendment, including the *Insular* framework,

enduring tradition, and pragmatic considerations. *Id.* at 33a–41a. In doing so, the district court cited Congressman Faleomavaega’s observations that longstanding practices established that democratic processes should govern whether unincorporated territories would attain statutory citizenship from Congress. *Id.* at 42a.

The American Samoa government and Congressman Eni F. H. Faleomavaega intervened on appeal. The Honorable Aumua Amata subsequently succeeded Congressman Faleomavaega as the Congressional Representative from American Samoa.

The U.S. Court of Appeals for the District of Columbia unanimously affirmed the order granting the motion to dismiss. Pet. App. 2a. In so doing, it held that the Citizenship Clause did not guarantee birthright citizenship to persons born in American Samoa. *Id.* As an initial matter, it explained that the application of the Citizenship Clause to unincorporated territories was not obvious from its plain text, legislative history, or the common law context. *Id.* at 5a–11a. In so doing, it reiterated the district court’s reasoning, invoking the framework of the *Insular Cases* to distinguish between incorporated territories intended for statehood and in which the entire Constitution automatically applies, from unincorporated territories, such as American Samoa, not intended for statehood and in which only certain “fundamental” rights apply. *Id.* at 11a–14a.

The court then determined that there is no set, fundamental determinant of citizenship that is integral to free society. *Id.* at 14a–17a. Examining what it determined to be essential principals of a

democratic republic, the court concluded that it would be anomalous and even culturally imperialistic to hold that the Constitution imposed citizenship over the objections of American Samoans themselves, as expressed through their elected representatives. *Id.* at 17a–20a.

Certiorari should be denied as the district court’s dismissal of Petitioners’ complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure was plainly correct and based on the text of the Constitution, binding precedent, historical tradition, and practicality.

REASONS FOR DENYING THE PETITION

I. The D.C. Circuit’s Ruling Respects *Fa’a Samoa* and Is the Only Sensible Result.

The American Samoan way of life, *fa’a Samoa*, is of fundamental importance to the American Samoan people, and Congress has done its part to help preserve this unique culture for over a century. Petitioners ignore the anomalous and potentially disruptive consequences for the people and culture of American Samoa that would result from a judicial determination that American Samoans are automatically American citizens. Such a judicial determination could threaten certain aspects of *fa’a Samoa*, including its basic social structures, its traditional practices with respect to alienation of land, and its religious customs—all of which are constitutionally-protected principles of American Samoan society. *See* Revised Const. of Am. Samoa art I, § 3 (“It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the

destruction of the Samoan way of life and language.”).

Social Structure. First, citizenship by judicial fiat could threaten the basic structure of American Samoan society. American Samoan households are organized according to large, extended families, known as *‘aiga*. See Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int’l L.J. 220, at 224–25. *Matai*, holders of hereditary chieftain titles, regulate village life. See Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 Asian-Pac. L. & Pol’y J. 3, *71–72 (2001) (quoting Lowell D. Holmes, *Quest for the Real Samoa: The Mead/Freeman Controversy & Beyond* 38 (1987)).

The United States has always recognized the *matai* system in American Samoa. See Arnold H. Liebowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations*, at 440 (1989). Although the United States initially imposed a few changes to the *matai* structure by suppressing some titles and transferring governmental recognition of authority from certain high ranking *matais* to lesser ranking *matais*, the basic *matai* structure was untouched and is preserved today. See *id.* at 441. When American Samoa was under the authority of the Navy from 1900–1951, it was customary for the naval government to meet annually with the district governors whom had been appointed by the naval governor on the basis of their rank within the *matai* system. *Id.* This annual meeting, or *fono*, eventually

evolved into what is the American Samoa Legislature (*Fono*) today. *Id.*

In 1951, U.S. authority over American Samoa was transferred from the naval government to the Department of the Interior. Following the transfer of authority, the Department of the Interior approved the American Samoa Code, which provides for registration of the *matai* title limits, and limits the Senate to persons who are *matai*, despite the U.S. constitutional ban on titles. *Id.*

The prominence of *matai* in American Samoan culture is recognized by limiting eligibility to serve in the upper house of the territorial legislature to “a registered *matai* of a Samoan family who fulfills his obligations as required by Samoan custom in the county from which he is elected.” Revised Const. of Am. Samoa art. 2, § 3. Were all American Samoan people granted United States citizenship, this tradition could be subjected to scrutiny under the Equal Protection Clause. Indeed, this Court has observed that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). While it is far from predetermined that precedent would require abolition of the *matai* system if the Court extended United States citizenship to American Samoans, there is good reason for the people of American Samoa to urge caution in any societal changes that could imperil their revered cultural institutions.

Land Alienation. In addition to endangering the role of the *matai*, citizenship by judicial fiat could also compromise the ways in which land in American

Samoa is owned and alienated. The ‘*aiga*, which can range in number from dozens to thousands, owns the land in common for the benefit of the group, and the property is managed via the *matai*. See Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int’l L.J. at 222–24. Each *matai*’s power rests in control over the land, without which he would have no authority. The *matai*, in turn, supervise the economic activity of the common land and meet with each other in a council (*fono*) to organize larger projects. *Id.* at 224.

American Samoan social institutions revolve around the communal ownership and management of the land for the good of the community. More than ninety percent of the land in American Samoa is communally owned. *Id.* at 239. Alienation of communal land is strictly regulated, to the extent that the Governor himself must approve the sale. Am. Samoa Code Ann. § 37.0204(a) (1992). Thus, it is unsurprising that the D.C. Circuit has observed that “[c]ommunal ownership of land is the cornerstone of the traditional Samoan way of life.” *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 377 (D.C. Cir. 1987). It is this complex relationship that the Samoans sought to protect in the Instruments of Cession. As the D.C. Circuit more recently noted, this long expressed concern that the extension of United States citizenship to the territory could potentially undermine this aspect of the Samoan way of life plays a large part in the reluctance and inability of the American Samoan people to come to a collective consensus in requesting a change in status. Pet. App. 18a.

Furthermore, Samoan law restricts the sale of community land to anyone with less than fifty percent racial Samoan ancestry. Am. Samoa Code Ann. § 37.0204(a–b). This restriction is consistent with practice going back to when the United States assumed possession of American Samoa in 1900 and Commander B.F. Tilley prohibited the alienation of land to non-Samoans. See Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 Gonz. J. Int'l L. 35, 17 (2000).

Notably, the Department of Justice has recognized the role that American Samoans' status as noncitizen nationals plays in preserving traditional aspects of Samoan culture. The Department of Justice explained during American Samoa's constitutional debates of 1984 that the maintenance of *fa'a Samoa*:

has been based partly on treaty and partly simply on our sense of obligation of not imposing our ways arbitrarily on others. That protection . . . has been accomplished in part through a legal isolation of American Samoa, which stems *in part from the fact that American Samoans are noncitizen nationals rather than American citizens.*

Statement of Robert B. Shanks, *Revised Constitution of Am. Samoa: Hearing before the Subcomm. on Energy Conservation and Supply of the Comm. on Energy and Natural Res.*, 98th Cong. 46 (1984) (“Const. Hearing”) (emphasis added).

Petitioners and some of their *amici* argue that the American Samoan people should not be concerned that United States citizenship would threaten

traditional Samoan practices with respect to ownership and alienation of land. They argue that racial-alienation laws have been upheld in other territories against challenges under the Equal Protection Clause. *See Wabot v. Villacrusis*, 958 F.2d 1450, 1460–61 (1990). It is ironic, though, that Petitioners, who are asking the Court to overturn decades of established Supreme Court precedent, point to caselaw by a federal court of appeals as a guarantee that Samoan customs will abide. Moreover, the alienation laws in places such as the Commonwealth of the Northern Mariana Islands, where such laws have been upheld, are unlike the traditional practices in American Samoa. In the former case, the laws simply restrict who may buy land. *See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, Proclamation No. 4534, 42 Fed. Reg. 56,593 (Oct. 24, 1977) (restricting for a period of time “the alienation of permanent and long-term interest in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent”). In American Samoa, the racial land alienation rules are tied into the *communal* ownership of land and its relation to both the *matai* hierarchy and the *‘aiga* clan system. All of this could be endangered by judicial imposition of United States citizenship.

Religion. Unlike the United States, American Samoa has an exceptionally homogenous culture of religion. Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 Asian-Pac. L. & Pol’y J. 3, *71 (2001) (“One hundred percent of Samoans report being Christian.”).

Religious observance is not only a social norm, it is enforced by local leaders, the village *matai*: “[i]n most villages in American Samoa, there are both early evening ‘prayer’ curfews as well as nocturnal curfews.” *Id.* at *97. American Samoans themselves characterize the early evening curfew as having “a religious purpose.” *Id.* Curfews are enforced by young men who punish violators with a range of sanctions that could “include requiring the offender to feed the entire village or the village council, fining the offender as much as \$100, reprimanding the offender, withdrawal of titles in extreme cases, banishment, and withholding village protection of the family of the offender.” *Id.* at *98.

It is not difficult to imagine the disruptive consequences that the extension of United States citizenship might create for the American Samoa tradition of prayer curfews. First, the Establishment Clause, whatever else it proscribes, has been interpreted to prohibit attempts to aid religion through government coercion. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 606 (1992). Second, “most curfews in American Samoa apply to both adults and juveniles,” Hall, *Curfews, Culture, and Custom*, 2 Asian-Pac. L. & Pol’y J. at *97, and the imposition of blanket adult curfews to United States citizens could be unconstitutional under existing caselaw.²

² At least two circuits have expressly recognized the “right to free movement” within a state as a fundamental substantive due process right subject to strict scrutiny. *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (citing *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) (“the Constitution . . . protects the right to travel freely within a single state”)); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *United States v. Wheeler*, 254 U.S. 281, 293 (1920); *cf.*

For more than a century, the people of American Samoa have worked with Congress to protect *fa'a Samoa* and to develop a unique relationship between the unincorporated territory and the United States. For example, when Congress voted to amend the American Samoa Constitution in 1984, it made clear that “[i]t has been the constant policy of the United States, partly as a matter of honor, partly as a result of treaty obligations, not to impose our way of life on Samoa.” Statement of Robert B. Shanks, *Const. Hearing* at 53. Indeed, as Governor Peter Tali Coleman, the first person of Samoan descent to serve as governor of American Samoa and also the first popularly-elected governor of American Samoa, explained to Congress during the same hearing, “[t]he United States in turn has guaranteed protection to American Samoa not only of our islands themselves but also of our land, customs and traditions.” Statement of Hon. Peter Tali Coleman, *Const. Hearing* at 10. Governor Coleman noted, moreover, that “Congress has played, and we pray, that it will continue to play a meaningful role in our development, and particularly, the role of being the protector of the Samoan way of life.” *Id.* at 16. Extending United States citizenship by judicial fiat would upend this longstanding relationship and could threaten *fa'a Samoa*.

Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (while allowing “less than the strictest level of scrutiny” to be applied to juveniles, still requiring “more than rational basis review”); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (assuming without deciding that juvenile curfew implicated a fundamental right to freedom of movement and applying intermediate scrutiny).

II. The D.C. Circuit’s Ruling Affirms the Political Autonomy and Right to Self-Determination of the People of American Samoa.

A. The People of American Samoa Are Entitled to Choose Their Own Political Arrangements.

The American Samoan people have never reached a consensus regarding the imposition of birthright citizenship. Thus, “[t]he imposition of citizenship on the American Samoan territory is impractical and anomalous at a . . . fundamental level.” Pet. App. 19a. Consent of the governed is the foundational premise of a democratic republic. *Id.* at 20a (*citing Kennett v. Chambers*, 55 U.S. (14 How.) 38, 41 (1852)). As Justice Story explained:

[C]ivil society has its foundation in a voluntary consent or submission; and, therefore, it is often said to depend upon a social compact of the people composing the nation. And this, indeed, does not, in substance, differ from the definition of it by Cicero, *Multitudo, juris consensu et utilitatis communione sociata*; that is . . . a multitude of people united together by a common interest, and by common laws, to which they submit with one accord.

¹ Joseph Story, *Commentaries on the Constitution of the United States* 225–26 (Thomas M. Cooley ed., 4th ed. 1873) (footnotes omitted). Accordingly, the state “arises from, and its legitimacy depends upon, the express or tacit consent of individuals. The state, in turn, may rightfully exercise its authority only in

accordance with the terms of that ‘social contract.’” Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 Calif. L. Rev. 395, 409 (2000).

Citizenship, as an effect of the social compact, defines the relationship between the individual and the state. See Alexander M. Bickel, *The Morality of Consent* 33 (1975). However, the significance of citizenship is not limited to the sum of its benefits nor a certain set of rights. “Citizenship contain[s] a cluster of meanings related to a defined legal or social status, a means of political identity, a focus of loyalty, a requirement of duties, an expectation of rights and a yardstick of good social behavior.” Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* 166 (3d ed. 2004). The imposition of a compact of citizenship, directly conflicting with the will of the American Samoan people, therefore serves as an “irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa.” Pet. App. 23a.

The Circuit Court paid proper attention to modern standards of majoritarian self-determination in deciding that an extension of birthright citizenship without the will of the governed is in essence a form of “autocratic subjugation” of the American Samoan people. *Id.* at 20a. An extension of constitutional citizenship to American Samoans through judicial means would short-circuit and undercut the democratic process of self-

determination, undeniably putting American Samoa on a path to greater union with the United States.

In contrast, the United States government, specifically through the administration of the Department of the Interior, has continuously supported the self-determination efforts of the American Samoan people.³ With sincere regard for the interests of its electorate, the elected officials of American Samoa continue to evaluate the best steps for maintaining or changing the Samoan relationship with the United States through an effective democratic method. *See The Future Political Status*

³ See Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 San Diego L. Rev. 437, 523 (2002); Statement of Jay Kenneth Katzen on American Samoa, U.S. Mission to the United Nations (Nov. 18, 1976) (“The United States is fully aware and freely acknowledges the obligations regarding non-selfgoverning territories which it administers specified in Chapter 11 of the United Nations Charter, and the United States is fully committed to the principle of self-determination.”); Statement by the Representative of American Samoa, Pacific Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism: Current Realities and Prospects 4 (June 1, 2012), *available at* http://www.un.org/en/decolonization/pdf/crp_2012_american_samoa.pdf (The Department of the Interior’s “approach to the Territory’s political status and workings has always been one of greater self-determination for the people of American Samoa within constraints set by the current system.”); W. Ofuately-Kodjoe, *The Principle of Self-Determination in International Law* 79 (1977) (President Wilson states “[n]o peace can last or ought to last which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples [] from sovereignty to sovereignty as if they were property.”).

Study Commission of American Samoa 41 (Jan. 2, 2007) (incorporating the opinions of the Samoan people through a number of public hearings, including special hearings organized for the traditional leaders, the local government, and *faiifeaus* (Samoan religious leaders) under the auspices of the Office of Samoan Affairs).

The report of the American Samoa Future Political Status Study Commission, commissioned to “evaluate the impact of American Samoa’s political status and relationship with the United States as to the economic, cultural, land tenure, health, safety and social needs of American Samoa,” exemplifies the democratic efforts of Samoan elected officials to proceed according to the will of the American Samoan people. *See* Am. Samoa Code § 2.1402(d). Similarly, a deliberate distance between the territory and the law of the United States is necessary to respect the cultural autonomy of American Samoa and its way of life. *See* Statement of Hon. Salanoa S.P. Aumoeualogo, *Const. Hearing* at 15–16 (“American Samoa enjoy and welcome our present status as an unincorporated and unorganized territory of the United States. It signifies our desire to be part of the American Family, and at the same time, it preserves and protects our communal land and *matai* systems, the basic core of our Samoan way of life.”). As described above, the imposition of birthright citizenship would bridge this distance and usurp the political process of self-determination.

Should the American Samoan people decide to change their status with the United States, they have options to do so, including a closer relationship to the United States (like Puerto Rico or the CNMI),

free association (like the Marshall Islands or the Federated States of Micronesia), or even independence (like the Philippines). Moreover, even if the American Samoan people petition Congress for statutory citizenship within the current political framework, a change in territorial form as a commonwealth or organized, unincorporated territory has integral self-governance implications as well, which are best left to the will of the people of American Samoa.

By contrast, “impos[ing] citizenship by judicial fiat . . . requires [the Court] to override the democratic prerogatives of the American Samoan people themselves.” Pet. App. 2a. The democratic principles embedded in the social compact require self-determination as the only legitimate means to extending constitutional citizenship. A novel application of the Citizenship Clause would upset the political process and undeniably put American Samoa on a path to greater union with United States, an act of paternalism and overt cultural imperialism. See John Adams, *Answer of the House*, reprinted in *The Briefs of The American Revolution* 45, 63 (John Philip Reid ed., 1981) (“[The] Right to be governed by Laws made by Persons in whose Election they had a Voice . . . [is a] most essential Right, which discriminates Freeman from Vassals.”).

B. Congress—Not the Courts—Extended Citizenship to Other Territories and Never Over Their Objections.

Whether or not to extend United States citizenship to the people of American Samoa is a question for Congress and not the courts. Petitioners argue that citizenship is “a constitutional right” and

not “a matter of legislative grace.” Pet. at 15. That position is unsupported by territorial history.⁴ In *every other territory*, the grant of citizenship has been made by Congress, not the courts. See 48 U.S.C. § 1421 and 8 U.S.C. § 1407 (Guam); Jones-Shafroth Act of 1917, Pub. L. 64-368, 39 Stat. 951 (Puerto Rico); Act of March 24, 1976, 90 Stat. 266 (CNMI); 8 U.S.C. § 1406 (U.S. Virgin Islands). Neither the American Samoan people nor Congress has chosen to alter the status of American Samoa. Congress has designated American Samoa as an “outlying possession” of the United States, 8 U.S.C. 1101(a)(29), and declared that persons born to non-U.S. citizen parents in an outlying possession of the United States on or after its date of acquisition are nationals, but not U.S. Citizens, at birth. 8 U.S.C. 1408(1). When Congress had opportunity to amend the American Samoa Constitution in 1984, it made clear that it was a policy of the United States not to impose her way of life on American Samoa.

These grants of citizenship in other territories have also been made without any significant controversy from the people’s elected representatives. And rightly so, as questions of birthright citizenship are tied to questions of political status, and thus are necessarily political questions best left to the democratic process. Respect for the shared democratic traditions of the United States

⁴ Even with respect to territories that have been granted citizenship by Congress, there is a recognized difference between statutory and constitutional citizenship. See Pet. App. 14a (“This court, like the lower court, is also mindful of the years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional right.”)

and modern American Samoa dictates that the majoritarian will of the Samoan people determine their status at such time and in such manner as they themselves decide. *See King v. Andrus*, 452 F. Supp. 11, 15 (D.D.C. 1977) (“The institutions of the present government of American Samoa reflect . . . the democratic tradition.”). The court below found that, at this time, there is an “absence of evidence that a majority of the territory’s inhabitants endorse such a tie,” and, in fact, “the territory’s democratically elected representatives actively oppose such a compact.” Pet. App. 22a.

American Samoa has worked closely with Congress to maintain a deliberate distance between the territory and the law of the United States. It has done so because this distance is necessary to respect the cultural autonomy of American Samoa and its way of life. *See* Statement of Hon. Salanoa S.P. Aumoeualogo, *Const. Hearing* at 15, 16. If this Court chooses to bridge that distance by imposing citizenship on Samoans, it would effectively decide the political status of American Samoa without any democratic input. This would be both unjustified and anomalous when compared to the experience of other territories.

CNMI. Take, for example, the experience of the Commonwealth of the Northern Mariana Islands. There, Congress took action to promote self-determination and granted U.S. citizenship in response to the “clearly expressed [desires of the CNMI people] over the past twenty years through public petition and referendum.” H.R.J. Res. 549, 94th Cong. (1976).

Following World War II, Congress approved the Trusteeship Agreement for the former Japanese governed islands of the Northern Marianas, Marshall and Caroline in 1947. See Liebowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations*, at 526–27. “The Trusteeship was only three years old” when the CNMI people began the first in a series of democratic efforts to request political association with the United States. *Id.* at 527. In 1950, “the Northern Marianas House of Council and the House of Commissioners petitioned” the United States “to terminate the trusteeship and incorporate the Mariana Islands into the United States as a territory or possession.” *Id.* In 1961, a plebiscite was held on the most populated islands of the Northern Mariana Islands, resulting in a majority of votes favoring reintegration with the territory of Guam, which had been granted U.S. citizenship in 1950 via the Guam Organic Act. *Id.* As the Visiting Mission from the United Nations reported to the U.N. Trusteeship Council, “[t]here is an almost unanimous desire among the people in regard to seeking United States citizenship.” *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands* (1961) at 10. In 1963, another plebiscite was conducted and reflected a similar desire to reintegrate with Guam and to obtain U.S. citizenship. See Liebowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations*, at 527. Guam’s 1969 plebiscite vote *against* reintegration with the Northern Mariana Islanders, however, sent the people of Northern Marianas to seek a more direct solution for self-

government and permanent ties to the United States. *See id.* at 528.

On February 15, 1975, the “Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America” was signed by the United States and the Marianas Political Status Commission for the people of the Northern Mariana Islands, providing for, among other things, the collective naturalization of Northern Mariana Islanders at the same time that the United States trusteeship of the Northern Mariana Islands would terminate in 1986. H.R.J. Res. 549, 94th Cong. (1976). On February 20, 1975, “the covenant was approved by the unanimous vote of the Mariana Islands District Legislature . . . and by a 78.8% [vote] of the people of the Northern Mariana Islands voting in a plebiscite held on June 17, 1975. *Id.*”

Unlike the Commonwealth of the Northern Mariana Islands, American Samoa has not made the legislative and political decision to request a change in its status. Thus, the D.C. Circuit was correct in recognizing that the imposition of citizenship that directly conflicts with the will of the American Samoan people serves as an “irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism—if not overt cultural imperialism.” Pet. App. 23a.

Guam. The experience of Guam is also instructive. Guam was originally acquired by the United States under the Treaty of Paris, Dec. 10, 1898. Before it was statutorily granted in 1950 through the Guam Organic Act, 48 U.S.C. § 1421 and 8 U.S.C. § 1407, the Guamanian people had long

expressed a strong desire for United States citizenship. Prior to the Act's passage, the Guamanian legislature "repeatedly petitioned the Federal Government for United States citizenship." H.R. Rep. No. 1677 at 2 (1950). Not only that, the "elected representatives [of Guam] unanimously carried a resolution memorializing" their desire for Congress to "determine [their] civil rights and political status by the passage of an organic act providing, among other things, the establishment of the Territory of Guam, and the government thereof, and conferring United States citizenship upon certain of the inhabitants thereof." Statement of Franciusci B. Leon-Guerrero, Member of the House Council of the Guam Cong., *Civil Government for Guam: Hearing on S. 185, S. 1892 and H.R. 7273 Before the Subcomm. of the S. Comm. on Interior and Insular Affairs*, 81st Cong. 44 (1950). "[N]ot a single person" who appeared before the Congressional committee hearings on granting statutory citizenship to Guam "testified against passage of this measure." H.R. Rep No. 1677 at 2 (1950).

At the same time Congress considered citizenship for residents of Guam, it also considered a bill to grant citizenship to American Samoa. See H.R. Rep. No. 1677 at 8 (1950) (discussing H.R. 4500, "a bill to provide a civil government for American Samoa"). Samoan leaders expressed their strong opposition to citizenship, citing the "overwhelming desire of the people of Samoa not to make any change of their government at this time." Ltr. from High Chief Tufele-Faia'oga to Chief Clerk of Senate Committee on Interior and Insular Affairs, *Civil Government for Guam, Hearings on H.R. 7273 Before Senate Subcommittee of Committee on Interior and Insular*

Affairs, 81st Cong. 2d Sess. 866–67 (dated Feb. 27, 1950). Even *amici* for the Petitioners, including former elected officials of Guam, emphasize that the people of Guam desired citizenship and fought to secure it, unlike the people of American Samoa. See Brief for *Amici Curiae* Members of Congress and Former Governmental Officials at 18.

USVI. The case of the U.S. Virgin Islands also illustrates Congress's consideration of a territory's self-determination when determining the political status of a territory's citizens, even if not immediately. The United States purchased the U.S. Virgin Islands from Denmark in 1916 pursuant to a Convention ratified on January 17, 1917, after two previous attempts to purchase the islands had failed. Denmark attempted to negotiate U.S. citizenship for the Danish inhabitants of the Virgin Islands upon cession, but had to settle for a preferred status over non-Danish Virgin Islanders. See Liebowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations*, at 248. Congress passed the first Organic Act on March 3, 1917 that provided for a temporary government, but failed to resolve the citizenship of the Virgin Islanders. Act of Mar. 3, 1917, 39 Stat. 1132.

Then, in 1927, Congress granted U.S. citizenship to the people of the Virgin Islands. See 8 U.S.C. § 1406. And as local ambitions for greater self-determination by Virgin Islanders grew, Congress passed subsequent Organic Acts in 1936 and 1954 that each provided for a greater degree of self-governance. See Act of June 22, 1936, 49 Stat. 1807 (1936) (codified at 48 U.S.C. § 1405 (1936)); Act of July 22, 1954, 68 Stat. 497 (1954) (codified at 48

U.S.C. § 1541 (1954)). In 1964, the Virgin Islands held its first Constitutional Convention and adopted a Resolution on Status which stated, among other things, that the people of the Virgin Islands “are unalterably opposed to independence from the United States of America,” and wish to “remain an unincorporated territory under the constitutional system of the United States” In 1988, Congress approved a constitution drafted by the Virgin Islands. See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S-Flag Islands*, 14 U. Haw. L. Rev. 445, 498 (1992). And in 1993, a referendum held on the status of the U.S. Virgin Islands further reflected the desire of the people of the Virgin Islands to maintain their relationship with the United States. *Id.*

Puerto Rico. Like Guam, Puerto Rico was originally acquired by the United States under the Treaty of Paris, Dec. 10, 1898. It was granted citizenship not long after. See Jones-Shafroth Act of 1917, Pub. L. 64-368, 39 Stat. 951. Similar to the experience of other territories, delegates from Puerto Rico’s controlling political party expressed support for citizenship at Congressional hearings on the Jones-Shafroth Act. Statement of Cayetano Coll Cuchi, *Civil Government for Porto Rico: Hearings on H.R. 8501 Before the H. Comm. on Insular Affairs*, 64th Cong. (1916); see also Statement of Antonio R. Barcelo on Behalf of the Unionist Party of Porto Rico, *Civil Government for Porto Rico: Hearings on H.R. 8501 Before the H. Comm. on Insular Affairs*, 64th Cong. (1916)). Citizenship in all other territories, therefore, has been granted with the imprimatur of democratic will and Congressional inquiry, both of which are notably lacking here.

A judicial decision extending United States citizenship to the people of American Samoa would contravene these democratic processes and resolve for American Samoa important questions that should be left to the people of American Samoa. Ironically, under the guise of “equality,” the judiciary would achieve what the U.S. Navy could not: a conquest of American Samoa over the will of its people.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

May 11, 2016

Respectfully submitted,

MICHAEL F. WILLIAMS

Counsel of Record

KATHLEEN A. BROGAN

KIRKLAND & ELLIS LLP

655 Fifteenth St., N.W.

Washington, DC 20005

(202) 879-5000

michael.williams@kirkland.com

Counsel for Respondents