ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5272

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

LENEUOTI F. TUAUA, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

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TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. DEFENDANTS IGNORE THE TEXT, PURPOSE, AND ORIGINAL UNDERSTANDING OF THE CITIZENSHIP CLAUSE 3

A. The Phrase "the United States" in the Citizenship Clause Plainly Includes Current Territories Like American Samoa. 4

1. The text and structure of the Citizenship Clause are straightforward. 4

2. The context and history of the Citizenship Clause confirm its purpose and meaning. 6

3. The Supreme Court's interpretations of the Citizenship Clause confirm Plaintiffs' plain-text reading.....8

B. Contrary Arguments about the Scope of the Citizenship Clause Are Incorrect and Unpersuasive. 11

II. CONGRESS LACKS POWER TO NARROW THE SCOPE OF CONSTITUTIONAL BIRTHRIGHT CITIZENSHIP 15

A. The State Department's Interpretation of the Challenged Statutes and Regulations Is Neither Disputed Nor Relevant. 15

B. Congress's Power under the Naturalization Clause Is Irrelevant to Plaintiffs' Claims.....16

C. The Fourteenth Amendment Protects Individuals from Having to Seek Political Recognition of Their Birthright Citizenship. 19

III. IN THE ALTERNATIVE, BIRTHRIGHT CITIZENSHIP APPLIES TO INDIVIDUALS BORN IN AMERICAN SAMOA UNDER THE *KING V. MORTON* FRAMEWORK 22

A. Birthright Citizenship Is a Fundamental Right that Applies Automatically to Plaintiffs. 23

B. Even If Not Fundamental, Birthright Citizenship Applies to American Samoa As the Facts Will Show That It Is Neither Impractical Nor Anomalous. 24

1. Defendants' suggestion that Plaintiffs undergo the naturalization process only highlights Plaintiffs' injuries. 26

2. Defendants' *Amici*'s argument that birthright citizenship would upend American Samoa's cultural traditions lacks merit. 28

IV. THERE IS NO BASIS FOR INTERVENTION ON APPEAL 30

CONCLUSION 31

TABLE OF AUTHORITIES

Cases **Page(s)**

**Afroyim v. Rusk*,
387 U.S. 253 (1967).....7, 10, 17

Amalgamated Transit Union Int'l v. Donovan,
771 F.2d 1551 (D.C. Cir. 1985).....30, 31

Ballentine v. United States,
486 F.3d 806 (3d Cir. 2007) 12

**Boumediene v. Bush*,
553 U.S. 723 (2008).....23, 24

Collins v. Youngwood,
497 U.S. 37 (1990).....7

Corporation of the Presiding Bishop v. Hodel,
830 F.2d 374 (D.C. Cir. 1987).....26, 29

Craddick v. Territorial Registrar,
1 Am. Samoa 2d 10 (1980) 28, 29

Davis v. Commonwealth Election Comm'n,
No. 14-CV-00002, 2014 WL 2111065 (D.N.M.I. May 20, 2014).....30

District of Columbia v. Heller,
554 U.S. 570 (2008).....4, 6, 7

Dred Scott v. Sandford,
60 U.S. 393 (1857).....8

Downes v. Bidwell,
182 U.S. 244 (1901).....24

***** Authorities upon which Plaintiffs-Appellants chiefly rely are marked with asterisks.

Eche v. Holder,
694 F.3d 1026 (9th Cir. 2012) 12

Elk v. Wilkins,
112 U.S. 94 (1884).....6, 9

Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero,
426 U.S. 572 (1976).....29

Johnson v. Eisentrager,
339 U.S. 763 (1950).....23

King v. Andrus,
452 F. Supp. 11 (D.D.C. 1977).....25, 26, 28

**King v. Morton*,
520 F.2d 1140 (D.C. Cir. 1975).....23, 24, 25

Loughborough v. Blake,
18 U.S. 317 (1820).....4, 5

Medellin v. Texas,
552 U.S. 491 (2008).....13

Miller v. Albright,
523 U.S. 420 (1998).....17

**NLRB v. Noel Canning*,
134 S. Ct. 2550 (2014).....3, 5, 13

Overby v. Nat'l Ass'n of Letter Carriers,
595 F.3d 1290 (D.C. Cir. 2010).....10

Rabang v. INS,
35 F.3d 1449 (9th Cir. 1995) 11-12

Rogers v. Bellei,
401 U.S. 815 (1971).....7, 10, 17, 18

Saenz v. Roe,
526 U.S. 489 (1999).....13

Slaughter-House Cases,
83 U.S. 36 (1872).....8, 9, 20

United States v. Dorcely,
454 F.3d 366 (D.C. Cir. 2006).....10

United States v. Ginsberg,
243 U.S. 472 (1917).....18

**United States v. Wong Kim Ark*,
169 U.S. 649 (1898).....8, 9, 16, 17, 24

Wabol v. Villacrusis,
958 F.2d 1450 (9th Cir. 1990) 30

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012).....15, 19

Constitution, Statutes & Rules

U.S. Const. Amend. XIV § 2 4

U.S. Const., art. I, § 8, cl. 4.....12, 16

U.S. Const., art. IV, § 3, cl. 2.....22

8 U.S.C. § 1436.....27

Nationality Act of 1940, § 101(b)(1)-(2), Pub. L. 76- 852, 54 Stat. 1137 (1940)...14

Fed. R. Civ. P. 12(b)(6).....2

Fed. R. Civ. P. 24(a)(2).....31

Other Authorities

American Samoa, Hearings Before the Commission Appointed by the President of the United States, September 26, 27, 29, 30, October 1, 2, 3, 4, 1930 in American Samoa (U.S. G.P.O. 1931).....21

Cong. Globe, 39th Cong., 1st Sess. 2894 (1866)..... 4-5, 20

Harold Ickes, *Navy Withholds Samoan and Guam Petitions From Congress*, Honolulu Advertiser, Apr. 16, 1947 22

Hiram Bingham, *American Samoans: Further Delay is Protested in Granting Them Citizenship*, N.Y. Times, Nov. 17, 1946.....22

Legislation Denying Citizenship at Birth to Certain Children Born in the United States, 19 Op. Off. Legal Counsel 340 (1995) 20

Reuel S. Moore and Joseph F. Farrington, *The American Samoan Commission's Visit to Samoa, Sept.-Oct. 1930* (U.S. G.P.O. 1931).....21

Subcommittee on Territorial and Insular Possessions of the Committee on Public Lands, June 2, 1947, Hearing on H.J. Res 70.....22

U.S. Dep't of State, Updated Core Document, Report to United Nations Comm. on Human Rights Concerning Int'l Convenant on Civil and Political Rights (Oct. 2005) 6

GLOSSARY

A.S.C.A.	American Samoa Code Annotated
FAM	U.S. Department of State Foreign Affairs Manual
INA	Immigration and Nationality Act of 1952
JA	Joint Appendix

SUMMARY OF ARGUMENT

Defendants avoid the core issue in this case: the meaning of the Fourteenth Amendment's Citizenship Clause. They disregard the canonical methods of constitutional interpretation, most notably by failing to address the history and context of the Citizenship Clause. They also fail to acknowledge, let alone address, the Supreme Court cases that interpreted the Clause in the years immediately after the Fourteenth Amendment's ratification in 1868. Defendants' narrow and ahistorical interpretation of the Citizenship Clause cannot be squared with its purpose, which—as the Supreme Court concluded in *United States v. Wong Kim Ark*—was to overturn *Dred Scott v. Sandford* and constitutionalize the pre-existing right of *jus soli*, forever removing the question of citizenship by birth on American soil from the realm of politics. Defendants cannot wish away this controlling authority.

Every accepted interpretative tool supports reading the plain text of the Citizenship Clause as guaranteeing birthright citizenship for Plaintiffs and all others born in the long-time U.S. Territory of American Samoa. *See* Opening Brief of Plaintiffs-Appellants 15-29 ("Pls.' Br."). Rather than engage the meaning of the Citizenship Clause, Defendants and their *Amici Curiae* rely on Congress's separate powers to enact legislation concerning immigration and territorial administration. But neither power allows the political branches to redefine the

scope of constitutional birthright citizenship. Nor do these powers strip the judiciary's authority to clarify the meaning of this—or any other—constitutional provision.

Even if the Court were to analyze Plaintiffs' citizenship claims under the *Insular Cases* framework for the territorial application of other constitutional rights, birth in American Samoa would still confer a constitutional right of citizenship. First, birthright citizenship is a fundamental right that automatically applies in American Samoa of its own force. Second, it would not be "impractical and anomalous" to apply that right to individuals born in American Samoa. *See* Pls.' Br. 46-59. As this Court held in *King v. Morton*—and as reinforced by the Supreme Court in *Boumediene v. Bush*—the "impractical and anomalous" test requires the courts to consider American Samoa's contemporary circumstances.

Defendants' and their *Amici*'s arguments about the factual circumstances in American Samoa today are not an appropriate basis for this Court to affirm a dismissal under Rule 12(b)(6). In any event, those arguments lack merit. They also underscore that the statutory classification of "non-citizen national" status is *itself* impractical and anomalous.

The Fourteenth Amendment's Framers guaranteed that Americans born throughout the Nation—in its States, Territories, and the District of Columbia—would be recognized as citizens, and ensured that this birthright could never be

revoked at the discretion of the political branches. In the decades that followed the Fourteenth Amendment's ratification, the Supreme Court confirmed this original understanding of the Citizenship Clause. So long as American Samoa remains a part of the United States, the Citizenship Clause applies there and guarantees Plaintiffs birthright citizenship.

ARGUMENT

I. DEFENDANTS IGNORE THE TEXT, PURPOSE, AND ORIGINAL UNDERSTANDING OF THE CITIZENSHIP CLAUSE

The "key question" in this case is "whether American Samoa qualifies as a part of the 'United States' as that [phrase] is used within the Citizenship Clause" of the Fourteenth Amendment. JA46. Courts "interpret the Constitution in light of its text, purposes, and 'our whole experience' as a Nation." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). The text, structure, and original understanding of the Fourteenth Amendment all demonstrate that the Citizenship Clause applies in the whole United States—the States, Territories, and the District of Columbia. Defendants and their *Amici* barely address the Clause's text and totally ignore its drafting history and the Fourteenth Amendment's historical context.

A. The Phrase "the United States" in the Citizenship Clause Plainly Includes Current Territories Like American Samoa.

1. The text and structure of the Citizenship Clause are straightforward.

The plain text of the Citizenship Clause lends itself to no other interpretation than that "the United States" means the whole United States, and not some fraction thereof. *See* Pls.' Br. 18-19. Words and phrases in the Constitution must be given "their normal and ordinary" meaning as "known to ordinary citizens" at the time of ratification. *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008). When the Fourteenth Amendment was ratified in 1868, it had long been settled that "the United States" meant "the name given to our great republic *which is composed of States and territories*." *Loughborough v. Blake*, 18 U.S. 317, 319 (1820) (emphasis added).

The structure of the Fourteenth Amendment similarly demonstrates that "the United States" in the Citizenship Clause does not mean merely "the States." *See generally* Pls.' Br. 19. In Section 1, the Citizenship Clause uses the broad phrase "the United States," while Section 2 speaks more narrowly of congressional representation "among the several States." U.S. Const. amend. XIV, § 2. These terms were chosen deliberately by the Amendment's drafters. As Judiciary Committee Chairman Senator Lyman Trumbull explained: "The second section refers to no persons except those in the States of the Union; but the first section

[*i.e.*, the Citizenship Clause] *refers to persons everywhere*, whether in the States *or in the Territories* or in the District of Columbia." Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (emphases added).

The Defendants do not dispute that *Loughborough* reads "the United States" to mean the whole United States, including Territories, nor that the textual differences between Sections 1 and 2 of the Fourteenth Amendment confirm "the United States" is not the same as "the several States." *Cf. Noel Canning*, 134 S. Ct. at 2561 (interpreting the term "recess" as used by "[t]he Founders themselves"). Defendants' *Amici* attempt to distinguish *Loughborough* based on a reference to "the territory west of the Missouri." Brief for Intervenors or *Amici Curiae* American Samoa Government and Congressman Faleomavaega 18-19 ("Defs.' *Amici*'s Br.") (quoting *Loughborough*, 18 U.S. at 319). But the identity of that particular territory was irrelevant to the Court's overall holding: that the power to tax extends "throughout the United States," *i.e.*, "to all places over which the government extends." 18 U.S. at 318-19.

Defendants contend that the Citizenship Clause's secondary requirement that a person be "subject to the jurisdiction" of the United States provides "context" that permits Congress to statutorily modify the right to birthright citizenship, even going so far as to accuse Plaintiffs of "selectively quot[ing] the Clause," by substituting ellipses for that phrase. *E.g.*, Brief for Appellees 22 ("Defs.' Br.").

But there has never been a dispute in this case that persons born in American Samoa are "subject to the jurisdiction" of the United States. *See* JA46 (noting the parties do not dispute this point).[1] Nor could there be, given that phrase's settled meaning excluding those bearing allegiance to a *foreign* power, namely "children born within the United States, of ambassadors or other public ministers of foreign nations." *Elk v. Wilkins*, 112 U.S. 94, 101-02 (1884).

2. The context and history of the Citizenship Clause confirm its purpose and meaning.

The historical context for the Fourteenth Amendment also confirms that the Citizenship Clause applies in the Territories. *See* Pls.' Br. 19-23. Defendants and their *Amici* dismiss this history. Defs.' Br. 26-27; Defs.' *Amici*'s Br. 20-21. But historical context cannot be so readily ignored; indeed, it is particularly relevant where, as here, the constitutional provision "codified a *pre-existing* right." *Heller*, 554 U.S. at 592 (consulting "historical background" in interpreting Second Amendment).

[1] *See also* Defs.' Br. 23 (acknowledging that American Samoa's history "lends itself to placing American Samoa 'subject to the jurisdiction' of the United States"); U.S. Dep't of State, Updated Core Document, Report to United Nations Comm. on Human Rights Concerning Int'l Covenant on Civil and Political Rights ("U.N. Report") ¶ 48 (Oct. 2005), *available at* http://www.state.gov/j/drl/rls/55516.htm ("The southernmost United States jurisdiction is American Samoa."), ¶ 110 ("A significant number of United States citizens and/or nationals live in areas outside the 50 states and yet within the political framework and jurisdiction of the United States. They include people living in . . . American Samoa.").

The Citizenship Clause was ratified in the aftermath of the Civil War, when the Reconstruction Congress sought to rid the United States of slavery and its vestiges forever. *See* Pls.' Br. 20-21. The 1866 Civil Rights Act contained the Reconstruction Congress's first birthright citizenship legislation after the Civil War ended, and the Act served as an initial blueprint for the Citizenship Clause. Under the Act, birth "in the United States" included States and Territories, Pls.' Br. 22-23, which provides strong evidence that the Reconstruction Congress intended the Citizenship Clause to have a similar scope. *See generally* Pls.' Br. 22-23; *cf. Heller*, 554 U.S. at 600 (considering "analogous arms-bearing rights in state constitutions that preceded" the Second Amendment); *Collins v. Youngwood*, 497 U.S. 37, 43 (1990) (considering analogous state constitutional provisions to help construe the *Ex Post Facto* Clause).

The Reconstruction Congress subsequently determined that a constitutional amendment was necessary to ensure that African-Americans' citizenship would be "permanent and secure and not subject to change by mere statute." *Rogers v. Bellei*, 401 U.S. 815, 829 (1971) (internal quotation marks omitted). As a result, Congress wrote the Citizenship Clause to "settle[] the great question of citizenship and remove[] all doubt as to what persons are or are not citizens of the United States," and "to put this question of citizenship and the rights of citizens . . . under the civil rights bill *beyond the legislative power*." *Afroyim v. Rusk*, 387 U.S. 253,

263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess., 2896 (1866) (Sen. Howard)) (emphasis added).

The Citizenship Clause also was adopted to overturn *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which held that persons descended from enslaved Africans could not be U.S. citizens. *Dred Scott* was the only judicial deviation from the *jus soli* common law principle that birth within the sovereignty of the United States automatically conferred U.S. citizenship. *See Slaughter-House Cases*, 83 U.S. 36, 73 (1872); *see also* Pls.' Br. 20-21; Citizenship Scholars *Amicus* Br. 9-10. The Citizenship Clause constitutionalized that principle. *See United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). Defendants and their *Amici* do not dispute that the purpose of the Citizenship Clause was to constitutionalize the common law principle of *jus soli* birthright citizenship and overturn *Dred Scott*, which contradicts their interpretation of birthright citizenship.

3. The Supreme Court's interpretations of the Citizenship Clause confirm Plaintiffs' plain-text reading.

Finally, every time the Supreme Court analyzed the Citizenship Clause in the first thirty years after its ratification, it interpreted the Clause as applying throughout the United States' territorial limits. In the *Slaughter-House Cases*, decided four years after the Fourteenth Amendment's ratification, the Court explained that the Clause "put[] at rest" the proposition that "[t]hose . . . who had been born and resided always in the District of Columbia *or in the Territories*,

though *within the United States*, were not citizens." 83 U.S. at 72-73 (emphases added). In *Elk v. Wilkins*, the Court held that a Native American's birth "within the territorial limits of the United States," was "in a geographical sense born in the United States." 112 U.S. at 102 (also concluding he was not "subject to the jurisdiction thereof" if born with allegiance to a tribe). And in *Wong Kim Ark*, the Court held that "the fundamental principle of citizenship *by birth within the dominion* was reaffirmed [by the Fourteenth Amendment] in the most explicit and comprehensive terms." 169 U.S. at 675 (emphasis added).

Defendants do not mention any of these decisions, let alone try to confront their controlling interpretations of the Citizenship Clause's scope. For their part, Defendants' *Amici* try to dismiss these decisions by denigrating the Supreme Court's explanation of "the meaning of 'within the United States' [as] circular." Defs.' *Amici*'s Br. 19. Labeling an argument circular does not make it so. To be sure, *Wong Kim Ark* involved a person born in a State rather than a Territory. But the Supreme Court emphasized in no uncertain terms that the Fourteenth Amendment's guarantee of birthright citizenship applies to all persons born on the United States' sovereign soil. *Wong Kim Ark*, 169 U.S. at 693 ("The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States"); *id.* at 688 (amendment constitutionalized the principle of *jus soli*, conferring citizenship by birth "within the dominion of" or "within the limits

of" the United States"); *see generally* Pls.' Br. 26-27. *Amici* offer no reason why these decisions should not inform this Court's interpretation of the Citizenship Clause. *See United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) ("carefully considered language of the Supreme Court" generally is "authoritative"). Because "the Supreme Court has reiterated the same teaching" about the Clause's application to Territories in multiple cases (*i.e.*, *Slaughter-House Cases*, *Elk*, and *Wong Kim Ark*), such teachings are "especially" authoritative. *See Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010).

Defendants also make the peculiar argument that because the *statutes* challenged in the case "are clear, there is no need to look to the legislative history" *of the Fourteenth Amendment*. Defs.' Br. 27. It is true that the plain language in a *statute* diminishes the need to refer to *the statute's own* legislative history. But where a statute is alleged to be unconstitutional, its own textual clarity does not make irrelevant the drafting history of the constitutional provision that the statute violates. As explained above, the Fourteenth Amendment's drafting history is profoundly relevant to its construction—indeed, the Supreme Court has repeatedly discerned the purpose of the Citizenship Clause from this drafting history. *See Rogers*, 401 U.S. at 829; *Afroyim*, 387 U.S. at 263. This Court should do likewise.

B. Contrary Arguments about the Scope of the Citizenship Clause Are Incorrect and Unpersuasive.

Defendants and their *Amici* try to justify their inattention to the Citizenship Clause's text, structure, and history—as well as decisions of the Supreme Court addressing the Citizenship Clause—by focusing instead on *Downes v. Bidwell* and other *Insular Cases*. Defs.' Br. 31-32; Defs.' *Amici*'s Br. 9-10. Their reliance on these cases to determine the meaning of the Citizenship Clause is misplaced, and in any event, their reasoning is unpersuasive. *See* Pls.' Br. 27-37.

As Defendants' *Amici* admit, the discussion of citizenship in *Downes v. Bidwell* appears only in opinions that did not command a majority of the Court. *See* Pls.' Br. 34-37; Defs.' *Amici*'s Br. 10 ("*Downes* lacked a single majority opinion"); *id.* ("*Downes* was a plurality that addressed the Citizenship Clause in dicta"). As Defendants themselves admit, the sole holding in *Downes* was unrelated to citizenship. *See* Defs.' Br. 29 n.7 ("[T]he Court considered whether Congress could place a duty on merchandise imported from Puerto Rico") (quoting *United States v. Ptasynski*, 462 U.S. 74, 83 & n.12 (1983)). No majority of the Supreme Court, not even in *Downes*, ever enunciated Defendants' restrictive and ahistorical view of the Citizenship Clause.

The parties have identified no case—until this one—where a court has considered whether the Government may constitutionally *deny* birthright citizenship to someone born in a current Territory. Defendants and their *Amici* cite

Rabang v. INS, 35 F.3d 1449 (9th Cir. 1994), and other decisions concluding that persons born in the Philippines during the United States' "temporary occupation" from 1898 to 1946 were not, after that nation became independent, entitled to American citizenship (the "Philippines Cases"). Defs.' Br. 29-32; Defs.' *Amici*'s Br. 11-12. But as Plaintiffs have explained, each of the Philippines Cases mistook a single-Justice opinion in *Downes* and its faulty constitutional analysis for a binding precedent of the Supreme Court. *See* Pls.' Br. 41-44; Constitutional Law Scholars *Amicus* Br. 4-9, 15 n.8. In any event, the Philippines cases are distinguishable on their facts, because unlike the Philippines, American Samoa voluntarily joined the United States and remains under its sovereignty and jurisdiction after 114 years. Even Defendants recognize that these cases concerned a territory under "temporary occupation." *See* Defs.' Br. 32.

Defendants and Defendants' *Amici* also misstate decisions addressing other Territories. *Ballentine v. United States* did not hold that "a person born [in the U.S. Virgin Islands] was not automatically a citizen," Defs.' Br. 32. The plaintiff was born in Missouri, and thus the court found that he lacked standing to bring such a claim. 486 F.3d 806, 814 (3d Cir. 2007). And *Eche v. Holder* did not "find[] the Citizenship Clause did not apply to the Northern Mariana Islands." Defs.' *Amici*'s Br. 11. That decision construed the *Naturalization Clause* of Article I, ratified eight decades earlier. 694 F.3d 1026 (9th Cir. 2012).

Defendants also rely on "[c]ongressional actions taken and judicial decisions rendered in the intervening almost 150 years" after the Fourteenth Amendment. Defs.' Br. 27; Defs.' *Amici*'s Br. 22 (pointing to "over a century of precedent and practice"). But post-ratification practice is not relevant in this case, let alone dispositive. Defendants and their *Amici* suggest that the Supreme Court's decision in *Noel Canning* makes post-ratification practice determinative when analyzing any constitutional provision. But *Noel Canning*'s reliance on such practice was driven by the fact that the Supreme Court had "not previously interpreted the [Recess Appointments] Clause . . . in more than 200 years." 134 S. Ct. at 2560. By contrast, the Supreme Court has interpreted the Citizenship Clause numerous times over the past 150 years, as early as four years after its ratification in the *Slaughter-House Cases*, and as recently as sixteen years ago in *Saenz v. Roe*, 526 U.S. 489 (1999). *See supra* 8-10; Pls.' Br. at 11-12, 25-29, 48-50. As the Supreme Court has emphasized, "[p]ast practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (citation omitted). Additionally, *Noel Canning* presented a dispute between two coequal branches of government, where courts frequently defer to those branches' past practices, while this case presents a quintessential issue of individual rights.

In any event, the political branches' historical practice regarding the Citizenship Clause's application to the Territories is fully consistent with the

original understanding of the Clause described above. Birthright citizenship was "the rule in the United States following the Revolution"—indeed, "[t]he Framers themselves took birthright citizenship to be irrefutable"—and that "was understood to include persons born in the Territories of the United States." Citizenship Scholars *Amicus* Br. 6-8, 13. Of the 37 States in existence when the Fourteenth Amendment was ratified, 18 were formed from a prior Territory, and five States were established from Territories in the prior decade.

After the Fourteenth Amendment was ratified, this understanding of the Citizenship Clause's geographic breadth continued unquestioned for 30 years. "For over a century, Congress and the U.S. Supreme Court acknowledged and reaffirmed this core principle" of birthright citizenship in U.S. Territories. *Id.* at 27-28. Controversy over the citizenship status of people born in the overseas Territories only began in 1898 with the acquisition of overseas Territories following the Spanish-American War. *See id.* at 20-22. And not until 1940, *72 years after ratification of the Citizenship Clause*, did Congress adopt the concept of "non-citizen national" status in the Nationality Act of 1940 in derogation of *jus soli* principles. Pub. L. 76-852, § 101(b), 54 Stat. 1137 (1940). Since 1950 and continuing until today, persons born in American Samoa are the only persons born in any part of the United States—its States, Territories, or in the District of

Columbia—whose citizenship is not recognized by virtue of their birth in the United States.

II. CONGRESS LACKS POWER TO NARROW THE SCOPE OF CONSTITUTIONAL BIRTHRIGHT CITIZENSHIP

Defendants rely primarily on congressional power and the Government's interpretation of its regulations. Defs.' Br. 12-20. But these arguments ignore that the "key question" in this case is whether American Samoa falls within "the United States" as used in the Citizenship Clause. JA46. Where, as here, "the parties do not dispute the interpretation of [the statutes], the only real question . . . is whether the statute[s] [are] constitutional." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). This is a question for this Court to answer: "when an Act of Congress is alleged to conflict with the Constitution, 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Id.* at 1427-28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

A. The State Department's Interpretation of the Challenged Statutes and Regulations Is Neither Disputed Nor Relevant.

Plaintiffs' central claim is that the text of the Fourteenth Amendment provides that all those born "in the United States"—whether States, Territories, or the District of Columbia—are entitled to birthright citizenship. *See* Pls.' Br. 15-29. Therefore, the statutes that Defendants rely upon in denying Plaintiffs citizenship are constitutionally invalid.

At no time have Plaintiffs asserted that Defendants misinterpreted the relevant statutes. Rather, Plaintiffs have asserted a facial constitutional challenge. *See* JA31-32 (Complaint). Defendants misapprehend Plaintiffs' claims when they repeat that such statutes classify Plaintiffs as "non-citizen nationals," and that Defendants' interpretation of those statutes deserves deference. *See, e.g.*, Defs.' Br. 12, 27, 34. But an agency cannot defend against a *constitutional* challenge by protesting that it faithfully enforced an *unconstitutional* statute.

B. Congress's Power under the Naturalization Clause Is Irrelevant to Plaintiffs' Claims.

Defendants also argue that because "Congress expressly provides a path to naturalization" to Plaintiffs, "the Court cannot simply ignore or bypass that process and declare persons citizens." Defs.' Br. 25. Referring to Congress's immigration power under Article I's Naturalization Clause, Defendants contend that citizenship "can be granted only on the basis of the *statutory* right which Congress has created," and argue that "courts have consistently declined to interfere with Congressional action when taken in this area." Defs.' Br. 24 (citing U.S. Const., art. I, § 8, cl. 4). Defendants go so far as to assert that "even if . . . the Fourteenth Amendment should generally confer birthright citizenship" to persons born in American Samoa, "Congress's direct modification of that status by statute trumps that interpretation." *Id.* at 26.

Defendants are wrong. Naturalization has no bearing on Plaintiffs' claim to birthright citizenship. The Fourteenth Amendment separately provides "two sources of citizenship, and two only: birth and naturalization." *Wong Kim Ark*, 169 U.S. at 702. It guarantees that every person "born in the United States and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Id.*; *accord Miller v. Albright*, 523 U.S. 420, 423-24 (1998) (same). Here, Plaintiffs assert U.S. citizenship by virtue of their *birth* "in the United States"; they do not argue that they are entitled to citizenship by naturalization.

The fact that Congress has the power to stipulate the requirements for "naturalization" does not empower it to restrict citizenship by birth. To the contrary: "The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a *sufficient and complete right to citizenship*." *Wong Kim Ark*, 169 U.S. at 703 (emphasis added). "[N]o act . . . of congress . . . can affect citizenship acquired as a birthright by virtue of the constitution itself." *Afroyim*, 387 U.S. at 266-67 (citation omitted). The "undeniable purpose" of the Fourteenth Amendment "was 'to make citizenship . . . more permanent and secure' *and not subject to change by*

mere statute." *Rogers*, 401 U.S. at 829 (quoting *Afroyim*, 387 U.S. at 263) (emphasis added).

Given this longstanding precedent, Defendants' argument that this Court should "decline[] to interfere with Congressional action when taken in this area" is peculiar, and without merit. Defs.' Br. 24. Whatever deference may be owed to congressional action in naturalization matters, *see, e.g.*, *United States v. Ginsberg*, 243 U.S. 472, 474 (1917) ("An *alien* who seeks political rights as a member of this nation can rightfully obtain them" upon Congress's terms) (emphasis added), none is due here, where Plaintiffs are citizens by birth, not aliens seeking citizenship by naturalization.

Defendants completely misread *Rogers v. Bellei*, for the non-existent—and alarming—proposition that Congress can, by statute, *restrict* birthright citizenship under the Fourteenth Amendment. *Rogers* involved a plaintiff born in Italy to a father with Italian citizenship and a mother with American citizenship. The Supreme Court distinguished the plaintiff from those born in the United States entitled to birthright citizenship. 401 U.S. at 827. Because the Citizenship Clause did not apply to Plaintiff, the case considered "the appropriate exercise of [congressional] power within the restrictions of any pertinent constitutional provisions *other than the Fourteenth Amendment's first sentence*." *Id.* at 828 (emphasis added).

Defendants erroneously highlight this passage in *Rogers*: "'We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status *except as modified by statute*.'" Defs.' Br. 26 (quoting *Rogers*, 401 U.S. at 828) (emphasis added by Defendants). But the Court's reference to "modifi[cation] by statute" was discussing the *extension* of citizenship rights by statute to foreign-born descendants, not the *restriction* of constitutional birthright citizenship to those born within a nation's territory. *See id.* (canvassing history of citizenship extended to descendents of British subjects born abroad); *accord Zivotofsky*, 132 S. Ct. at 1425 (citing *Rogers* for the proposition that "foreign-born children of American citizens acquire citizenship at birth through 'congressional generosity'").

C. The Fourteenth Amendment Protects Individuals from Having to Seek Political Recognition of Their Birthright Citizenship.

Defendants' suggestion that Plaintiffs merely request that Congress recognize their citizenship by statute is wholly beside the point. Defs.' Br. 39-40. Plaintiffs are already entitled to birthright citizenship in the Constitution, so the availability of a political remedy does not moot the constitutional harm resulting from the denial of their rights. No one would contend, for example, that the availability of statutory civil rights legislation obviates the need to vindicate the Equal Protection Clause, or that criminal procedure protections codified in statute make the Fifth and Sixth Amendments irrelevant. Even if the political branches

were ready to recognize Plaintiffs' birthright citizenship through legislation, this would have no bearing on their constitutional rights.[2]

The suggestion also ignores the purpose of the Citizenship Clause: to overrule *Dred Scott* and "put this question of citizenship and the rights of citizens . . . beyond the legislative power." Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (Sen. Howard); *see Slaughter-House Cases*, 83 U.S. at 73; *supra* 6-10. The very history of the United States makes plain the Framers' purpose in ensuring birthright citizenship would be immune from statutory modification. Without this protection, Defendants today would be able to establish prerequisites and limitations on the right to citizenship based upon birth "in the United States." A recent example is a bill proposed in 1995, rejected as unconstitutional by the Department of Justice, that would have denied citizenship to children born in the United States to certain classes of alien parents. *See Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 Op. Off. Legal Counsel 340, 343, 346 (1995) (emphasizing that "the Fourteenth Amendment guaranteed citizenship to all persons born in the United States;" that courts "have consistently cited and followed the principles of *Wong Kim Ark*"; and

[2] Defendants and Defendants' *Amici* contend that this appeal presents "political questions" and that Plaintiffs seek to change American Samoa's territorial status. These arguments ignore the rationale of the Fourteenth Amendment and were properly rejected by the District Court. *See* JA7-8; Defs.' *Amici*'s Br. 33.

that the bill was therefore "unconstitutional on its face."). Just as that bill violated the Citizenship Clause's purpose—and just as would a statute purporting to deny birthright citizenship to persons born in the District of Columbia—so too do the statutes purporting to deny the citizenship of persons born in American Samoa.

Moreover, Defendants' suggestion that Plaintiffs can pursue the political process, and their *Amici*'s representation that "[i]n *every other territory*, the grant of birthright citizenship has been made by Congress without any significant controversy," *Amici* Br. 23, hold out a false promise that ignores American Samoa's history. When American Samoa's traditional leaders signed Deeds of Cession formally transferring sovereignty of their islands to the United States, "the people [of American Samoa] thought they were American Citizens." Reuel S. Moore and Joseph F. Farrington, *The American Samoan Commission's Visit to Samoa, Sept.-Oct. 1930*, 53 (U.S. G.P.O. 1931). After the U.S. Navy opposed that understanding, *see id.* at 53-54, American Samoans organized a vigorous, decades-long but ultimately unsuccessful effort to be recognized as citizens. In 1930, a Presidential Commission unanimously supported recognizing their citizenship after American Samoa's leaders uniformly testified in favor of such recognition, with one chief remarking, for example, "that the people of American Samoa should be true American citizens; receive American citizenship, to be equal with the true American." *See* American Samoa, Hearings Before the Commission Appointed by

the President of the United States, September 26, 27, 29, 30, October 1, 2, 3, 4, 1930 in American Samoa, 221, 268-70 (U.S. G.P.O. 1931); *see also* D. Ct. ECF No. 18 at 4-5 n.6 (collecting other chiefs' similar testimony) The U.S. Senate twice unanimously approved citizenship legislation, but the bills failed in the House of Representatives due to Navy opposition.[3]

It is therefore factually incorrect to suggest that Plaintiffs need only look to a cooperative Congress to resolve this issue. It is also irrelevant, because Plaintiffs' rights are already enshrined in the Constitution.

III. IN THE ALTERNATIVE, BIRTHRIGHT CITIZENSHIP APPLIES TO INDIVIDUALS BORN IN AMERICAN SAMOA UNDER THE *KING V. MORTON* FRAMEWORK

Plaintiffs are entitled to birthright citizenship pursuant to the plain text of the Fourteenth Amendment. The citizenship rights of Americans born in the U.S. Territory of American Samoa, as guaranteed by the Fourteenth Amendment, are entirely separate and independent of Congress's power to administer that Territory under Article IV's Property Clause. As such, the *Insular Cases* framework, which explored the breadth of Congress's historically broad Property Clause power as it implemented transitional governance in newly acquired overseas Territories, is

[3] *See, e.g.*, Hiram Bingham, *American Samoans: Further Delay is Protested in Granting Them Citizenship*, N.Y. Times, Nov. 17, 1946. Harold Ickes, *Navy Withholds Samoan and Guam Petitions From Congress*, Honolulu Advertiser, Apr. 16, 1947; Subcommittee on Territorial and Insular Possessions of the Committee on Public Lands, June 2, 1947, Hearing on H.J. Res 70.

inapplicable here. But even if this Court looks to the *Insular Cases* framework for guidance, that analysis supports Plaintiffs' particular claim to birthright citizenship.

A. Birthright Citizenship Is a Fundamental Right that Applies Automatically to Plaintiffs.

"[G]uaranties of certain fundamental personal rights declared in the Constitution" apply in all Territories. *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922)). Therefore, if a particular constitutional right is "fundamental," it applies in all Territories regardless of whether they are deemed "incorporated" or "unincorporated." *Accord King*, 520 F.2d at 1146-47.

Birthright citizenship is precisely such a fundamental right. Indeed, the Supreme Court has repeatedly characterized that right in such terms: "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950); *see also* Pls.' Br. 48-50 (citing other cases). Defendants offer no authority to the contrary, other than Justice Brown's opinion solely for himself in *Downes*. *See* Defs.' Br. 31-32. But Justice Brown's offhand comments about citizenship (particularly *naturalized* citizenship, *see* Pls.' Br. 36) in a case about tariffs on oranges are inconsistent with the original understanding of both the Fourteenth

Amendment's Framers and of the full Court in pre-*Downes* decisions from the *Slaughter-House Cases* to *Wong Kim Ark*. His statements that citizenship is an "artificial" right "peculiar to our own system of jurisprudence" or is not "indispensible to a free government," *Downes*, 182 U.S. at 282-83, were incorrect at the time—the Fourteenth Amendment had constitutionalized the "ancient" rule of *jus soli* borrowed from the laws of England, *see Wong Kim Ark*, 169 U.S. at 693—and today, as most nations extend rights on the basis of citizenship status.

Justice Brown's nonbinding and incorrect statement on his own behalf is the single, thin reed upon which Defendants deny that citizenship is a fundamental right. Under *King*, *Boumediene*, and the other authorities cited by Plaintiffs but uncontradicted by Defendants, birthright citizenship is a fundamental right that applies even in unincorporated Territories.

B. Even If Not Fundamental, Birthright Citizenship Applies to American Samoa As the Facts Will Show That It Is Neither Impractical Nor Anomalous.

Even constitutional rights not recognized as "fundamental" will apply in an "unincorporated" Territory if it is not "impractical and anomalous" for the right to apply there. *King*, 520 F.2d at 1147; *see* Pls.' Br. 51-53. The Supreme Court recently reaffirmed the relevance of such fact-sensitive analysis, evaluating territorial history and contemporary context. *See Boumediene* 553 U.S. at 759-60; Pls.' Br. 56-57.

In *King*, this Court applied the *Insular Cases* framework and held that the question of whether the right to a criminal jury trial applied in American Samoa must be informed by "an adequate factual record" regarding the contemporary "legal and cultural development of American Samoa." 520 F.2d at 1147-48. This factual record, to be developed on remand, would inform whether it would be "impractical and anomalous" for criminal jury trials to take place in American Samoa. *Id.*; *see also King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977).

As Plaintiffs explained at length in their opening brief, the recognition of the birthright citizenship of individuals born in American Samoa would not prove "impractical" for the federal or American Samoa governments, nor could such recognition be considered "anomalous." *See* Pls.' Br. 57-59. Neither Defendants nor their *Amici* present a credible reason to find otherwise. But insofar as this Court believes this question requires review of a factual record, remand to the district court is appropriate. Defendants and Defendants' *Amici* also characterize Plaintiffs' alternative request that this Court follow its precedent in *King v. Morton* as an "overreach" and they contend that *King* is limited to claims brought by plaintiffs already recognized as U.S. citizens, Defs.' Br. 35; Defs.' *Amici*'s Br. 22; yet significantly, they fail to answer Plaintiffs' point that the plaintiff's citizenship in *King* had *no relevance* to this Court's analysis, Pls.' Br. 53-54, and do not

dispute that the jury trial right was made applicable on remand to citizens and non-citizen nationals alike in American Samoa. *King v. Andrus*, 452 F. Supp. at 17.

Defendants also argue that this Court's decision in *Corporation of the Presiding Bishop v. Hodel*, 830 F.2d 374 (D.C. Cir. 1987), is more on point, and that Plaintiffs "overlook" that case. Defs.' Br. 35-37. Defendants ignore the discussion in Plaintiffs' opening brief showing *Hodel* is both consistent with *King* and distinguishable from this case. *See* Pls.' Br. 54-55. In *Hodel*, the plaintiff could not establish that "access to an independent court" free from any review by the Secretary of the Interior—a clear matter of territorial governance—was a constitutional right that needed to be balanced against Congress's territorial authority. *See Hodel*, 830 F.2d at 383-85. Here, by contrast, Plaintiffs contend that to the extent the *Insular Cases* govern at all, citizenship is either a fundamental right applicable in all Territories, or an individual right that must be applied in American Samoa if not "impractical and anomalous" to do so.

1. Defendants' suggestion that Plaintiffs undergo the naturalization process only highlights Plaintiffs' injuries.

Defendants suggest that Plaintiffs' injuries could be resolved by "travel to the United States and successful completion of the naturalization process." *See* Defs.' Br. 37-38. This suggestion appears to characterize the status quo as not impractical and anomalous. That point is not only irrelevant, but it is wrong, as birthright citizenship is conferred automatically. *See supra* 7-8.

Defendants' suggestion is tone-deaf to the real burdens the naturalization process demands of Plaintiffs and other non-citizen nationals. Individuals born in and still living in American Samoa who wish to undergo the naturalization process must first establish residency for a period of three months in another part of the United States because American Samoa is not part of any U.S. Citizenship and Immigration Services ("USCIS") district. JA25-26; 8 U.S.C. § 1436. They must move thousands of miles from home and bear the significant attendant costs and disruption to their lives. These American nationals must then take English and civics tests, be fingerprinted and interviewed, take a redundant oath of allegiance to the nation to which they already owe permanent allegiance as U.S. "nationals," and submit to a moral character determination. JA25-26. The government fees alone total $680, not including moving expenses and other costs. *Id.* The process can take a year or more, and there is no guarantee of success; the ultimate citizenship determination is made on a case-by-case basis by an USCIS officer. JA25.

Defendants' suggestion amounts to asking these Americans—whom the Constitution already recognizes as birthright citizens—leave their homes and embark on a costly year-long hiatus to earn congressional recognition of their U.S. citizenship. Rather than revealing the impracticality of Plaintiffs' requested relief, Defendants' suggestion highlights the impracticality of the status quo.

2. Defendants' *Amici*'s argument that birthright citizenship would upend American Samoa's cultural traditions lacks merit.

Defendants' *Amici* dedicate most of their brief to speculation that recognizing Plaintiffs' birthright citizenship would have "unintended negative consequences" for the culture of American Samoa. In particular, they express concern that the land ownership traditions at the heart of the *fa'a Samoa*, or American Samoan way of life, would be subjected to greater scrutiny on equal protection grounds. *See* Defs.' *Amici*'s Br. 23-35. Similar arguments were raised on remand in *King*. *See King v. Andrus*, 452 F. Supp. at 12-13. There, opponents of criminal jury trials in American Samoa argued that the right to trial by jury would disrupt the *fa'a Samoa*. *See id.* After a bench trial, the district court rejected these arguments as a factual matter. *Id.* at 17. Thus, to the extent they are relevant at all, *Amici*'s arguments should be tested by a fact-finder in appropriate proceedings, not simply assumed to be true as a basis for affirming a dismissal on the bare pleadings.

In any event, *Amici*'s concerns are without support. The laws reflecting and protecting American Samoa's cultural traditions have withstood exacting constitutional scrutiny by American Samoa's highest court. *See Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980) (Schwartz, J., then-Chief Judge

of the Southern District of California, sitting by designation).[4] *Craddick* held that equal protection already applies in American Samoa, regardless of American Samoa's status as an "unorganized" or "unincorporated" Territory. 1 Am. Samoa 2d at 12; *accord Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (discussing Puerto Rico and noting that these guarantees have long applied to the Territories). Thus, this Court's resolution of this case will have no bearing on the applicability of equal protection scrutiny in American Samoa, because such scrutiny already applies.

Even more importantly, *Craddick* held that American Samoan restrictions on land alienation passed muster under such strict scrutiny. The High Court held that "the Territory of American Samoa has demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa," and that the restrictions were "necessary to the safeguarding of these interests." *Craddick*, 1 Am. Samoa 2d at 12; *accord Hodel*, 830 F.2d at 386 ("preserving . . . Samoan traditions concerning land ownership" is a "legitimate congressional policy").

Defendants' *Amici*'s suggestion that *Craddick* might be called into question if Plaintiffs prevail misstates the nature of Plaintiffs' claims. Defs.' *Amici*'s Br. 30.

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[4] *Available at* http://www.asbar.org/archive/Cases/Second-Series/1ASR2d/1ASR2d10.htm.

Plaintiffs merely contend that a Territory's status as "incorporated" or "unincorporated" has no bearing *on the operation of the Citizenship Clause*, because birthright citizenship applies in American Samoa *even within* the *Insular Cases* framework. Nothing in Plaintiffs' claims carries any broader significance for questions about other constitutional rights or the political status of American Samoa.[5]

IV. THERE IS NO BASIS FOR INTERVENTION ON APPEAL

This Court should not allow intervention because Defendants' *Amici* cannot justify, and they "offer[ ] no explanation whatsoever," for Congressman Faleomavaega's "failure to make a request for intervention at the District Court level," *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1554 (D.C. Cir. 1985), or the American Samoan Government's failure to appeal the order mooting its untimely intervention request. *See* Pls.' Br. 60-61. Defendants' *Amici* concede that "the U.S. defendants have taken the legal position that [Defendants' *Amici*] advocate"; they share the same ultimate objective on appeal; and the only

[5] Defendants' *Amici*'s citation to *Davis v. Commonwealth Election Comm'n*, No. 14-CV-00002, 2014 WL 2111065 (D.N.M.I. May 20, 2014), is inapposite. Defs.' *Amici*'s Br. 27-30. They concede the case concerned voting restrictions, not whether Northern Mariana Islands' land ownership system complies with equal protection. *Id.*; *Davis*, 2014 WL 2111065, at *18. Such land ownership laws survived an equal protection challenge in *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 (9th Cir. 1990). That voting right restrictions in another Territory might not survive equal protection has no bearing on the fate of *fa'a Samoa* land ownership traditions that already passed such a test.

purported difference—that "U.S. defendants have no particular interest in protecting the traditional way of life in American Samoa,"—is belied by Defendants' brief. Defs.' Br. 9; Defs.' *Amici*'s Br. 39. Defendants' *Amici* have not demonstrated that Defendants do not represent their interests, Fed. R. Civ. P. 24(a)(2), nor that "imperative reasons" warrant intervention for the first time on appeal, *Amalgamated Transit*, 771 F.2d at 1552.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the judgment of the District Court.

Dated: October 8, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii);

2. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

3. The text of the electronic version of this brief is identical to the text of the paper copies of this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2014, I electronically filed the foregoing Reply Brief of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via the Court's appellate Case Management/Electronic Case Files ("CM/ECF") system, causing a true and correct copy to be served upon all counsel of record who are registered CM/ECF users.

Further, I hereby certify that I dispatched eight (8) paper copies to a third-party commercial carrier for delivery to the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit. In addition, one paper copy will be served via third-party commercial carrier upon the following party:

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STATUTORY AND REGULATORY ADDENDUM

8 U.S.C. § 1408(1)

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

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

8 U.S.C. § 1101(a)(29)

(a) As used in this chapter— . . .

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

7 FAM § 1125.1(b) & (d)

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

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

7 FAM § 1130, App'x H ¶ c

c. Documentation Issued to Non-Citizen Nationals: A passport containing the following endorsement is issued to non-citizen nationals. . . . The endorsement is Code 09 and states:

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