No.

IN THE

Supreme Court of the United States

LENEUOTI FIAFIA TUAUA,
VA'ALEAMA TOVIA FOSI, FANUATANU F. L. MAMEA,
ON BEHALF OF HIMSELF AND HIS THREE MINOR CHILDREN,
TAFFY-LEI T. MAENE, EMY FIATALA AFALAVA, AND
SAMOAN FEDERATION OF AMERICA, INC.,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourteenth Amendment's Citizenship Clause provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. American Samoa has been a United States Territory for more than a century. Yet persons born in American Samoa, alone among those born within the sovereign territorial limits of the United States, are denied recognition as U.S. citizens at birth. 8 U.S.C. § 1408(1).

The question presented is whether the Citizenship Clause entitles persons born in American Samoa, a U.S. Territory, to birthright citizenship.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All petitioners in this Court (plaintiffs-appellants below) are named in the caption.

Defendants-appellees below (respondents here) were the United States of America; the U.S. Department of State; John F. Kerry, in his official capacity as U.S. Secretary of State; and Michelle Bond, in her official capacity as U.S. Assistant Secretary of State for Consular Affairs.

The American Samoa Government and Aumua Amata, American Samoa's delegate to Congress, intervened in the court of appeals in support of defendants-appellees, and are therefore also respondents in this Court.

Petitioner Samoan Federation of America, Inc., is a 501(c)(3) non-profit organization that has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-23a) is reported at 788 F.3d 300. The district court's opinion (Pet. App. 24a-43a) is reported at 951 F. Supp. 2d 88. The court of appeals' order denying rehearing (Pet. App. 44a-45a) is not reported.

JURISDICTION

The court of appeals entered its judgment on June 5, 2015. A timely rehearing petition was denied on October 2, 2015. Pet. App. 44a-45a. On December 14, 2015, the Chief Justice extended the time for filing a petition for a writ of certiorari until February 1, 2016. No. 15A623. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced at Pet. App. 46a-59a.

STATEMENT

Few questions are more fundamental to the Nation's constitutional design than which persons are unconditionally entitled to claim the Nation as their own and to bear the rights and responsibilities of citizens. Only United States citizens can serve as voting members of Congress or as President, and States permit only citizens to vote. The scope of U.S. citizenship lay at the heart of the Civil War that nearly tore the Nation apart. A central feature of the Republic's response to that crisis was a constitutional amendment that, in its opening sentence, cemented the well-established common-law rule of *jus soli*—the right of the soil—into the Constitution's text. The Fourteenth Amendment's Citizenship Clause provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. The Clause's purpose was "'to put th[e] question of citizenship and the rights of citizens … beyond the legislative power.'" *Afroyim* v. *Rusk*, 387 U.S. 253, 263 (1967) (citation omitted). This case concerns whether Congress may, by fiat, subvert that constitutional safeguard to individual rights and limitation on its power by denying birthright citizenship to persons born within the sovereign limits of the United States who owe allegiance to this country.

Notwithstanding the Citizenship Clause's unequivocal promise of birthright citizenship, Congress has singled out persons born in American Samoa—part of the United States since 1900—as "nationals, *but not citizens*, of the United States." 8 U.S.C. § 1408(1) (emphasis added). Despite their birth in and allegiance to the United States, and despite the

sacrifices many have made defending the Nation in the military, persons born in American Samoa are branded with the label of "non-citizen national." That inferior, subordinate status deprives them of the full rights many of them have fought to defend—the right to vote, to bear arms, and to run for public office, among others. As every new citizen learns, Justice Brandeis once observed that "'[t]he only title in our democracy superior to that of President is the title of citizen.'"[1] Absent action by this Court, persons born in American Samoa will continue to be deprived of the latter, and forever barred from holding the former.

The court of appeals upheld Congress's classification of American Samoans as non-citizens, but the stakes of its departure from this Court's precedent merit further review. The Fourteenth Amendment's text, structure, history, and purpose *all* point to one conclusion: Birthright citizenship extends to persons born in U.S. Territories. Just five years after the Citizenship Clause was ratified, this Court recognized that it applies in States and Territories alike. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1873). And just two years before American Samoa ceded sovereignty to the United States, this Court held that the Clause constitutionalized the common-law rule that birthright citizenship extends throughout the country's territorial limits. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675-705 (1898).

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[1] U.S. Citizenship & Immigration Servs., *The Citizen's Almanac* 2 (2014), http://tinyurl.com/qfesah6 (brackets and citation omitted) (all Internet sites last visited Jan. 31, 2016).

The court of appeals disregarded these relevant precedents. It relied instead on the Insular Cases, a series of decisions that concerned neither the Citizenship Clause nor American Samoa, but rather addressed issues of revenue collection and criminal procedure in newly acquired Territories. Yet as this Court recently explained, "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory," but "not the power to decide when and where [the Constitution's] terms apply." *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008). Whatever the merit of the Insular Cases' territorial-incorporation doctrine, it does not govern the Citizenship Clause, which defines its own geographical scope. The court of appeals went even *beyond* the Insular Cases, narrowing the scope of constitutional rights applicable in Territories and subordinating them to the views of elected officials.

Without this Court's intervention, however, the court of appeals' decision is likely to be the final word for the foreseeable future. Other circuits share its misapprehension of the Insular Cases and *Wong Kim Ark*. And, because Congress currently singles out *only* American Samoa for such treatment, other cases presenting the issue are unlikely to arise.

Tens of thousands of persons born in American Samoa—whose citizenship has been uncertain for decades, and many of whom have defended the country with valor—should not be kept waiting for a definitive determination of whether they and their children may call themselves citizens. And the rights of four million Americans who live in other Territories should not be left in limbo by the court of appeals' troubling decision.

The petition should be granted.

1. Birthright citizenship for persons born in the United States has long been a fundamental tenet of American law. Although the Constitution referred to "Citizen[s] of the United States," and made citizenship a prerequisite to serving in Congress or the Presidency, U.S. Const. art. I, § 2, cl. 2, § 3, cl. 3; *id.* art. II, § 1, cl. 5, it originally did not define who was a "Citizen." Consistent with the principle that terms not defined in a Constitution "framed in the language of the English common law" should be read "in the light of" that common-law tradition, *Smith* v. *Alabama*, 124 U.S. 465, 478 (1888), courts looked to the common law to determine who was a citizen. *See*, *e.g.*, *Dawson's Lessee* v. *Godfrey*, 8 U.S. (4 Cranch) 321, 322-24 (1808); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 166 (1875).

The common-law rule regarding birthright citizenship was straightforward: "'the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth … owe obedience or allegiance to … the sovereign.'" *Wong Kim Ark*, 169 U.S. at 659 (quoting *Inglis* v. *Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring)). The geographic scope of birthright citizenship at common law was "birth locally within the dominions of the sovereign." *Ibid.*; *id.* at 655-58 (canvassing English cases); *see also*, *e.g.*, *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608).

Prior to American Independence, it was "universally admitted … that all persons within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects." *Inglis*, 28 U.S. (3 Pet.) at 120. After the Revolution, nothing "displaced in this country the fundamental

rule of citizenship by birth within its sovereignty." *Wong Kim Ark*, 169 U.S. at 658-63, 674; *accord*, *e.g.*, *United States* v. *Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866); *Lynch* v. *Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); *Leake* v. *Gilchrist*, 13 N.C. (2 Dev.) 73, 76 (1829); *Gardner* v. *Ward*, 2 Mass. 244 (1805). That included U.S. Territories. As Justice Story explained, "[a] citizen of one of our territories is a citizen of the United States." *Picquet* v. *Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828); *see also*, *e.g.*, William Rawle, *A View of the Constitution of the United States of America* 86 (2d ed. 1829) ("[E]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution."); C.A. Citizenship Scholars *Amicus* Br. 13-16.

2. The settled *jus soli* rule was temporarily disturbed by *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* infamously concluded, over powerful dissents, that one group of persons—African Americans—were not U.S. citizens regardless of birth in the United States because (the Court said) "they were … considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race … and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 404-05.

After the Civil War, Congress and the States emphatically repudiated *Dred Scott* by adopting the Fourteenth Amendment, which expressly codified the pre-existing common-law rule of birthright citizenship. The first sentence of Section 1 (the Citizenship Clause) provides that "[a]ll persons born or naturalized in the United States, and subject to the ju-

risdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, § 1. Both the Clause's advocates and opponents in Congress understood that it accorded citizenship to all persons born anywhere in the United States, including its Territories. *See*, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (Sen. Howard) (explaining, in introducing the Clause, that it declared what was "the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States"); *id.* at 2894 (Sen. Trumbull) (Clause "refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia"); *id.* at 2893 (Sen. Johnson) (there is "no better way to give rise to citizenship than the fact of birth within the territory of the United States").

As this Court explained, the Clause was adopted to "overtur[n] the *Dred Scott* decision" and to "pu[t] at rest" the proposition that "[t]hose … who had been born and resided always in the District of Columbia *or in the Territories*, though *within the United States*, were not citizens." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72-73 (emphases added). The Clause "reaffirmed in the most explicit and comprehensive terms" "the fundamental principle of citizenship by birth within the dominion." *Wong Kim Ark*, 169 U.S. at 675. By codifying in the Constitution this "ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country," *id.* at 693, its Framers sought "'to put th[e] question of citizenship and the rights of citizens … beyond the legislative power.'" *Afroyim*, 387 U.S. at 263 (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (Sen. Howard)).

In 1898, this Court held that, in light of the Citizenship Clause, the "established rule of citizenship by birth within the dominion" could not be "superseded or restricted, in any respect," by any "authority, legislative, executive or judicial." *Wong Kim Ark*, 169 U.S. at 674. Thus, "no act or omission of Congress … can affect citizenship acquired as a birthright, by virtue of the Constitution itself." *Id.* at 703. "Congress" had "no authority … to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *Ibid.*

3. Less than two years after *Wong Kim Ark*, American Samoa—the eastern islands of an archipelago in the South Pacific—became a U.S. Territory. Pet. App. 2a. In 1900, the traditional leaders of the Samoan islands of Tutuila and Aunu'u voluntarily ceded "all sovereign rights" in those islands "unto the Government of the United States of America." Instrument of Cession by Chiefs of Tutuila to U.S. Gov't, at 2 (Apr. 17, 1900). Four years later, the traditional leaders of the Samoan islands comprising the Manu'a island group also voluntarily ceded their lands "under the full and complete sovereignty of the United States." Instrument of Cession by Chiefs of Manu'a Islands to U.S. Gov't, at 2 (July 14, 1904); *see also Mulu* v. *Taliutafa*, 3 Am. Samoa 82, 89-90 (1953) ("cession of the Islands passed the sovereignty … to the United States"); 48 U.S.C. § 1661. In 1925, U.S. "sovereignty" over American Samoa was "extended" to include Swains Island, defined as "a part of American Samoa." 48 U.S.C. § 1662.

American Samoa has been part of the Nation ever since. Over the past century, its ties to the rest of the country have strengthened significantly as it has become part of the Nation's political, economic, and

cultural identity. C.A. App. 20-23. Approximately 55,000 people reside on the islands today, with many more American Samoans living throughout the rest of the Nation. *Id.* at 20-21. Students in public schools on the islands are taught in English using an American curriculum. *Id.* at 21. American Samoa's relationship with the United States is commemorated on quarters and postage stamps, and it is home to a National Park, National Marine Sanctuary, and National Historical Landmarks. *Id.* at 22.

American Samoans have blended fervent American patriotism with the proud continuation of Samoan culture and language. Each year this is on full display as American Samoan communities throughout the United States celebrate joining the Nation on "Flag Day," through lively parades and performances, including Vietnam veterans marching alongside cultural dancers and military honor guards raising the American flag, followed by traditional Samoan oratorical and musical ceremonies.[2]

American Samoans also have a rich history of U.S. military service. C.A. App. 21-22. "American Samoa yields the highest rate of military enlistment of any U.S. state or territory," and, as of 2014, the U.S. Army's full-time recruiting station in American Samoa "ranked #1 in recruitment out of the 885 Army recruiting stations and centers."[3] American Samoans have served in every major war of the 20th

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[2] *See, e.g.*, *Veterans Take Center Stage in 2015 Flag Day*, Talanei.com (Apr. 17, 2015), http://tinyurl.com/hjzb44c; *Flag Day 2015 at Veterans Memorial Stadium*, Samoa News (Apr. 17, 2015), http://tinyurl.com/gt2qygr.

[3] U.S. Army Reserve, American Samoa and the United States Army Reserve, http://tinyurl.com/zcdw3dq.

and 21st centuries, and on a per capita basis, its population has made a greater sacrifice in Iraq and Afghanistan than any State or Territory. C.A. App. 21.

Yet, today, persons born in American Samoa are the only U.S. nationals *not* recognized as U.S. citizens. Section 101(a)(29) of the Immigration and Nationality Act classifies American Samoa (including Swains Island)—and *only* American Samoa—as an "outlying possessio[n] of the United States." 8 U.S.C. § 1101(a)(29). Section 308(1) of the Act, in turn, provides that "person[s] born in an outlying possession of the United States"—*i.e.*, American Samoa—are "nationals, *but not citizens*, of the United States at birth." *Id.* § 1408(1) (emphasis added). As nationals, however, they "ow[e] permanent allegiance to the United States." *Id.* § 1101(a)(22). And they have no citizenship under or allegiance to any *other* sovereign.

Non-citizen nationals born in American Samoa may hold U.S. passports. But State Department policies require such passports to be imprinted with a stigmatizing disclaimer ("Endorsement Code 09") stating that "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." C.A. App. 27, 36-37; *see* 7 Dep't of State, *Foreign Affairs Manual* §§ 1125.1(b), (d), 1141(e), 1320 App. B.

American Samoans' "non-citizen national" status carries significant adverse consequences. Such persons are constitutionally barred from serving as Representatives or Senators in Congress and from ever running for President. U.S. Const. art. I, § 2, cl. 2, § 3, cl. 3; *id.* art. II, § 1, cl. 5. Federal law forbids non-citizen nationals from serving as officers in the

U.S. military or U.S. Special Forces, *e.g.*, 10 U.S.C. § 532, and many federal jobs, including in the federal judiciary, are advertised as limited to U.S. citizens. States bar non-citizen nationals from exercising many rights and freedoms accorded to citizens—for example, voting in federal, state, or local elections, *e.g.*, Haw. Const. art. II, § 1; holding public office, *e.g.*, Wash. Const. art. III, § 25; serving on juries, *e.g.*, Wash. Rev. Code § 2.36.070; serving as law-enforcement officers, firefighters, public-school teachers, or in other public-service positions, *e.g.*, *id.* §§ 41.08.060-.070; Cal. Gov't Code § 1031; Haw. Rev. Stat. § 121-14; 24 Pa. Cons. Stat. § 11-1109; and exercising the right to bear arms, *e.g.*, Haw. Rev. Stat. § 134-2(d); *see also* C.A. D. Cohen *Amicus* Br. 6-28.

4. Petitioners are five individuals born in American Samoa who are denied recognition as U.S. citizens, as well as the Samoan Federation of America, Inc.—a non-profit organization that serves the Samoan community in Los Angeles, California. C.A. App. 11-17. Their experiences exemplify the harms associated with non-citizen national status.

- When Leneuoti Tuaua lived in California as a young man in the 1970s, he registered for the military draft, but under California law could not vote or pursue his chosen career in law enforcement. C.A. App. 11-12.
- Va'aleama Fosi, a resident of Hawaii, is denied the rights to vote and to bear arms under Hawaii law, despite a decade of military service. C.A. App. 12-13.
- Fanuatanu Mamea, a Vietnam veteran living in American Samoa, was awarded two Purple Hearts and has a disability rating of 80%, yet

because of his non-citizen national status, his application to serve in the U.S. Special Forces was denied, and his foreign-national wife faces special immigration restrictions. C.A. App. 13-15.

- Taffy-lei Maene, a resident of Seattle, Washington, cannot vote and lost her job in a state agency (and with it her income and health insurance) because her passport says she is not a citizen. C.A. App. 15-16.
- Emy Afalava, who now lives in American Samoa, served in Kuwait during Operations Desert Shield and Desert Storm, but, as a noncitizen then residing in Texas, could only watch as his fellow infantrymen voted in the 1992 presidential election. C.A. App. 16-17.

Petitioners brought this action against respondents in 2012, challenging Section 308(1) of the Immigration and Nationality Act as unconstitutional under the Citizenship Clause, and seeking declaratory and injunctive relief. C.A. App. 31-33. Petitioners also challenged the State Department's implementing policies and practices. *Ibid.*

Respondents moved to dismiss for lack of jurisdiction and for failure to state a claim. Pet. App. 25a. The district court rejected respondents' jurisdictional arguments, but dismissed the suit for failure to state a claim. *Id.* at 29a-43a.

5. The court of appeals affirmed, holding that "the Citizenship Clause does not extend birthright citizenship to those born in American Samoa." Pet. App. 2a. The court reasoned that "it remains ambiguous whether territories situated like American Samoa are 'within' the United States for purposes of

the Clause." *Id.* at 6a. The court found not "fully persuasive" the difference in wording of the Citizenship Clause ("in the United States") and of the neighboring Apportionment Clause ("among the several States," U.S. Const. amend. XIV, § 2). Pet. App. 5a-6a. It also dismissed as "'not impressive'" statements of the Fourteenth Amendment's Framers confirming that it extended birthright citizenship to Territories. *Id.* at 6a-7a (citation omitted).

The D.C. Circuit also was "unconvinced" that *Wong Kim Ark*, 169 U.S. 649, "reflects the constitutional codification of the common law rule" of *jus soli* "as applied to outlying territories." Pet. App. 8a. It dismissed this Court's "expansive language" as dictum because the individual in that case was born in California, not a Territory. *Id.* at 8a-9a. "[E]ven assuming" the Citizenship Clause "constitutionally codif[ied] *jus soli* principles," the court opined, it would bestow birthright citizenship only on persons who owe "allegiance to the sovereign," and the court was "skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States' sphere of sovereignty." *Id.* at 9a, 11a.

The court of appeals "resort[ed] to the … analytical framework" of the "sometimes contentious Insular Cases"—a series of early 20th century decisions addressing issues of revenue collection and criminal procedure in the context of newly acquired Territories. Pet. App. 11a-12a. It construed those decisions to "announc[e]" a "doctrine of territorial incorporation" that "distinguishes between" so-called "incorporated territories … in which the entire Constitution applies *ex proprio vigore*," from "unincorporated territories such as American Samoa … in which only

certain fundamental constitutional rights apply by their own force." *Ibid.* (internal quotation marks and brackets omitted). Under the "framework" of those cases, the court held, whether a particular constitutional right applies in "unincorporated territories" turns on whether it is "fundamental"—a category limited to "principles which are the basis of *all* free government" and are "so basic as to be integral to free and fair society"—and whether "recognition of the right … would prove impracticable and anomalous." *Id.* at 15a, 18a (internal quotation marks omitted).

Applying this framework, the court held that birthright citizenship does not extend to American Samoa. Pet. App. 14a-23a. Birthright citizenship based on birth within the Nation's territory, it reasoned, is not "fundamental" because "numerous free and democratic societies principally follow *jus sanguinis*—'right of the blood'—where birthright citizenship is based upon nationality of a child's parents." *Id.* at 16a.

The court also concluded that extending birthright citizenship to American Samoa would be "anomalous" because the American Samoan government and its congressional delegate had intervened to argue that the question of citizenship should be decided politically by Congress, not the courts. Pet. App. 18a-20a. The court reasoned that construing the Citizenship Clause to apply to American Samoa would amount to "forcible imposition of citizenship against the majoritarian will." *Id.* at 22a.

Petitioners sought rehearing en banc. After requesting a response, the court of appeals denied their petition. Pet. App. 44a-45a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because this case squarely presents a constitutional question of exceptional importance: Whether Congress, notwithstanding the Fourteenth Amendment's explicit guarantee of birthright citizenship to those born within the sovereign territorial limits of the United States, may deny that right by fiat to persons born in a U.S. Territory. The answer governs whether tens of thousands of Americans born in American Samoa—many of whom have patriotically defended their country in the military—may finally call themselves American citizens. And it determines whether millions of others born in U.S. Territories hold citizenship as a constitutional right or as a matter of legislative grace.

This Court's intervention is also warranted because the court of appeals' holding that the scope of the Citizenship Clause is "ambiguous" is irreconcilable with this Court's precedents and the Clause itself. The Fourteenth Amendment's text, structure, history, and purpose all demonstrate that the Clause was intended and originally understood to confer birthright citizenship in *all* parts of the United States, including its Territories. This Court's decisions confirm that the Clause constitutionalized the common-law rule of *jus soli*, which recognized as citizens all persons born within the territorial limits and allegiance of the sovereign. The decision below cannot be squared with these precedents.

The court of appeals improperly relied on the Insular Cases to defer to Congress and the views of elected officials in American Samoa as to the scope of the Citizenship Clause. Neither the holdings nor reasoning of those cases have any application to that Clause or to citizenship generally. And construing

those decisions to require deference to elected officials contravenes the purpose of the Clause, which was adopted precisely to remove the scope of birthright citizenship from the sphere of politics. The court of appeals exacerbated its error by confining the "fundamental rights" applicable in unincorporated Territories under the Insular Cases to rights essential to *any* civilized society, irrespective of *this* Nation's traditions. The Insular Cases do not require that illogical and unjust result. To the extent they could be construed as doing so, they should be modified or overruled.

This case provides an excellent opportunity for the Court to resolve this important constitutional question, which was thoroughly litigated and decided below and is outcome-determinative. There is no reason to delay review to await a circuit conflict. Because Congress currently singles out *only* American Samoa, other cases are unlikely to arise. The court of appeals' error, moreover, rests on a misunderstanding of this Court's decisions—shared by other circuits—which only this Court can correct.

I. THE QUESTION WHETHER CONGRESS MAY WITHHOLD BIRTHRIGHT CITIZENSHIP FROM PERSONS BORN IN A UNITED STATES TERRITORY IS EXCEPTIONALLY IMPORTANT.

The importance of the question presented is indisputable. At stake is the meaning of a core constitutional provision that defines the boundaries of a foundational right—U.S. citizenship—on which many other rights are premised. Whether Congress may nullify the Citizenship Clause's explicit guarantee of birthright citizenship in a Territory that has been part of the United States for more than a century is an issue of tremendous legal and practical sig-

nificance. The rights and day-to-day lives of thousands of persons born in American Samoa hang in the balance. And the correct interpretation of that Clause governs Congress's ability to carve out other Territories from the Clause's scope in the future.

American Samoa is home to more than 55,000 individuals; tens of thousands more who were born in American Samoa live elsewhere the United States. C.A. App. 20-21. The answer to the question presented is critical to those living in American Samoa, who are barred from recognition as citizens unless they first undergo the costly and burdensome naturalization process. *Id.* at 26. For most American Samoans, that process requires uprooting themselves thousands of miles to establish residency in another part of the country, and then navigating the same naturalization procedures as *foreign* nationals, including paying a $680 fee, passing English and civics tests, submitting to fingerprinting and a "good moral character" determination, and taking an oath renouncing "'all allegiance and fidelity to any foreign'" sovereign of which they "'have heretofore been a subject or citizen,'" *id.* at 25-26 (citation omitted)—even though those born in American Samoa *already* owe allegiance to this Nation and are *not* citizens of any other. 8 U.S.C. § 1101(a)(22).[4] No other Americans are asked to complete these burdensome and invasive steps to be recognized as citizens. Neither should those born in American Samoa.

Petitioners' experiences illustrate the impact of being deprived recognition as citizens. Petitioners are reminded of their unequal status whenever they

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[4] Certain active-duty veterans of particular foreign wars may seek naturalization without relocating. 8 U.S.C. § 1440(a).

open their passports, which are imprinted with a disclaimer that the bearer is "NOT A UNITED STATES CITIZEN." C.A. App. 27, 36-37. That stigmatizing classification means American Samoans are citizens *nowhere*: American Samoa is not a country, nor part of any other besides the United States. Pet. App. 2a-3a; 48 U.S.C. §§ 1661-1662.

The subordinate, inferior non-citizen national status relegates American Samoans to second-class participation in the Republic. As non-citizens, for example, they cannot run for President or serve as Representatives or Senators in Congress. And many are barred from voting for the federal, state, and local elected officials who determine what rights non-citizen nationals enjoy. Many, like petitioners Tuaua and Maene, have also had their livelihood impacted by state laws barring them certain public-service occupations, such as law enforcement. Other state laws bar non-citizens—even military veterans like petitioner Fosi—from exercising the right to bear arms. Non-citizen nationals also face discrimination at the federal level, from serving as officers in the U.S. military, to how foreign-national family members are treated under immigration law. *Supra* pp. 10-11.

Continued discrimination is particularly troubling given the sacrifice American Samoans, including petitioners, have made through military service. Individuals that have defended the United States in battle are entitled at a minimum to know whether the Nation they protected at great personal sacrifice will accept them and their children as citizens.

Moreover, whatever advances toward equality non-citizen nationals might make under state or federal law are illusory because they can be taken away

by the political process. Only this Court can ensure that persons born in American Samoa enjoy the same rights and dignity as their fellow Americans.

The question presented also matters greatly to millions of Americans living in other U.S. Territories. While Congress has by statute recognized birthright citizenship in Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, on the court of appeals' view, Congress did so purely as a matter of grace. If the decision below is allowed to stand, the Framers of the Citizenship Clause will have failed in their objective "'to put th[e] question of citizenship and the rights of citizens … beyond the legislative power.'" *Afroyim*, 387 U.S. at 263 (citation omitted). Instead, persons born in U.S. Territories will remain at the mercy of legislative whim.

II. THE DECISION BELOW CONTRAVENES THE CONSTITUTION AND THIS COURT'S PRECEDENT.

The decision below also merits review because it conflicts with this Court's precedent and the Citizenship Clause itself. Contrary to this Court's teaching, the court of appeals gave short shrift to the pertinent constitutional text, structure, history, and purpose—finding ambiguity where those dispositive sources of constitutional meaning speak clearly. It also failed to heed this Court's case law construing the Clause, arbitrarily confining this Court's decision in *Wong Kim Ark* to its facts. Instead of faithfully applying this Court's *relevant* precedent, the court below erroneously looked to—and unjustifiably expanded—the Insular Cases' territorial-incorporation doctrine, which is inapposite here. Even if the Insular Cases could be read to support the decision below, they themselves are inconsistent with the Constitution and should be modified or overruled.

A. The Court Of Appeals' Holding Cannot Be Reconciled With The Constitutional Text, Structure, History, Or Purpose.

"[I]n all cases," the Constitution should be interpreted "in light of its text, purposes, and our whole experience as a Nation." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2578 (2014) (internal quotation marks omitted). A court's duty is to conduct a "careful examination of the textual, structural, and historical evidence" presented. *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012). The court of appeals defaulted on that duty here. It held that the Citizenship Clause is "ambiguous" simply because arguments for competing interpretations had been advanced. Rather than resolve that purported ambiguity by carefully examining the textual and contextual evidence of the Clause's meaning, the court threw up its hands and concluded that the text, structure, history, and purpose provide no answer. Both its approach and conclusion are incorrect.

1. The Fourteenth Amendment's text and structure forcefully demonstrate that it extends birthright citizenship to persons born in Territories like American Samoa. The Citizenship Clause states that "[a]ll persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. Const. amend. XIV, § 1 (emphasis added). Because American Samoa is "in the United States," persons born there are entitled to U.S. citizenship.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia* v. *Heller*, 554 U.S. 570, 634-35

(2008). From the early decades of the Republic, the term "the United States" has been understood to "designate the whole … of the American Empire." *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.). As Chief Justice Marshall explained, "the United States" is "the name given to our great republic, which is composed of States *and territories*." *Ibid.* (emphasis added). "The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania." *Ibid.* When the Citizenship Clause was debated in the 1860s, "[e]ach member [of Congress] knew and properly respected the old and revered decision in the Loughborough-Blake case, which had long before defined the term 'United States.'" Ltr. from J.B. Henderson to Hon. C.E. Littlefield (June 28, 1901), *reproduced in* Charles E. Littlefield, *The Insular Cases (II: Dred Scott v. Sandford)*, 15 Harv. L. Rev. 281, 299 (1901) ("Henderson Ltr.").

The broad scope of "in the United States" in the Citizenship Clause is confirmed by comparing it with Section 2 of the Fourteenth Amendment. That adjoining, contemporaneous provision uses the narrower phrase "among *the several States*" to provide that Representatives are to be apportioned only among States. U.S. Const. amend. XIV, § 2 (emphasis added). Just as courts presume that Congress's use of different language in neighboring statutory provisions is "'intentiona[l] and purpose[ful],'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted), the Framers' choice of different language in these adjacent, simultaneously adopted constitutional provisions is strong evidence that they did not intend the provisions' geographic scope to be identical.

The court of appeals noted this "difference between the Citizenship and Apportionment Clauses," which it conceded "could suggest the former has a broader reach than the latter." Pet. App. 6a. But it did not attempt to determine what that broader scope of the Citizenship Clause *is*, or why it would not include Territories such as American Samoa. *See ibid*. And it did not address the evidence and case law confirming the original understanding that "in the United States" includes such Territories.

The court of appeals also noted but did *not* adopt respondents' argument that the Thirteenth Amendment's prohibition of slavery "within the United States, or any place subject to their jurisdiction," suggests that the Constitution "contemplates areas not a part of the Union, which are still subject to the jurisdiction of the United States." Pet App. 5a (internal quotation marks and alterations omitted). And for good reason: The areas to which the Thirteenth Amendment refers that are not "within the United States," yet are within U.S. jurisdiction, do *not* include Territories; instead, they include locations beyond the Nation's sovereign limits but nevertheless under U.S. control—such as vessels outside U.S. territorial waters, embassies abroad, and military installations on foreign soil—where Congress also sought to forbid slavery. *See*, *e.g.*, *In re Chung Fat*, 96 F. 202, 203-04 (D. Wash. 1899) (slavery aboard U.S. vessel would violate Thirteenth Amendment). As the Thirteenth Amendment's co-author explained, "[w]hatever else these words"—*i.e.*, "or any place subject to their jurisdiction"—"may refer to, they surely were not intended to embrace or refer to the territories of the United States." Henderson Ltr. at 299.

2. The natural reading of the Citizenship Clause's text is confirmed by its history, which is "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves." *Wong Kim Ark*, 169 U.S. at 699. That history reflects the Framers' understanding that the Clause applies to Territories. Senator Trumbull, for example, explained that "[t]he second section" of the Fourteenth Amendment "refers to no persons except those in the States of the Union; but the first section refers to persons everywhere, whether in the States *or in the Territories* or in the District of Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (emphasis added). Both supporters and opponents of the Amendment agreed. *See*, *e.g.*, *id*. at 2890 (Sen. Howard); *id.* at 2893 (Sen. Johnson).

The court of appeals brushed aside these uncontradicted statements of the Clause's Framers as "'isolated,'" and invoked this Court's observation that on *other* topics the Fourteenth Amendment's history "'contains many statements from which conflicting inferences can be drawn.'" Pet. App. 6a (quoting *Afroyim*, 387 U.S. at 267; brackets and other citation omitted). But the court pointed to *no* contrary statements on *this* issue regarding the Citizenship Clause's geographic scope. Ambiguity on *other* matters is immaterial. In any event, this Court has turned to the Amendment's history *even where* some evidence points in different directions. *See*, *e.g.*, *Afroyim*, 387 U.S. at 266-67.

The "'initial blueprint'" for the Amendment—Section 1 of the Civil Rights Act of 1866, *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 721 (1989) (plurality opinion) (citation omitted)—further confirms that the original understanding of "in the United

States" included States *and* Territories. "Many of the Members of the 39th Congress viewed § 1 of the Fourteenth Amendment as 'constitutionalizing' and expanding the protections of the 1866 [Civil Rights] Act." *Ibid.* That Act "declared" that (*inter alia*) "all persons born in the United States and not subject to any foreign power" are "citizens of the United States" and "shall have the same right, in every State *and Territory* in the United States, … to full and equal benefit of all laws and proceedings for the security of person and property." Ch. 31, § 1, 14 Stat. 27, 27 (1866) (emphasis added). The court of appeals never addressed this additional evidence of the original understanding of the Amendment.

B. The Decision Below Conflicts With This Court's Precedent Construing The Citizenship Clause.

The court of appeals' decision also contradicts this Court's precedent addressing the Citizenship Clause specifically. In a series of decisions in the three decades after the Fourteenth Amendment's ratification, this Court authoritatively construed the Clause, making clear that it applies to Territories like American Samoa.

Just five years after the Clause was ratified, this Court concluded in the *Slaughter-House Cases* that the Fourteenth Amendment "pu[t] at rest" any notion that "[t]hose … who had been born and resided always in the District of Columbia *or in the Territories, though within the United States*, were not citizens." *See* 83 U.S. (16 Wall.) at 72-73 (emphasis added). The Amendment, the Court explained, "declares that persons may be citizens of the United States without regard to their citizenship of a particular State." *Id.* at 73.

The Court confirmed this understanding in *Elk* v. *Wilkins*, 112 U.S. 94 (1884), where it explained that "Indians born *within the territorial limits* of the United States"—there, evidently in the Iowa Territory—were "in a geographical sense born in the United States." *Id.* at 102 (emphasis added); *see* Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 Neb. L. Rev. 462, 480 (1991). Such "Indians" who were "members of, and owing allegiance to, one of the Indian tribes" were not covered by the Clause for a *different* reason: As members of tribes, they did not owe allegiance to, and were not "subject to the jurisdiction" of, the United States. 112 U.S. at 102.

Just two years before the United States obtained sovereignty over American Samoa, the Court spoke directly to the Citizenship Clause's geographic scope in *Wong Kim Ark*. The Clause, the Court held, "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." 169 U.S. at 654. Based on a painstaking survey of common-law authorities and the Fourteenth Amendment's history, the Court held that the Clause "reaffirmed" the "fundamental principle of citizenship by birth *within the dominion*"—*i.e.*, *jus soli*—using "the most explicit and comprehensive terms." *Id.* at 675 (emphasis added). The Clause, "in clear words and in manifest intent, includes the children born, *within the territory* of the United States, … of whatever race or color, domiciled within the United States." *Id.* at 693 (emphasis added). Applying that principle, the Court rejected the government's claim that a person born within the United States' sovereign territorial limits (there, California) could be deprived of citizenship based on his parents' place of birth: "The Four-

teenth Amendment ha[d] … conferred no authority upon Congress to restrict the effect of birth, declared by the [C]onstitution to constitute a sufficient and complete right to citizenship." *Id.* at 703.

As "legal … sources" demonstrating "the public understanding of [the Fourteenth Amendment] in the period after its enactment or ratification," these early cases are "critical tool[s] of constitutional interpretation." *Heller*, 554 U.S. at 605 (emphasis omitted). The court of appeals, however, failed to apply them. It did not address the *Slaughter-House Cases* at all, and never confronted the relevant aspect of *Elk* concerning the meaning of "in the United States" as used in the Citizenship Clause.

The court of appeals did address *Wong Kim Ark*, but it sidestepped that decision by concluding that this Court did not mean what it said. The D.C. Circuit reasoned that *Wong Kim Ark* is irrelevant because that case "involved a person born in San Francisco." Pet. App. 8a (internal quotation marks omitted). The constitutional *principle* this Court articulated and applied, however, speaks directly to the question presented here: The Citizenship Clause's geographic scope incorporated the common-law *jus soli* rule. *See* 169 U.S. at 675, 693. Whether Territories like American Samoa are "within the dominion" of the United States must therefore be determined by looking to that common-law principle. *Cf. Heller*, 554 U.S. at 592 (where Constitution "codified a *pre-existing* right," courts must look to its "historical background" to discern its contours). And it was clear at common law that "[a] citizen of one of our territories is a citizen of the United States." *Picquet*, 19 F. Cas. at 616; *accord* Rawle, *supra*, at 86. Indeed, in the decades before *Wong Kim Ark*, this

Court recognized that "[t]he Territories are but political subdivisions of the *outlying dominion* of the United States." *Nat'l Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880) (emphasis added). The court of appeals had no basis to limit this Court's decision in *Wong Kim Ark* to its facts.

The court of appeals' only other ground for disregarding *Wong Kim Ark* was its "skeptic[ism]" that American Samoans owe "direct and immediate allegiance" to the United States, and thus might not be "'subject to the jurisdiction thereof.'" Pet. App. 10a-11a (citation and brackets omitted). That skepticism is unfounded. Even Congress recognizes that American Samoans "ow[e] permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). And respondents conceded below that American Samoa is "'subject to the jurisdiction' of the United States." C.A. Resp. Br. 23; *see also* Pet. App. 33a. The court of appeals questioned whether American Samoans are "'*completely* subject to [the United States'] political jurisdiction,'" yet it acknowledged that "ultimate governance remains statutorily vested with the United States Government." Pet. App. 10a-11a (citation omitted). Under the settled common-law rule the Citizenship Clause codified, persons born in American Samoa are natural-born U.S. citizens.

C. The Insular Cases Are Inapposite And Cannot Justify The Court Of Appeals' Reading Of The Citizenship Clause.

While adopting an untenably *narrow* view of this Court's Citizenship Clause jurisprudence, the court of appeals relied on an insupportably *expansive* view of the Court's inapposite decisions in the Insular Cases and an "analytical framework" that the D.C. Circuit derived from them. Pet. App. 12a. Those de-

cisions have no application to the Citizenship Clause, and in any event they provide no basis to deprive American Samoans of birthright citizenship. To the extent the Insular Cases could be construed as allowing Congress to restrict birthright citizenship in American Samoa, those cases are inconsistent with the Constitution and should be modified or overruled.

1. "'Whatever the validity of the Insular Cases in the particular historical context in which they were decided,'" *Boumediene*, 553 U.S. at 758 (brackets and citation omitted), they are irrelevant here. *None* involved the Citizenship Clause or defined "in the United States" as it is used in the Fourteenth Amendment. *Downes* v. *Bidwell*, 182 U.S. 144 (1901), on which the decision below relied, concerned the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1—a provision that arose in a different historical background with a different purpose unrelated to codifying any common-law right. 182 U.S. at 249. And the opinion of Justice Brown, whose "dictum" the court of appeals expressly "adopt[ed]," Pet. App. 16a, commanded only his vote. 182 U.S. at 244 n.1 (syllabus). Indeed, because the fractured decision in *Downes* "lacked a majority rationale," it "is of minimal precedential value." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258 n.8 (2013). Members of this Court have accordingly cautioned that "neither the [Insular C]ases nor their reasoning should be given any further expansion." *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion); *see also* *Torres* v. *Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in judgment).

Extending those cases' "framework" to the Citizenship Clause is especially inappropriate because

that Clause expressly defines its own geographic scope. This Court has characterized *Dorr* v. *United States*, 195 U.S. 138 (1904), as holding "that the Constitution, *except insofar as required by its own terms*, did not extend to" unincorporated Territories. *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 589 n.21 (1976) (emphasis added). The Citizenship Clause is "applicable" in American Samoa "by its own terms" because it codifies birthright citizenship to persons born anywhere "in the United States," including Territories. U.S. Const. amend. XIV, § 1.

The Insular Cases are not to the contrary. For example, in 1904 this Court explained that the people of Puerto Rico, "whose permanent *allegiance* is due to the United States, … live in the peace of the *dominion* of the United States." *Gonzales* v. *Williams*, 192 U.S. 1, 13 (1904) (emphases added). *Gonzales* was referring to what *Wong Kim Ark* had described just six years earlier as the touchstones for birthright citizenship. And in *De Lima* v. *Bidwell*, 182 U.S. 1 (1901), decided the same day as *Downes*, this Court rejected the notion that Puerto Rico was "without the sovereignty of the United States." *Id.* at 180.

The Insular Cases' rationale for adopting special rules for certain Territories also does not extend to American Samoa. Those cases "involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions," *Covert*, 354 U.S. at 14 (plurality opinion) (emphasis added). "The Court … was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these *newly acquired* Terri-

tories." *Boumediene*, 553 U.S. at 757 (emphasis added). Those cases' reasoning has no bearing on Territories, including American Samoa, that have now been a part of the United States for *more than a century*, in which "over time the ties [with] the United States" have "strengthen[ed] in ways that are of constitutional significance." *Id.* at 758; *supra* pp. 8-10.

2. Even if the Insular Cases' "framework" were relevant to the Citizenship Clause, it would not support the court of appeals' conclusion that the Clause does not apply to American Samoa. The court below reached its result only by distorting that framework in a manner that warrants this Court's correction.

As this Court has made clear, even under the Insular Cases, "'guaranties of certain fundamental personal rights declared in the Constitution'" apply "even in unincorporated Territories." *Boumediene*, 553 U.S. at 758 (quoting *Balzac* v. *Porto Rico*, 258 U.S. 298, 312 (1922)); *see also Flores de Otero*, 426 U.S. at 599 n.30. And citizenship is a "fundamental right." *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion); *see also*, *e.g.*, *Afroyim*, 387 U.S. at 267-68 ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power."); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159 (1963) ("Citizenship is a most precious right. It is expressly guaranteed by the Fourteenth Amendment to the Constitution, which speaks in the most positive terms.").

In reaching a contrary conclusion, the court of appeals advanced an exceptionally narrow understanding of the "fundamental rights" prong of the territorial-incorporation doctrine. In the court's view, only "universally fundamental" rights that are

"so basic as to be integral to free and fair society" and that are "'the basis of *all* free government'" qualify, while rights that are "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence" do not. Pet. App. 15a (citation omitted). Applying its narrow view of fundamental rights, the court deemed our Nation's *jus soli* tradition "non-fundamental" under that standard because *other* "democratic societies principally follow *jus sanguinis*," and accord citizenship based on one's parentage. *Id.* at 15a-16a.

That approach makes little sense. In determining whether certain aspects of the U.S. Constitution apply in certain places, the benchmark should be—as in other contexts where courts consider whether rights are "fundamental"—whether the rights are "fundamental from an *American* perspective." *McDonald* v. *City of Chicago*, 561 U.S. 742, 784 (2010) (plurality opinion) (emphasis added). After all, "numerous free and democratic societies" (Pet. App. 16a) do not recognize, or construe more narrowly, various rights that are undoubtedly central to the American Constitution. Many free societies, for example, "have established state churches," "ban or severely limit handgun ownership," or do not share this Nation's understanding of "the right against self-incrimination" and "the right to counsel." *McDonald*, 561 U.S. at 781-83 (plurality opinion). Absent review by this Court, residents of the Territories will find an array of core American rights put in limbo by the court of appeals' narrow view of which constitutional rights are universally fundamental.

The court of appeals' application of the "impractical and anomalous" prong of the territorial incorporation doctrine to deny recognition of birthright citi-

zenship in American Samoa is also deeply misguided. Rather than examine "practical considerations" outlined by this Court's precedent, *see Boumediene*, 553 U.S. at 759-60, the court of appeals created from whole cloth a rule of dispositive deference to the views of the Territory's government in an amicus brief, which argued that the question of citizenship should be answered through the political process rather than by the courts' interpretation of the Constitution. The court of appeals inferred from that submission that according birthright citizenship would be "anomalous" and contrary to the "majoritarian will" of the American Samoan people as "expressed through their democratically elected representatives." Pet. App. 18a-20a, 22a.

That inference is untenable. The people of American Samoa *did* choose birthright citizenship when they voluntarily joined the United States *after* the Citizenship Clause had been ratified and authoritatively construed by this Court to recognize that right. *See* Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, 53 (1931) (when American Samoa ceded sovereignty to the United States, "the people [of American Samoa] thought they were American Citizens").

Moreover, this Court has repudiated the notion that elected officials "have the power to switch the Constitution on or off at will." *Boumediene*, 553 U.S. at 765. The whole "purpose" of the Citizenship Clause was to put the "'question of citizenship and the rights of citizens … under the civil rights bill *beyond the legislative power*.'" *Afroyim*, 387 U.S. at 263 (emphasis added) (omission in original) (citation omitted). Subjecting individual constitutional rights

like birthright citizenship to the shifting winds of political majorities is antithetical to the value of a written Constitution. While American Samoa's future *political status* remains open to Congress and American Samoa's elected leaders, the question of the application of the Citizenship Clause on sovereign U.S. soil is not.

3. If and to the extent the Insular Cases do support the decision below, they should be modified or overruled. Those decisions rest in significant part on outdated, indefensible racial biases that have no place in this Court's constitutional jurisprudence today. *See*, *e.g.*, *Downes*, 182 U.S. at 279-80, 282, 287 (opinion of Brown, J.) (different rules appropriate for "alien races, differing from us"); *id.* at 302, 306 (White, J., concurring in judgment) (different rules appropriate for an "uncivilized race" of "fierce, savage, and restless people"); *see also* C.A. Constitutional-Law Scholars *Amicus* Br. 24-30; Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement,* in *Reconsidering the Insular Cases* 61, 62 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("[T]he Insular Cases represent classic *Plessy v. Ferguson* legal doctrine and thought that should be eradicated from present-day constitutional reasoning." (footnote omitted)).

Moreover, "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory," but "*not* the power to decide when and where [the Constitution's] terms apply." *Boumediene*, 553 U.S. at 765 (emphasis added). Insofar as the Insular Cases establish a contrary principle, they are incompatible with the Constitution and should be rejected.

III. This Case Is An Excellent Vehicle To Resolve This Important Question.

This case provides a prime opportunity for this Court to provide definitive guidance on these important constitutional issues. The question presented was pressed and passed upon in both courts below, and it is outcome-determinative in this case. Pet. App. 4a-23a, 33a-43a.

There is no reason to await a direct circuit split. American Samoa is the only Territory Congress currently excludes from the Constitution's guarantee of birthright citizenship. Other suits by current residents of American Samoa are unlikely to arise in other circuits. American Samoa lacks a U.S. district court, and the only proper venue for many actions by its current residents may be the District of Columbia—where the defendants reside and the relevant acts occur, *see* 28 U.S.C. § 1391(e)(1), but where the decision below now controls.

Moreover, the court of appeals here mistakenly believed that the Insular Cases compelled its conclusion, Pet. App. 11a-23a, and other circuits similarly have relied on erroneous interpretations of those inapposite decisions to hold that the Citizenship Clause does not apply in U.S. Territories. *See*, *e.g.*, *Nolos* v. *Holder*, 611 F.3d 279, 283-84 (5th Cir. 2010) (per curiam); *Lacap* v. *INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam); *Valmonte* v. *INS*, 136 F.3d 914, 918 (2d Cir. 1998); *Rabang* v. *INS*, 35 F.3d 1449, 1452 (9th Cir. 1994). Only this Court can correct the widespread misapprehension of the meaning and relevance of its own precedents. Even if the circuits' reading of the Insular Cases were correct, none could entertain arguments that those cases should be abrogated. This Court "alone" has the "prerogative" to

overrule or modify its own decisions. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 1, 2016

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 9, 2015 Decided June 5, 2015

No. 13-5272

LENEUOTI FIAFIA TUAUA, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

AMERICAN SAMOA GOVERNMENT AND AUMUA AMATA,
INTERVENORS

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01143)

* * *

Before: BROWN, *Circuit Judge*, and SILBERMAN and SENTELLE, *Senior Circuit Judges*.

BROWN, *Circuit Judge*: In our constitutional republic, Justice Brandeis observed, the title of citizen is superior to the title of President. Thus, the questions "[w]ho is the citizen[?]" and "what is the meaning of the term?" Aristotle, *Politics* bk. 3, *reprinted in part in* READINGS IN POLITICAL PHILOSOPHY 55, 61 (Francis W. Coker ed., 1938), are no less than the questions of "who constitutes the sovereign state?"

and "what is the meaning of statehood as an association?" We are called upon to resolve one narrow circumstance implicating these weighty inquiries. Appellants are individuals born in the United States territory of American Samoa. Statutorily deemed "non-citizen nationals" at birth, they argue the Fourteenth Amendment's Citizenship Clause affords them citizenship by dint of birthright. They are opposed not merely by the United States but by the democratically elected government of the American Samoan people. We sympathize with Appellants' individual plights, apparently more freighted with duty and sacrifice than benefits and privilege, but the Citizenship Clause is textually ambiguous as to whether "in the United States" encompasses America's unincorporated territories and we hold it "impractical and anomalous," *see Reid v. Covert*, 354 U.S. 1, 75 (1957), to impose citizenship by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves. The judgment of the district court is affirmed; the Citizenship Clause does not extend birthright citizenship to those born in American Samoa.

I

The South Pacific islands of American Samoa have been a United States territory since 1900, when the traditional leaders of the Samoan Islands of Tutuila and Aunu'u voluntarily ceded their sovereign authority to the United States Government. *See* Instrument of Cession by the Chiefs of Tutuila Islands to United States Government, U.S.-Tutuila, Apr. 17, 1900. Today the American Samoan territory is par-

tially self-governed, possessing a popularly elected bicameral legislature and similarly elected governor.[1] Complaint at 13 ¶ 27, Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 12-cv-01143). The territory, however, remains under the ultimate supervision of the Secretary of the Interior. *See* Exec. Order No. 10,264 (June 29, 1951) (transferring supervisory authority from the Secretary of the Navy to the Secretary of the Interior).

Unlike those born in the United States' other current territorial possessions—who are statutorily deemed American citizens at birth—section 308(1) of the Immigration and Nationality Act of 1952 designates persons born in American Samoa as non-citizen nationals.[2] *See* 8 U.S.C. § 1408(1). Below, Appellants challenged section 308(1), as well as State Department policies and practices implementing the statute, *see*, *e.g.*, 7 FAM § 1125.1(b), on Citizenship Clause grounds and under the Administrative Procedure Act. The district court rejected Appellants' arguments and dismissed the case for failure to state a claim upon which relief can be granted. *Tuaua v. United States*, 951 F. Supp. 2d 88, 94 (D.D.C. 2013); *see also* FED. R. CIV. P. 12(b)(6). On appeal Appellants reassert only their constitutional claim. Our review is de novo. *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009).

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[1] Although it possesses significant institutions of local self-governance American Samoa is classified as a "non-self-governing territory" by the United Nations General Assembly. *See generally* U.N. Charter ch. XI.

[2] Persons born in the Philippines during the territorial period, which ended in 1946, were likewise statutorily designated non-citizen nationals.

II

The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1, cl. 1. Both Appellants and the United States government[3] agree the text and structure of the Fourteenth Amendment unambiguously leads to a single inexorable conclusion as to whether American Samoa is within the United States for purposes of the clause. They materially disagree only as to whether the inescapable conclusion to be drawn is whether American Samoa "is" or "is not" a part of the United States. *See generally* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS (17th ed. 2002) ("The devil is in the detail[s].").

A

Appellants rely on a comparison of the first and second clauses of the Fourteenth Amendment—the Citizenship and Apportionment Clauses, respectively. They argue the former is framed expansively through use of the overarching term "in the United States," U.S. CONST. amend. XIV, § 1, cl. 1, while the latter speaks narrowly in terms of apportionment of representatives "among the several *States*," U.S. CONST. amend. XIV, § 1, cl. 2 (emphasis added). In contrast, the Appellees look to differences between

[3] Unlike the United States Government, Intervenors—the American Samoan Government and Congressman Faleomavaega—exclusively argue Appellants' interpretation is foreclosed by precedents from the Insular case line.

the Thirteenth and Fourteenth Amendment.[4] Partly relying on dictum from Justice Brown's judgment for the Supreme Court in *Downes v. Bidwell*, 182 U.S. 244 (1901), the United States Government argues the Thirteenth Amendment prohibits slavery "within the United States, *or any place subject to their jurisdiction*," *id.* at 251 (emphasis added), while the Fourteenth Amendment's Citizenship Clause applies to persons "born … in the United States, *and* subject to the jurisdiction thereof," *id.* (emphasis added). According to the Government the Thirteenth Amendment's phraseology contemplates areas "not a part of the Union, [which] [a]re still subject to the jurisdiction of the United States," while the Fourteenth Amendment incorporates a "limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.'" *Id.*

Neither argument is fully persuasive, nor does it squarely resolve the meaning of the ambiguous phrase "in the United States." The text and structure alone are insufficient to divine the Citizenship

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[4] The United States Government also argues, "even if Plaintiffs were correct that … the Fourteenth Amendment should generally confer birthright citizenship[,] … Congress's direct modification of that status by statute trumps that interpretation." Brief of Respondent-Appellee at 26, No. 13-5272 (D.C. Cir. Aug. 11, 2014) (relying on *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)). This argument is novel, if curious. Yet it erroneously conflates Congress's broad powers over naturalization with authority to statutorily abrogate the scope of birthright citizenship available under the Constitution itself. Congress's authority for the latter is wanting. *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("[T]he constitution is superior to any ordinary act of the legislature.").

Clause's geographic scope. The difference between the Citizenship and Apportionment Clauses could suggest the former has a broader reach than the latter. *See United States v. Diaz-Guerrero*, 132 F. App'x 739, 740-41 (9th Cir. 2005) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates … [intent] to convey a different meaning for those words…."). But, even if this is the case, Appellants' argument does not resolve the question at issue because both text and structure are silent as to the precise contours of the "United States" under the Citizenship Clause. Even if "United States" is broader than "among the several States," it remains ambiguous whether territories situated like American Samoa are "within" the United States for purposes of the clause. The Government's argument is similarly incomplete. While the language of the Thirteenth Amendment may be broader than that found in the Citizenship Clause, this comparison yields no dispositive insight as to whether the Citizenship Clause's use of the term "United States" includes American Samoa or similarly situated territories.

Appellants rely on scattered statements from the legislative history to bolster their textual argument. *See*, *e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 2890, 2894 (1866) ("[The Citizenship Clause] refers to persons everywhere, whether in the States, or in the Territories or in the District of Columbia.") (statement of Sen. Trumbull). "[T]he legislative history of the Fourteenth Amendment … like most other legislative history, contains many statements from which conflicting inferences can be drawn…." *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967). Here, and as a general matter, "[i]solated statements … are not impres-

sive legislative history." *Garcia v. United States*, 469 U.S. 70, 78 (1984).

B

Appellants and Amici Curiae further contend the Citizenship Clause must—under Supreme Court precedent—be read in light of the common law tradition of *jus soli* or "the right of the soil." *See United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) ("The constitution nowhere defines the meaning of … [the word "citizen"], either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.") (internal citation omitted).

The doctrine of *jus soli* is an inheritance from the English common law. Those born "within the King's domain" and "within the obedience or ligeance of the King" were subjects of the King, or "citizens" in modern parlance. *See Calvin's Case*, 77 Eng. Rep. 377, 399 (1608). The domain of the King was defined broadly. It extended beyond the British Isles to include, for example, persons born in the American colonies. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 120-21 (1830).

After independence the former colonies continued to look to the English common law rule. *See*, *e.g.*, *id.* at 164-65. Following the Constitution's ratification the principal exception to *jus soli* was for African Americans born in the United States, *see Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404-05 (1857); an

exception necessarily repudiated with the ratification of the Fourteenth Amendment.[5] Relying on the Supreme Court's opinion in *United States v. Wong Kim Ark*, 169 U.S. 649, Appellants and Amici Curiae accordingly argue the geographic scope of the Fourteenth Amendment's Citizenship Clause should be read expansively as the "domain" of the sovereign under background *jus soli* principles.

We are unconvinced, however, that *Wong Kim Ark* reflects the constitutional codification of the common law rule as applied to outlying territories. As the Ninth Circuit noted in *Rabang v. INS*, the expansive language of *Wong Kim Ark* must be read with the understanding that the case "involved a person born in San Francisco, California. The fact that he had been born 'within the territory' of the United States was undisputed, and made it unnecessary to define 'territory' rigorously or decide whether 'territory' in its broader sense meant 'in the United States' under the Citizenship Clause." 35 F.3d 1449, 1454 (9th Cir. 1994); *accord Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010); *Valmonte v. INS*,

[5] During the pre-constitutional period of confederation, "[p]aupers, vagabonds and fugitives from justice" were excepted from the "privileges and immunities of free citizens *in the several States*." ARTICLES OF CONFEDERATION, art. IV (emphasis added). It was only after "the adoption of the Constitution [that] it became necessary in many cases to determine whether an individual in a given case was a citizen of the *United States*." *Peter Hand Co. v. United States*, 2 F.2d 449, 452 (7th Cir. 1924) (emphasis added).

136 F.3d 914, 920 (2d Cir. 1998).[6] "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Wong Kim Ark*, 169 U.S. at 679.

And even assuming the framers intended the Citizenship Clause to constitutionally codify *jus soli* principles, birthright citizenship does not simply follow the flag. Since its conception *jus soli* has incorporated a requirement of allegiance to the sovereign. To the extent *jus soli* is adopted into the Fourteenth Amendment, the concept of allegiance is manifested by the Citizenship Clause's mandate that birthright citizens not merely be born within the territorial boundaries of the United States but also "subject to the jurisdiction thereof," U.S. CONST. amend. XIV, § 1, cl. 1; *see Wong Kim Ark*, 169 U.S. at 655 ("The principle embraced all persons born within the king's

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[6] Because it may also bear upon the impractical and anomalousness inquiry, we note the vast practical consequences of departing from our sister circuits' decisions. Despite Appellants' contentions to the contrary, there is no material distinction between nationals born in American Samoa and those born in the Philippines prior to its independence in 1946. *Contra* Brief for Petitioner-Appellant at 42-43 (attempting to distinguish the Philippines context because that territory was acquired via conquest and because it was always the purpose of the United States to eventually withdraw its sovereignty). The extension of citizenship to the American Samoan people would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period—and potentially their children through operation of statute.

allegiance, and subject to his protection…. Children, born in England, of [] aliens, were [] natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.").

Appellants would find any allegiance requirement of no moment because, as non-citizen nationals, American Samoans already "owe[] permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22); *see also Sailor's Snug Harbor*, 28 U.S. at 155 ("[A]llegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign."). Yet, within the context of the Citizenship Clause, "[t]he evident meaning of the[] … words ["subject to the jurisdiction thereof"] is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, and owing them direct and immediate allegiance." *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (emphasis added). It was on this basis that the Supreme Court declined to extend constitutional birthright citizenship to Native American tribes. *See id.* at 99 ("The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities…."). As even the dissent to *Elk* recognized, "it would be obviously inconsistent with the semi-independent character of such

a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights—or, on the other, subjected to the full responsibilities—of American citizens. It would not for a moment be contended that such was the effect of this amendment." *Id.* at 119-20 (Harlan, J., dissenting). Even assuming a background context grounded in principles of *jus soli*, we are skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty—even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government. *See Downes*, 182 U.S. at 305 (White, J., concurring) (doubting citizenship naturally and inevitably extends to an acquired territory regardless of context).

III

Analysis of the Citizenship Clause's application to American Samoa would be incomplete absent invocation of the sometimes contentious Insular Cases, where the Supreme Court "addressed whether the Constitution, by its own force, applies in any territory that is not a State." *Boumediene v. Bush*, 553 U.S. 723 (2008). *See also King v. Morton*, 520 F.2d 1140, 1153 (D.C. Cir. 1975) ("The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without parallel in our judicial history.").

"The doctrine of 'territorial incorporation' announced in the Insular Cases distinguishes between incorporated territories, which are intended for

statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore*, and unincorporated territories [such as American Samoa], which are not intended for statehood and in which only [certain] fundamental constitutional rights apply by their own force." *Commonwealth of N. Mariana Islands v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984).

Appellants and Amici contend the Insular Cases have no application because the Citizenship Clause textually defines its own scope. *See Examining Bd. of Engineers*, *Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 590 n.21 (1976) ("[T]he Court in *Dorr v. United States*, 195 U.S. 138, 143 (1904) … [held] that the Constitution, *except insofar as required by its own terms*, did not extend to the Philippines.") (emphasis added). We conclude the scope of the Citizenship Clause, as applied to territories, may not be readily discerned from the plain text or other indicia of the framers' intent, absent resort to the Insular Cases' analytical framework. *See Boumediene*, 553 U.S. at 726 (While the "Constitution has independent force in the territories that [is] not contingent upon acts of legislative grace[,] … because of the difficulties and disruptions inherent in transforming … [unincorporated territories] into an Anglo-American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies … only in part in unincorporated territories").

Amici Curiae suggest territorial incorporation doctrine should not be expanded to the Citizenship Clause because the doctrine rests on anachronistic views of race and imperialism. But the Court has continued to invoke the Insular framework when

dealing with questions of territorial and extraterritorial application. *See id.* at 756-64. Although some aspects of the Insular Cases' analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories. *See id.* at 758-59 ("[T]he Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed" in recognition of the "inherent practical difficulties of enforcing all constitutional provisions always and everywhere."). *See also Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) ("The Constitution … contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases [is] … which [] of [the Constitution's] provisions [a]re applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements" arising in the territorial context).

As the Supreme Court in *Boumediene* emphasized, the "common thread uniting the Insular Cases … [is that] questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. While "fundamental limitations in favor of personal rights" remain guaranteed to persons born in the unincorporated territories, *id.* at 758 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890)), the Insular framework recognizes the difficulties that frequently inure when "determin[ing] [whether a] particular provision of the Constitution is applicable," absent inquiry into the impractical or anomalous. *See id.*; *see also Downes*, 182 U.S. at 292 (White, J., concurring) ("[T]he de-

termination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.").

A

American citizenship "is one of the most valuable rights in the world today." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). "The freedoms and opportunities secured by United States citizenship long have been treasured by persons fortunate enough to be born with them, and are yearned for by countless less fortunate." *Fedorenko v. United States*, 449 U.S. 490, 522 (1981). Accordingly, even if the Insular framework is applicable, Appellants cite to a bevy of cases to argue citizenship is a fundamental right. *See*, *e.g.*, *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Trop v. Dulles*, 356 U.S. 103 (1958) (plurality op.). But those cases do not arise in the territorial context. Such decisions do not reflect the Court's considered judgment as to the existence of a fundamental right to citizenship for persons born in the United States' unincorporated territories. *Cf. Wong Kim Ark*, 169 U.S. at 679.[7]

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[7] 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." *Tuaua*, 951 F. Supp. 2d at 98. "[N]o one acquires a vested or protected right in violation of the Constitution by long use…. Yet an unbroken practice … openly [conducted] … by affirmative state action … is not something to be lightly cast aside." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970).

"Fundamental" has a distinct and narrow meaning in the context of territorial rights. It is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be "necessary to [the] []American regime of ordered liberty." *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1990) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)). Under the Insular framework the designation of fundamental extends only to the narrow category of rights and "principles which are the basis of *all* free government." *Dorr v. United States*, 195 U.S. 138, 147 (1904) (emphasis added); *Downes*, 182 U.S. at 283 ("Whatever may be finally decided by the American people as to the status of these islands and their inhabitants … they are entitled under the principles of the Constitution to be protected in life, liberty, and property … even [if they are] not possessed of the political rights of citizens of the United States.").

In this manner the Insular Cases distinguish as universally fundamental those rights so basic as to be integral to free and fair society. In contrast, we consider non-fundamental those artificial, procedural, or remedial rights that—justly revered though they may be—are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence. *E.g.*, *Balzac*, 258 U.S. 298 (constitutional right to a jury trial does not extend to unincorporated territories as a fundamental right); *see also Downes*, 182 U.S. at 282 ("We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence.").

We are unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a "*sine qua non* for 'free government'" or otherwise fundamental under the Insular Cases' constricted understanding of the term. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 386 n.72 (D.C. Cir. 1987). Regardless of its independently controlling force, we therefore adopt the conclusion of Justice Brown's dictum in his judgment for the Court in *Downes*. *See* 182 U.S. at 282-83. "Citizenship by birth within the sovereign's domain [may be] a cornerstone of [the Anglo-American] common law tradition," Brief for Petitioner-Appellant at 48, Tuaua v. United States, No. 13-5272 (D.C. Cir. April 25, 2014), but numerous free and democratic societies principally follow *jus sanguinis*—"right of the blood"—where birthright citizenship is based upon nationality of a child's parents.[8] *See Miller v. Albright*, 523 U.S. 420, 477 (1998) (citing various authority "noting the 'widespread extent of the rule of jus sanguinis.'"); Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 99-100 (2010) (*jus sanguinis* has traditionally predominated in civil law countries, whereas *jus soli* has historically been the norm in common law countries).

In states following a *jus sanguinis* tradition birth in the sovereign's domain—whether in an outlying

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[8] "In the United States, nationality may be predicated either on jus soli … or on jus sanguinis…." *Acheson v. Maenza*, 202 F.2d 453, 459 (D.C. Cir. 1953) (the latter is conferred statutorily).

territory, colony, or the country proper—is simply irrelevant to the question of citizenship. Nor is the asserted right so natural and intrinsic to the human condition as could not warrant transgression in civil society. *See generally Dorr*, 195 U.S. at 147. "[C]itizenship has no meaning in the absence of difference." Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492, 1509 (2003). The means by which free and fair societies may elect to ascribe the classification of citizen must accommodate variation where consistent with respect for other, inherent and inalienable, rights of persons. To find a natural right to *jus soli* birthright citizenship would give umbrage to the liberty of free people to govern the terms of association within the social compact underlying formation of a sovereign state. *Cf.* Aristotle, *Politics* bk. 3, *reprinted in part in* READINGS IN POLITICAL PHILOSOPHY 55, 87 (Francis W. Coker ed., 1938) ("The basis of a democratic state is liberty; which, according to the common opinion of men, can only be enjoyed in such a state[.]").[9]

B

The absence of a fundamental territorial right to *jus soli* birthright citizenship does not end our inquiry. "The decision in the present case does not depend on key words such as 'fundamental' or 'unincorporated territory[,]' … but can be reached only by applying the principles of the [Insular] [C]ases, as controlled by their respective contexts, to the situa-

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[9] The case before us pertains only to the permissibility of designating American Samoans as nationals, rather than citizens. We need not decide whether constitutional impropriety would arise if persons born in an unincorporated territory were also denied national status.

tion as it exists in American Samoa today." *King*, 520 F.2d at 1147. *Cf. Boumediene*, 553 U.S. at 758 ("It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."). "[T]he question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Reid*, 354 U.S at 75. In sum, we must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove "impracticable and anomalous," as applied to contemporary American Samoa. *Id.* at 74.

Despite American Samoa's lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship. In part this reluctance stems from unique kinship practices and social structures inherent to the traditional Samoan way of life, including those related to the Samoan system of communal land ownership. Traditionally *aiga* (extended families) "communally own virtually all Samoan land, [and] the *matais* [chiefs] have authority over which family members work what family land and where the nuclear families within the extended family will live." *King*, 520 F.2d at 1159. Extended families under the authority of *matais* remain a fundamentally important social unit in modern Samoan society.

Representatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life. For example Congressman Faleoma-

vaega and the American Samoan Government posit the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional, racially-based land alienation rules. Appellants contest the probable danger citizenship poses to American Samoa's customs and cultural mores.

The resolution of this dispute would likely require delving into the particulars of American Samoa's present legal and cultural structures to an extent ill-suited to the limited factual record before us. *See King*, 520 F.2d at 1147 ("The importance of the constitutional right at stake makes it essential that a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts."). We need not rest on such issues or otherwise speculate on the relative merits of the American Samoan Government's Equal Protection concerns. The imposition of citizenship on the American Samoan territory is impractical and anomalous at a more fundamental level.

We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically

elected representatives.[10] *See* Brief for Intervenors, or in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 23-35, Tuaua v. United States, No. 13-5272 (D.C. Cir. Aug. 25, 2014) (opposing constitutional birthright citizenship). A republic of people "is not every group of men, associated in any manner, [it] is the coming together of … men who are united by common agreement…." MARCUS TULLIUS CICERO, DE RE PUBLICA bk. I, ch. 25, 26-35 (George H. Sabine & Stanley B. Smith trans., Prentice Hall 1929). In this manner, we distinguish a republican association from the autocratic subjugation of free people. And from this, it is consequently understood that democratic "governments … deriv[e] their [] powers from the consent of the governed," *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 41 (1852); under any just system of governance the fount of state power rests on the participation of citizens in civil society—that is,

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[10] We address only whether the Citizenship Clause mandates the imposition of birthright citizenship where doing so overrides the wishes of an unincorporated territory's people. We do not doubt Congress's general authority to, in its discretion, naturalize persons living in the United States's unincorporated territories nor do we question the expansive scope of birthright citizenship in the incorporated territories or opine on the general scope of Congress's powers under the Territorial Clause, U.S. CONST. art. IV, § 3, cl. 2.

through the free and full association of individuals with, and as a part of, society and the state.[11]

"Citizenship is the effect of [a] compact[;] … [it] is a political tie." *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 141 (1795) (distinguishing citizenship from the feudal doctrine of perpetual allegiance). "[E]very [] question of citizenship[] … [thus] depends on the terms and spirit of [the] social compact." *Id.* at 142. The benefits of American citizenship are not understood in isolation; reciprocal to the rights of citizenship are, and should be, the obligations carried by all citizens of the United States. *See Trop v. Dulles*, 356 U.S. 86, 92 (1958) ("The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation."); THE FEDERALIST NO. 14 (James Madison) ("[T]he kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union.").

Citizenship is not the sum of its benefits. It is no less than the adoption or ascription of an identity, that of "citizen" to a particular sovereign state, and a

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[11] *Cf.* THE FEDERALIST NO. 22 (Alexander Hamilton) ("It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the People… Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified…. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the People. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.") (emphasis omitted).

ratification of those mores necessary and intrinsic to association as a full functioning component of that sovereignty. *See Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165-66 (1874) ("There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association."). At base Appellants ask that we forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity[12]—on a distinct and unincorporated territory of people, in the absence of evidence that a majority of the territory's inhabitants endorse such a tie and where the territory's democratically elected representatives actively oppose such a compact.

We can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will.[13] *See*, *e.g.*, U.N. Charter arts. 1, 73 (recognizing self-determination of people as a guiding principle and obliging members to "take due account of the politi-

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[12] *See also*, *e.g.*, Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 169 (1999) (arguing that statutorily "[f]orcing American citizenship upon Indigenous [Native American] people [destructively] transformed [their] political identity").

[13] Complex questions arise where territorial inhabitants democratically determine either to pursue citizenship or withdraw from union with a state. Such scenarios may implicate the reciprocal associational rights of the state's current citizens or the right to integrity of the sovereign itself.

cal aspirations of the peoples" inhabiting non-self-governing territories under a member's responsibility);[14] Atlantic Charter, U.S.-U.K., Aug. 14, 1941 (endorsing "respect [for] the right of all peoples to choose the form of government under which they will live"); Woodrow Wilson, President, United States, Fourteen Points, Address to Joint Session of Congress (Jan. 8, 1918) ("[I]n determining all [] questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.") (Point V). *See also Tuaua*, 951 F. Supp. 2d at 91 ("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."). To hold the contrary would be to mandate 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. *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.…").

IV

For the foregoing reasons the district court is

Affirmed.

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[14] *But see Medellin v. Texas*, 552 U.S. 491 (2008).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LENEUOTI FIAFIA TUAUA, et al., **Plaintiffs,** **v.** **UNITED STATES OF AMERICA, et al.,** **Defendants.**	)))))))))	**Civil Case No. 12-01143 (RJL)**

MEMORANDUM OPINION
June *26th*, 2013 [# 9]

Plaintiffs are five non-citizen U.S. nationals born in American Samoa and the Samoan Federation of America, a nonprofit organization serving the Samoan community in Los Angeles. Compl. ¶¶ 10-15.[1] They seek declaratory and injunctive relief against defendants, the United States and the related parties that execute its citizenship laws. *Id.* ¶¶ 16-19.[2] They assert that the Fourteenth Amendment's Citi-

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[1] The five individual plaintiffs are Leneuoti Fiafia Tuaua ("Tuaua"), Va'aleama Tovia Fosi ("Fosi"), Fanuatanu Fauesala Lifa Mamea ("Mamea"), Taffy-Lei T. Maene ("Maene"), and Emy Fiatala Afaleva ("Afaleva"). Mamea also brings his claims on behalf of his three minor children. *Id.* ¶ 12(a).

[2] Defendants are the United States, the State Department, the Secretary of State, and the Assistant Secretary of State for Consular Affairs.

zenship Clause extends to American Samoa and that people born in American Samoa are therefore U.S. citizens at birth. *Id.* at 25-26. Plaintiffs also argue that Immigration and Naturalization Act § 308(1) is unconstitutional because it provides that American Samoans are noncitizen U.S. nationals. *See id.* at 26. Further, they ask the Court to hold that a State Department policy and practice are unconstitutional and invalid under the Administrative Procedure Act ("APA"). *See* Compl. at 26. Underlying all of these claims is the same legal argument: the Citizenship Clause applies to American Samoa, so contrary law and policy must be invalidated. The United States and related parties move to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b) for lack of subject-matter jurisdiction and failure to state a claim. *See* Mem. of P. & A. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Mem.") [Dkt. # 9] at 1. Because plaintiffs have failed to state a claim upon which relief can be granted, the Court GRANTS defendants' Motion to Dismiss.

BACKGROUND

American Samoa is located on the eastern islands of an archipelago in the South Pacific. Compl. ¶ 3. The United States claimed this territory in a 1900 treaty with Great Britain and Germany, 31 Stat. 1878, and Samoan leaders formally ceded sovereignty to the United States in 1900 and 1904, 45 Stat. 1253. American Samoa was administered by the Secretary of the Navy until 1951, when President Truman transferred administrative responsibility to American Samoa's current supervisor, the Secretary of the Interior. Exec. Order No. 10,264, 16 Fed. Reg. 6,417 (July 3, 1951).

Over the past half-century, American Samoa has strengthened its ties to the United States. The Constitution of American Samoa was approved by the Secretary of the Interior in 1967 and provides for an elected bicameral legislature, an appointed governor, and an independent judiciary. Compl. ¶ 27. In 1977, the Secretary permitted the governor to be selected by popular vote. *Id.* One year later, Congress voted to give American Samoa a nonvoting delegate in the U.S. House of Representatives. *Id.*[3] American Samoans have served in the U.S. military since 1900 and, most recently, in the wars in both Iraq and Afghanistan. *Id.* ¶ 31. In signing the 1978 legislation granting American Samoa a delegate in Congress, President Carter acknowledged the islands' contributions to American sports and culture and their role as "a permanent part of American political life." Jimmy Carter, Presidential Statement on Signing H.R. 13702 into Law (Oct. 31, 1978), *cited in* Pls.' Mem. of P. & A. in Opp'n to Gov't's Mot. Dismiss ("Pls.' Opp'n") [Dkt. # 18] at 5 n.7.

At the same time, however, American Samoa has endeavored to preserve its traditional way of life known as *fa'a Samoa.* Indeed, its constitution protects the Samoan tradition of communal ownership of ancestral lands by large, extended families:

> 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

[3] The current delegate, Eni F. H. Faleomavaega, appears as Amicus Curiae in this case opposing the plaintiffs' suit. *See generally* Br. of the Hon. Eni F.H. Faleomavaega as Amicus Curiae in Supp. of Defs. ("Amicus Br.") [Dkt. # 12].

> and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.

Rev. Const. of Am. Samoa art. I, § 3; *see also Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 11, 12 (1980); Amicus Br. at 4-5. 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. Amicus Br. at 3.

Federal law classifies American Samoa as an "outlying possession" of the United States. Immigration and Naturalization Act ("INA") § 101(a)(29), 8 U.S.C. § 1101(a)(29). As such, people born in American Samoa are U.S. nationals but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1). The State Department's Foreign Affairs Manual ("FAM") accordingly categorizes American Samoa as an unincorporated territory and states that "the citizenship provisions of the Constitution do not apply to persons born there." 7 FAM § 1125.1(b). In accordance with INA and FAM, the State Department stamps the passports of people born in American Samoa with "Endorsement Code 09," which declares that the holder of the passport is a U.S. national but not a U.S. citizen. *See* Compl. ¶ 7; Defs.' Mem. at 6-7.

American Samoans have been permitted to become naturalized U.S. citizens since 1952, but plaintiffs describe that process as "lengthy, costly, and burdensome." Compl. ¶¶ 47-48. American Samoans must relocate to another part of the United States to begin the naturalization process, and the citizenship application requires a $680 fee, a moral character assessment, fingerprinting, and an English and civics examination. Pls.' Opp'n at 11.

All of the individual plaintiffs were issued passports by the State Department bearing Endorsement Code 09. *See id.* ¶¶ 10-14. Plaintiffs allege a variety of harms that have befallen them due to their noncitizen national status. Several plaintiffs, despite long careers in the military or law enforcement, remain unable to vote or to work in jobs that require citizenship status. *Id.* ¶ 10(c), 11(c)-(e), 14(c)-(d). Other harms include: ineligibility for federal work-study programs in college, *id.* ¶ 11(c); ineligibility for firearm permits, *id.* ¶ 11(e); and inability to obtain travel and immigration visas, *id.* ¶ 12(e), 13(d-e).

STANDARD OF REVIEW

Pursuant to the Federal Rules of Civil Procedure, defendants have moved to dismiss plaintiffs' complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). *See* Defs.' Mot. to Dismiss Pls.' Compl. ("Defs.' Mot.") [Dkt. # 9] at 1. For a motion to dismiss under Rule 12(b)(1), "the plaintiff bears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence." *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006) (citing, *inter alia*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "[P]laintiff s factual allegations in the complaint … will bear closer scru-

tiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *U.S. ex rel. Digital Healthcare*, *Inc. v. Affiliated Computer*, 778 F. Supp. 2d 37, 43 (D.D.C. 2011) (citation and internal quotation marks omitted).

A motion to dismiss under Rule 12(b)(6) tests whether the plaintiff has pleaded facts sufficient to "raise a right to relief above the speculative level," assuming that the facts alleged are true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Fla.*, Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984).

In considering motions under both Rule 12(b)(1) and Rule 12(b)(6), a court must construe the complaint in a light favorable to the plaintiff and must accept as true plaintiff's reasonable factual inferences. *See Howard v. Fenty*, 580 F. Supp. 2d 86, 89-90 (D.D.C. 2008); *Smith v. United States*, 475 F. Supp. 2d 1, 7 (D.D.C. 2006) (citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)).

ANALYSIS

I. Jurisdiction

Before the Court can reach the merits of this case, it must, of course, ensure that the dispute falls within its jurisdiction. *Util. Air Regulatory Grp. v. EPA*, 320 F.3d 272, 277 (D.C. Cir. 2003). Defendants put forth three arguments contesting this Court's jurisdiction over plaintiffs' claims: 1) two of plaintiffs'

APA claims are jurisdictionally time-barred, 2) the Samoan Federation of America lacks standing, and 3) plaintiffs' complaint is barred by the political question doctrine. *See* Defs.' Mem. at 17-18, 19-23. For the reasons set forth below, the Court finds that it has jurisdiction.

First, defendants allege that two of the five individual plaintiffs' APA claims are time-barred because their passports, bearing Endorsement Code 09, were issued outside the six year limitations period. *See* Defs.' Mem. at 20-21.[4] Putting aside the merits of defendants' argument, however, the fact remains that the three other plaintiffs have, in essence, raised the identical APA claim. Thus, having jurisdiction to hear those claims effectively provides this Court with the very jurisdiction necessary to evaluate the merits of these claims.

Similarly, defendants' assertion that the Samoan Federation of America lacks standing to sue either on its own behalf or on behalf of its members, *see* Defs.' Mem. at 21-23, is an argument that is of no real consequence.[5] It is well-established that a court need not consider the standing of the other plaintiffs

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[4] The APA time bar issue is best understood as a jurisdictional matter. Our Circuit has held that the general section 2401(a) statute of limitations applies to APA claims unless another statute provides otherwise, *see Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004), and that, "[u]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition," *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987).

[5] "A … motion to dismiss for lack of standing implicates subject matter jurisdiction…." *Edwards v. Aurora Loan Serv.*, 791 F. Supp. 2d 144, 150 (D.D.C. 2011).

when at least one plaintiff has standing. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). The bottom line here is clear: defendants do not allege that the individual plaintiffs lack standing, nor is there any reason for this Court to believe that they do. As such, the Court need not address the standing of the Samoan Federation of America in order to determine whether it has jurisdiction.

Finally, defendants advance the novel and somewhat exotic jurisdictional argument that plaintiffs' suit raises a nonjusticiable political question.[6] *See* Defs.' Mem. at 17-18. The Government argues that, "at bottom," plaintiffs are arguing for a grant of statehood to American Samoa, and that such a determination is a political question committed by the Constitution to Congress. *See id.* at 18. Plaintiffs respond that their complaint does not argue for statehood, but instead argues for the application of a particular constitutional provision to a territory, a

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[6] The political question doctrine is a jurisdictional matter. "[T]he concept of justiciability, which expresses the jurisdictional limitations imposed on federal courts by the 'case or controversy' requirement of Art. III, embodies … the … political question doctrine[]…. [T]he presence of a political question [thus] suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (quoted in *Hwang Geum Joo v. Japan*, 413 F.3d 45, 47-48 (D.C. Cir. 2005)).

claim "eminently fit for judicial resolution." Pls.' Opp'n at 33.

To the extent they view plaintiffs as petitioning for statehood, however, defendants misread the complaint. The complaint clearly urges the application of the Citizenship Clause to American Samoa, but it never "demands" recognition of American Samoa as a state or even mentions the word "statehood." *See generally* Compl. The actual task before the Court—determining whether the Citizenship Clause applies to American Samoa—is, indeed, a proper judicial inquiry.[7]

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[7] The Supreme Court has decided similar questions throughout its history. *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (finding Suspension Clause applicable to U.S. Naval Station at Guantanamo Bay); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment jury trial right inapplicable to unincorporated territory of Puerto Rico); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses inapplicable to Puerto Rico). Most recently, in *Boumediene*, the Supreme Court expressly rejected the contention that the Constitution's extraterritorial application presents a political question. 553 U.S. at 754-55. In fact, defendants themselves rely on several cases in which courts exercised their jurisdiction to determine whether the Citizenship Clause extended to the Philippines while it was an unincorporated territory of the United States. *See* Defs.' Mem. at 12-15 (citing, *inter alia*, *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1995), *cert. denied sub nom. Sanidad v. Immigration & Naturalization Serv.*, 515 U.S. 1130 (1995); *Licudine v. Winter*, 603 F. Supp. 2d 129 (D.D.C. 2009)).

II. Failure to State a Claim

Having jurisdiction, the Court turns to defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim. Plaintiffs' claims all hinge upon one legal assertion: the Citizenship Clause guarantees the citizenship of people born in American Samoa. Defendants argue that this assertion must be rejected in light of the Constitution's plain language, rulings from the Supreme Court and other federal courts, longstanding historical practice, and pragmatic considerations. *See generally* Defs.' Mem.; Gov't's Reply in Supp. of Their Mot. to Dismiss ("Defs.' Reply") [Dkt. # 20]; Amicus Br. Unfortunately for the plaintiffs, I agree. The Citizenship Clause does *not* guarantee birthright citizenship to American Samoans. As such, for the following reasons, I must dismiss the remainder of plaintiffs' claims.

The Citizenship Clause of the Fourteenth Amendment provides that [a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, section 1. Both parties seem to agree that American Samoa is "subject to the jurisdiction" of the United States, and other courts have concluded as much. *See* Pls.' Opp'n at 2; Defs.' Mem. at 14 (citing *Rabang* as noting that the territories are "subject to the jurisdiction" of the United States). But to be covered by the Citizenship Clause, a person must be born or naturalized "in the United States *and* subject to the jurisdiction thereof." Thus, the key question becomes whether American Samoa

qualifies as a part of the "United States" as that is used within the Citizenship Clause.[8]

The Supreme Court famously addressed the extent to which the Constitution applies in territories in a series of cases known as the Insular Cases.[9] In these cases, the Supreme Court contrasted "incorporated" territories—those lands expressly made part of the United States by an act of Congress—with "unincorporated territories" that had not yet become part of the United States and were not on a path toward statehood. *See*, *e.g.*, *Downes*, 182 U.S. at 312; *Dorr v. United States*, 195 U.S. 138, 143 (1904); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (citing *Boumediene v. Bush*, 553 U.S.

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[8] The Court is also guided by the familiar principle that "'[p]roper respect for a coordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)). Unless it can be *clearly* shown that the Citizenship Clause extends to American Samoa, plaintiffs' legal theory should be rejected.

[9] The Insular Cases include *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Huus v. N.Y. and Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

723, 757-58 (2008)).[10] In an unincorporated territory, the Insular Cases held that only certain "fundamental" constitutional rights are extended to its inhabitants. *Dorr*, 195 U.S. 148-49; *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *see also Verdugo-Urquidez*, 494 U.S. at 268. While none of the Insular Cases directly addressed the Citizenship Clause, they suggested that citizenship was not a "fundamental" right that applied to unincorporated territories.[11]

For example, in the Insular Case of *Downes v. Bidwell*, the Court addressed, via multiple opinions, whether the Revenue Clause of the Constitution applied in the unincorporated territory of Puerto Rico. In an opinion for the majority, Justice Brown intimated in dicta that citizenship was not guaranteed to unincorporated territories. *See Downes*, 182 U.S. at 282 (suggesting that citizenship and suffrage are not "natural rights enforced in the Constitution" but rather rights that are "unnecessary to the proper

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[10] Plaintiffs do not contest whether American Samoa is an "incorporated" or "unincorporated" territory; rather they reject this dichotomy altogether. *See* Pls.' Opp'n at 25-33. For the purposes of this characterization, the Court assumes that American Samoa is an "unincorporated" territory, as no act of incorporation has been identified.

[11] Plaintiffs cite two cases to support the conclusion that citizenship is a fundamental right: *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality op.) (mentioning the "fundamental right of citizenship") and *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) (citizenship is "no light trifle"). Each of these cases discusses the fundamentality of citizenship in dicta, and neither case has anything to do with territorial citizenship. Such precedent is unpersuasive in light of the voluminous federal case law discussed herein that concludes that citizenship is not guaranteed to people born in unincorporated territories.

protection of individuals."). He added that "it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States." *Id.* at 279-80. He also contrasted the Citizenship Clause with the language of the Thirteenth Amendment, which prohibits slavery "within the United States, or in any place subject to their jurisdiction." *Id.* at 251 (emphasis added). He stated:

> [T]he 14th Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized in the United States, *and* subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction."

Id. (emphasis added). In a concurrence, Justice White echoed this sentiment, arguing that the practice of acquiring territories "could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States." *Id.* at 306.

Plaintiffs rightly note that *Downes* did not possess a singular majority opinion and addressed the right to citizenship only in dicta. Pls.' Opp'n at 25-27. But in the century since *Downes* and the Insular Cases were decided, *no* federal court has recognized birthright citizenship as a guarantee in unincorporated territories. To the contrary, the Supreme Court has continued to suggest that citizenship is not

guaranteed to people born in unincorporated territories. For example, in a case addressing the legal status of an individual born in the Philippines while it was a territory, the Court noted—without objection or concern—that "persons born in the Philippines during [its territorial period] were American nationals" and "until 1946, [could not] become United States citizens. *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954). Again, in *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998), Justice Ginsberg noted in her dissent that "the only remaining noncitizen nationals are residents of American Samoa and Swains Island" and failed to note anything objectionable about their noncitizen national status. More recently, in *Boumediene v. Bush*, the Court reexamined the Insular Cases in holding that the Constitution's Suspension Clause applies in Guantanamo Bay, Cuba. 553 U.S. 723, 757-59 (2008). The Court noted that the Insular Cases "devised … a doctrine that allowed [the Court] to use its power sparingly and where it would most be needed. This century-old doctrine informs our analysis in the present matter." *Id.* at 759.

Plaintiffs argue that *Boumediene* did not reaffirm—but instead narrowed—the Insular Cases. Pls.' Opp'n at 28-29. They point to the Court's statement that "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance." *Boumediene*, 553 U.S. at 758 (citing *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the

Commonwealth of Puerto Rico in the 1970's.")). *Id.* This vague statement crafted in a vastly different context, however, does not license this Court to turn its back on the more direct and more persuasive precedent and the legal framework that has predominated over the unincorporated territories for more than a century.

Indeed, other federal courts have adhered to the precedents of the Insular Cases in similar cases involving unincorporated territories. For example, the Second, Third, Fifth, and Ninth Circuits have held that the term "United States" in the Citizenship Clause did not include the Philippines during its time as an unincorporated territory. *See generally Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Rabang*, 35 F.3d 1449. These courts relied extensively upon *Downes* to assist with their interpretation of the Citizenship Clause. *See Nolos*, 611 F.3d at 282-84; *Valmonte*, 136 F.3d at 918-21; *Rabang*, 35 F.3d at 1452-53. Indeed, one of my own distinguished colleagues in an earlier decision cited these precedents to reaffirm that the Citizenship Clause did not include the Philippines during its territorial period. *See Licudine v.*

Winter, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009) (Robinson, J.).[12]

Plaintiffs attempt to distinguish these cases by noting that the Philippines, unlike American Samoa, was a territory only "temporarily." Pls.' Opp'n at 31. But none of these cases based their decision on the fact that the Philippines was a temporary territory. Even if this distinction made a difference, plaintiffs fail to rebut the Ninth Circuit's recent holding that the Northern Mariana Islands—a current and longstanding territory—is not included within the bounds of the Citizenship Clause. *Eche v. Holder*, 694 F.3d 1026, 1027-28 (9th Cir. 2012).[13] In short, federal courts have held over and over again that unincorporated territories are not included within the

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[12] The Philippines cases also reject the applicability of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), in which the Supreme Court addressed whether a child born to alien parents in the United States was a citizen. *See Nolos*, 611 F.3d at 284; *Valmonte*, 136 F.3d at 920; *Rabang*, 35 F.3d at 1454; *see also* Pls.' Opp'n at 13, 24 (citing *Wong Kim Ark*). Because the child was born in San Francisco, the Court did not need to address the territorial scope of the Citizenship Clause in that case.

[13] Plaintiffs address *Eche* in a footnote, stating simply that it "relies on the same flawed arguments as the other cases cited by Defendants." Pls.' Opp'n at 31 n.25.

Citizenship Clause, and this Court sees no reason to do otherwise![14]

In both their brief and in oral argument, plaintiffs placed great weight on our Circuit's decision in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975). In that case, the Court addressed whether an American citizen was guaranteed the right to trial by jury in American Samoa. *Id.* at 1146. Rejecting the reliance on "key words such as 'fundamental' or 'unincorporated territory'" in the Insular Cases and other cases, the court instead employed the test from *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring): asking whether the right to trial by jury would be "'impractical and anomalous.'" *King*, 520 F.2d at 1147 (quoting *Reid*, 354 U.S. at 75). As defendants rightly note, this case addressed the rights of an *existing* citizen in American Samoa—not the right of persons born in American Samoa to citizenship itself. Defs.' Reply at 9. This distinction was critical in

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[14] Unpersuasively, plaintiffs attempt to use legislative history to support the territorial reach of the Citizenship Clause. *See* Pls.' Opp'n at 13-18. Plaintiffs cite, *inter alia*, a senator's comment that the Citizenship Clause declares that "every person born within the limits of the United States [is] a citizen." *Id.* at 13. This comment fails to shed any light on whether the "United States" includes its territories. Plaintiffs also rely upon contemporaneous language from another senator, President Jackson, and other legislation that include people in the "Territories" within the bounds of the Citizenship Clause. *Id.* at 13-15. However, it is unclear from this language whether the "Territories" included only incorporated territories on the path to statehood or also unincorporated territories—particularly unincorporated territories such as American Samoa that had not yet come into existence. Even if this legislative history were clear, these stray comments are not sufficient to upend years of contrary legal precedent.

Reid, the case upon which *King* relied. As the Supreme Court noted in *Boumediene*, "That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States." 553 U.S. at 760. Further, neither *King* nor *Reid* discussed the right to citizenship—a right that other federal courts have addressed directly and, in doing so, have refused to extend to unincorporated territories.

Morever, our Circuit appeared to reaffirm its commitment to Insular Cases—in terms of extending only "fundamental" rights to unincorporated territories—in a case following *King* that involved a due process claim in American Samoa. *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 385 (D.C. Cir. 1987). In that case, the Circuit stated that "the Supreme Court long ago determined that in the 'unincorporated' territories, such as American Samoa, the guarantees of the Constitution apply only insofar as its 'fundamental limitations in favor of personal rights' express 'principles which are the basis of all free government which cannot be with impunity transcended.'" *Id.* (citing *Dorr*, 195 U.S. at 146-47). The court held that access to a court independent of the executive branch is not a "fundamental" right extending to American Samoa. *Id.* at 386. In light of this later case and *King*'s distinct context, this Court

does not find *King* to be an appropriate guidepost for this case.[15]

Finally, this Court is mindful of the years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right. In the unincorporated territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, birthright citizenship was conferred upon their inhabitants by various statutes many years after the United States acquired them. *See* Amicus Br. at 10-11. If the Citizenship Clause guaranteed birthright citizenship in unincorporated territories, these statutes would have been unnecessary. While longstanding practice is not sufficient to demonstrate constitutionality, such a practice requires special scrutiny before being set aside. *See*, *e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it[.]"); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use.... Yet an unbroken practice ... is not some-

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[15] In a brief, per curiam opinion, our Circuit declined to address the question of whether the Citizenship Clause applied to the Philippines in *Mendoza v. Soc. Security Comm'r*, 92 F. App'x 3, 3 (2004). In claiming that *Mendoza* suggests that birthright citizenship in the territories is "an open question in the Circuit," plaintiffs attempt to make a mountain out of a molehill. The *Mendoza* court sidestepped the issue not because it was necessarily "an open question"—but rather because the issue was simply unnecessary to the disposition of the case. *See id.* ("We need not decide any of the constitutional questions presented by Amicus....").

thing to be lightly cast aside."). And while Congress cannot take away the citizenship of individuals covered by the Citizenship Clause, it can bestow citizenship upon those not within the Constitution's breadth. *See* U.S. Const. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory belonging to the United States."); *id.* at art. I, § 8, cl. 4 (Congress may "establish an uniform Rule of Naturalization…."). To date, Congress has not seen fit to bestow birthright citizenship upon American Samoa, and in accordance with the law, this Court must and will respect that choice.[16]

CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' Motion to Dismiss. An order consistent with this decision accompanies this Memorandum Opinion.

s/________________________
RICHARD J. LEON
United States District Judge

[16] Because the Court finds statutory interpretation and legal precedent sufficient to grant defendants' motion to dismiss, it need not address the Amicus's arguments about the potentially deleterious effects of mandating birthright citizenship on American Samoa's traditional culture. *See* Amicus Br. at 12-18.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5272 **September Term, 2015**

1:12-cv-01143-RJL

Filed On: October 2, 2015

Leneuoti Fiafia Tuaua, et al.,

Appellants

v.

United States of America, et al.,

Appellees

American Samoa Government and
Aumua Amata,

Intervenors

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Silberman and Sentelle, Senior Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

<u>Per Curiam</u>

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX D

U.S. Const. art. I, § 2, cl. 2:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const. art. I, § 3, cl. 3:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. Const. art. II, § 1, cl. 5:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

U.S. Const. amend. XIII, § 1:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const. amend. XIV, §§ 1-2:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

8 U.S.C. § 1101. Definitions *(excerpt)*:

(a) As used in this chapter—

* * *

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

* * *

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

* * *

8 U.S.C. § 1408. Nationals but not citizens of the United States at birth:

Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and

(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years—

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B) at least five years of which were after attaining the age of fourteen years.

The proviso of section 1401(g) of this title shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.

8 U.S.C. § 1440. Naturalization through active-duty service in the Armed Forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities:

(a) Requirements

Any person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment, reenlistment, extension of enlistment, or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the United States for noncommercial service, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the

United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however*, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of an application for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

(b) Exceptions

A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 1429 of this title as they relate to deportability and the provisions of section 1442 of this title;

(2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required;

(3) service in the military, air or naval forces of the United States shall be proved by a duly

authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and was separated from such service under honorable conditions; and

(4) notwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing a petition for naturalization or for the issuance of a certificate of naturalization upon citizenship being granted to the applicant, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

(c) Revocation

Citizenship granted pursuant to this section may be revoked in accordance with section 1451 of this title if the person is separated from the Armed Forces under other than honorable conditions before the

person has served honorably for a period or periods aggregating five years. Such ground for revocation shall be in addition to any other provided by law, including the grounds described in section 1451 of this title. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation. Any period or periods of service shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service.

10 U.S.C. § 532. Qualifications for original appointment as a commissioned officer *(excerpt)*:

(a) Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be given only to a person who—

(1) is a citizen of the United States;

(2) is able to complete 20 years of active commissioned service before his sixty-second birthday;

(3) is of good moral character;

(4) is physically qualified for active service; and

(5) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

* * *

48 U.S.C. § 1661. Islands of eastern Samoa:

(a) Ceded to and accepted by United States

The cessions by certain chiefs of the islands of Tutuila and Manua and certain other islands of the Samoan group lying between the thirteenth and fifteenth degrees of latitude south of the Equator and between the one hundred and sixty-seventh and one hundred and seventy-first degrees of longitude west of Greenwich, herein referred to as the islands of eastern Samoa, are accepted, ratified, and confirmed, as of April 10, 1900, and July 16, 1904, respectively.

(b) Public land laws; revenue

The existing laws of the United States relative to public lands shall not apply to such lands in the said islands of eastern Samoa; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the said islands of eastern Samoa for educational and other public purposes.

(c) Government

Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

48 U.S.C. § 1662. Sovereign of United States extended over Swains Island:

The sovereignty of the United States over American Samoa is extended over Swains Island, which is made a part of American Samoa and placed under the jurisdiction of the administrative and judicial authorities of the government established therein by the United States.

7 Dep't of State, *Foreign Affairs Manual* § 1125.1. Current Law:

a. As defined in Section 101(a)(29) INA, the term "outlying possession" of the United States applies only to American Samoa and Swains Island.

b. American Samoa and Swains Island are not incorporated territories, and the citizenship provisions of the Constitution do not apply to persons born there.

c. Section 301(e) INA provides for acquisition of U.S. citizenship by birth in outlying possessions to one U.S. citizen parent who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person. Section 309 INA made Section 301(e) applicable to children born out of wedlock under certain conditions (see 7 FAM 1133.4).

d. Section 308(1) and (3) INA provides non-citizen U.S. nationality for the people born (or foundlings) in American Samoa and Swains Island (see 7 FAM 1121.4-2 for text of Sec 308 (1) and (3) INA).

e. By its wording, Section 308(1) INA is retroactive, effectively granting U.S. non-citizen nationality status to anyone born in American Samoa or Swains Island after annexation (February 16, 1900 for American Samoa and March 4, 1925 for Swains Island) and before December 24, 1952, who did not acquire non-citizen U.S. nationality at the time of birth.

7 Dep't of State, *Foreign Affairs Manual* § 1141. Introduction:

a. The acquisition of non-citizen U.S. nationality by birth abroad is governed by treaty or congressional legislation. The law in effect when a person was born governs that person's acquisition of non-citizen U.S. nationality, unless the legislation specifically provides otherwise such as retroactive application. See 7 FAM 1120 regarding acquisition of U.S. nationality by birth in U.S. territories and possessions.

See 7 FAM 1330 regarding documentary evidence to establish a citizenship claim.

(1) The national or nationals through whom a child claims non-citizen U.S. nationality must have been U.S. non-citizen nationals when the child was born and previously must have resided or been physically present in the United States or one of its outlying possessions as required by the applicable law.

(2) See 7 FAM 1125 regarding acquisition of U.S. non-citizen nationality by persons born in American Samoa and Swains Island and 7 FAM 1126 regarding the non-citizen national option provided for persons born in the Commonwealth of the Northern Mariana Islands in Section 302 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Public Law 94-241. 90 Stat. 263) ("Covenant") of March 24, 1976, entered fully into force November 3, 1986.

b. Blood Relationships: The considerations in 7 FAM 1131, relating to blood relationships, and 7 FAM 1180, concerning posthumous children also apply to persons claiming non-citizen U.S. nationality through their parents.

c. Retention Provisions: Persons who acquired non-citizen U.S. nationality at birth were never subject to special requirements for retaining their U.S. nationality.

d. Birth to One U.S. Citizen and One U.S. Non-Citizen National: A child born to one U.S. citizen parent and one U.S. non-citizen national parent ac-

quires U.S. citizenship if the parent meets the requirements of INA 301(d) (8 U.S.C. 1401(d)) (or prior statutes) and, in cases of children born out of wedlock, INA 309 (8 U.S.C. 1409) (or prior statutes). The person may not opt for U.S. non-citizen national status. A person cannot be both a citizen and non-citizen national. Non-citizenship nationality under Section 308 of the INA is only acquired when there is no U.S. citizen parent.

e. Certificate of Non-Citizen National Status: See INA 341(b) (8 U.S.C. 1452(b)).

NOTE: Only persons who acquired U.S. non-citizen national status pursuant to INA 308 (8 U.S.C. 1408) or Section 204 NA are eligible for such a certificate. The Department implements INA 341(b) (8 U.S.C. 1452(b)) by annotating the person's U.S. passport to indicate that he or she is a non-citizen national and not a citizen, using endorsement code 09. (See 7 FAM 1300 Appendix B.)

Endorsement Code 09 Text:

THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN.

Explanation: **Placed in a passport issued to a U.S. national who is not a citizen**

f. Naturalization of a U.S. Non-Citizen National: A person who is a U.S. non-citizen national may apply for naturalization as a U.S. citizen pursuant to INA 325 (8 U.S.C. 1436) and 8 CFR 325.

7 Dep't of State, *Foreign Affairs Manual* § 1320, App. B. List of current Endorsements *(excerpt)*:

* * *

CODE	WORDING OF ENDORSEMENT (TEXT FIELD) or (DROPDOWN/ TEXT) **Explanatory notes appear below endorsement text in this font and color.**

* * *

09 (ALL)	THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN. • **Placed in a passport book issued to a U.S. national who is not a citizen.** • **"U.S. National" will be printed instead of "USA" on the front of the passport card.**

* * *