No. 15-981

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

REPLY BRIEF FOR PETITIONERS

NEIL C. WEARE
WE THE PEOPLE PROJECT
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009
(202) 304-1202

CHARLES V. ALA'ILIMA
ALA'ILIMA AND ASSOCIATES P.C.
P.O. Box 1118
Nu'uuli, AS 96799
(684) 699-6732

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
JONATHAN C. BOND
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

This case undisputedly presents a constitutional question of tremendous importance. All agree that the question presented governs the citizenship of tens of thousands of persons born in American Samoa—and in turn affects their legal rights and daily lives in countless ways. And the federal respondents (the "government") admit that the question governs whether *millions* more, born in other Territories, are *constitutionally* entitled to U.S. citizenship, or can be stripped of it at Congress's whim.

Few issues more plainly warrant certiorari, and respondents offer no valid reason to withhold review. The government notes the absence of a circuit split, but never denies that the question presented cannot arise as to any *other* Territory because Congress today excludes *only* American Samoa from birthright citizenship. Nor does it explain how a conflict concerning American Samoa plausibly could develop, given that the decision below controls in the only circuit where American Samoan residents likely can sue.

Both the government and the territorial-government respondents ("intervenors") thus spend most of their submissions arguing the merits. Yet far from demonstrating that the decision below is correct, respondents' arguments confirm its departure from controlling principles and precedent. The government's tepid effort to square 8 U.S.C. § 1408(1) with the Citizenship Clause's text, structure, history, and pertinent precedent adds nothing to the court of appeals' conclusory analysis, rehashing claims even that court rejected. And intervenors

do not even *try* to defend the decision below on those terms.

Instead, the government astonishingly stakes its defense of the statute on an expansive reading of the Insular Cases—rulings infused with indefensible racial biases and that have no bearing on the Citizenship Clause or American Samoa. That the Solicitor General, in attempting to shield the statute, feels compelled not merely to interpose those inapposite, oft-maligned decisions, but to urge their *extension*, is powerful proof that review is appropriate. While the court below was bound to apply this Court's cases as it (mistakenly) understood them, this Court, and *only* this Court, can clarify that the Insular Cases are irrelevant to the question presented—or, if necessary, modify or overrule them.

Respondents' contention that Congress has plenary power in this area—and that birthright citizenship should be withheld unless and until Congress and American Samoa's government assent—is not a reason to deny certiorari. It is a merits argument that simply begs the question presented, which is precisely *whether* the Constitution leaves birthright citizenship in U.S. Territories to the political process—a process that has thus far failed American Samoa, which has repeatedly sought legislative relief, only to be rebuffed by Congress. Whether the Constitution permits that condition to persist is a question only this Court can conclusively resolve. For thousands of American Samoans—many of whom have selflessly defended the Nation that denies them equal dignity—a definitive answer is long overdue.

The petition should be granted.

I. THE QUESTION PRESENTED IS UNDISPUTEDLY IMPORTANT.

A. Respondents do not and cannot dispute the importance of the question presented. They do not deny that it governs the citizenship of thousands of persons born in American Samoa, or the harmful consequences denying citizenship can inflict—including ineligibility to vote, hold public office and public-service posts, serve on juries, and bear arms. Pet. 10-11, 16-19.

Indeed, respondents' submissions underscore the issue's significance. The government admits (at 16 n.3) that "[t]he other U.S. territories," including "Puerto Rico, Guam, the Northern Mariana Islands, [and] the U.S. Virgin Islands," "also are" so-called "unincorporated territories." Under the decision below, therefore, *millions* of persons born in those Territories hold U.S. citizenship solely by Congress's grace; their "status," like American Samoans', thus "may be changed by Congress at any time." *Id.* at 21.

The government claims (at 17) that applying the Citizenship Clause to Territories would yield "'vast practical consequences.'" *Accord* Intervenors' Opp. 1, 10-11 (citation omitted). Even taken at face value, these purported consequences of the question presented further demonstrate the need for a definitive answer.

B. The government halfheartedly observes (at 8-10) the lack of a lower-court conflict. But it does not deny that the question presented currently cannot arise *except* as to American Samoa because that is the only U.S. Territory where Congress purports to deny birthright citizenship. Pet. 10, 34; U.S. Opp. 2-3. While the question presented affects the *founda-*

tion of millions of other Territorial natives' citizenship, only American Samoans *lack* citizenship altogether. Respondents offer no reason to await a split concerning this single Territory. No sound reason exists given that a resident of American Samoa apparently could not sue in any *other* circuit without uprooting herself and relocating to another part of the United States.

The government is left to contend (at 8-10) that the decision below is "consistent" with other circuits' decisions, but there is less to that claim than meets the eye. All four Citizenship Clause cases it cites concerned the Philippines, a *former* Territory independent since 1946. *See Rabang* v. *INS*, 35 F.3d 1449, 1450-52 (9th Cir. 1994); *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). It was "'always … the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government c[ould] be established therein.'" *Boumediene* v. *Bush*, 553 U.S. 723, 757 (2008) (citation omitted).

The Philippines cases establish no consensus relevant to the status of *current* Territories, least of all American Samoa. With the Philippines' independence, this Court has held, came a transfer of nationality, *see Rabang* v. *Boyd*, 353 U.S. 427, 430-31 (1957)—a principle irrelevant to Territories (like American Samoa) that remain. And whether "in the United States" includes areas only *temporarily* under U.S. control—a way-station to independence—sheds no light on Territories that *were once* independent

but voluntarily *ceded* sovereignty to the United States.[1]

The relevant feature of the Philippines cases is that each mistakenly relied (directly or indirectly) on the Insular Cases, particularly *Downes* v. *Bidwell*, 182 U.S. 244 (1901), in construing the Citizenship Clause. *See Nolos*, 611 F.3d at 282-84; *Lacap*, 138 F.3d at 519; *Valmonte*, 136 F.3d at 918-20; *Rabang*, 35 F.3d at 1451-53. That shared misunderstanding of this Court's precedent is more reason for review. Constitutional-Law Scholars Br. 4-10. Because the question presented no longer can arise *except* as to American Samoa, this error has ossified; only this Court can correct it. This case provides a perfect opportunity.

II. RESPONDENTS' MERITS ARGUMENTS CONFIRM THAT CERTIORARI IS WARRANTED.

Rather than offer any valid reason not to answer the question presented, respondents and their *amici* devote nearly all of their submissions to the merits. Their arguments only reinforce the need for review.

A. Abandoning a key plank of the decision below, Pet. App. 10a-11a, the government concedes (at 10) that "persons born in the territories are 'subject to the jurisdiction' of the United States." It thus admits (at 9) that this case turns on one question: whether American Samoa, a "United States territory," is "'in the United States' within the meaning of [the Citizenship] Clause." Respondents fail to refute peti-

[1] For the same reasons, there is no basis for the government's speculation (at 17, 22) that faithfully construing the Citizenship Clause to reach American Samoa would require revisiting the status of persons born in the Philippines before 1946.

tioners' showing that the Clause's text, structure, history, purpose, and *relevant* precedent confirm that it includes Territories. Pet. 19-33.

1. The government denies (at 10-11) that "the United States" includes Territories because the Constitution "distinguishes between States and territories." That truism ignores that, when the Citizenship Clause was adopted, "the United States" was understood as "the name given to our great republic, which is composed of States *and territories*." *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.) (emphasis added); Pet. 21. The government dismisses *Loughborough* (at 19-20) because some Justices in *Downes* read it narrowly. The government's reading of *Downes* is wrong, *infra* pp. 8-9, but irrelevant to the Fourteenth Amendment's Framers' understanding of "the United States" decades *earlier*.

The government never grapples with the contrast between the Citizenship Clause ("*in the United* States") and the neighboring, contemporaneous Apportionment Clause ("*among the several* States"), U.S. Const. amend. XIV, §§ 1-2 (emphases added)—which shows that the former sweeps beyond States. It points instead to the Thirteenth Amendment's disjunctive language ("within the United States, or any place subject to their jurisdiction"), *id.* amend. XIII, § 1; U.S. Opp. 11-12—which even the decision below found unpersuasive, Pet. App. 5a-6a. But it never confronts the simple explanation—corroborated by that Amendment's coauthor—that its text reaches *beyond* States and Territories, to areas *outside* "the United States" but subject to U.S. *control*, such as embassies, military bases, or other outposts. Pet. 22.

The government tries (at 16) to cabin the Fourteenth Amendment's text with two other provisions that supposedly grant Congress "plenary power"—the Naturalization Clause (U.S. Const. art. I, § 8, cl. 4) and the Territory Clause (*id.* art. IV, § 3, cl. 2)—but neither supports that claim. As the decision below and the government's own authority explain, Congress's power over *naturalization* is irrelevant to whether it may "statutorily abrogate the scope of birthright citizenship available under the Constitution itself." Pet. App. 5a n.4; *Rabang*, 35 F.3d at 1453 n.8. And whatever power the Territory Clause confers, it does not trump other constitutional limits, *see Torres* v. *Puerto Rico*, 442 U.S. 465, 469-70 (1979), least of all a clause added later precisely to put "'th[e] question of citizenship … beyond the legislative power,'" *Afroyim* v. *Rusk*, 387 U.S. 253, 263 (1967) (citation omitted).

2. The government brushes aside (at 20) the Citizenship Clause's "background" as inconclusive, but cites *no* statement contradicting the Framers' consistent view that "the United States" encompasses Territories. Pet. 23-24. Respondents' *amici* admit that the Clause's "intended function was to replicate the coverage" of the Civil Rights Act of 1866, Erler Br. 15—which expressly encompassed Territories, Pet. 23-24.

The government's conjecture (at 20) that the Framers could not have meant to address "unincorporated territories" because none supposedly existed then is anachronistic legerdemain: The distinction between so-called incorporated and unincorporated Territories was not posited until decades later—by this Court, in the Insular Cases. There is no basis to believe the Framers had any such distinction in

mind. Indeed, in the 1860s nearly "half of the land mass of the United States" lay in Territories, whose ultimate statehood was uncertain. Citizenship Scholars Br. 12. The government offers no evidence that the Framers meant to block birthright citizenship in *those* Territories.

3. The government similarly gives short shrift to this Court's precedent construing the Citizenship Clause. Pet. 24-27. It dismisses (at 19) the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), asserting without explanation that the Court "did not purport to decide the [Clause's] geographic scope"—but disregards the Court's explicit determination that the Clause extends birthright citizenship to "the Territories" and makes "citizenship of a particular State" unnecessary to U.S. citizenship. *Id.* at 72-73. And it never responds to the Court's reaffirmation of that reading in *Elk* v. *Wilkins*, 112 U.S. 94 (1884).

The government likewise writes off (at 18-19) *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), because it involved a person born in a State. But the government ignores the pivotal point: Because *Wong Kim Ark* authoritatively construed the Citizenship Clause as "codif[ying] a *pre-existing* right"—the common-law *jus soli* rule—the Court thus must look to *that* right's "historical background" to discern its scope. *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008). And because the *jus soli* rule extended birthright citizenship to Territories within the sovereign's dominion, Pet. 5-6; Citizenship Scholars Br. 3-7, 13-17, the Clause encompasses American Samoa.

B. Rather than distance itself from the court of appeals' aggressive reading of the Insular Cases, the government doubles down, urging this Court (at 12-18) to leave the decision below alone because it pur-

portedly comports with those cases, particularly *Downes*, 182 U.S. 244. That the Solicitor General is forced to defend a statute based on opinions blessing overt discrimination against persons branded as "alien races," *id.* at 287 (opinion of Brown, J.), and "fierce, savage and restless people" "absolutely unfit" for citizenship, *id.* at 302, 306 (White, J., concurring in judgment), is a red flag that review is warranted.

Indeed, what the government seeks is not merely reaffirmation of the Insular Cases, but unjustified *expansion* of them. It admits (at 13 n.2) that none of the opinions in *Downes* "commanded a majority." In any event, neither *Downes* nor the other cases govern the Citizenship Clause, which defines its *own* geographic scope. Pet. 28-29; Constitutional-Law Scholars Br. 10-15; Citizenship Scholars Br. 16-17; Gov't Officials Br. 12-23. Moreover, even the Insular Cases do not countenance denying *fundamental* rights in the Territories, Pet. 30-31, and the government (unlike the courts below) never disputes that citizenship *is* a fundamental right.

The decision below thus cannot be sustained based on the Insular Cases without radically enlarging their reach. There is ample reason to *overrule* those decisions; they certainly should not be *extended*. Pet. 33; Constitutional-Law Scholars Br. 15-20; Former Judges Br. 4-22; League of United Latin-American Citizens Br. 6-24; P.R. Bar Ass'n Br. 5-21; International-Law Scholars Br. 4-19. That the government's defense of the decision below requires just such an extension powerfully supports review.

III. RESPONDENTS' REMAINING REASONS FOR WITHHOLDING REVIEW ARE MERITLESS.

Respondents urge the Court to deny review because American Samoa's elected officials oppose birthright citizenship. But that cannot justify leaving this undisputedly important constitutional question unanswered.

A. Respondents claim that the Citizenship Clause does not apply unless and until a Territory's government and Congress agree through the "political process" to extend birthright citizenship, and that here they have not done so. U.S. Opp. 20-21; Intervenors' Opp. 1-3, 18-30. That is not a basis to withhold review. Whether political officials can *nullify* the Clause is the crux of the question presented. Respondents' claim that construing the Clause to include Territories would usurp Congress's or territorial governments' prerogatives inverts our system of laws: If the Constitution extends birthright citizenship to Territories, neither Congress nor territorial governments have any prerogative to alter that conclusion.[2]

Respondents' claim that the Court must defer to the political process to safeguard American Samoa's self-determination—because its people never desired citizenship—is simply untrue. When American Samoa ceded sovereignty to the United States a century ago, its people "thought they *were* American Citizens." Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, 53 (1931) (emphasis added).

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[2] Consistent with self-determination, Congress and the territorial government of course remain free to modify American Samoa's *political status* going forward.

Once informed years later that the government viewed them as *non*-citizens, they sought (unsuccessfully) to *obtain* citizenship. *See ibid.*; *The American Samoan Commission Report* 6 (G.P.O. 1931); *American Samoa: Hearings Before the Commission Appointed by the President* 80, 219-23, 229, 234, 242 (G.P.O. 1931). Bills were repeatedly introduced in Congress; some even passed the Senate, but none was enacted. *E.g.*, 74 Cong. Rec. 3186-90, 3420 (1931); 75 Cong. Rec. 4129-33, 4591-92, 4844 (1932); 76 Cong. Rec. 4926-27 (1933). The Navy reportedly even blocked petitions for citizenship from *reaching* Congress. *See* Harold L. Ickes, *Navy Withholds Samoan and Guam Petitions from Congress*, Honolulu Advertiser, Apr. 16, 1947. American Samoa's own delegate has introduced bills waiving various naturalization requirements, to no avail. *E.g.*, H.R. 4021, 112th Cong. (2012); H.R. 6191, 110th Cong. (2008). This history belies any assertion that citizenship has always been on offer, and withheld out of respect for "self-determination." Intervenors' Opp. 18; U.S. Opp. 21-22. The "political process" is not the solution, but the problem.

B. Intervenors speculate (at 10-17) that American Samoans do not desire citizenship because it would threaten various facets of their culture (*fa'a Samoa*). That claim falls apart upon inspection. Intervenors argue (at 12-15) that if "all American Samoan people [were] granted United States citizenship," hereditary-chieftainship and land-alienation practices "could be subjected to scrutiny under the Equal Protection Clause." But that Clause (like the Fifth Amendment) "is not confined to the protection of *citizens*"; it protects "all *persons* … without regard to any differences of race, of color, *or of nationality*." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (em-

phases added); *see*, *e.g.*, *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 599-601 (1976). Likewise, the Establishment Clause, which intervenors hypothesize (at 15-17) might call curfews into question, draws no distinction based on citizenship. U.S. Const. amend. I.

These constitutional provisions, in short, are *already* operative in American Samoa, as in other Territories. Intervenors' apparent contrary view would mean American Samoa's people have *no* entitlement to freedom of speech and religion, bedrock criminal-procedure protections, equal protection, and many other constitutional guarantees. That implausible position is startling to hear from the people's own representatives.

Moreover, as intervenors admit (at 12), that constitutional protections *exist* hardly means every tradition is *unconstitutional*. *How* equal-protection and other principles apply will depend on the constitutional doctrine and the circumstances; any number of existing practices may pass muster. Tellingly, federal judges sitting by designation in American Samoa have already *upheld* its land-alienation laws against equal-protection challenges. Gov't Officials Br. 22-23 (citing *Craddick* v. *Territorial Registrar*, 1 Am. Samoa 2d 10 (1980)). The Court should not deny review of the important question of birthright citizenship based on conjecture about what other, already-operative constitutional provisions might require.[3]

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[3] The government's reliance (at 21 n.5) on the limited factual record regarding alleged "effect[s]" of birthright citizenship is misplaced. Having chosen to litigate in a pleading-stage posture, it cannot defend the decision below based on the *lack* of a record. If such "effect[s]" were relevant, at minimum a remand would be necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NEIL C. WEARE
WE THE PEOPLE PROJECT
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009
(202) 304-1202

CHARLES V. ALA'ILIMA
ALA'ILIMA AND ASSOCIATES P.C.
P.O. Box 1118
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GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioners

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