No. 15-981

IN THE
Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ASIAN AMERICANS ADVANCING JUSTICE | AAJC, AND THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL E. STEWART
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022

PAUL M. SMITH
Counsel of Record
JESSICA RING AMUNSON
MICHAEL T. BORGIA
EMILY A. BRUEMMER
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

League of United Latin American Citizens ("LULAC") is a nationwide nonprofit organization dedicated to advancing the economic condition, educational attainment, political influence, housing, health and civil rights of Hispanic Americans. LULAC involves and serves all Hispanic nationality groups and has approximately 132,000 members throughout the United States, including many in the U.S. Territory of Puerto Rico. LULAC and its members have an interest in this case because of its potential impact for racial equality in general and the people of Puerto Rico in particular. The same discriminatory rationale employed by the court below to deny birthright citizenship to the people of American Samoa based on their race and culture has been invoked to deny foundational rights to the 3.5 million U.S. citizens of Puerto Rico. LULAC seeks to explain why that rationale and the legal framework it has created have no place in our constitutional jurisprudence.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national nonprofit, non-partisan organization working to advance the human and civil rights of Asian Americans and build

---

[1] Pursuant to Rule 37.2, *amici* notified all parties of their intent to file an *amicus* brief at least ten days prior to the due date for the brief. The parties' written consent to this filing accompany this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief are filed herewith.

and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., Advancing Justice | AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including equal opportunity and economic development for Asian-American communities. Toward this end, Advancing Justice | AAJC is hopeful that, by agreeing to accept certiorari in this case, this Court will be able to address grave concerns of justice and equity for American Samoans.

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of nearly seventy five state and local Asian Pacific American bar associations and nearly 50,000 attorneys. NAPABA serves as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. NAPABA recognizes that the Asian Pacific American community and other minority communities have been subject to discriminatory laws and practices in the past and opposes the continued use of racist and discriminatory justification to serve as the basis for American law.

SUMMARY OF ARGUMENT

Petitioners ask this Court to resolve an issue of exceptional importance—whether the Citizenship Clause of the Fourteenth Amendment applies to persons born in the territory of American Samoa. The question Petitioners pose is no less than whether

Americans born in a territory over which the United States has exercised sovereignty for 115 years, who owe permanent allegiance to the United States,[2] and who serve in our military and other public institutions in great numbers, may be denied the rights and responsibilities of citizenship—and thereby held indefinitely in a second-class status—because of their racial and cultural heritage. At present, American Samoans are the only natural-born Americans still denied birthright citizenship.

The District of Columbia Circuit analyzed this question under a line of Supreme Court holdings in the *Insular Cases*. Decided between 1901 and 1922, those cases considered whether the rights secured by the Constitution extended to the people of the noncontiguous territories, and concluded generally that, while "the Constitution applies in full in incorporated [t]erritories surely destined for statehood," it applied "only in part in unincorporated [t]erritories." *Boumediene v. Bush*, 553 U.S. 723, 757 (2008); *see also Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922); *Downes v. Bidwell*, 182 U.S. 244, 288, 293-95 (1901) (White, J., concurring). In those cases, this Court found that the territories of Puerto Rico, the Philippines, and Hawaii remained "unincorporated," and therefore certain constitutional protections, including provisions of the Fifth, Sixth, and Seventh Amendments, did not apply to those territories. American Samoa, along with Puerto Rico, the U.S.

---

[2] *See* 8 U.S.C. § 1101(a)(22) (a "national of the United States" is a person who "owes permanent allegiance to the United States").

Virgin Islands, Guam and the Northern Marianas, remain "unincorporated" territories today.

Applying its interpretation of the doctrine of "territorial incorporation" arising from the *Insular Cases*,[3] the D.C. Circuit held that birthright citizenship under the Fourteenth Amendment is not "fundamental" or "integral to [a] free and fair society," but instead is "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence." Pet. App. 15a. The court thus held that the Citizenship Clause does not apply to "unincorporated" territories like American Samoa and therefore does not entitle persons born in American Samoa to citizenship.

The question of whether certain Americans are entitled to birthright citizenship under the Fourteenth Amendment is itself "an important question of federal law" that should be settled by this Court. *See* Sup. Ct. R. 10(c). But it is especially crucial that the Court grant certiorari in this case to address the potential consequences of the D.C. Circuit's opinion, which affects not only American Samoans, but also people born in the other noncontiguous territories, and the American constitutional system generally.

The D.C. Circuit erred in extending the reach of the *Insular Cases'* discriminatory framework to Petitioners' claim. Its decision to do so was erroneous for at least two reasons addressed here: First, the

[3] As argued in the Petition, the court below actually applied a significantly expanded version of the analytical framework from the *Insular Cases*. Pet. App. 27-30.

rationale underlying the *Insular Cases*—and specifically its distinction between "fundamental" constitutional rights and those "idiosyncratic" to the Anglo-American legal tradition—is based on anachronistic and abhorrent assumptions about the racial and cultural backgrounds of people born in the noncontiguous territories, and particularly the belief that those non-Anglo-Saxon people are less capable of exercising the rights and bearing the burdens of U.S. citizenship. The rationale underlying the *Insular Cases* is a close relative of the more infamous rationale of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which was decided by the same Court just a few years before *Downes*. But the rationale of *Plessy*, along with its resultant legal rule, was resoundingly rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Insular Cases*, even as applied to American Samoa and other "unincorporated" territories—territories that have long been part of our country and are currently home to more than four million Americans—remain good law. The rationale of racial and cultural exclusion at the heart of the *Insular Cases*, like that of *Plessy*, has no place in our constitutional jurisprudence, and can no longer be grounds for denying American Samoans citizenship.

Second, the D.C. Circuit's ruling failed to appreciate the foundational role that citizenship plays in the American political system and in the relationship between the citizen and his or her government. In distinguishing between "fundamental" constitutional rights and those particular to the Anglo-American legal tradition, the court considered birthright citizenship in

isolation, divorced from the many basic and practical rights that citizenship bestows. To say that the Citizenship Clause is not fundamental because of the way citizenship is acquired misses the point. In denying citizenship to American Samoans, the D.C. Circuit has denied them access to some of our most basic and sacred rights—even when they reside in one of the 50 states or the District of Columbia—from voting and jury service to military advancement to the right to pursue certain careers.

The rationale underlying the *Insular Cases* is a stain on our constitutional tradition, which the court below used to justify the continued second-class status of American Samoans. The Petition presents this Court with the opportunity to ensure that a rationale of racial and cultural exclusion is, like its jurisprudential cousin in *Plessy*, properly relegated to a regrettable chapter of history. Accordingly, the Petition should be granted.

ARGUMENT

I. The *Insular Cases'* "Territorial Incorporation" Doctrine Reflects an Agenda of Racial and Cultural Discrimination That Has No Place in Current Constitutional Jurisprudence.

The *Insular Cases* did not consider whether the Citizenship Clause's grant of birthright citizenship to those "born … in the United States," U.S. Const. amend. XIV, applies to persons born in the noncontiguous territories. Nevertheless, the D.C. Circuit addressed Petitioners' claim by "resort to the

… analytical framework" of the *Insular Cases*. Pet. App. 12a. The court, calling the *Insular Cases* "contentious," explained that "some aspects of the Insular Cases' analysis may now be deemed politically incorrect...." Pet. App. 13a. Even so, the court believed it could separate the "framework" created by those cases for determining whether the Constitution applies to outlying territories from the "anachronistic views of race and imperialism" that gave rise to the doctrine. *Id.* at 12a-13a. Finding that birthright citizenship is not fundamental, but rather particular to the Anglo-American legal tradition, the D.C. Circuit denied Petitioners' claims.

In the D.C. Circuit's view, the language of racial and cultural inferiority pervading the *Insular Cases* was just unfortunate and unnecessary dicta underlying an otherwise legitimate doctrine. But this supposed dichotomy between the *Insular Cases*' reasoning and its doctrinal legacy is illusory. The framework of "incorporated" and "unincorporated" territories arose from discriminatory motives and was crafted to serve a discriminatory purpose. This Court recognized in *Brown v. Board of Education* that the nation could not divide people of different races into supposedly "separate but equal" categories without serving *Plessy's* purpose of perpetuating Anglo-Saxon supremacy. So too, courts cannot deny American Samoans birthright citizenship on the ground that they were born in a so-called "unincorporated" territory and therefore unworthy of rights "idiosyncratic to the Anglo-American tradition of jurisprudence," Pet. App. 15a (first quotation from *Dorr v. United States*, 195

U.S. 138, 147 (1904)), without sanctioning the belief that they are not fully capable of U.S. citizenship because of their non-Anglo-Saxon heritage.

A. The Doctrine of "Territorial Incorporation" Arose from the View that the Diverse Peoples of the Noncontiguous Territories Were Incapable of U.S. Citizenship.

By 1901, the year in which the first set of the *Insular Cases* was decided, the United States found itself in a new role—that of a global imperial power. *See* The Hon. Juan R. Torruella, *The Insular Cases*, 29 U. Pa. J. Int'l L. 283, 289 (2007). Victory in the Spanish-American War in 1898 gave the United States possession of the former Spanish colonies of Puerto Rico, the Philippines and Guam. *Id.* at 288-89. The same year, the Republic of Hawaii (itself a product of the overthrow of the Kingdom of Hawaii led by white planters) was annexed as the Territory of Hawaii. In 1900, the United States annexed American Samoa. *See generally* Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory*, 78 Denv. U. L. Rev. 921, 923-33 (2001).

The United States thus became sovereign over noncontiguous territories that were extensively settled by non-Anglo-Saxon people living in societies, cultures, and systems of government markedly different from what the Court would term the "Anglo-American tradition." *See Dorr v. United States*, 195 U.S. 138, 147 (1904). These territorial acquisitions ignited political and legal debates between so-called "imperialists" and "anti-imperialists"—those who believed that the

United States could and should annex the new territories, and those who believed the nation should not or could not. *See* Torruella, *supra* at 287-300; *see also* Efrén Rivera Ramos, *The Legal Construction of American Colonialism*, 65 Rev. Jur. U.P.R. 225, 237, 241-42 (1996).

At the center of these debates was the question of how to treat the diverse, non-Anglo-Saxon peoples inhabiting the new territories: would they become American citizens like those living in western continental territories, or would they be ruled like colonial subjects? Some anti-imperialists opposed annexation because they believed that it was both illegal and antithetical to American values to rule territories indefinitely as colonies. *See* Rivera Ramos, *supra* at 238-39. Others in the "anti-imperialist" camp, however, were motivated by a very different concern—that annexing the new territories required making their inhabitants citizens. Those in this second camp thought that the Constitution permitted only two choices for the new territories: full independence or full integration into the United States, as had been provided to the western continental territories held by the United States at the time of independence, acquired in the Louisiana Purchase, or annexed following the Mexican-American War. *Id.* at 238, 297–98. These anti-imperialists found the idea of integrating the new territories into the nation to be unthinkable, as doing so would mean granting "alien" people of "inferior" races U.S. citizenship and therefore full access to the rights and mechanisms of self-government. In the words of

Carl Schurz, a one-time U.S. senator and Secretary of the Interior:

> The fundamental objection to bring [the new territories] in as states was that they would then participate in the government of the Republic. If they become states on an equal footing with the other states they will not only be permitted to govern themselves as to their home concerns, but they will take part in governing the whole republic, in governing us …. The prospect of the consequences which would follow the admission of the Spanish creoles and the negroes of West India islands and of the Malays and Tagals of the Philippines to participation in the conduct of our government is so alarming that you instinctively pause before taking the step.

See Rivera Ramos, *supra* at 238 n.35.

Despite their sharp differences of opinion, those in favor of annexing the new territories and those opposed were united on one issue—that the inhabitants of the new territories were unfit for U.S. citizenship, as is evident in the congressional and academic debates at the time, which referred to "the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico …,"[4] "mongrels of the East, with breath of pestilence and touch of leprosy,"[5] coming

---

[4] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 415 (1899).

[5] Hon. Gustavo A. Gelpi, *The Insular Cases*, 58-Fed. Law. 22, 22 (Mar./Apr. 2011) (quoting 33 Cong. Rec. 3616 (1900)).

from a "cannibal island."[6] The prevailing view in these debates was that the inhabitants of the noncontiguous territories had "nothing in common with us and centuries cannot assimilate them" and thus they would "never be clothed with the rights of American citizenship nor their territory be admitted as a State of the American Union."[7] *See* Rivera Ramos, *supra* at 238-39.

But Supreme Court rulings and historical practice at that point were clear that the Constitution required the new territories to be fully integrated into the nation — and their inhabitants provided the rights and responsibilities of citizenship. *See* Rivera Ramos, *supra* at 241-42. In fact, in the far-less infamous portion of *Dred Scott v. Sanford*, the Court held unequivocally that the Constitution granted "no power … to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled or governed at its own pleasure," and "no power is given to acquire a territory to be held and governed" as a permanent colony. 60 U.S. 393, 446 (1857). Likewise, historical practice offered no precedent for holding the new territories indefinitely as colonies, as the western continental territories had always been governed by a framework providing them a path to statehood and affording their non-Native American inhabitants U.S. citizenship. *See* Rivera Ramos, supra at 237.

---

[6] James Bradley Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464, 481 (1899).

[7] Gelpi, *supra* at 22 (quoting 33 Cong. Rec. 2105 (1900)).

The challenge for those who could not fathom extending citizenship, with its rights and responsibilities of self-government, to the non-Anglo-Saxon inhabitants of the new territories, was to distinguish these new territories and their people from the territories acquired and settled through western expansion. *See* Lazos Vargas, *supra* at 930-31. The Supreme Court in the *Insular Cases* answered that challenge.

B. Like *Plessy v. Ferguson*, the *Insular Cases* Created a Discriminatory Framework that Cannot Be Separated from its Discriminatory Purpose.

The *Insular Cases*, and in particular *Downes v. Bidwell*, 182 U.S. 244 (1901) and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), developed a constitutional framework for holding the new territories as colonies, even while extending the full rights and responsibilities of citizenship to settlers in the western continental territories. The race and culture of the peoples of the new territories served as the primary distinguishing factor.

Joined by two other justices, Justice White wrote what would eventually emerge as the central holding of the *Insular Cases*. Warning of the "evil(s) of immediate incorporation," including the possibility of "millions of inhabitants of alien territory," which could result in a breakdown of the "whole system of government," *Downes*, 182 U.S. at 311-13 (White, J., concurring), Justice White distinguished between "incorporated" territories, which were fit for eventual statehood, and "unincorporated" territories of "alien

races" not so fit. *Id.* at 291. He determined that only in incorporated territories, as in the states themselves, would residents enjoy full benefits of constitutional protection, while the "alien races" of unincorporated territories like Puerto Rico would enjoy only those constitutional provisions that were "of so fundamental a nature that they cannot be transgressed…." *Id.* Justice White's rationale for this new rule was unequivocally imperialist. Postulating a scenario in which the United States discovered "an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons," he reasoned that the country's supposed right to acquire the island "could not be practically exercised if the result would be … the immediate bestowal of citizenship on those absolutely unfit to receive it[.]" *Id.* at 306.

Justice Brown, announcing the judgment of the Court but writing only for himself, was even more explicit than Justice White about the need to create a rule that would prevent the entire Constitution from applying to the overseas territories once they were annexed:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of

> the same race, or by scattered bodies of native Indians.

182 U.S. at 282. In other words, Justice Brown drew a distinction between continental territories on the one hand, and "outlying" territories such as those newly acquired on the other, based on "grave questions" about whether the non-Anglo-Saxon residents of such territories should be given "rights ... peculiar to our own system of jurisprudence." *Id.* at 282-83. Indeed, Justice Brown concluded that "[i]f [distant] possessions are inhabited by alien races ... the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." *Id.* at 287.

Given that no opinion in *Downes* garnered the support of a majority of the Court, the doctrinal rule of the *Insular Cases* would not crystallize until years later, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Applying Justice White's incorporation doctrine while invoking the explicit rationale of Justice Brown's opinion, the *Balzac* Court held that the right to a jury trial did not apply on Puerto Rico as an unincorporated territory. 258 U.S. at 311. Writing for the Court, Justice Taft (formerly President and before that Governor General of the Philippines) developed the distinction in Justices White's and Brown's opinions between "fundamental" rights and those "peculiar to our own system of jurisprudence." *Downes*, 182 U.S. at 282-83 (Brown, J.). He explained that the residents of Puerto Rico and the Philippines were not well-suited to adopting the jury system, as those territories were populated by people who "liv[ed] in compact and ancient communities, with definitely formed customs

and political conceptions," and who need not benefit from "institution[s] of Anglo-Saxon origin." *Id.* at 310.

Distinguishing *Rassmussen v. United States*, 197 U.S. 516 (1905), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970), which held that the Sixth Amendment jury trial right applied in the territory of Alaska, Justice Taft explained that, in contrast to the "compact and ancient communities" of the new territories, Alaska was "an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens." *Balzac*, 258 U.S. at 309-10.

The *Insular Cases* remain a relatively unknown chapter of American constitutional history. Yet, they should not be mistaken for a niche area of the law, because their effect is profound. The *Insular Cases* do to the diverse races and cultures of the noncontiguous territories what the Court's infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), did to African-Americans — legalize a system of racial subordination and provide constitutional legitimacy to racially discriminatory motives. *See* Ediberto Román, *Empire Forgotten*, 42 Vill L. Rev. 1119, 1148 (1997). Notably, *Downes* and *Plessy* were decided by the same Justices joining along similar lines, with Justice Brown writing both opinions for the Court, and Justice White joining in both judgments. Justice Harlan dissented both times. *See* Torruella, *supra* at 300-01.

In both the *Insular Cases* and *Plessy*, the prevailing opinions adopt abhorrent racial stereotypes to justify racial subjugation. *Compare Downes*, 182 U.S. at 306, 311-13 (White, J., concurring) *with Plessy*,

163 U.S. at 552 ("If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."). Both created a legal framework, thinly veiled in supposedly non-discriminatory terms, that actually operated to constitutionalize racial discrimination. In *Plessy*, this was "separate but equal;" in the *Insular Cases*, it was the sanitized lexicon of "incorporation." In creating these frameworks, both sanctioned a two-tiered, racially segregated system of civic membership, as Justice Harlan observed in his dissents in both cases. *See Plessy*, 163 U.S. at 563-64 (Harlan, J., dissenting) (laws such as the one upheld "interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States ….'"); *Downes*, 182 U.S. at 380 (Harlan, J., dissenting) (the judgment permits Congress to "engraft upon our republican institutions a colonial system such as exists under monarchical governments."). And both endeavored to add constitutional legitimacy to their holdings by claiming that they did not lead to racial subjugation at all. *Compare Plessy*, 163 U.S. at 550 ("[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."), *with Downes*, 182 U.S. at 291 ("there may nevertheless be restrictions of so fundamental a nature that they cannot be

transgressed, although not expressed in so many words in the Constitution.").

Most notably for purposes of the Petition pending before the Court, each case put forth a legal framework that cannot be separated from the discriminatory rationale it was created to serve. Both "separate but equal" and "territorial incorporation" discriminate on the basis of race by their very operation. The Supreme Court in *Brown v. Board of Education* recognized this when it ruled that "[s]eparate educational facilities are inherently unequal" because segregation of African-American students on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," and that "[t]he impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." 347 U.S. 494-95.

In the same way, courts cannot, as the D.C. Circuit attempted to do below, undertake the bizarre and unmoored exercise of carving up the Constitution into those rights that are "fundamental" and those that are "idiosyncratic to the Anglo-American tradition of jurisprudence," Pet. App. 15a (first quotation from *Dorr v. United States*, 195 U.S. 138, 147 (1904)), without serving the purpose of that exercise—to deny certain rights, as foundational to our Constitution as those ensconced in the Fifth, Sixth, and Seventh Amendments, to people deemed too far outside the Anglo-American legal tradition. That purpose is the only rationale ever provided in the *Insular Cases* for

why such a test should govern which constitutional rights apply to those living in the territories like American Samoa.

There is, however, one stark difference between *Plessy* and the *Insular Cases*: *Plessy's* doctrine of separate but equal was rightly rejected 62 years ago in *Brown v. Board of Education*. 347 U.S. 483, 494–95 (1954). The rationale of racial and cultural exclusion underlying the *Insular Cases* has long been due the same fate. Even if that rationale ever had legitimacy, it certainly has none now. American Samoa has been part of our nation for 115 years. Its people operate within our systems of government and law, and have one of the highest military enlistment rates of the states and territories. *See* Pet. at 9. It cannot plausibly be said that American Samoans are incapable of U.S. citizenship. *See* Pet. at 8-10. It is time for this Court to hold that American Samoans are birthright citizens, and can no longer be denied that right based on the discriminatory doctrine of territorial incorporation.

II. By Denying Citizenship To American Samoans, the Court Below Denied Them Access To a Host of Political, Social, and Civil Rights.

The decision below has real and practical consequences for Americans born in American Samoa. Citizenship is not only an honorific entitling one to full membership in the political community. It is also, in its most practical sense, a "turn-key" that entitles the citizen to an entire set of additional exclusive rights. *Perez v. Bronwell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (citizenship is "nothing less than the right

to have rights"), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967). It is the basis on which the polity grants, or denies, a set of other rights based on federal, state, and local law. *See* Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 21-23 (2008). The indignities and uncertainties suffered by American Samoans alone among persons born within the United States' jurisdiction are discrete and identifiable.

The *Insular Cases*' project of trying to draw clear lines around specific constitutional provisions and label them as "fundamental" or "idiosyncratic to the Anglo-American tradition," is plainly inadequate to consider this meaning of citizenship. By decoupling citizenship from the attendant rights and obligations it bestows and considering only the source of the title itself, the D.C. Circuit failed to account for the practical way that citizenship functions in our nation.

Like other residents of the territories, American Samoans are denied the right to vote for president and have no representation in Congress. The Supreme Court has also held that Americans living in the territories can be denied equal access to benefits such as Aid to Families With Dependent Children, *see Harris v. Rosario*, 446 U.S. 651, 651-52 (1980), or Social Security benefits, *Califano v. Gautier Torres*, 435 U.S. 1, 5 (1978). But American Samoans, in the unique position of non-citizen U.S. nationals, are denied a host of additional rights even when they are living in one of the fifty states or the District of Columbia.

For instance, American Samoans living in a state cannot vote in most elections, even state and local

elections. The right to vote is not simply a routine privilege; it is "the essence of a democratic society," and the principal mechanism by which individuals engage with and exercise control over the governance of the community. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As non-U.S. citizens, American Samoans are also uniformly denied another primary mechanism of civic engagement and participation—service on federal and state juries. *See* 28 U.S.C. § 1865(b). Like voting, jury service is a quintessential means of participating in American social and civic life. *See Powers v. Ohio*, 499 U.S. 400, 407 (1991). The inability to serve on a jury is "practically a brand upon [an individual], affixed by the law, [and] an assertion of [his] inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975). Moreover, the exclusion of American Samoans from jury service is particularly harmful to American Samoan litigants and—most of all—American Samoan criminal defendants, who cannot go before juries "composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder*, 100 U.S. at 308). For American Samoans, the reality of trial by a jury of one's peers is a far cry from this ideal.

American Samoans also face obstacles to advancement within the United States Armed Services, even though they have bravely fought for this

country for the past century. According to the U.S. Army Reserve, America Samoa "yields the highest rate of military enlistment of any U.S. state or territory." U.S. Army Reserve, *American Samoa and the United States Army Reserve*, http://www.usar.army.mil/Featured/ArmyReserveAtAGlance/AmericanSamoa.aspx. However, as of 2011, only about one quarter of enlisted active-duty positions in the Air Force were in occupations that did not require citizenship. Molly F. McIntosh & Seema Sayala with David Gregory, *Noncitizens in the Enlisted U.S. Military*, Center for Naval Analyses, 21-22 (Nov. 2011). Once a non-citizen has finished the initial enlistment commitment with the Air Force, he or she is prohibited from reenlisting without citizenship. *Id.* American Samoan service members in the other branches of the armed services face similar restrictions: as of 2011, non-citizens were eligible for only two-fifths of enlisted active-duty positions in the Navy and one-half of those positions in the Army and Marine Corps. *Id.* Advancement of non-citizens in the military is also limited. Non-citizens may not be appointed or commissioned as officers or reserve officers in any branch of the armed forces. 10 U.S.C. §§ 532(a)(1), 12201(b)(1).

Even when they die serving their country, American Samoan service members are treated less favorably than American citizens. Spouses, children, and parents of deceased service members who were citizens may apply for naturalization without demonstrating residence or physical presence in the United States. 8 U.S.C. § 1430(d). However, the law denies this benefit to the families of service members

who were not citizens at death. *Id.* The spouse, child, or parent of the deceased service member may overcome this slight only if they first obtain posthumous citizenship for their deceased loved one. *Id.; see also* 8 U.S.C. § 1440-1(a)-(b).

Citizenship also plays a significant role in family-based immigration laws, under which American Samoans—as non-citizens—are afforded only the rights and benefits granted to legal permanent residents. *See Matter of Ah San*, 15 I. & N. Dec. 315 (BIA 1975). Thus, American Samoans who live in the fifty States and the District of Columbia do not enjoy the same advantages as U.S. citizens in their ability to sponsor their foreign-national family members for visas to immigrate to the United States. Perhaps most significantly, there are entire classes of foreign nationals that non-citizen nationals simply may not sponsor to immigrate to the United States, even though U.S. citizens would have that ability. For example, a U.S. citizen may sponsor his or her parents to immediately immigrate to the United States under the "immediate relatives" provision. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Non-citizen nationals do not have that right. Under different provisions of the immigration law, U.S. citizens may sponsor their married sons or daughters, or their brothers and sisters, for immigration to the United States and eventual citizenship, INA § 203(a)(3), (4), 8 U.S.C. § 1153(a)(3), (4), but non-citizen nationals are afforded no correlate right.

Even where American Samoans can sponsor their relatives' immigration to the United States, their

ability to do so is more limited than that of U.S. citizens. For instance, both American Samoans and U.S. citizens may sponsor their foreign national spouses or unmarried children under the age of 21. However, only citizens may take advantage of the "immediate relatives" provision of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), which allows citizens to immediately sponsor those relatives (as well as their parents) for permanent residence and eventual citizenship. This has significant practical consequences, because it allows citizens and their sponsored family members to avoid the complicated system of per-year and per-country limits on immigration that are part of the family-based visa program—a system that often entails a substantial waiting period before an individual is finally eligible for a visa.

Finally, many professional opportunities in the public sector are limited to U.S. citizens. It is well known that the Constitution requires the President to be a "natural born [c]itizen," U.S. Const. art. II § 1, cl. 4, and the Constitution requires that members of the Senate and the House of Representatives be citizens for nine or seven years, respectively. *Id.* art. I, §§ 2, 3. But state and local laws often impose significant restrictions on public positions at all levels that American Samoans may hold. Many states require that state governors, legislators, judges, and other state leaders be U.S. citizens. Numerous state and local laws also require U.S. citizenship to hold a number of ordinary but vital public positions, such as that of police officer or state trooper, firefighter or paramedic, and public school teacher. Those laws also prohibit non-

citizens from holding various public and quasi-public leadership positions, such as a member of a state board of nursing, a state pharmacy commission, a school board, or a real estate commission, among a wide variety of others. The State of Washington, home to one of the largest communities of ethnic American Samoans in the country, broadly prohibits any non-citizen from "hold[ing] any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision." Wash. Rev. Code § 42.04.020. Public employment, like private employment, provides a means of income as well as opportunities for personal and professional development. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990). For that reason alone, restrictions on the types of positions American Samoans can hold is harmful. But public employment, similar to voting and jury service, also provides an opportunity to shape and serve one's community, whether by working in national security or serving on a local school board.

***

The Petition presents an important question of federal law—whether a group of Americans can be denied U.S. citizenship based on racial and cultural stereotypes. This question is of great importance to people born in American Samoa, who are currently denied U.S citizenship on those very bases. But the question is also important to all Americans who no longer wish to have a racially and culturally tiered system of citizenship.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. STEWART
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022

PAUL M. SMITH
Counsel of Record
JESSICA RING AMUNSON
MICHAEL T. BORGIA
EMILY A. BRUEMMER
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com