NO. 15-981

In the
Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* MEMBERS OF CONGRESS AND FORMER GOVERNMENTAL OFFICIALS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are current and former elected officials of the United States Territories of Guam, Puerto Rico, and the U.S. Virgin Islands, as well as governmental officials with expertise in territorial relations. *Amici* include members of Congress, former Governors of the Territories, and a former Executive Branch official with responsibility for territorial relations. By virtue of their expertise in the U.S. Territories that currently enjoy birthright citizenship, *Amici* are uniquely positioned to describe the importance of the question presented and the impact that birthright citizenship has had on the Territories.

Congresswoman Stacey Plaskett is the delegate to the U.S. House of Representatives from the U.S. Virgin Islands. She has served in that role since January 2015.

Congresswoman Madeleine Bordallo is the delegate to the U.S. House of Representatives from Guam. She has served in that role since January 2003.

Donna M. Christian-Christensen served as the delegate to the U.S. House of Representatives from the U.S Virgin Islands from 1997 to 2015. Prior to serving

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief, and counsel for all parties have consented to this filing.

as Delegate, Ms. Christian-Christensen was Acting Commissioner of Health for the U.S. Virgin Islands.

Joseph F. Ada served as the fifth elected Governor of Guam, from 1987 to 1994. Prior to becoming Governor, Mr. Ada served as Lieutenant Governor of Guam and as Speaker of the Guam Legislature.

Felix P. Camacho served as the seventh elected Governor of Guam, from 2003 to 2010. Prior to becoming Governor, Mr. Camacho served four terms in the Guam Legislature.

John de Jongh, Jr. served as the seventh elected Governor of the U.S. Virgin Islands, from 2007 to 2014. Prior to becoming Governor, Mr. de Jongh served as Commissioner of Finance for the U.S. Virgin Islands.

Carl Gutierrez served as the sixth elected Governor of Guam, from 1995 to 2002. Prior to becoming Governor, Mr. Gutierrez served nine terms in the Guam Legislature, including two terms as Speaker of the Legislature.

Dr. Pedro Rosselló served as the sixth elected Governor of Puerto Rico, from 1993 to 2000. After his eight years as Governor, Dr. Rosselló served as a Senator in the Legislative Assembly of Puerto Rico.

Charles W. Turnbull served as the sixth elected Governor of the U.S. Virgin Islands, from 1999 to 2006. Prior to becoming Governor, Mr. Turnbull served as Commissioner of the U.S. Virgin Islands Department of Education.

Anthony M. Babauta, a native of Guam, served as Assistant Secretary of the Interior for Insular Areas from 2009 to 2013. Prior to becoming Assistant

Secretary of the Interior, Mr. Babauta served the U.S. House of Representatives Natural Resources Committee as Staff Director for the Subcommittee on Insular Affairs, Oceans, and Wildlife.

SUMMARY OF ARGUMENT

The Constitution states unequivocally 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. Yet according to the decision below, Congress can withhold what the plain terms of the Constitution appear to guarantee to persons born in Territories of the United States. As current and former government officials of the U.S. Territories, *Amici* are uniquely well positioned to speak to the profound implications of that profoundly wrong decision. If birthright citizenship really is something that persons born in the Territories enjoy only as a matter of legislative grace, then there is nothing to stop Congress from denying citizenship to persons born in Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands tomorrow. Indeed, it is not even clear that Congress could not revoke birthright citizenship of territorial residents who currently enjoy it. The decision below thus imperils the citizenship of *everyone* born in the U.S. Territories.

That result cannot be reconciled with the text, structure, history, and purpose of the Fourteenth Amendment. Unsurprisingly, the D.C. Circuit's decision is grounded in none of those things, but instead rests largely on the notion that the American Samoa Government should get to dictate whether American Samoans enjoy constitutional birthright

citizenship. Setting aside the rather obvious problem with conditioning a constitutional right on the will of the majority, the concerns that led the D.C. Circuit to defer to the preferences of the American Samoa Government are completely unfounded, as recognizing that the Citizenship Clause applies with full force to the Territories would not imperil the culture or the people of American Samoa. Puerto Ricans, Guamanians, Virgin Islanders, and Northern Mariana Islanders have enjoyed birthright citizenship for decades without sacrificing their cultural identities or traditions. The people of American Samoa are sure to do the same if and when their constitutional birthright to citizenship is recognized. And this case provides the Court with a rare opportunity to restore that constitutional right—not just to the people of American Samoa, but to the people of *all* the Territories—as the question presented was pressed by litigants who plainly have standing and was passed upon by both courts below. Accordingly, the Court should grant certiorari and confirm once and for all that the U.S. Territories are not just *of* the United States, but also "in the United States." U.S. Const. amend. XIV, §1.

REASONS FOR GRANTING THE PETITION

I. This Court's Review Is Essential To Provide Clarity And Certainty To Millions Of Americans Living In The U.S. Territories.

A. The Question Presented Impacts All Americans Born in the U.S. Territories.

The Constitution states unequivocally 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. Yet according to the decision below, it is Congress, not the Constitution, that determines whether persons born in Territories of the United States are citizens. That conclusion is fundamentally incompatible with the text, structure, history, and purpose of the Fourteenth Amendment, each of which confirms beyond cavil that citizenship is the constitutional birthright of *everyone* born in the United States, not just those born in a State. That conclusion is equally incompatible with this Court's decisions in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), which "pu[t] at rest" any suggestion that "[t]hose … who had been born and resided always … in the Territories, though within the United States, were not citizens." *Id.* at 72-73. In short, while there are many aspects of citizenship over which Congress undoubtedly has control and circumstances in which Congress can extend citizenship, the Constitution itself guarantees citizenship to "[t]hose … who had been born and resided always … in the Territories." *Id.* at 72.

The D.C. Circuit's contrary conclusion has profound implications, not just for the tens of thousands of American Samoans from whom Congress has purported to deny citizenship by statute, but for the millions of Americans born in Territories to which Congress has purported to grant birthright citizenship by statute. While persons born in every Territory *but* American Samoa currently enjoy birthright citizenship, according to the decision below, they do so only as a matter of legislative grace. Just as Congress has purported to deny birthright citizenship to people born in American Samoa, under the decision below,

Congress could purport to deny birthright citizenship to people born in Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands tomorrow. The decision below thus deprives not only American Samoans, but people born in *all* the U.S. Territories, of the constitutional birthright to citizenship that the Fourteenth Amendment guarantees.

To make matters worse, if their citizenship really is a matter of legislative grace, then it is not even clear that Americans born in the Territories where birthright citizenship is recognized are entitled to *keep* the citizenship that they currently possess. Confronted with a similar question in *Rogers v. Bellei*, 401 U.S. 815 (1971), this Court concluded that Congress had the power to revoke the citizenship of an individual who became a citizen at birth via statute rather than via the Fourteenth Amendment. Relying on *Bellei*, the Congressional Research Service has opined that "the Fourteenth Amendment would not restrain Congress' discretion in legislating about the citizenship status of Puerto Rico." Memorandum from Cong. Research Serv., to Bennett Johnston: Discretion of Congress Respecting Citizenship Status of Puerto Ricans (Mar. 9, 1989). While one would like to think Congress would never resort to rescinding birthright citizenship already conferred, it is not hard to imagine situations in which the temptation would arise. Indeed, not so long ago, legislation was introduced in Congress that, in an effort "to force Puerto Rico to choose statehood or independence," would have "mandate[d] that Congress … revoke U.S. citizenship given to Puerto-Ricans" if Puerto Rico did not choose statehood. *Efron v. United States*, 1 F. Supp. 2d 1468,

1469 (S.D. Fla. 1998); *see* H.R. 856, 105th Cong. (1997).

Moreover, leaders on both sides of the aisle have acknowledged the massive influence that citizens born in the Territories can have on Presidential elections. *See, e.g.*, Mary Jordan, *Exodus from Puerto Rico Could Upend Florida Vote in 2016 Presidential Race*, Wash. Post (July 26, 2015), http://wapo.st/20XTJBG. For instance, like citizens born in other Territories, Puerto Ricans cannot vote in Presidential elections while living in Puerto Rico. *See Igartua-De La Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) ("As Puerto Rico has no electors, its citizens do not participate in the presidential voting."). They are eligible to vote, however, "if they take up residence in one of the 50 states." *Id.* In recent years, tens of thousands of Puerto Ricans have done just that, seeking out economic opportunity in Florida. *See* Jordan, *supra*. This influx of Puerto Ricans into Florida "could change the political calculus" in a state that is often critical to the Presidential election. *Id.* Given the stakes, it is far from implausible that Puerto Ricans' citizenship could become political leverage in years to come. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality opinion) ("Political gerrymanders are not new to the American scene.").

As the foregoing illustrates, the state of the law under the D.C. Circuit's view is simply untenable. Millions of citizens in the Territories hold the title that suggests full membership in the body politic, yet lack the certainty and dignity their fellow Americans enjoy. Instead of deriving their citizenship from the Fourteenth Amendment—the constitutional provision

that most embodies American ideals of equality and liberty—they derive their citizenship principally from a grant of power to Congress directed at colonial conquest and imperial rule. Their membership in the American community is defeasible; their most fundamental rights subject to political whims and judicial balancing tests.

It is difficult to fathom how that result could be reconciled with the Constitution's guarantee that "persons born … in the United States, and subject to the jurisdiction thereof, are citizens." U.S. Const. amend. XIV, §1. But if that seemingly unambiguous command really does not apply to millions of persons who unquestionably were born within the territorial limits of the United States and owe allegiance to our Nation, then this Court should be the one to say so. Indeed, there are few questions of such exceptional and foundational importance as the question of who in our country is entitled to U.S. citizenship as a matter of constitutional right. And Americans born in the Territories—Americans who are governed by and owe allegiance to the United States—should have the benefit of a clear answer from the Nation's highest Court as to whether they can in fact be deprived of a right that the Constitution seems to clearly convey.

To be sure, this Court cannot provide Americans who reside in the Territories the full panoply of rights and privileges exercised by Americans who reside in the States. No matter the result here, Americans who reside in the Territories will be represented in Congress by just one non-voting member of the House of Representatives. No matter the result here, Americans in the Territories will have no say in

choosing a Commander-in-Chief, even though they serve in the military at higher rates than the rest of the country. And no matter the result here, the territorial governments' powers will derive not from inherent sovereignty but from congressional authorization. This Court can, however, recognize what is made plain by the terms of the Fourteenth Amendment and the common-law tradition upon which those terms are based—namely, that individuals born in the United States Territories were in fact born "in the United States." U.S. Const. amend. XIV, §1. Doing so not only would "put th[e] question of citizenship … beyond the legislative power," *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967), but would provide Americans in the Territories with "the sense of permanent inclusion in the American political community" that is the very essence of citizenship. José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the U.S. Citizenship of Puerto Rico*, 127 U. Pa. L. Rev. 391, 396 n.12 (1978).

B. This Case Presents an Ideal Opportunity To Determine the Scope of the Citizenship Clause.

This case presents the Court with a rare and ideal opportunity in which to provide residents of the Territories with much-needed clarity about their citizenship status. There is no dispute that the petitioners have standing to raise the question of the scope of the Citizenship Clause, or that both courts below squarely addressed and resolved it. That alone is a rare feat, as it has proven difficult for residents of Territories in which Congress currently recognizes

birthright citizenship to obtain a judicial determination of whether their citizenship is a matter of constitutional right or legislative grace. In *Efron v. United States*, for example, a native-born Puerto Rican sought a declaratory judgment that she was a citizen under the Fourteenth Amendment. 1 F. Supp. 2d at 1469. Efron argued that she was injured because, if her citizenship did not derive from the Constitution, Congress could revoke her statutory citizenship at any time. *Id.* Although she supported her argument by pointing to then-pending legislation that could have revoked her citizenship, the district court dismissed her suit at the government's urging, concluding that Efron's claimed injury was "too speculative to create a substantial justiciable controversy." *Id.* at 1469-70. The Eleventh Circuit summarily affirmed. *Efron v. United States*, 189 F.3d 482 (11th Cir. 1999).

Because petitioners were born in American Samoa—the only Territory as to which Congress does *not* recognize birthright citizenship—they do not face the standing impediment that plagues Americans born in the other Territories. They thus are among the rare individuals with unquestionable standing to litigate a question that profoundly impacts *all* persons born in the Territories.

That said, American Samoans face a significant obstacle that makes future litigation on this issue unlikely should the Court deny certiorari—namely, the unfortunate tendency of lower courts to misread the Insular Cases as compelling them to hold that the phrase "in the United States" is "limited to the states of the Union." *Rabang v. INS*, 35 F.3d 1449, 1452-54 (9th Cir. 1994); *see also Nolos v. Holder*, 611 F.3d 279,

282-84 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914, 918 (2d Cir. 1998). That conclusion is not only wrong, *see infra* Part II; Pet.28-30, but also underscores the pressing need for this Court's intervention, as only this Court can disabuse lower courts of the mistaken belief that they are bound to adopt an atextual and ahistorical interpretation of the Citizenship Clause.

And this may well be the last best opportunity for this Court to do so. Awaiting a circuit split is not realistic when courts are laboring under the misimpression that binding precedent from this Court already answers this question. Nor is there any need to await a circuit split to ensure the fullest exploration of the important issues at stake, as this is hardly an area that has suffered from a dearth of legal analysis. Competing interpretations of the Citizenship Clause and the Insular Cases have been a source of scholarship and commentary for decades. *See, e.g.*, *Rabang*, 35 F.3d at 1466 (Pregerson, J., dissenting) (concluding that "[p]ersons born in the Philippines during the territorial period indisputably were born within the dominion of the United States, and therefore were born 'in the United States'"). Many of the same issues also have been explored in the context of persons born on a United States military base. *See, e.g.*, *Thomas v. Lynch*, 796 F.3d 535 (5th Cir. 2015), *petition for cert. filed*, No. 15-889 (U.S. Jan. 12, 2016); *compare, e.g.*, Laurence H. Tribe & Theodore B. Olson, *Presidents and Citizenship*, (Mar. 19, 2008), http://bit.ly/1oTQQ9i ("[C]itizenship includes birth within the territory and allegiance of the United States."), *with* 7 Charles Gordon et al., *Immigration Law and Procedure* §92.03(2)(d) (rev. ed. 2010) ("It

seems quite clear that [military] installations cannot be regarded as part of the United States for the purposes of the Fourteenth Amendment.").

In sum, there is little to be gained from allowing this exceptionally important issue to simmer any longer, as the historical sources have been vetted, the arguments made, and the rejoinders offered. And yet there is so much at stake, both for American Samoans and for the citizens of other Territories. If the Court denies certiorari now, *Amici* and the millions of Americans they represent may be powerless to bring the question back before the Court, and any American Samoans willing and able to do so may lack a venue in which the question remains open. Moreover, even if an American Samoan seeking to litigate the issue were fortunate enough to reside in a circuit where the question remains open as a technical matter, court after court has mistakenly viewed the answer to that question as foreordained by antiquated precedent from this Court. Accordingly, only this Court can set the record straight and confirm that persons born in the Territories are constitutionally entitled to the same birthright citizenship as any other person "born … in the United States." U.S. Const. amend. XIV, §1.

II. The Decision Below Is Profoundly Wrong Both In Its Reasoning And In Its Result.

A. The Insular Cases Do Not—and Should Not—Resolve the Question Presented.

Amici fully agree with petitioners that the Insular Cases do not govern the scope of the Citizenship Clause, both because those cases had nothing to do with the Citizenship Clause and "because that Clause expressly defines its own geographic scope." Pet.28-

29. Equally importantly, however, the Insular Cases *should* not apply here because they were premised on notions of racial superiority that have no place in constitutional interpretation and no relevance to the Territories today. If anything, the Court should embrace this case as an opportunity to renounce the Insular Cases and to free lower courts of the obligation to repeatedly reaffirm their "racist underpinnings." *Ballentine v. United States*, 486 F.3d 806, 813 (3d Cir. 2007).

It is no secret that the Insular Cases were "strongly influenced by racially motivated biases and by colonial governance theories." Juan R. Torruella, *The Insular Cases: The Establishment of A Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007). One need only read the decisions to confirm the point. In *Downes v. Bidwell*—the primary authority on which the Second, Third, Fifth, and Ninth Circuits relied in deeming the Citizenship Clause inapplicable to the Territories—Justice Brown referred to individuals in the "outlying and distant" Territories as "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought," so much so that "the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." 182 U.S. 244, 282, 287 (1901). Justice White went further still, suggesting in his opinion that individuals in the Territories were "fierce, savage, and restless people" who were "absolutely unfit" to be citizens. *Id.* at 302, 306; *see also Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) ("compact and ancient communities"); *Dorr v. United States*, 195 U.S. 138, 148 (1904) ("territory peopled by savages").

Those sentiments may have reflected the governing opinion of a colonial age, but they have no place in modern jurisprudence, and yet lower courts feel bound to apply these anachronistic precedents. While the Territories certainly continue to preserve their own unique cultures and traditions, neither they nor their people differ from States in ways that make "the administration of government and justice" within them "impossible." 182 U.S. at 287. To the contrary, in many respects, government and justice in the Territories already closely resembles government and justice in the States. For instance, each of the Territories has a tripartite government with a democratically elected governor. Most have a multi-party legislature and a supreme court from which aggrieved parties may petition for review in this Court.[2] Conversely, in many respects, the Territories already are treated much like the States. Each is celebrated on U.S. coins[3] and commemorated on U.S. postage stamps.[4] The Territories are home to multiple National Parks,[5] more than a dozen National Historic Landmarks,[6] and hundreds of National Historic

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[2] While Congress has not given American Samoans the right to seek review in this Court, American Samoans have may obtain federal court review through the D.C. Circuit. *See King v. Morton*, 520 F.2d 1140, 1144 (D.C. Cir. 1975).

[3] U.S. Mint, *D.C. and U.S. Territories Quarters*, http://1.usa.gov/1RrqgNQ.

[4] U.S.P.S., *Flags of Our Nation*, http://bit.ly/1WMEWbH.

[5] *See, e.g.*, Nat'l Park Serv., *Virgin Islands*, http://1.usa.gov/1QAWxij.

[6] *See, e.g.*, Nat'l Historic Landmarks Survey, *National Historic Landmarks in Puerto Rico*, http://1.usa.gov/24shoP8.

Places.[7] Natives of the Territories and their children are American military heroes,[8] NBA legends,[9] and Broadway sensations.[10]

Accordingly, "[w]hatever the validity of the [Insular Cases] in the particular historical context in which they were decided," *Torres v. Puerto Rico*, 442 U.S. 465, 475 (1979) (Brennan, J., concurring in judgment), the notion that the Territories or the people who reside within them are so fundamentally "un-American" as to make them "unfit" to be citizens has long since lost any force it may once have had. If anything, "the ties between the United States and … its unincorporated Territories [have] strengthen[ed] in ways that are of constitutional significance," *Boumediene v. Bush*, 553 U.S. 723, 758 (2008), making the case for application of the Citizenship Clause to the Territories even more powerful than it was when they first became part of the United States. But in all events, the "racist underpinnings" of the Insular Cases have no place in the interpretation of a constitutional provision enacted to secure the promise of liberty for *all* persons "born … in the United States," U.S. Const. amend. XIV, §1, regardless of race, religion, custom or anything else.

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[7] *See, e.g.*, Guam Historic Res. Div., *Register Listing*, http://bit.ly/1oLnIB8.

[8] *See, e.g.*, U.S. Marine Corps History Div., *Private First Class Fernando Luis Garcia, USMC*, http://bit.ly/1QJ92Pa.

[9] Nat'l Basketball Ass'n, *Tim Duncan*, http://on.nba.com/1Qhai9S.

[10] Rebecca Mead, *All About the Hamiltons*, The New Yorker (Feb. 9, 2015), http://bit.ly/1D4qF2X.

Moreover, the Insular Cases are just as incompatible with the basic purpose of our Constitution as they are with the rights it protects. This is a case in point. The D.C. Circuit relied on the Insular Cases (or, more aptly, Justice Harlan's gloss on those cases) for the proposition that "impos[ing] citizenship" on American Samoans would be "'impractical and anomalous'" because it would "override the democratic prerogatives of the American Samoan people." Pet.App.2 (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)). That is exactly the reasoning that a plurality of this Court *rejected* in *Reid* when it concluded that "neither the [Insular Cases] nor their reasoning should be given any further expansion." 354 U.S. at 14. As Justice Black explained, "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Id.*

That principle applies with no less force to the provision that dictates whether people born in the United States are entitled to full membership in the body politic. If the Fourteenth Amendment confers citizenship on people born in the Territories, then the "democratic prerogatives" expressed by the American Samoa Government can no more deny that right to American Samoans than the democratic prerogatives expressed by the governments of Texas or California could deny that right to people born in those States. What makes a right a *constitutional* right is that it cannot be overridden by the popular sentiment of the

day. Whether the majority considers the right one worth insisting upon is therefore entirely irrelevant. Indeed, rights not supported by a majority are often those most in need of constitutional protection, and the courts play a vital role in defending those rights against majoritarian intrusion. *See Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) ("[C]ertain groups … have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

B. Even On Their Own Terms, the Insular Cases Do Not Support the Decision Below.

At any rate, even assuming the reasoning of the Insular Cases holds any force in the Citizenship Clause context, that still would not justify the result the D.C. Circuit reached here. Contrary to the decision below, there is nothing "impractical" or "anomalous" about recognizing constitutional birthright citizenship in the Territories. Pet.App.2 (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring)). Indeed, if there is anything "anomalous" here, it is the American Samoa Government's view that "extension of United States citizenship to [American Samoa] could potentially undermine … the Samoan way of life." Pet.App.18. As residents, government officials, and representatives of territories that have enjoyed birthright citizenship for decades, *Amici* are uniquely positioned to attest to the reality that U.S. citizenship is just as compatible with preservation of the rich and diverse traditions of the Territories as it is with

preservation the rich and diverse traditions of the States.

Guam provides an excellent example. Guam was ceded by Spain to the United States in the Treaty of Paris of 1898, which ended the Spanish-American War. *See Rabang v. Boyd*, 353 U.S. 427, 429 (1957). Guam has been a United States territory ever since, save for a "relatively brief but very painful" occupation by Japan during World War II. Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 323-24 (1989). Guamanians fought hard to secure citizenship to "bring … a sense of dignity and equality with the rest of the United States, the security of permanent political union, and finally an acceptance by the national government of their political loyalty and willingness to share the obligations of the U.S. Federal system." *Id.* at 330. In 1950, after a half-decade of efforts by the Guamanian people, Congress finally declared that "[a]ll persons born in the island of Guam on or after April 11, 1899 … subject to the jurisdiction of the United States, are declared to be citizens of the United States." 8 U.S.C. §1407(b).

Since then, Guam's unique culture has hardly gone by the wayside. The indigenous Chamorros have remained the dominant ethnic group, and the Chamorro language, along with English, is Guam's official language. 1 Guam Code Ann. §706; *see* Leibowitz, *supra*, at 315. And although the Chamorros are certainly "impacted and influenced by … American values and ways of life," they "continue to find pride and identity in their indigenous roots." Anthony F. Quan, *The Recognition and Establishment*

of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam, 3 Asian-Pac. L. & Pol'y J. 56, 73 (2002). Indeed, "their ongoing cultural endurance" is a testament to the reality that U.S. citizenship has not deprived them of "a sense of their indigenous identity." *Id.* at 73 n.102.

Puerto Rico's experience has been much the same. Like Guam, Puerto Rico was ceded to the United States by Spain under the Treaty of Paris of 1898. *See* 30 Stat. 1754 (Apr. 11, 1899). In the years that followed, "United States citizenship … inevitably was considered a means of acknowledging the special place of Puerto Rico among the new colonial territories and of expressing the virtually universal expectation of a permanent relationship." Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. at 444. The Jones Act of 1917 granted U.S. citizenship to all "citizens of [Puerto] Rico," 31 Stat. 77, 79 (1900), and Congress formally recognized birthright citizenship in 1934, declaring that "[a]ll persons born in Puerto Rico on or after April 11, 1899 (whether before or after the effective date of this Act) and not citizens, subjects, or nationals of any foreign power, are hereby declared to be citizens of the United States," Act of June 27, 1934, Pub. L. No. 477, 48 Stat. 1245; *see also* 8 U.S.C. §1402.

Like Guamanians, Puerto Ricans have not lost their traditional identity or institutions by becoming U.S. citizens. "Puerto Rican culture represents a peoples who had a distinct consciousness before the first [conquistador] came ashore in 1898, because the Puertorriqueña/o was not then culturally Spanish and is not now culturally 'American.'" Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6

Mich. J. Race & L. 1, 55 (2000); *see id.* at 58 ("Spanish civil law on the one hand, and Anglo-American common law on the other, both have managed to co-exist, producing a uniquely Puerto Rican mixed law approach.").

Virgin Islanders likewise have enjoyed birthright citizenship since 1927, 8 U.S.C. §1406, yet they have not sacrificed their "complex tapestry of Caribbean island traditions." Lolly Ockerstrom, *Virgin Islander Americans*, Gale Encyclopedia of Multicultural America (2000). When the United States acquired the Virgin Islands from Denmark, the mood "at the time of the acquisition was one of optimism," as the Danish "neglect of the Islands bred an unusual popular support for the transfer." Leibowitz, *supra*, at 245. Islanders now "claim allegiance to two distinct cultural identities, as they are simultaneously Virgin Islanders and U.S. citizens," with "art forms, clothing, cuisine, and traditions unique to their region and its Caribbean and African history." Ockerstrom, *supra*; *see* Robert W. Nicholls, *The Mocko Jumbie of the U.S. Virgin Islands*, African Arts, Vol. 32, No. 3 (1999) ("The Mocko Jumbie is a stilt-dancing masquerade whose existence in the Virgin Islands dates from the late nineteenth century or earlier."). The vitality of local culture is evident in everyday conversation; though English is the official language, most Islanders mix it with a distinct local dialect that dates back hundreds of years.

The experience in the Northern Mariana Islands is much the same. The Northern Marianas formally became part of the United States in 1986, *see* 90 Stat. 263; Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov.

3, 1986), and the concomitant grant of birthright citizenship has not undermined local customary law. Indeed, the Commonwealth Code explicitly provides that customary law governs in matters not covered by the sparse statutory code, 7 N. Mar. I. Code §3401, and the statutes that do exist often incorporate customary law concepts, including in the areas of adoption, intestate succession, and criminal sentencing, *see* Robert J. Torres, Jr., *Jon'd at the Hip: Custom and Tradition in Island Decision Making*, 35 U. Haw. L. Rev. 921, 930 (2013).

To be sure, each of the Territories has lost some aspects of its culture and heritage over the past several centuries. But any cultural dilution is attributable to colonial conquest (often several times over), not to the more recent grant of birthright citizenship. In the relevant timeframe—*i.e.*, the years since Congress granted birthright citizenship to individuals in the Territories—integration into American society has proven fully compatible with traditional culture. Just as Texans and Vermonters cherish and preserve their own unique cultures despite their shared American citizenship, so too have the citizens in the Territories continued to cherish and preserve their own identities since becoming U.S. citizens.

There is little reason to think that the experience of American Samoans would be any different. The American Samoa Government's contrary claim is grounded principally in a fear that recognizing birthright citizenship for American Samoans would imperil the Territory's land alienation rules. *See* Br. for Intervenors Am. Sam. Gov't & Congressman Eni F.

H. Faleomavaega at 26-32 (D.C. Cir. Aug. 25, 2014). The decision below did not investigate whether that concern was well-founded, instead treating the bare fact that it was raised as reason enough to deprive the people of American Samoa of birthright citizenship. *See* Pet.App.19-20. In fact, both the ASG's premise and the court's conclusion miss the mark. In the only federal case dealing with a comparable constitutional issue, the Ninth Circuit *upheld* similar land alienation restrictions in the Northern Mariana Islands, holding that "[i]t would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property." *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990).

Moreover, the High Court of American Samoa, with two federal judges sitting by designation, rejected an equal protection challenge to the very land alienation rules the ASG now claims are in jeopardy. *See Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980). In an opinion by Judge Schwartz, then the Chief Judge of the U.S. District Court for the Southern District of California, the High Court recognized that "the whole fiber of the social, economic, traditional, and political pattern in American Samoa is woven fully by the strong thread which the American Samoan places in the ownership of land." *Id.* at 14 (quoting *Haleck v. Lee*, 4 Am. Samoa 519, 551 (1964)). That being the case, the land alienation rules served the "compelling state need to preserve an entire culture" and withstood "the rigorous scrutiny of a watchful court." *Id.* Indeed, if the ASG views the interests protected by its land alienation rules as compelling enough to justify denying the fundamental

right of citizenship to the people of American Samoa, then surely it considers those same interests compelling enough to satisfy any level of scrutiny that might apply were those laws again subjected to constitutional challenge.

But in all events, whatever the consequences of recognizing birthright citizenship in the Territories may be, those are consequences that the American people already considered and accepted when they concluded 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. In doing so, the American people sought to *protect* people born in the United States from laws that are inconsistent with the rights enshrined in our Constitution. That their decision to do so might have real consequences is thus hardly a basis for depriving residents of the Territories of the birthright citizenship to which the Constitution entitles them. "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). The American people have conferred citizenship on persons born in the Territories, and it is not for the territorial governments (or the courts) to second-guess that decision. This Court should grant certiorari and restore to Americans born in the Territories the inalienable birthright citizenship that the Fourteenth Amendment guarantees them.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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